*Mel Marquis**

# Regulating Mergers: Substantive and Procedural Issues, Judicial Review, International Convergence and Best Practices

This volume contains a collection of contributions prepared for the 15th edition of the Annual EU Competition Law and Policy Workshop, held on 12–13 November 2010 at the European University Institute in Florence. The 2010 Workshop was devoted to a variety of issues related to merger control. The subject is not dealt with comprehensively but a broad range of issues of relevance to competition experts in Europe and elsewhere have been covered. The Workshop was both the inaugural event for my co-organizer and co-editor, Philip Lowe, and the final Workshop organized under the auspices of the Robert Schuman Center for Advanced Studies. Organizationally the Workshop was transferred in 2011, along with your correspondent, to the EUI's Law Department, where our activities continue. Since 2011 the Workshop has considered issues related to the integration of public and private enforcement of competition law and to the interplay between competition, public policies and regulation.

## Background

The EU Competition Law and Policy Workshop is an ongoing program that explores topical policy and enforcement issues in the area of competition law and economics. Each year the Workshop brings together a group of top-level EU and international policy makers, judges, legal practitioners, economic experts and scholars to take part in intensive roundtable debates that explore specific competition-related issues in an informal and non-commercial environment. One of our primary objectives is to stimulate critical reflection on the part of both the Workshop participants and the broader public.

* *Part-time Professor of Law,* EUI, Florence; *Professore a contratto,* Università degli studi di Verona; and *Visiting Professor*, LUMSA, Rome. On specific points made in this introductory chapter I benefited from the kind feedback of Massimo Motta. In addition to my esteemed collaborator Philip Lowe, many friends and colleagues have supported the Workshop, including among others (in particular our sponsors) Gerald Barling, Joachim Bornkamm, John Cooke, Claus Ehlermann, John Fingleton, Mattia Guidi, Barry Hawk, Valentine Korah, Bill Kovacic, Rosanna Lewis, Petros Mavroidis, Giorgio Monti, Kanako Nagao, Aindrias Ó Caoimh, Savvas Papasavvas, Tom Rosch, Daniela Romagnoli and Diane Wood. Collaborating with me on the preparation of the transcripts included in this volume was Emma Linklater, a PhD researcher in the Law Department of the EUI.

The 15th edition of the Workshop[2] was entitled: *Merger Control in European and Global Perspective*. The objective was to examine and better understand a panorama of topical issues in the field of merger control across multiple jurisdictions. As seen in the title of this introduction, the themes encompassed substantive and procedural issues, judicial review, international convergence and best practices. To some extent the title is both overinclusive and underinclusive. For example, few contributions devoted close attention to non-horizontal mergers,[3] or to selection, design and implementation of remedies in different merger scenarios, although other aspects of remedies such as cross-border coordination and cooperation were addressed. In terms of procedure, more discussion could have concentrated on due process or procedural rights of third parties. And while certain younger and/or developing jurisdictions are represented here – with chapters covering, e.g., China, Brazil and the Middle East – more could have been said about the specific challenges faced by developing countries in terms of, among other things, capacity/resource constraints and regime effectiveness.[4] The title is underinclusive in the sense that "international convergence" does not necessarily convey the ideas of inter-agency cooperation and comity, which figured prominently in the discussions and contributions. Another issue which was discussed but which does not appear in the title is the obviously important question of how to develop a robust framework to evaluate how a given merger control system *measures up*. However, on the whole the title provides a rough impression of the range of subjects addressed in this volume. A more schematic breakdown of the proceedings appears below (see "Structure of the Workshop").

As usual, a rather belabored chapter-by-chapter review is provided below. I won't begin with any elaborate attempt to neatly encapsulate all of the content of these chapters. The following slanted preface will have to do.

Since the adoption of the EC Merger Regulation in 1989, global and multijurisdictional merger control progressed rapidly through its "infancy", developing in the 1990s increasingly sophisticated and data-intensive methods

[2] For information concerning previous editions of the Workshop and the corresponding *European Competition Law Annual* series, see the website of the Workshop: http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/CompetitionWorkshop/Index.aspx. The various books in the series are advertised on Hart's website: see http://www.hartpublishingusa.com/books/series.asp?sc=European+Competition+Law+Annual&st=European+Competition+Law+Annual.

[3] A few concrete non-horizontal merger cases are discussed by Xinzhu Zhang and Vanessa Yanhua Zhang, and a few other papers touch on the subject (see, e.g., the papers by Irwin Stelzer and Seonghoon Jeon). Each of these papers is reviewed in this chapter. See also the oral remarks of Johannes Lübking, p. 5 (referring to a few non-horizontal cases handled by the European Commission once it had adopted its Non-Horizontal Merger Guidelines).

[4] For recent discussion of these challenges (which, despite many positive developments in fora such as the ICN, still in some ways presents a gloomy picture), see OECD Policy Roundtable, "Cross-Border Merger Control: Challenges for Developing and Emerging Economies" (13 February 2012), DAF/COMP/GF(2011)13, http://www.oecd.org/competition/mergers/50114086.pdf; UNCTAD Secretariat, "Cross-border anticompetitive practices: The challenges for developing countries and economies in transition", TD/B/C.I/CLP/16 (19 April 2012), http://unctad.org/meetings/en/SessionalDocuments/ciclpd16_en.pdf, pp. 13-20.

drawing on the theory of industrial organization.[5] The prospect of devoting substantial resources to the complex task of vetting mergers (often with substantially heterogeneous characteristics) within strict time frames was not so intimidating as to staunch a global merger control "movement" that has produced a lush thicket of regulatory regimes, a movement that may be linked to, inter alia, processes of economic globalism and to some limited extent institutional isomorphism. The global turn toward multipolarity, with the increasing economic and political significance of emerging economies, has reacted to and reinforced these processes. Today's vast matrix of merger control systems ideally protects consumers from the point of view of price, choice, quality and innovation (and protects sellers against exploitation of buyer power) but it also presents significant coordination and timing problems and tends to raise regulatory costs. On the whole, it is manageable but messy.[6] Taking for granted the impossibility of a global one-stop shop for large transactions affecting multiple jurisdictions, public authorities and private actors navigating the "thicket" find themselves in a constant search for other solutions (with varying results) along various dimensions: substantive and procedural, internal and external, bilateral/regional and global, formal and informal, and so on. Against this background, a likely impression of the proceedings contained here is one of juxtaposition: on the one hand, there are trends toward consolidation, consensus and convergence, with strong cooperative efforts paying off; yet at the same time global merger control is in a period of transition and increasing variability in some respects, as leading jurisdictions press forward with increasingly demanding investigative techniques. It is doubtful that the most refined techniques can be and/or will be implemented across jurisdictions, and to that extent (and for other institutional and cultural reasons) we will surely continue to see global diversity and multi-speed (antitrust and) merger control.[7] But this may be an endemic feature of regulatory convergence;

[5] Oliver Budzinski pairs the IO/economic effects turn in merger control (and antitrust more generally) with the constant neglect of modern institutional economics, an imbalance that has resulted in underenforcement and has moreover made it difficult if not impossible to capitalize on what industrial economics has to offer. See Budzinski, "An Institutional Analysis of the Enforcement Problems in Merger Control" (June 2010), http://static.sdu.dk/mediafiles/F/8/A/%7BF8A24E92-59AE-4457-8A67-AC2A805592A1%7Dbudzinski101.pdf.

[6] Despite a variety of efforts to smooth out the creases, potentially costly differences across jurisdictions remain. See, e.g., Larry Fullerton and Megan Alvarez, "Convergence in International Merger Control", *Antitrust* 20 (Spring 2012) (noting points of divergence attributable in their view to the 2010 revision of the US Horizontal Merger Guidelines); Jonathan Galloway, "Convergence in International Merger Control", 5(2) *Competition Law Review* 179 (2009). *Cf.* also Dane Holbrook, "International Merger Control Convergence: Resolving Multijurisdictional Review Problems", 7 *UCLA Journal of International Law and Foreign Affairs* 345 (2002).

[7] It seems redundant to say, but references to convergence should not be construed as a normative call for the relentless pursuit of uniformity ("blind" convergence). One-size-fits-all is rarely accurate from a descriptive point of view, and presumptively it is apt to be risky. What can be commended, in brief, is "informed convergence" toward better common solutions in the common interest, taking account of their relative costs and of any counter-indicative benefits of experimentation and creative tension. (*Cf.* the oral remarks of Kirsten Edwards, p. 197, and Bill Kovacic, p. 207.) Informed convergence in this perspective leaves adequate space for the *informed divergence* (a term used by David Lewis, John Fingleton and others) to which our past Workshop editions have referred – divergence based on affirmative choices such as protecting consumers in local markets, developmental differences, cultural

the diversity within the EU itself is testimony to the fact that convergence is not an outcome, nor an inevitable, unidirectional *engrenage* but a multifaceted process with no fixed destination.

## Structure of the Workshop

In the present volume, the debates held at the 2010 Workshop are broken down into introductory remarks by Irwin Stelzer, followed by five main sessions, or "Panels". The following broad topics were covered:

(1) Merger enforcement across jurisdictions: Substantive issues (market definition, unilateral/coordinated effects, innovation, efficiencies);
(2) Merger policy assessment and judicial review;
(3) Merger enforcement across jurisdictions: Procedural issues;
(4) International convergence: Substantive and procedural issues and the scope for comity; and
(5) Merger control and best practices.

As indicated above, the remainder of this chapter provides an overview of the Workshop's written contributions. As per my usual caveat, this is no substitute for the contents of the other chapters, let alone for the book as a whole. It is just a selective discussion of some of the issues raised by the Workshop participants, and a guide to some of the connections between the contributions. As a rare concession to brevity I do not summarize in this chapter the proceedings reported in the transcripts of the oral discussions.

---

differences and the like; and allows for a dynamic process involving pioneers, a bit of "peer review" and opt-in or abstention. Different observers will regard global convergence/divergence in merger control in a variety of ways. I would just note here the observations of Thomas Cheng, who writes: "Given the possibility of an outright rejection of a proposed transaction, merger review should be considered as full entity regulation, which means that there is a strong case for convergence from the perspective of regulatory accommodation. The need to avoid conflicting merger review decisions, however, should not be overstated. Here, it is again important to distinguish between genuinely globalized markets and local markets. If a merger involves global markets, and if the competitive effects of the transaction are felt the same way in different jurisdictions, there is a strong argument for a harmonized approach to merger analysis and perhaps a single decision on the transaction. Assuming that these jurisdictions pursue similar goals under their competition law [an assumption which, as Cheng points out in his article, requires significant qualification] and their competition authorities are analyzing the same transaction in the same market(s) involving the same parties, conflicting decisions by different authorities are indefensible. This argument loses its force when the markets are not globalized and the authorities are analyzing the effects of the merger on their respective national markets. […] While it may be frustrating for the proponents of a transaction to abort a merger simply because one jurisdiction objects to it, if an informed and well-supported economic analysis of the transaction demonstrates irremediable anticompetitive effects in a local market, the desire for uniformity cannot deny the local authority's prerogative to protect its own market and consumers. Even for a full entity regulation, the argument for harmonization is not absolute." Cheng, "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law", 12 *Chicago Journal of International Law* 433, 463-464 (2012).

**Irwin Stelzer** kicks things off with his paper, "Merger Policy and Schumpeter's Creative and Destructive Gale". Joseph Schumpeter was a thinker whose role has never quite been fully debated or defined in the specific context of EU competition law[8] – even if his name has been invoked with some regularity.[9] In general, the deregulatory policy prescriptions that seem to follow from Schumpeter's faith in long-term productivity and wealth creation may be less likely than ever to gain traction in the current climate of skepticism toward free markets. Competition enforcers have long been resistant to hands-off approaches to high-tech industries on the basis of Schumpeterian arguments, as one has seen in particular in cases involving the alleged abuse of dominance. But what of merger control in particular? Although he doesn't formulate the issue quite in the following terms, Stelzer suggests that, in the field of non-horizontal mergers, doubt should be resolved against intervention, at least in markets with Schumpeterian competition. Such an approach boils down to an 'inverse precautionary principle' for certain types of mergers.

It is easy to understand why Stelzer is concerned with achieving a proper threshold of intervention – if Schumpeter's assumptions were right, entrepreneurs will do all they can to generate dynamic efficiencies (fixed cost savings, fieldsweeping new products, etc.) of a magnitude likely to dwarf the static efficiencies a merger may produce, but the analytical framework established by law and policy may be ill-equipped for the consideration of dynamic efficiencies. That is to say, once it is determined, that a merger would significantly impede "effective competition", it may be difficult to overcome that finding with difficult-to-quantify and/or long-delay gains in dynamic efficiency.[10] Stelzer therefore suggests that the competitive dynamics and possible efficiencies should be considered at an earlier stage, which might entail a determination that a merger would not impede competition in the first place, in particular because post-merger market "dominance" might prove to be transitory. From a dynamic perspective, it follows that market definition and market shares should be regarded with great caution and should be corroborated as far as possible, in particular where there is product differentiation. (Stelzer does not go so far as to suggest abandoning those traditional tools altogether; nor, for that matter, do many of the proponents of newer techniques.) Of course, some jurisdictions already follow his advice, and

[8] Some discussions point in this direction, however. See, e.g., Jonathan Galloway, "Driving Innovation: A Case for Targeted Competition Policy in Dynamic Markets", 34 *World Competition* 73 (2011) (counseling against a Schumpeterian approach for antitrust treatment (in the EU) of innovative industries; arguably, this reflects the views of many if not most Europeans – all the more so in industries characterized by network effects and market tipping).

[9] Of course, there is literature aplenty on Schumpeter and innovation in a more general sense, with contributions typically pitting Schumpeter against Ken Arrow. For a recent discussion of the affinities between their approaches, see Carl Shapiro, "Competition and Innovation: Did Arrow Hit the Bull's Eye?", in Josh Lerner and Scott Stern, eds., *The Rate and Direction of Inventive Activity Revisited*, University of Chicago Press (2012), pp. 361 et seq., with references.

[10] In more detail, see Lars-Hendrik Röller, "Efficiencies in EU Merger Control: Do They Matter?", this volume, pp. 61 et seq. (discussed below). See also OECD, Dynamic Efficiencies in Merger Analysis, DAF/COMP(2007)41 (15 May 2008), http://www.oecd.org/competition/mergers/40623561.pdf.

regard data such as large market shares as indicators which need to be checked holistically against other factors, particularly if, say, the market of reference exhibits rapid growth or high volatility, or possibly if it is so new that its future direction of evolution is anybody's guess.[11] Other (younger) jurisdictions may not yet have the same self-assurance.

## 1. Merger enforcement across jurisdictions: Substantive issues (market definition, unilateral/coordinated effects, innovation, efficiencies)[12]

### Contributions by Edwards, Hemphill, Hawk and Röller

Despite the fanfare that accompanied the 2010 revision to the U.S. Merger Guidelines[13] (and the ideas that direct methods of measuring a merger's market power consequences can sometimes be employed, that SSNIP is often misused and that market definition and concentration may not be the initial focus of the assessment), most of the traditional tools remain an important part of the competitive analysis in merger control, both for the agencies (which may find market definition very useful or may be faced with evidence that limits options[14]) and in court (where, for example, the US statute refers to a "line of commerce"[15]). A notable example of the lasting importance of "markets" is the ultimately abandoned *AT&T/T-Mobile* 4-to-3 merger, where the DOJ pleaded before the

[11] On the latter point, see Howard Shelanski's oral remarks, this volume, pp. 19-20. In the hardest cases, agencies may not have to face a binary choice: time-limited and proportionate behavioral remedies can in some cases provide supplementary options.

[12] Papers contained in other sections, especially section 4, cover substantive analysis as well. This is the case for example, in the papers by Seonghoon Jeon and by Xinzhu Zhang and Vanessa Yanhua Zhang (discussed later in this chapter – see session 4).

[13] On the background to the 2010 incarnation of the Guidelines, see among others D. Daniel Sokol, "Antitrust, Institutions, and Merger Control", 17 *George Mason Law Review* 1055, 1105-1109 (2010); and DOJ/FTC, Commentary on the Horizontal Merger Guidelines (March 2006), http://www.justice.gov/atr/public/guidelines/215247.htm. The revised US Guidelines were of course not the only ones issued in 2010. For example, the UK's OFT and CC also adopted merger guidelines that year. (For a visual tour of "illustrative price rise" (IPR) analysis in the UK (first used in 2005), see Amelia Fletcher's slides at http://www.competitioneconomics.org/dyn/files/basic_items/364-file/Fletcher-Walters-UPP%20up%20and%20away.pdf.) Indeed, since 2009, other (revised or debut) merger guidelines – covering but not limited to horizontal effects – have been adopted in Canada, China, France, Germany, India, Ireland and Japan, among other jurisdictions. The ICN's Recommended Practices for Merger Analysis, updated most recently in April 2010 (i.e., about eight months before the US Guidelines were published), endorse the traditional tools (market shares, market definition with product differentiation, etc.) but caution against too much reliance on them and also stress the need to consider market-specific, effects-oriented evidence. See http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

[14] See and compare the oral remarks of Alison Oldale (p. 10), Simon Bishop (p. 14) and Howard Shelanski (pp. 16-19).

[15] See Irwin Stelzer, oral remarks, p.2.

federal district court both relevant markets and concentration indicators.[16] But whether the initial focus in a given case is market definition or upward price pressure (the latter tool being designed to measure incentives to raise price), data that give indications as to competitive constraints, including substitutability where potential substitutes are differentiated, are likely to be important.[17] **Kirsten Edwards** addresses the subject of (hypothetical) customer switching in her paper, "Estimating Diversion Ratios: Some Thoughts on Customer Survey Design". Customer surveys are not the only method of collecting data to derive diversion ratios (since one might refer, for example, to exogenous shocks and actual switching, win/loss reports, etc.), but given the frequency with which surveys are used and their potential probative value, Edwards conducts her own survey of surveys with a view to identifying methodological errors and sound design principles. The general message of the paper is that surveys are a useful but complex tool whose results can potentially be misleading unless an adequate investment is made in *ex ante* design and *ex post* checks. Reviewing a number of merger investigations by the European Commission and the UK's Competition Commission, Edwards explains how certain types of errors (sampling error, coverage error, non-response error, measurement error) can creep into customer surveys if proper care is not taken. Along the way she offers suggestions to design and execute surveys that minimize the risk of such errors. Further research in this area could be fruitful considering that, as Edwards points out, no consensus has yet developed as to the best approaches to design techniques and error control.

**Scott Hemphill** comments on the 2010 U.S. Guidelines in "Higher Profits as a Merger Defense: Innovation, Appropriability and the Horizontal Merger Guidelines". It is a very specific critique, as Hemphill focuses particularly a single passage of the Guidelines:

> When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. *The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations*. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.[18]

[16] See the DOJ's Complaint at http://www.justice.gov/atr/casesf274600/274613.htm. The allegedly affected markets were defined according to distinctions between residential and business customers, and between national and local markets. Regarding concentration factors, the DOJ applied the more relaxed presumption of adverse effects described in Section 5.3 of the 2010 Merger Guidelines, which increased the relevant threshold from a post-merger HHI of 1,800 to a post-merger HHI of 2,500, assuming a delta of at least 200. The enhanced threshold was easily surpassed in this case since, for example, the HHI score for the national business user market would have exceeded 3,400 if the transaction had proceeded as proposed.

[17] *Cf.* Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years", 77 *Antitrust Law Journal* 701, 708 (2010) ("same piece of evidence may be relevant to competitive effects and to market definition").

[18] US DOJ and FTC, Horizontal Merger Guidelines (19 August 2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf, § 10 ("Efficiencies"), p. 31 (emphasis added).

From this inelegant paragraph Hemphill deduces that the US Agencies purport to adopt a new "defense" that may be claimed if it has been found under Section 7 of the Clayton Act that a given merger substantially lessens competition. He calls this an "increased appropriation defense", i.e., a defense based on actual or likely higher margins. To put flesh on the discussion Hemphill proceeds to introduce the US case of *FTC v Lundbeck*,[19] where a US District Court denied the FTC's application for an order to unwind an alleged "acquisition to monopoly" by Lundbeck (then Ovation) of NeoProfen, a therapeutic drug due for FDA approval which, like Lundbeck's own drug Indocin IV, was designed to treat a rare heart condition afflicting infants.[20] After Hemphill wrote his paper, the Eighth Circuit confirmed the District Court's judgment.[21] Although Chairman Leibowitz and Commissioners Brill and Ramirez found the outcome to be "profoundly wrong", they declined to apply for certiorari.[22]

According to the District Court, the FTC's allegation that the acquisition was contrary to Section 7 depended on whether the target drug NeoProfen belonged to the same market as Indocin IV. This required the court to arbitrate between, among other evidence, the testimony of specialized physicians – neonatologists – who for evident reasons tended to be price-insensitive (which the judge took to mean that there would be no effective price competition between the products even if owned by different firms) and, on the other hand, an eye-popping price increase of 1,300% for Indocin IV – two days after Lundbeck obtained the rights to NeoProfen.[23] Hemphill shows the defects of the court's analysis in order to set up a discussion of how, if hypothetically the decision had gone the other way, the parties might still have saved their merger under a (second) hypothetical

[19] *FTC v. Lundbeck, Inc.*, Nos. 08-6379, 08-6381, 2010 WL 3810015 (D. Minn., 31 August 2010).

[20] In addition to divestiture and rescission, the FTC's complaint, brought under Section 7 of the Clayton Act (asset acquisition) and Sections 5(a) and 13(b)(2) of the Federal Trade Commission Act (application for injunction against unfair method of competition in the form of willful maintenance of monopoly power) also sought disgorgement of Lundbeck's allegedly ill-gotten gains. Although post-consummation challenges to mergers and acquisitions are rather infrequent (but not terribly so), it is well established that the US Agencies can bring such actions. See, e.g., *U.S. v. E.I. DuPont de Nemours & Co.,* 353 U.S. 586 (1957) (DOJ challenge of DuPont's acquisition of an interest in General Motors around 30 years later). For recent discussion of the FTC's practice, see J. Thomas Rosch, "Consummated Merger Challenges – The Past is Never Dead", speech, Washington, DC, 29 March 2012, http://www.ftc.gov/speeches/rosch/120329springmeetingspeech.pdf (referring to *Lundbeck* at pp. 4-5).

[21] *FTC v. Lundbeck, Inc.,* 650 F.3d 1236 (8th Cir. 2011). Since the determination of the relevant market was essentially a matter for the trier or fact, i.e., the District Court, the FTC was obliged, and failed, to demonstrate to the Circuit Court that the District Court's finding on market definition was clearly erroneous. The standard of review may have been a crucial factor in the Eighth Circuit's judgment, as there was ample room to doubt the District Court's counterintuitive findings. For a critical discussion of the appellate judgment, see Herbert Hovenkamp, "Mergers, Market Dominance and the *Lundbeck* Case" (December 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968151.

[22] See their Statement of 20 January 2012, http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-jdl-brill-ramirez.pdf. Disagreeing with his colleagues, Commissioner Rosch listed several reasons why seeking review by the Supreme Court would have been appropriate in this case. See Separate Statement of 20 January 2012, http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-rosch.pdf.

[23] Merck, the previous owner of Indocin IV, had charged about $78 per treatment. Following the contested acquisition, Lundbeck raised the price of Indocin IV to $1614. It set prices for NeoProfen in a range of $1450 to $1522 per treatment. Prior to regulatory approval, it was anticipated that the price of NeoProfen would be around $450 to $500 per treatment, but such forecasts had been made when the price of Indocin IV was still relatively very low.

assumption that the 2010 Guidelines could have (retroactively) provided the basis for claiming an "increased appropriation defense". Hemphill does not argue that the transaction could have been justified under the Guidelines. His aim, rather, is to show how, given the ambiguity of the paragraph quoted above concerning appropriability, it is difficult to know for sure whether the defense could have applied. The interpretive difficulty is that, from a practical point of view, increased appropriation will in most cases imply higher post-merger prices. That would normally spell trouble for a proposed merger. Having incorporated the language of appropriation, the Guidelines may have failed to follow through, leaving only a mirage of a defense.[24]

This is one of Hemphill's "puzzles".[25] In most cases, if the defense is to bring added value, it must be available to justify static consumer harm on the basis of enhanced incentives to innovate. But the Guidelines continue, unsurprisingly, to stress that merger analysis is largely concerned with price and output effects. Indeed, in an earlier passage of the same section, the Guidelines cite merger effects that "prevent" price increases as one form of cognizable efficiency.[26] The apparent cognitive dissonance arising from these different passages will have to be sorted out in practice until a more coherent synthesis can be incorporated in a future version of the Guidelines.[27]

One can't help but note that in certain cases the US courts and the FTC have not been reading from the same page, as *Lundbeck* vividly suggests. Older habits of mind (such as the idea that even when products are differentiated market boundaries determine where competitive pressures switch on and off) may make the courts reluctant to let go of their familiar orthodoxies, even in a case where an

---

[24] The *de jure* existence and *de facto* unavailability of efficiency claims in antitrust law constitute an enduring paradox. The invariable problem relates to what Dan Crane calls an "asymmetry" principle: evidence suggesting post-merger price increased will be examined with piqued interest; evidence of efficiencies with furrowed brow. See Crane, "Rethinking Merger Efficiencies", 110 *Michigan Law Review* 347, 356-358 (2011).

[25] Another puzzle he described relates to the tension between the District Court's approach in *Lundbeck* and a more standard mode of analysis in monopolization law whereby steps taken by a monopolist to eliminate a potential competitive threat (as in the US *Microsoft* browser case), irrespective of whether the source of the threat were found at this early stage to belong to the same relevant market as the dominant product, might constitute an infringement under Section 2 of the Sherman Act. See Hemphill's oral remarks, pp. 21-22.

[26] See Guidelines, cited above note 18, at 30-31: "The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. […] [T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market. In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market." (footnotes omitted)

[27] Practically any set of Guidelines, in the field of merger control or otherwise, is by nature incomplete and must be further tested and elaborated through implementation. With regard to the 2010 Merger Guidelines, see William Kovacic, "Dominance, duopoly and oligopoly: the United States and the development of global competition policy", 13(11) *Global Competition Review* 39, 41 (December 2010).

acquisition eliminates the only possible competitive threat (a "2 to 1", one might say), and where prices soar above costs, which caused Hovenkamp to conclude that *Lundbeck* "should have been an easy call".[28] This illustrates another kind of dissonance, two institutions talking past each other. If it is true that there has been a growing dissonance between the courts and the FTC in merger enforcement, still deeper misunderstandings may lie ahead now that the more challenging 2010 Guidelines have been adopted. This theme is addressed by **Barry Hawk** in "A Tale of Two Cities: Washington and Brussels Face the Courts". The tension Hawk describes is a familiar one (not limited to merger control, but time pressure in this field may make it more poignant) between "sophisticated fact-specific economic analysis" – of which the Guidelines are an example *par excellence* – and "clear, predictable legal rules", the kind of bright lines and safe harbors that used to predominate when economists' prescriptions could more easily fit the less equivocal or even apodictic style of the law. There is some irony here in that, with hints of a political science story, Hawk (and others) portray the 2010 Guidelines – insofar as they broaden the discretion of the Agencies – as very possibly a strategic reaction to inhospitable treatment in the federal courts[29] by embracing a larger analytical toolkit; yet the proliferation of refinements could conceivably put still more distance between judges and enforcers. It remains to be seen how relations between these institutions will evolve (after all, jurisprudence does change significantly when enough time elapses), but Hawk, in footnote 17 of his paper, tellingly cites a 2010 judgment in which the Southern District of New York refused to rely on a unilateral effects analysis that was based on the UPP approach. In 2011 the judgment was affirmed by the Second Circuit.[30] Other federal courts have been skeptical as well.[31]

---

[28] Hovenkamp, cited above note 21.

[29] High-profile agency losses include, among others: *U.S. v. Oracle Corp.,* 331 F. Supp. 2d 1098 (N.D. Cal. 2004): *FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004); and *FTC v. Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007).

[30] *City of New York v Group Health Inc.,* 649 F.3d 151 (2nd Cir. 2011) ("[W]e find no error or abuse of discretion in the district court's rejection of the Upward Pricing Pressure test. As the district court explained, and as we discussed above, the applicable case law requires plaintiffs asserting a claim under the Sherman Act, the Clayton Act, or the Donnelly Act to allege a market in which the challenged merger will impair competition. While the City explains the Upward Pricing Pressure test's usefulness in assessing the impact of a merger, it does not explain how the test can substitute for a definition of the relevant market in the pleadings. *Cf.* Carl Shapiro, Deputy Ass't Attorney Gen. for Economics, Antitrust Division, U.S. Dep't of Justice, *Update from the Antitrust Division,* at 15 (Nov. 18, 2010), http://www.justice.gov/atr/public/speeches/264295.pdf (recognizing need to define relevant market in any antitrust challenge)."). In the cited speech, Shapiro had stated: "The Division recognizes the necessity of defining a relevant market as part of any merger challenge we bring." This does not change the fact that the market definition is a means, not an end, and that misconstrued evidence can divert market definition from its purpose (see discussion of *Lundbeck* above); this seems to suggest that when market definition and other indicators point in opposite directions redoubled scrutiny and caution are appropriate, and the legalistic approach of the courts in *Group Health* may be insufficiently nuanced.

[31] See, e.g., *FTC v. Laboratory Corporation of America*, No. SACV 10-1873 AG (S.D. Cal. 2011); *U.S. v. H&R Block*, 2011 WL 548955 (D.D.C. 2011) (where market power can be measured directly, "in theory market definition is superfluous, at least as a matter of economics […] [However, [a]s a matter of law, […] a market definition may be required by Section 7 of the Clayton Act").

In part II of his paper, Hawk reports three basic criticisms that have been aimed against the 2010 Guidelines. First, the Guidelines tilt the field in favor of the Agencies and leave them with unfettered discretion, thus undermining certainty and predictability. They "increase the mystery of U.S merger control despite the declared intention to increase transparency".[32] The UPP approach that appears in the Guidelines is, of course, the main source of unease here, since the Guidelines do not offer much precision as to what diversion ratio and gross margin thresholds to watch for in order to stay on safe ground. Compounding this uncertainty seems to be a lack of clarity as to the role of UPP analysis in routine merger work.[33] The second, related criticism is the "fanfare" point mentioned earlier – the reports of market definition's demise. Hawk finds, as others noted at the Workshop, that market definition is not about to fade from sight in the US[34] or, for that matter, in the EU[35] (or in other jurisdictions). But some of the controversy over what was initially perceived or cast as a threat to market definition was likely fuelled by the suspicion (consistent with the political science story) that UPP puts another arrow in the Agencies' quiver, and business hardly needs *that*. The courts may ultimately protect firms from the newfangled slings and arrows, but protection is costly; some incremental increase of intervention (allowing for defensive arguments based on, e.g., new entry, the counterstrategies of rivals and efficiencies) may thus follow from the adoption of the 2010 Guidelines even if market definition remains the touchstone for the courts, as Hawk expects. Related to the point about market definition is, once again, the greater level of "mystery" due to some uncertainty about when the Agencies will rely more or less readily on traditional tools, although intuition can probably be a good guide. The final criticism discussed briefly in the paper is related to the others: will firms across the vast sea of industries be able to collect sufficient, reliable pre-merger margin and diversion ratio data that will enable them to predict Agency findings?

In part III of his paper Hawk morphs from detached reporter to agent provocateur and reformer, not to mention religious historian. The title of his paper is drawn

[32] Hawk, "Two Cities", this volume, p. 54.

[33] See, e.g., Deborah Feinstein, "The Revised Merger Guidelines: Did the Agencies Heed the Lessons of the Past?", *Antitrust Source* (October 2010), p. 3 ("[T]he UPP model is not intuitive to business people, nor particularly easy to implement as an initial screen. If it becomes a necessary initial step involving a data-intensive, months-long process for every transaction that raises unilateral effects concerns, the 2010 Guidelines will not have offered practical guidance.").

[34] In this sense, see, e.g., Gregory Werden, "Why (Ever) Define Markets? An Answer to Professor Kaplow" (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004655.

[35] The European Commission quite often abstains in its decisions from reaching definitive conclusions as to the boundaries of relevant markets, but nevertheless it systematically carries out the market definition exercise, typically searching for narrowly drawn plausible markets in order to err on the side of caution. From the perspective of business operators, an unfortunate side-effect of the Commission's approach is a lack of reliable precedents as to market definition, and a consequent degree of uncertainty. Narrow market definitions also sometimes imply costly data excavation. From the perspective of administrative costs and opportunity costs, the Commission's approach may be questioned to the extent that it amounts to "continually reinventing the wheel". See Jean-François Bellis, Porter Elliott and Johan Van Acker, "The Current State of the EU Merger Control System: Ten Areas Where Improvements Could Be Made", in Barry Hawk, ed., *International Antitrust Law and Policy: Fordham Competition Law Institute 2011*, Juris Publishing, 2012, chapter 13, at p. 342.

from the contrast he describes briefly between the way the US enforcers have responded to defeats in the courtroom (if this interpretation is accurate) and the way the European Commission responded to *Airtours* and its sister cases.[36] But in the end his emphasis is not so much on the courts; it is on what Hawk sees as a dysfunctional procedural system in the US, the framework installed by the Hart-Scott-Rodino Act of 1976, now past its prime.[37] He points, for example, to the insufficient publication of agency decisions not to challenge a merger, which compares poorly with other jurisdictions.[38] Reform, he suggests, will be resisted by vested interests.

The final paper explicitly covering a substance-related topic is **Lars-Hendrik Röller's** "Efficiencies in EU Merger Control: Do They Matter?", which to some extent seems to resonate with Dan Crane's "asymmetry principle".[39] If the asymmetry is taken too far, efficiencies don't matter. The background to this discussion in the EU context, as Röller points out, is the fundamental question of what goal or goals are driving law and policy. Lawyers may favor a range of very different views, but for many economists the answer often amounts to a (non-trivial) choice between a total surplus standard and a consumer surplus standard.[40] Here there is a vivid contrast between the framework adopted by the EU for merger control and the Schumpeterian perspective mentioned earlier because in this field of law it is (threats, harm and benefits to) consumer surplus that steers the merger review process.[41] Requiring credible proof of "consumer pass-on" would

[36] On this comparison (predating the 2010 Guidelines), see also Mark Leddy et al., "Transatlantic Merger Control: The Courts and the Agencies", 43 *Cornell International Law Journal* 25, 41-54 (2010).

[37] There are other aspects of merger enforcement that could be discussed, including fundamental questions regarding the long-term sustainability (not only as regards jurisdiction over mergers) of the path-dependent two-agency system. Commentary abounds: see, e.g., Daniel Crane, *The Institutional Structure of Antitrust Enforcement*, OUP, 2011, chapter 2.

[38] But see Rachel Brandenburger, "Merger Enforcement in the Americas: Update from the U.S. Department of Justice", speech, New York, 17 July 2012, http://www.justice.gov/atr/public/speeches/285173.pdf, at pp. 6-8 (emphasizing the issuance of eight closing statements since 2009 shedding light on the decision of the Antitrust Division in each case to exercise prosecutorial discretion).

[39] See above note 24.

[40] For further recent discussion, see Louis Kaplow, "On the choice of welfare standards in competition law", Daniel Zimmer, ed., *The Goals of Competition Law*, Edward Elgar, 2012, chapter 1. The total surplus/consumer surplus debate has been questioned by economists who would rather put emphasis on how short-term effects analysis can best guarantee desirable long-term results, given the great difficulty of reliable evaluation of long-term effects. See Alison Oldale and Jorge Padilla, "For welfare's sake? Balancing rivalry and efficiencies in horizontal mergers", 55 *Antitrust Bulletin* 953 (2010).

[41] While consumer surplus is the comfortable language of economists, the Court of Justice is more apt to use the expression "consumer interests"; but the concepts generally seem compatible, as the ECJ speaks in terms of price, choice, quality and innovation, "among other things", from the perspective of consumers. See Ekaterina Rousseva and Mel Marquis, "Hell freezes over: a climate change for assessing exclusionary conduct under Article 102 TFEU", forthcoming, *Journal of European Competition Law and Practice*. Innovation suggests a framework broad enough to evaluate dynamic efficiency, but the Court unsurprisingly does not make explicit distinctions between static and dynamic efficiencies. It seems likely that the scope for verifying long-term efficiencies and trading them off against short term adverse price or output effects in Article 101(3) and Article 102 cases will depend on the policy preferences of the European Commission. In Merger Control at least, one might infer that there is a "double asymmetry"

sometimes be reconcilable with a consumer surplus standard, but not always, and its short-term bias means, once again, that there is little room for Schumpeterian arguments based on cumulative (and potentially massive) productivity growth.

Röller proceeds with a review of the criteria employed under the EU's 2004 Horizontal Merger Guidelines to determine whether efficiencies can justify clearing a merger that otherwise would be incompatible with (i.e., significantly impede effective competition in) the "common market". These are the familiar conditions of consumer benefits, merger-specificity (causation) and verifiability which have now been made more explicit, albeit with different nuances, in Section 10 of the 2010 US Guidelines as well. Here Röller highlights the clear preference for static benefits, i.e., those that consumers can take advantage of in the relatively short run, and without too much intermediation (variable or marginal cost savings, or in the case of some non-horizontal mergers, avoidance of double mark-ups).

The ground is thus laid for Röller to assemble an empirical answer to his question of whether efficiencies matter in EU merger control. His data set is composed of practically all EU-filed Phase II merger cases that arose in the first five years of the regime put in place in 2004, which amounts to 37 cases once withdrawn notifications are discarded. The cases are classified according to whether efficiencies were alleged by the parties in those cases, if so whether the claimed efficiencies were static or dynamic or both, whether the efficiencies were considered to be relevant to the analysis, and whether in the end they carried the day. A first finding is that in only 5 of the 37 cases did the parties assert that their transaction would yield static efficiencies (and dynamic efficiencies were asserted in only 6 cases). Röller finds this dysfunctional, and later argues that a better tailored incentive structure is necessary to encourage parties more frequently to highlight how a proposed merger will produce benefits, since if they do not the Commission is unlikely to do so at its own initiative. He suggests, for example, that the parties might be asked to explain why they have not submitted efficiency arguments, if they have not.[42] Another finding is that in the five cases involving claims of static efficiencies, the Commission twice accepted that the cumulative conditions were satisfied – a ratio that seems significant if we do not balk too much at the N=5 problem. On the other hand, Röller points out that although static efficiencies were accepted as relevant in two cases (*TomTom/Tele Atlas* and *Nokia/NAVTEQ*, both non-horizontals), efficiencies were not decisive in either of these. Dynamic efficiency claims fared poorly. While they are not rejected out of hand, the parties failed, in each of the 6 cases where they were asserted, to show that all of the relevant conditions (consumer benefits, merger-specificity and verifiability) were fulfilled.

---

principle at work, which not only makes it relatively difficult to make a decisive efficiency claim, but which makes it particularly difficult to do so with regard to dynamic efficiencies.

[42] To be clear, this does not mean that the Commission would be permitted to draw the opposite inference – i.e., a presumption that a merger is inefficient – if the parties failed to come forward with evidence of likely efficiencies. Probably, the sanction could be pitched low (even to the point of a non-sanction) so that it is just enough to provide the desired motivation.

## 2. Merger policy assessment and judicial review

### Contributions by Duso/Gugler/Szücs and Venit

While Röller asks whether efficiencies matter, **Duso, Gugler and Szücs** ask the more fundamental question of whether the EU merger review process matters. Their paper, entitled "Merger Policy Evaluation: Where Do We Stand?", is short but packed with empirical propositions that will not be independently verified here. The authors draw together several threads from studies published in the last few years in an effort to erect a multifunction four-part framework that could potentially be used as a standard (or as they put it tongue-in-cheek, "canonical") tool by researchers going forward.[43] The tool consists of the following chronologically inspired parameters:

- the ability to predict with confidence how a notified merger will be received by the Commission (legal certainty, policy stability);
- type I and type II enforcement errors (where errors are identified according to stock market movements in a time window straddling the announcement of a merger, and in particular shifts in share values of rivals who might stand to gain from more rigid post-merger market structures and softer competition);
- effectiveness of remedies (which is distinct in methodology from, but nonetheless seems related to, the concern about type II errors); and
- deterrence of "anticompetitive" merger notifications (where horizontal mergers, and the ratio of notified horizontal mergers to notified mergers overall appear to be used by the authors as proxies of anticompetitiveness).

Although the authors' method of measuring predictability – the first parameter – is not crystal clear, their finding that merging parties have been somewhat less certain in recent years (and especially since the introduction of Regulation 139/2004) about whether their transaction might be approved unconditionally is not terribly surprising, since theoretical and empirical techniques have advanced since the 1990s and since this may imply an added layer of complexity when anticipating review outcomes. With regard to the second parameter, decision errors, it may be a good idea to consider stock value-based event studies of merger control effects in a cautious vein. Apart from tricky causality issues and extraneous noise, there may be asymmetric information between those close to the investigation and the *market,* and other potential limitations (bounded rationality, biases, etc.) that constrain the market's capacity to know whether a merger will add to or subtract

[43] The reader may wish to compare this framework with the evaluative criteria suggested by Bill Kovacic in "International Convergence: Assessing the Quality of Horizontal Merger Enforcement", this volume, pp. 253 et seq. (discussed below). For another recent study of the economic effects of merger review, focusing on the Greek regime in particular, see Panagiotis Fotis and Michael Polemis, "The Short Run Competitive Effects of Merger Enforcement", 8 *European Competition Journal* 183 (2012).

from competitors' bottom line – even if one may counter that the market takes its own limitations into account and assigns weight and probability values to all relevant factors.[44] Be that as it may, the authors record a trend toward more frequent type II errors and a relative decline in type I errors, which is correlated with a relatively diminished rate of outright prohibitions since the adoption of the 2004 regime (with the authors' time frame running 1990 to 2007). Stock market movements are also relied on in order to evaluate the third parameter, the effectiveness of remedies. Taking account of well-known *ex post* evaluation studies by DG Comp and by the FTC,[45] the authors report conclusions they reached in another paper according to which: "only prohibitions achieve a full reversal of the anticompetitive rents generated at the announcement of a merger. Approvals subject to remedies are only partially effective in achieving rent reversion. Furthermore, remedies seem to be most efficient after the first investigative phase, while their impact is diminished after an in-depth investigation."[46] The sobering thought that Phase II remedies might not matter is complemented by the authors' finding in relation to deterrence, the fourth parameter:[47] outright prohibitions and withdrawals to avoid them generate significant (general) deterrence effects, but "[i]t appears that the Commission blocks too few mergers".[48] The method used by the authors relies to some extent on subsequent merger notification data, including the composition of mergers by type. Although it is not clear from the paper how extraneous factors which might also contribute to a decline in filings are controlled for, one can accept the intuition that an increase in the rate of prohibitions (at least in high-profile cases) may give boardrooms pause before

[44] See Gugler's oral remarks at pp. 98-99.

[45] For more recent discussion of studies evaluating merger decision outcomes, see OECD Policy Roundtable, *Impact Evaluation of Merger Decisions*, DAF/COMP(2011)24 (18 September 2012), http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf; Fiorenzo Bivenzi and Anna Piesarkiewicz, "The Role of Efficiency Claims in Antitrust Proceedings: Mergers and Dominance Cases", OECD Background Note, DAF/COMP(2012)16 (11 October 2012), http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP%282012%2916&docLanguage=En, at pp. 27-35.

[46] Duso, Gugler and Szücs, "Where Do We Stand?", this volume, p. 108. On the patterns of remedy types (divestitures, access remedies, supply remedies, etc.) employed in horizontal, vertical and conglomerate merger cases, see, e.g., Wei Wang and Matti Rudanko, "EU Remedies and Competition Concerns: An Empirical Assessment", 18 *European Law Journal* 555 (2012).

[47] Andreas Mundt in his oral remarks opposed the proposition that a significant objective of merger control is to generate general deterrence effects in the general business sector. (See pp. 90-91.) This debate cannot be resolved here, but ideally a merger control system should deter firms from transactions that significantly impede competition while offering no appreciable quantitative or qualitative efficiencies ("naked" anticompetitive mergers). Remedies are futile in such cases, as they render harmless a merger that brings little or no value. If such mergers are notified they are likely to impose collateral costs and drain scarce enforcement resources. Putting aside the question of whether deterrence is an appropriate goal, as a concrete matter it seems clear that the prospect of scrutiny by agencies causes firms to abandon a small but significant proportion of merger plans even prior to notification. With reference to the UK, see Deloitte and Touche LLP, The deterrent effect of competition enforcement by the OFT, OFT962 (November 2007), http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf, at pp. 27-49. The possibility that merger control has overdeterrent effects and dissuades firms from executing pro-competitive transactions is discussed at pp. 44-47 of the report.

[48] Duso, Gugler and Szücs, *ibid*., p. 111. Compare the oral remarks of Mario Siragusa (p. 89, sympathetic to the claim of underenforcement) and Philip Lowe (pp. 93-94, suggesting the contrary).

proceeding with transactions liable to raise serious competition concerns. (For example, 2-to-1, 3-to-2 or 4-to-3 mergers, or mergers thought problematic based on a range of market factors, might be passed over even without seeking advice from outside counsel.[49]) Again, however, the ultimate point of the paper is not so much to report the authors' specific findings but to present their framework of interrelated yardsticks.

In seven paragraphs, **Jim Venit** summarizes his chapter "The Scope of EU Judicial Review of Commission Merger Decisions" better than I could,[50] so I'll just jot down a few incidental observations. First, the issue of how the EU Courts review the Commission's decisions in terms of scope and intensity seems to have become a permanent part of competition law discourse. This trend is likely to be irreversible given: (i) the constitutional requirement of effective judicial review (i.e., a fair trial by an independent and impartial tribunal) imposed by Article 47(2) of the EU Charter of Fundamental Rights and by Article 6(1) ECHR,[51] and more abstractly by the subordination of the Union to the rule of law; and relatedly, (ii) certain salient features of EU-level competition law enforcement, which include the potential imposition of stiff sanctions by an integrated, prosecutor-adjudicator agency. Second, Venit's essay is a sequel to his leviathan chapter from the previous Workshop volume,[52] in which he explored related issues but did so largely through the lens of abuse of dominance and restrictive agreement cases (i.e., cases involving conduct punishable by sanctions), rather than merger control. Of course, there are significant connections between judicial review in the field of antitrust

[49] See Deloitte and Touche, OFT962, cited above note 47, at p. 35.

[50] See Venit, "Scope of EU Judicial Review", this volume, pp. 113 et seq., at pp. 113-114. A good deal of discussion on judicial review (in the EU system or otherwise) was had in Panel 2. See, among other interventions, the oral remarks of Enrique González Díaz (pp. 75-77 and 99-100), Venit (pp. 77-79 and 101), Fanis Christoforou (pp. 81-82), Judge Forwood (pp. 82-84 and 103-104), Ian Forrester (pp. 86-87) and John Fingleton (pp. 88-89).

[51] Article 6(3) TEU also provides that fundamental rights – as guaranteed by the ECHR and as derived from constitutional traditions common to the Member States – constitute general principles of EU law. Now that the EU Charter is directly binding and ranks as primary law, the Court of Justice has explained that its Article 47(2) gives expression to the general principle of effective judicial protection and serves to implement Article 6(1) ECHR, which requires States Parties to ensure that the right to a fair trial by an independent and impartial tribunal is respected. See Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, judgment of the ECJ of 8 December 2011, not yet reported, paras. 50-52. This raises the question of whether Article 47(2) provides a higher level of protection than Article 6(1) (as elevated standards are permitted both by the Charter and by the Convention). Although the full implications of Article 47(2) are yet to be explored, the right to a fair trial under Article 47(2) applies regardless of whether a procedure is rightly characterized as "criminal" (*hard core* or, as in the case of administrative enforcement of competition law via sanctions, *non-hard core*, although debate rages over this distinction) from the perspective of the Convention. In other words, it applies even to the adoption of purely administrative measures falling short of the *non-hard core* category, and in particular to infringement decisions where no fine is imposed. See Heike Schweitzer, "Judicial Review in EU Competition Law", in Damien Geradin and Ioannis Lianos, eds., *Research Handbook on EU Antitrust Law*, Edward Elgar, forthcoming, section III(A)(1).

[52] Venit, "Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82", in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011, pp. 191 et seq.

and judicial review in contested merger cases.[53] Third, while the title of the essay refers to judicial review, Venit also covers the closely related subject of the quality and sufficiency of proof when the General Court reviews the Commission's merger decisions.[54] He examines several significant judgments in these areas (*Airtours, Schneider Electric, Tetra Laval, Sony/BMG, Ryanair*), extracts the operative legal principles and articulates certain subtleties which are not obvious from the standard formulations of those principles.

One sees from Venit's paper and other sources – and this corroborates the general findings of *ECLA 2009*[55] – that the Commission's margin of appreciation in relation to *complex economic matters*[56] (as opposed to, e.g., errors of law,

[53] Crudely speaking, the concepts of *marginal review* and *comprehensive review* "spilled over" first from the ECSC Treaty to the field of restrictive agreements under the EEC/EC Treaty (particularly in cases where the Commission assessed, under the defunct notification regime, whether Article 85(3) EEC or Article 81(3) EC applied); from restrictive agreements to EC merger control (especially given the need to evaluate the impact of mergers prospectively); and finally to the field of abuse of dominance (e.g., market definition, interoperability analysis, calculation of price squeeze, etc.). Pertinent cases in these three areas of law include, among others: Joined Cases 56 and 58/64, *Consten and Grundig v Commission* [1966] ECR 299; Joined Cases 29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679; Case 42/84, *Remia v Commission* [1985] ECR 2545; Case C-441/07 P, *Commission v Alrosa Company Ltd.* [2010] ECR I-5949; Case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II-5865; Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, judgment of the ECJ of 8 December 2011, not yet reported; Joined Cases C-68/94 and C-30/95, *France and Société commerciale des potasses et de l'azote (SCPA and Entreprise minière et chimique (EMC) v Commission (Kali und Salz)* [1998] ECR I-1375; Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987; Case T-210/01, *General Electric v Commission* [2005] ECR II-5575; Case T-342/07, *Ryanair Holdings plc v Commission* [2010] ECR II-3457; Case T-65/96, *Kish Glass v Commission* [2000] ECR II-1885, *upheld:* Case C-241/00 P, [2001] ECR I-7759; Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601; Case T-271/03, *Deutsche Telekom v Commission* [2008] ECR II-477, *upheld:* Case C-280/08 P, [2010] ECR I-9555; Case T-321/05, *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805, *on appeal:* Case C-457/10 P, not yet decided. See also the judgment of the EFTA Court in Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, http://www.eftacourt.int/images/uploads/15_10_JUDGMENT.pdf.

[54] It seems clear that the nature of the standard of proof imposed upon an administrative authority can have important *de facto* consequences for the standard of review of its decisions, however the latter standard may be denominated. See, e.g., Per Hellström, "A Uniform Standard of Proof for EU Competition Proceedings", in Ehlermann and Marquis, eds., *ECLA 2009: Evaluation of Evidence and its Judicial Review*, cited above note 52, pp. 147 et seq.; and *cf.* Fernando Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases", in Ehlermann and Marquis, *ibid.*, pp. 319 et seq., at p. 386.

[55] See Ehlermann and Marquis, eds., *ibid*. For recent discussion, see Schweitzer, "Judicial Review in EU Competition Law", cited above note 51. For further discussion, see also Renato Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective", 49 *Common Market Law Review* 971 (2012). Focusing on the context of infringement proceedings under Articles 101 and 102, Nazzini examines the EU Courts' *de facto* deference to the Commission from several angles and notes a shift, particularly in light of the ECJ's *KME* judgment (cited above note 53), from deferential review to "full" review (whereby the appropriate standard is "correctness"), but despite this trend finds that, "under the current system, deferential judicial review is incompatible with the principle of effective judicial protection". *Ibid*., p. 998. This author advocates changes going well beyond a tightening up of the standard of review, and discusses means of establishing a first-instance decision taker which, unlike the European Commission, would satisfy "constitutional" standards of independence and impartiality.

[56] Sometimes in merger cases the word "complex" is not used (as in "margin of discretion with regard to economic matters"), which might give the impression of a broader zone of judicial restraint but one may conclude on the basis of the case law that the distinction is inconsequential.

breach of essential procedural requirements or material errors of fact, to which "comprehensive" legality control applies; or fines, over which the Courts have unlimited jurisdiction according to Article 261 TFEU and Article 31 of Reg. 1/2003) is often a thin margin – sometimes razor-thin,[57] unless the complex economic matter falls within a rather vague realm of economic policy choices within the Commission's remit.[58] The general narrowness of the Commission's margin of assessment is evident from the requirement that the facts on which the Commission relies must be accurate, reliable and "complete",[59] and the requirement that the Commission's conclusions must follow from that accurate and complete factual record.[60] Venit suggests that this fine margin of appreciation

[57] The Commission's recognized margin of appreciation was not always so thin but in general it has become so, subject to nuances, in line with a general trend toward more detailed examination of evidence in most types of competition cases ever since the Court of First Instance opened for business in September 1989. See also the assessment of President Jaeger, who reviews the relevant jurisprudence and concludes: "first, the requirements surrounding the application of marginal review make this standard of review far from light; second, the General Court illustrates this understanding by constantly affirming its willingness to thoroughly review elements despite the fact that they belong to the Commission's margin of discretion; and finally, the General Court's actual control goes beyond its mere declared intention to conduct a deep examination of those elements in practice leading – if need be – to the annulment of the challenged decision." Marc Jaeger, "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards a Marginalisation of the Marginal Review?", 2 *Journal of European Competition Law and Practice* 295, 303 (2011). Jaeger's argument that the GC's "actual control" is intensive may be contrasted with Venit's oral remarks (see p. 101), where he qualifies his paper by claiming the GC often fails to bring the full intensity of its power of review to bear. See further Nazzini, "Administrative Enforcement", cited above note 55, at pp. 992 et seq.

[58] See Jaeger, *ibid.*, pp. 310 and 313. In the past, matters of genuine policy orientation – to which only a marginal review (manifest error) standard applied – notably included the Commission's judgement calls when applying Article 85 EEC or its equivalent. (See Nicholas Forwood, "The Commission's 'More Economic Approach' – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review", in Ehlermann and Marquis, eds., *Evaluation of Evidence and its Judicial Review,* cited above note 52, at pp. 255 et seq.) But the days of constitutive exemption decisions by a central enforcer are over, and since 2004 Article 101(3) TFEU has been directly applicable, which may imply an eradication of the zone of policy discretion the Commission once had in this context. (See Heike Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", in Ehlermann and Marquis, *ibid*., pp. 79 et seq. at pp. 98, 102 and 140.) Other matters have been held to fall within the Commission's policy remit, including in particular where its enforcement priorities lie. However, questions remain as to how to elaborate more precise guidelines with regard to the shades of gray between matters that constitute genuine questions of economic policy that may warrant institutional-balance deference (i.e., as Jaeger says at p. 313, marginal review "applied with the intensity described in *Tetra Laval's* 'forgotten' paragraph") and *juridified* matters that do not. Schweitzer maps out and discusses these issues in "Judicial Review in EU Competition Law", cited above note 51, especially in sections II(C)(4)(b) and IV of her paper.

[59] "Completeness" cannot refer to an absolute concept. In practice, the fact-finder will tend to gather pertinent information until the perceived marginal value of additional data collection is overtaken by its marginal costs. On appeal, the General Court has no jurisdictional impediment to concluding that the Commission's decision is flawed by a material omission of fact, which amounts to a finding that the Commission's cost-benefit calculation was from an *ex post* point of view deficient.

[60] These significant qualifications emerge from what Jaeger (cited above note 57, at p. 300) describes as *Tetra Laval's* "forgotten paragraph", the forgetters being critics sometimes protesting too much about judicial deference for the Commission. The paragraph in question (para. 39) states: "Whilst the [ECJ] recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of

corresponds to a "plausibility" analysis, and plausibility does not imply an obligation to tell the best story; the existence of *more* plausible conclusions does not justify annulment. In theory and in practice this seems to allow for more rigor than in the case of, say, a "substantial evidence" standard of review and less rigor than "full merits" review (where even a wholesale rewrite of a contested decision, i.e., a review going well beyond full or partial annulment, is theoretically possible). When the General Court controls the plausibility of the Commission's conclusions, the ECJ can intervene and annul the decision of the GC if the latter has gone so far as to substitute its own preferences, including its own economic assessments, for those of the Commission;[61] but in principle it is for the GC alone to assess the probative character, credibility and persuasiveness of the Commission's evidence,[62] and to verify that the evidence substantiates the Commission's findings.

The only other observation that will be made here concerning this paper is that Venit presents the descriptive and normative case for the proposition that, with regard to complex matters that are by nature speculative – theories predicting conglomerate effects (leveraging) or coordinated effects, and possibly other post-merger predictions, since merger analysis is ultimately prospective – the EU Courts (do and should) employ heightened scrutiny by the back door, i.e., by rigorously checking the quality and sufficiency of the evidence (or, in Venit's terms, by raising the "burden of proof").[63] In this regard, Venit suggests that "the intensity of the Court's analysis will be proportional to the speculative nature of the Commission's theory of harm, with the intensity of judicial scrutiny being greater in cases involving conglomerate (and arguably coordinated) effects, as opposed to more straightforward cases of unilateral horizontal effects".[64] In such cases, the Commission will normally have to support its decision to intervene

substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect." Although *Tetra Laval* was a merger case, the limits to marginal review imposed by the forgotten paragraph apply equally in non-merger cases, as can be seen in a growing number of judgments.

[61] See Case C-441/07 P, *Alrosa*, cited above note 53, paras. 66-67 (finding that the "General Court" had gone too far in its proportionality review of the Commission's findings as to the acceptability of (initially jointly) proposed commitments in an Article 9 case: by reaching "personal" conclusions regarding whether jointly proposed commitments could eliminate the competition concerns identified by the Commission, the GC had "put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment".).

[62] See, e.g., Case C-136/92 P, *Commission v Brazzelli Lualdi and others* [1994] ECR I-1981, para. 66; Case C-237/98 P, *Dorsch Consult v Council and Commission* [2000] ECR I-4549, para. 50. The principle that the ECJ may generally only review points of law, if applied too expansively, may lead to concerns that the General Court is in some ways exempt from control. See Venit's oral remarks at pp. 78-79.

[63] *Cf.* Arjen Meij, "Judicial Review in the EC Courts: *Tetra Laval* and Beyond", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, eds., *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Europa Law Publishing, 2009, chapter 2 (explaining that in *Tetra Laval* the CFI had endeavored to articulate the applicable standard of proof, as opposed to establishing a new standard of scrutiny going beyond the standard seen in the ECJ's *Kali und Salz* judgment).

[64] See Venit, "Scope", this volume, pp. 125-126.

with particularly convincing evidence, a proposition consistent with the evidence needed to prove that a lion feasted on daisies in Regent's Park last Sunday.[65] Venit astutely notes a tension between the intuitive lion-in-the-park, sliding scale approach when assessing evidence and the odd "symmetry" principle established in *Sony/BMG*.[66] If theories of adverse effects defy normal expectations when a conglomerate merger is consummated (see the CFI in *Tetra Laval*[67]), wouldn't it be natural to allow such a merger to benefit from a rebuttable presumption of compatibility with the common market?[68] In adopting the symmetry principle in *Sony/BMG*, the ECJ in this sense seems to have established an *asymmetry* between merger control cases and antitrust cases. But again, Venit suggests that while the standard of proof for prohibitions and approvals is the same,[69] one sees upon scratching the surface differences in the evaluation of evidence; and from a functional perspective one sees something roughly comparable to a presumption embedded within the sliding scale.

---

[65] Several parkgoers claimed to have spotted Lord Hoffmann's stately beast firsthand in Ehlermann and Marquis, *ECLA 2009*, cited above note 52. See, e.g., Luis Ortiz Blanco, "Standards of Proof and Personal Conviction in EU Antitrust and Merger Control Procedures", in *ibid*., pp. 175 et seq.

[66] Case 413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR 4951, para. 43.

[67] Case T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4381, para. 155 ("Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognised in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (see, by analogy, *Airtours v Commission,* paragraph 63)."). *Cf.* Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987, paras. 40-41 (endorsing the need affirmed by the CFI for a "close examination" of effects on the reference market in light of the nature of the notified merger and rejecting the contention that the CFI was introducing a more rigorous standard of proof to be met by the Commission, opining instead that the CFI had merely drawn attention to the "essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger"); Case C-413/06 P, *Bertelsmann AG and Sony Corporation v Impala,* cited previous footnote, paras. 50-51 (quality of evidence in conglomerate merger cases particularly important, and again, a reference to the essential function of evidence).

[68] Coordinated effects cases may arguably raise somewhat different issues. Rigorous analysis to avoid type I errors is certainly commendable. However, vigilance seems equally important, all the more so in specific instances such as maverick-absorption cases. To some degree, the intensification of civil and criminal punishment for cartel activity may be driving firms seeking supracompetitive profits to consider horizontal concentration and competition-softening strategies as a better risk compared to cartel activity. The latter point is raised, for example, in William Kovacic, "Criminal Enforcement Norms in Competition Policy: Insights from US Experience", in Caron Beaton-Wells and Ariel Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, Hart Publishing, 2011, chapter 3, at p. 55.

[69] In essence, the Commission must show that its treatment of the merger in question is justified given the balance of probabilities (economic outcome "most likely to ensue") absent its decision to (conditionally) approve or prohibit the transaction. *Cf.* Aindrias Ó Caoimh, "Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of the Court of Justice of the European Union", in Ehlermann and Marquis, *ECLA 2009*, cited above note 52, pp. 271 et seq., at 281-282 (quoting Case 413/06 P, *Bertelsmann AG and Sony Corporation v Impala,* cited above note 66, para. 52).

## 3. Merger enforcement across jurisdictions: Procedural issues

### Contributions by Völcker, Forrester, Goldman

**Sven Völcker's** paper – "Dare to Defer? Towards Greater Procedural Efficiency in Multijurisdictional Merger Remedies" – is a polite call to action for the world's antitrust agencies with regard to coordinated remedy design and/or agency restraint based on work sharing, comity or "pure" deference. Outside of special cases such as the EU, competition problems arising from multijurisdictional mergers cannot be resolved via a one-stop shop remedy procedure, just as a one-stop global filing procedure is unrealistic. However, *de facto* coordination of remedies is already possible, particularly where two or more agencies and the merging parties all cooperate in good faith. When effective work sharing is achieved (or even when acting on a more unilateral basis), Agency X can close its file with little fuss on the ground that the merging parties have agreed divestitures with Agency Y (and maybe Agency Z, etc.) which fully address any likely competition problems in X's jurisdiction that flow from the merger.[70]

In this regard, Völcker reviews some of the relevant practice, points out the potential difficulties which may on a formal level interfere with cooperation, and then shows – using the EU merger rules as an example – how practical solutions can overcome formal obstacles (and how the Commission's enforcement powers can allay fears of system-gaming). Agencies with well developed remedies policies, or perhaps the OECD and/or ICN, could take the lead in distilling practice into non-binding principles relating to "core safeguards" and work allocation in order to build trust and encourage more frequent deference in appropriate cases. Such initiatives could build on the existing degree of bilateral guidance already provided by the EU and the US in the form of a more general Best Practices document.[71] A range of issues concerning cooperation and comity are taken up again in section 4 ("International convergence, etc.") below.

---

[70] For example, the Canadian Competition Bureau decided to take no action in the (US $18 billion) *United Technologies/Goodrich* case on the ground that remedies secured by the DOJ and the European Commission sufficed to alleviate competition concerns in Canada. See CCB Press Release of 26 July 2012, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html. The cooperative and remedial aspects of the case are discussed in Rachel Brandenburger, "Recent Developments in Merger Control: Views from the U.S. Department of Justice's Antitrust Division", speech, Florence, 14 September 2012, http://www.justice.gov/atr/public/speeches/286981.pdf, at pp. 13-16. Another frequently cited example is the *Cisco/Tandberg* case. See DOJ Press Release of 29 March 2010, http://www.justice.gov/atr/public/press_releases/2010/257173.htm (closing investigation after taking account of commitments made to the European Commission). Concerning this case, Christine Varney made pertinent remarks shortly before the DOJ published its press release. See Varney, "Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency", speech, Paris, 15 February 2010, http://www.justice.gov/atr/public/speeches/255189.htm.

[71] US-EU Working Group, Best Practices on Cooperation in Merger Investigations (October 2011), http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (recommending that merging parties coordinate the timing and substance of remedy proposals and to participate in joint discussions on remedies with the Commission and with the FTC or DOJ).

Like Völcker, **Ian Forrester** – in his paper, "POST PLURES UNUM: Streamlining and Simplifying Merger Procedures in an Era of Multijurisdictional Merger Filings" – writes chiefly about Europe but also raises some procedural issues that need to be addressed by jurisdictions around the globe. The problems stem from a generalized parochial bias which leads legislatures to adopt merger regimes (in particular, notification thresholds) that do not take account of the full brunt of global regulatory costs, and which are sometimes disproportionate in light of limited links between the merging parties and the jurisdiction in question. Perhaps empirical measurements (independently conducted and financed) have been made of the true additional (static and dynamic) private and social costs caused by clearly gratuitous filings that serve little purpose,[72] but in any case Forrester's more qualitative analysis seems to confirm the intuition that the global patchwork of filing rules constitutes an appreciable drain on the global economy that tends to dampen investment.[73]

Forrester begins his paper with an unexpected but engaging historical recollection of the hard road that had to be traversed in order to secure a (*post plures unum*) European-level procedural framework for the vetting of large mergers and acquisitions.[74] This first part of the paper might even have been extracted as a fitting preface to this volume: considering the economic importance and competitive impact of such transactions, one can easily point to the merger control system as one of EU competition law's capital achievements, ranking with the adoption of the competition rules of the Treaty itself. But the remainder of the paper is equally interesting; it proceeds to highlight the role of the Merger Regulation (i.e., Regulation 139/2004) in combating against economic nationalism and political interference that would stifle cross-border investment in a manner contrary to an ever closer Union. The key *federalesque* instrument used to check this kind of "spillback" is Article 21 of the Regulation.[75]

---

[72] For a study commissioned by the private bar which focuses on private costs, see PricewaterhouseCoopers, "A tax on mergers? Surveying the costs to business of multi-jurisdictional merger review" (June 2003), http://www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf, cited by Adam Fanaki, "Convergence in Multi-Jurisdictional Merger Reviews: A Canadian Perspective", this volume, pp. 261 et seq. Since 2003 the level of this "tax" in real terms has undoubtedly risen.

[73] On the other hand, there is surely a body of "inframarginal" merger activity that is unlikely to be deterred by high aggregate regulatory costs in absolute terms due to the potentially enormous scale and value of some international transactions. Any chilling effect that may result from extra regulatory and compliance costs occasioned by a multiplicity of merger regimes seems more likely to affect transactions of lesser value.

[74] For an in-depth retrospective on the contentious and lengthy efforts to convince the Council of Ministers to approve the Community's first merger regulation – which in the end was only possible with the aid of the ECJ, as Forrester explains – see Hubert Buch-Hansen, *Rethinking the history of European level merger control. A critical political economy perspective,* Copenhagen Business School Press, 2009. For a variety of legal and historical perspectives on the history of competition law and policy (and industrial policy) in the Community (i.e., the EEC) and its largest Member States, see Kiran Patel and Heike Schweitzer, eds., *Historical Foundations of European Competition Law*, Oxford University Press, forthcoming.

[75] In principle, concentrations with a "Community [now a Union] dimension" are subject, so far as the EU is concerned, to the exclusive administrative jurisdiction of the European Commission. However, Article 21(4) of the Merger Regulation provides that "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation

The most specific parts of Forrester's essay concern notification thresholds and the EU's pre- and post-notification referral mechanisms (Articles 4(4), 4(5), 9 and 22 of the Merger Regulation).[76] With regard to notification thresholds, the issues include, as noted above, jurisdictional nexus (stressed often in international fora), possible perverse incentives arising from inordinate filing fees, and occasionally unjustified complexity and opacity (or even irrationality) of filing thresholds, leading to uncertainty and pointless risk. As for (total or partial) referrals to and from the Commission, which occur relatively frequently,[77] Forrester provides elaborate comments that highlight their unsatisfactory overall performance. The issues here generally relate to: needlessly excessive time windows in which the Commission or the Member States, as the case may be, can mull over the acceptability of a mooted referral; and needlessly onerous questions that could be struck out from the Form RS. In brief, Forrester finds significant room for improvement in these technical but practically important areas, and makes numerous suggestions to that end.

In **Cal Goldman's** paper, "Contemporary US-Canada Cross-border Merger Review: Tradeoffs in Policy Objectives between Harmonization, Simplification and Accountability", both the bright side and the potentially dark side of procedural convergence are seen. Canada, orbiting as it does in the gravitational field of the United States, continually faces substantive and procedural choices that are to some extent thrust upon it by US policy preferences; and yet the latest procedural alignments[78] occurred only in 2009-2010, while the Hart-Scott-Rodino Act was adopted in 1976 and NAFTA entered into force in 1994. It may be that US/Canadian convergence is driven almost as much by global trends, and by the gentle prodding of the ICN, as it is by gravity – which after all is the weakest of the fundamental forces.

---

[i.e., essentially competition-based criteria] and compatible with the general principles [fundamental rights protection, proportionality, legitimate expectations, etc.] and other provisions of Community [Union] law". Legitimate interests automatically include public security, plurality of the media and prudential rules, but "[a]ny other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of [Union] law before the measures […] may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication."

[76] For further critical remarks concerning case referrals under the Regulation 139/2004, see also Ioannis Kokkoris and Krisztian Katona, "Critical Analysis of the ECMR Reform", in Ioannis Lianos and Ioannis Kokkoris, eds., *The Reform of EC Competition Law*, Kluwer Law International, 2010, chapter 16, at pp. 439-444; Bellis, Elliott and Van Acker, "Ten Areas", cited above note 35, at pp. 335-337 and 348-350 (questioning, *inter alia*, the tendency of case teams to use the submission of the (draft) Form RS as an occasion to explore substantive issues; and calling – unless harmonizing steps are taken to address persistently divergent processes among EU Member States – for an expanded concept of referral whereby transactions could be referred if notifiable in just two or more Member States).

[77] See Thomas Deisenhofer, "International Cooperation in Merger Cases – An EU Practitioner's Perspective", this volume, pp. 227 et seq.

[78] Further substantive convergence was prompted by the 2010 US Horizontal Merger Guidelines. The Canadian Competition Bureau responded in October 2011 with new Merger Enforcement Guidelines (briefly covering non-horizontal mergers as well). See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

In his paper, Goldman reports Canada's most significant procedural reforms, which were largely modeled on the "second request" process in the US.[79] Although he finds certain aspects of the reforms to be helpful (e.g., nominally more compatible 30-day + 30-day waiting periods), his reservations concern the rather fundamental matter of whether second requests (or in the Canadian style, "supplementary information requests") are a suitable model for merger review. It is intimated in the paper that second requests can involve disproportionately burdensome data requirements, and that such a costly and extensive process is hardly conducive to simplifying and streamlining the Canadian regime (one of the "tradeoffs" referred to in Goldman's title).[80]

While Canada's reforms were directly inspired by the US model, Goldman also explains how certain local practices will continue to reflect Canada's specific institutions, customs and available resources.[81] But in importing the central pillars of the framework, Canada has cast its lot with the Procrustean approach.[82]

## 4. International convergence: Substantive and procedural issues and the scope for comity

### Contributions by Mundt/Bardong, Deisenhofer, Brandenburger, Kovacic, Fanaki, Shiraishi, Kameoka/Marquis, Jeon, Zhang/Zhang, Mateus, Dabbah

Some of the international-dimension themes seen already – such as managing complexity, diversity and time pressure in a global and multipolar transaction

[79] These procedural reforms are also discussed by Fanaki, "A Canadian Perspective", this volume, pp. 261 et seq.

[80] Arguably, when measuring red tape, treatment in the US of cases that do not provoke a second request may compare favorably with other significant jurisdictions. It is not unusual to see criticism of the information requirements contained in the Form CO in Europe, and the EU's "simplified procedure" as currently configured is regarded as underinclusive and ultimately of limited value. See, e.g., Bellis, Elliott and Van Acker, "Ten Areas", cited above note 35, at pp. 327-334.

[81] See also Fanaki, "A Canadian Perspective", at pp. 267-268 (referring to certain distinctions remaining between the Canadian and US procedures, such as Canada's one-year time window for *ex post* merger challenges and the possibility of obtaining an Advanced Ruling Certificate (i.e., pre-merger no-action ruling) from the Commissioner.

[82] The tradeoff seems to be whether gains arising from enhanced synchronicity exceed the additional costs imposed by supplemental information requests – taking account of the low percentage of notified mergers subject to such requests. Some of the benefits of the broad alignment of the US and Canadian regimes are reviewed by Fanaki in his paper, and he observes that the scope of data and document requests in issued SIRs has been more narrow than that of the model Second Request, but he stops short of claiming that Canada's reforms have in fact reduced the relative cost of multijurisdictional merger review where one of the jurisdictions in which the merger must be cleared is Canada. Instead, he calls for further study (noting also that other factors not causally linked to the procedural reforms, and in particular a turn toward effects-based merger analysis) tend to increase the costs of review). The latest stocktaking suggests that the Canadian Competition Bureau has exercised some restraint with the new procedure, and that overly burdensome use of SIRs has been avoided. See Mark Katz and Erika Douglas, "The Canadian 'SIR' Process: A Progress Report", *CPI Antitrust Chronicle*, September 2012(1).

arena – are also treated in the many contributions to this session 4, which was more explicitly dedicated to international perspectives and issues. The first of these contributions is **Andreas Mundt** and **Andreas Bardong**, "Comity, Cooperation and International Convergence – Recent Developments in German Merger Control". Mundt and Bardong cover, among other things, the exercise of jurisdiction over foreign-to-foreign mergers, comity and the "nexus" principle, inter-agency cooperation and (procedural and substantive) convergence.

With respect to foreign-to-foreign mergers, Mundt and Bardong describe the (fully litigated) *Phonak/ReSound* case, where the parties came forward with several quaint arguments as to why public international law should have forestalled the assertion of jurisdiction (and *a fortiori* intervention) by the Bundeskartellamt. These arguments have the superficial appeal of being linked to classical ideals of sovereignty and territoriality. Although public international law may be criticized for sometimes (not always) being too faithfully wedded to paradigms of the past,[83] this is not so in relation to the extraterritorial application of domestic law where a cognizable harm is suffered in a State that otherwise does not appear to have a plausible claim to exercise jurisdiction on the basis of classical territorial links. Indeed, the foundations of the idea that jurisdiction necessarily presupposes such links[84] were unsettled, to some extent, 85 years ago by the Permanent International Court of Justice (i.e., the forerunner of today's ICJ).[85] Since then the doctrines of significant effects and "implementation" (which are distinct[86]) have taken various twists and turns,[87] and they certainly have not rendered territoriality irrelevant,[88]

[83] See recently *Germany v. Italy*, judgment of the International Court of Justice of 3 February 2012, not yet reported, http://www.icj-cij.org/docket/files/143/16883.pdf.

[84] See *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 356-357 (1909) (Sherman Act capable of application only to conduct occurring within US borders; with the Supreme Court claiming that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done").

[85] See *France v. Turkey* (*Affair du « Lotus »*), judgment of the PICJ of 7 September 1927, Series A No. 10, http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (confirming proper exercise of criminal jurisdiction by Turkey over French ship officer Lieutenant Demons, accused of an allegedly criminal act, i.e., allowing his ship to tear a Turkish ship apart, causing death and injury, on the high seas. Arguably, this could be called a hybrid case that could be read as either an extension of territory-based jurisdiction (the "territory" being a sailing ship) or as an embryonic effects-doctrine case, although there are passages, such as at page 23, that leave doubts). See further the Opinion of Advocate General Darmon in Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström Osakeyhtiö and others v Commission* [1988] ECR 5193, paras. 19-58.

[86] See, e.g., Yves Botteman and Agapi Patsa, "The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits", 8 *European Competition Journal* 365, 379 (2012).

[87] There is abundant literature on the subject, and the point of departure is, of course, Judge Hand's Opinion in *Alcoa*. See, e.g., Eleanor Fox, "Competition Law", in Andreas Lowenfeld, *International Economic Law*, 2nd edition, OUP, 2008, chapter 14, pp. 423-431; Mark Popofsky, "Extraterritorial Jurisdiction: Legal Foundations and U.S. Jurisprudence", in Wayne Dale Collins, ed., *Issues in Competition Law and Policy Vol. III*, ABA Section Antitrust, 2008, pp. 2417 et seq.); and some of the contributions in Andrew Guzman, ed., *Cooperation, Comity and Competition Policy*, OUP, 2011. The subject is also discussed in Tadashi Shiraishi, "Effects on Domestic Purchasers: A Descriptive Theory for Competition Law in Cross-Border Cases", this volume, pp. 275 et seq.

[88] Sovereignty may be "in transition", but it is sticky, and it takes offense. Historically, many States defended their prerogatives by adopting blocking statutes (which remain in place; see, e.g., Erica Davila, "International E-Discovery: Navigating the Maze", 8 *Pittsburgh Journal of Technology Law and Policy* 1, 11-14 (2008)). Good ol' Westphalian manoeuvring was exemplified recently by a Russian

but with time they have been adopted, subject to limiting principles, as common "State" practice. Barring a wildly improbable turn toward a global merger control system, these widely applied doctrines will continue to be of practical relevance.

Mundt and Bardong accept that in some scenarios the exercise of merger control jurisdiction may have to be weighed against actual or likely harm to another State's important interests (e.g., where national security is under threat), but such cases are far out of the ordinary. On the other hand, it is evident that in some instances a State may voluntarily decline to exercise jurisdiction irrespective of such balancing. Here the authors refer to the (non-binding) principle of comity, which is reflected in the sound notion that only jurisdictions with a sufficient nexus to a given transaction should exercise jurisdiction over it.[89] In this regard they show how the nexus principle influenced the 2009 refinements of the German merger regime, including in particular the adoption of a second domestic turnover test which probably contributed (along with the economic crisis) to a decline in notifications in Germany. The strengthening of the local nexus requirement is portrayed by the authors as one feature among others of a svelte, state-of-the-art merger regime; to substantiate the "competitiveness" of German merger control, they refer to ICN documents and international (product) comparisons.

Turning to the related subjects of inter-agency cooperation and convergence, Mundt and Bardong first of all review some of the multijurisdictional merger cases on which the Bundeskartellamt cooperated with other authorities, such as the curious case of *BHP/Rio Tinto*. Here the authors suggest that the modalities of cooperation between competition authorities can be more important than procedural convergence as such. They also stress the need for substantive convergence (to avoid conflicting decisions and to facilitate cooperation[90]), which may already be an *acquis* among some jurisdictions as far as horizontal merger cases are concerned,[91] although one can still occasionally observe varying outcomes even

executive decree of 11 September 2012 that looks likely to interfere with the European Commission's ongoing antitrust investigation of Gazprom (see Press Release 12/937 of 4 September 2012). Even if a practical solution were ultimately to be found in this case, the intervention of the government sends a grim message about State-owned enterprises and uneven playing fields.

[89] See, e.g., ICN Recommended Practices for Merger Notification Procedures, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[90] Cristina Caffarra gives an example of how extra costs may result from divergent theories of harm in her oral remarks at pp. 15-16. For a fuller account of the problems associated with substantive divergence in merger control, see, among others, Daniel Crane, "Substance, Procedure, and Institutions in the International Harmonization of Competition Policy", 10 *Chicago Journal of International Law* 143, 148 (2009) (discussing negative externalities, potential overdeterrence and opportunistic behavior on the part of regulators). On convergence and divergence in general, see Cheng, "Convergence and Its Discontents", cited and quoted above note 7.

[91] Gauging US/EU convergence with regard to non-horizontal issues in recent years (in particular, post-*GE/Honeywell*) is less straightforward. (Moreover, it is not clear what future directions the FTC and DOJ might take given ongoing personnel changes, such as, e.g., the departure of Commissioner Rosch.) On the one hand, the form used to notify a merger under the Hart-Scott-Rodino Act does not (any longer) inquire as to the merging parties' vertical relationships, a sign of nonchalance. On the other hand, non-horizontal aspects have been cited in enforcers' speeches and publications as a potentially promising line of development. See J. Thomas Rosch, "Terra Incognita: Vertical and Conglomerate Merger and Interlocking Directorate Law Enforcement in the United States", speech, Hong Kong, 11 September

in cases of horizontal effects.[92] Embracing a kind of "evolutionary convergence" approach for substantive matters, Mundt and Bardong provide an update with regard to the preparation of merger guidelines in Germany, now adopted in their final form,[93] and other envisaged or possible initiatives. The traditional dominance test in Germany is probably living out the last of its days, but experience suggests that its successor will not provoke a radical change of practice.

**Thomas Deisenhofer** is next with "International Cooperation in Merger Cases – An EU Practitioner's Perspective". Senior-level contacts between the European and US competition enforcers date back to the 1960s, when Hans von der Groeben flew to Washington and Don Turner later paid a visit to DG "IV". But cooperation in merger control, which only goes back about two decades as far as Brussels is concerned, and cooperation in international cartel cases have necessarily been of an intensity and urgency that requires particularly close contacts at the level of operations – cooperation in real time.[94] Deisenhofer's paper is illuminating in this

2009, http://www.ftc.gov/speeches/rosch/090911roschspeechunivhongkong.pdf, at pp. 7-15 (discussing the sparse FTC practice since the Reagan/Baxter era with regard to non-horizontal mergers, but taking some inspiration from the Commission's Guidelines on Non-Horizontal Mergers and signaling a possibly more assertive approach in non-horizontal merger cases); J. Thomas Rosch and Darren S. Tucker, "Emerging Theories of Competitive Harm in Merger Enforcement", *Antitrust Source* (October 2011). As regards the DOJ, recent cases suggesting increasing attention to non-horizontal mergers include *Google/ITA*, *GrafTech/Seadrift Coke* and the *Comcast/NBC* joint venture. See also DOJ, Antitrust Division Guide to Merger Remedies (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf, at p. 5 ("vertical mergers can create changed incentives and enhance the ability of the merged firm to impair the competitive process. In such situations, a remedy that counteracts these changed incentives or eliminates the merged firm's ability to act on them may be appropriate. Accordingly, in appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realized. The Division also will consider structural remedies in vertical merger matters – they may be particularly effective when the vertical integration is a small part of a larger deal.").

[92] See Deborah Feinstein, "Process Divergence As an Obstacle to Substantive Convergence?", *Antitrust* 5, 5 (Summer 2012) (contrasting the handling of *Intel/McAfee* by the European Commission, which required commitments, and the FTC's unconditional clearance; and citing cases involving other significant jurisdictions). Of course, some jurisdictions, including now most famously China, have merger control provisions that permit the relevant agency (generally MOFCOM's Anti-Monopoly Bureau in China's case) to bring non-competition criteria (notably industrial policy, among others) into the review process, sometimes in opaque ways. To the extent that non-competition criteria override a strictly effects-based assessment, divergence with other jurisdictions is to be expected. For a recent assessment of merger control in China, see Xinzhu Zhang and Vanessa Yanhua Zhang, "China's Merger Control Policy: A Three-Year Milestone", this volume, pp. 303 et seq. Much has been written on the specific subject of the explicit and implicit industrial policy features of Chinese competition law and policy. See, e.g., Xiaoye Wang and Jessica Wu, "China's Anti-Monopoly Law: agent of competition enhancement or engine of industrial policy?" in Zimmer, ed., *The Goals of Competition Law,* cited above note 40, chapter 20.

[93] The Guidelines cover vertical and conglomerate mergers as well as horizontal mergers. See BKA, Guidance on Substantive Merger Control (29 March 2012), http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf. See also Andreas Bardong, "The Bundeskartellamt's New Merger Guidelines", *Journal of European Competition Law and Practice* (2012) doi: 10.1093/jeclap/lps042.

[94] Initial steps toward the establishment of a Framework for Merger Review Cooperation were taken in April 2012. The presently humble ambitions of the non-binding, opt-in Framework include the compilation of a list of liaison officers and the development of modes of information exchange, subject to confidentiality. The Framework may thus facilitate inter-agency discussions of, in particular, time schedules, market definition, theories of the case and remedies. See http://www.jftc.go.jp/en/policy_enforcement/speeches/pdf/1Framework%20for%20Merger%20Review%20Cooperation.pdf.

respect, as it contains both statistical and qualitative analysis of both "external" cooperation, i.e., cooperation with third countries, and internal cooperation, i.e., cooperation with EEA jurisdictions. The statistical analysis draws on two merger case datasets from the periods of January 2007 to 30 September 2009 and November 2008 to January 2011. The first of these is comprehensive (926 merger decisions), the other is tailored to include only those cases that require the special attention of senior management ("significant" cases) and those requiring substantial resources ("heavy" cases), which combined amounted to 94 cases. Of these 94 cases, if one removes the 53 cases where the merging parties were both EU-established undertakings, it appears that DG Comp's case teams cooperated with their international counterparts (typically but not only from the US and Canada) in 25 of the remaining 41 cases (i.e., about 61% of those cases). In significant and heavy cases, therefore, international cooperation is the norm if the merger involves at least one non-EU party.[95] This is undoubtedly as it should be, and one wonders if the remaining 16 cases did not involve cooperation because they were not notifiable (or notified) in any other jurisdiction, or whether there are other reasons.

Deisenhofer provides a variety of other useful statistical information on both global cooperation and intra-EU referrals which must be skipped over here, and then offers (in section 4 of his paper) some observations regarding the challenges faced by agencies in the age of global business and the latticework of merger control regimes. These include, among others: tight and non-linear statutory review periods that differ in different jurisdictions, which can invite opportunistic behavior (although Deisenhofer later warns that attempts to exploit divergent timetables will be self-defeating); restrictions on the exchange of information among authorities, typically overcome when parties furnish waivers (although third parties may have fewer incentives to do so); and language and cultural barriers, not to mention yawning time lags between, say, Brussels and Ottawa.[96] In a context of ever-growing complexity, and with relatively high numbers of mergers processed each year, aren't conflicts inevitable? It seems they are not. A key finding of the paper is that, of the 27 significant or heavy cases involving international cooperation,[97] tensions only boiled over in one case, namely, *Oracle/Sun*, and even then the DOJ and DG Comp were able to smooth things over.[98]

[95] This is true *a fortiori* in cases involving only firms established in third countries. In this context, DG Comp cooperated with a foreign agency in 19 of the 23 relevant cases (83%).

[96] For further discussion of obstacles to inter-agency cooperation (in merger control and antitrust), see OECD Secretariat, "Limitations and Constraints to International Co-operation", DAF/COMP/WP3(2012)8 (12 October 2012), http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WP3%282012%298&docLanguage=En.

[97] The number 27 includes the 25 cases mentioned above plus two of the 53 cases that involved only parties from the EU.

[98] The paper does not make any reference to *GE/Honeywell*, or to *Boeing/McDonnell-Douglas*. However, it was recognized at the Workshop, and has equally been recognized by others, that the quasi-acrimony sparked by *GE/Honeywell* led to redoubled efforts on the part of the European Commission and the US agencies (above all, the DOJ) to achieve common understandings and to minimize the politicization of high profile cases. The rapid development of the ICN and general proliferation of contacts may also have been factors nurturing an *esprit* of cooperation and serving as

Deisenhofer compares this paradoxical conflict avoidance rate with the much greater uncertainty faced by a competition agency (or its legal service) walking into court to seek an injunction or to defend a merger decision, and hypothesizes that agencies may be more risk averse in relation to international conflicts than they are when deciding to request a court order to prevent or unwind a merger, or when adopting an administrative decision likely to trigger an appeal.

Section 5 of Deisenhofer's paper is more qualitative. Here he reviews the modalities of cooperation witnessed in several noteworthy "global" cooperation cases (*Panasonic/Sanyo, BHP Billiton/Rio Tinto, Oracle/Sun, Microsoft/Yahoo! Search Business* and *Cisco/Tandberg*) and he outlines, more concisely, several referral cases within the EU. In the final section of the paper he concludes that international cooperation is not just advisable on account of the benefits but essential on account of the high costs of non-cooperation. This entails a need for significant investments (which in some cases might in turn pose prioritization choices for a number of competition agencies). It also requires good faith effort, cooperative gestures and appropriate timing of notifications by the merging parties to avoid blindsiding one authority or the other.

As if to offer proof that the world's leading competition authorities are on the same page, **Rachel Brandenburger** endorsed Deisenhofer's positive assessment in her oral remarks and underlines the virtues of cooperation in her paper, "Promoting International Convergence: Substantive and Procedural Challenges – the Scope for Comity". Brandenburger's very appointment was a gutsy symbolic gesture by the DOJ's Antitrust Division. Hiring a foreign citizen is not unprecedented for the DOJ: Georgetown's Heinrich Kronstein once worked for the Antitrust Division (Special Attorney for international/German cartels) under Thurman Arnold, and there may well be other examples. Nevertheless, the US Agencies had never hired anyone fresh off foreign shores for a Deputy-level post; this and comparable hiring practices by certain other agencies worldwide is to be commended and emulated.[99]

But coming to the paper, Brandenburger emphasizes a number of themes that define many of her public speeches. These begin with one of her primary tasks at the Antitrust Division, namely, to ensure that international cooperation is not left on

a partial buffer against conflict. Perhaps this means that agency cooperation is not akin to a "bubble" that bursts on a cyclical basis. For all of the challenges faced by agencies today when handling international matters, the common recognition of a need for dialogue and mutual operational support, all in the light of reputational effects in a "repeated game" and of Deisenhofer's costs of failure, might be enough to avoid public meltdowns for a good while. However, agencies need to keep the issues of unmanaged public conflict avoidance and *informed* divergence on their permanent agenda. Furthermore, arrangements should be made with a minimum of delay to bring the Chinese agencies formally into the ICN fold.

[99] There are, of course, less politically daring but nevertheless equally commendable ongoing exchange programs (e.g., the DOJ's Visiting International Enforcer Program) that allow foreign enforcers to take up residency for a while at the host agency. Such programs do not substitute for senior-level cross-border appointments but they are another tool that facilitates mutual learning; a degree of socialization/integration and consequently intermediation skills and better communication; convergence in some areas; and ultimately enhanced conditions for conflict avoidance.

the sidelines for the internationally inclined eccentrics of the antitrust community but integrated into operational and strategic work as a core part of the Division's thinking. This too can only be commended, although again, as Deisenhofer suggests, it does require material investment. With references to the DOJ's case practice, Brandenburger's other themes include the rise of multipolarity; convergence, cooperation and transparency (i.e., the principles endorsed in the ICPAC Report presented to AAG Jim Rill in 2000); and associated ICN-friendly ideas promoted by Christine Varney (while at the DOJ) and articulated more specifically by Brandenburger in various fora, namely, "mindfulness, respect, trust and dialogue".

Mindfulness, of which comity would be a more specific expression, refers first to greater and constant awareness of the potential external impacts of an agency's actions and decisions (e.g., as regards remedies), possibly imposing costs, and second, to an awareness of the impact on the said agency of the actions and decisions of other agencies. Moreover, as Brandenburger explains, an agency should be mindful of other authorities' jurisdiction, practices and traditions (and this might extend to mindfulness of the jurisdiction of non-competition authorities with competences that bear on antitrust or merger control). Respect involves openness to the ideas of others, i.e., of other agencies, and respect for the differences between agencies in a very heterogeneous global environment. Respect might be seen as an end in itself or as a condition that facilitates communication and persuasion in the deliberative processes typical of the largely informal sphere of inter-agency contacts. An equally important condition is trust, which according to Brandenburger has two dimensions. The first concerns trust between agencies, which tends to vary with frequency and intensity of interaction and cooperation. Second, since cooperation on cases entails "triangular" interdependencies involving regulated parties whose activities straddle two or more jurisdictions, Brandenburger (like Deisenhofer) stresses the need for trust on the part of the agencies *vis-à-vis* the parties as a key to effective cooperation. The last ingredient of Brandenburger's recipe for global good will *à la crème* is dialogue.[100] Importantly, the idea of dialogue "includes a willingness of competition agencies to revisit their own policies and practices over time to reflect new learning and the experiences of others".[101] Dialogue therefore includes communicative exchanges with a view to finding ways to develop better ideas and habits, and ways to build on success. Humility, self-critique, adaptability, a sense of future history and, where appropriate, openness to watershed reform should be seen as hallmarks of top-notch agency culture, and here again it is necessary to think in terms of proactive investment of resources (where feasible) and prioritization. All such

[100] This orientation (non-coercive discourse with a view to transcending subjectivity in order to discover superior ideas and solutions) recalls the communicative rationality discussed by scholars of various stripes. See, e.g., Tanja Börzel and Thomas Risse, "The Transformative Power of Europe: The European Union and the Diffusion of Ideas", KFG Working Paper 1/2009, http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_1.pdf, with references; and Thomas Risse, "Let's Argue!: Communicative Action in World Politics", 54 *International Organization* 1 (2000).

[101] Brandenburger, "Promoting International Convergence", this volume, p. 250.

self-discovery and self-improvement is closely linked to what Muris or Kovacic might call an agency's "research and development and innovation" portfolio.

Since I have mentioned **Bill Kovacic** I might as well turn to his paper, "International Convergence: Assessing the Quality of Horizontal Merger Enforcement". One can divine the main messages of Kovacic's papers before reading them, and while that could be a cruel fate for some commentators, here it reflects characteristics determined by a fox/hedgehog double helix: adroit and quick, knowing many things; but also tireless and nocturnal, with a big, unrelenting idea. In his contribution to this volume Kovacic proposes, drawing on his previous work,[102] three criteria that might be used to measure how well or poorly a given merger control regime performs.[103] The objectives of the essay thus recall those of the more empirically oriented paper delivered by Duso, Gugler and Szücs.[104] The latter paper (reviewed above) responds to some extent to Kovacic's call for more attention to the economic effects of merger control itself, or at least the economic effects of a particular merger regime's substantive, procedural and institutional configuration. Economic effects, Kovacic points out, involve questions quite different from the typical methodologies used to assess how well agencies are doing. In classic Muris/Kovacic terms, he points out first of all that "[t]o say that an agency is doing a lot of things or only a few things does not tell us whether it is doing the right things".[105] He then presents his evaluative criteria.

First, he would ask whether merger policy has improved economic performance by achieving benefits for consumers such as reduced prices, better quality and so on. If the answer is yes, then the policy is yielding the opposite of type I and type II errors: it is approving, reforming and prohibiting the transactions that it should.[106] Shifting from a consumer welfare to social welfare perspective and from a single-jurisdiction to global perspective, Kovacic's second criterion is whether particular merger regimes minimize pointless implementation costs within a given jurisdiction and across jurisdictions. This might be done by shredding red tape and alleviating other burdensome system features, converging toward better and best global investigative techniques and standards, and enhancing trans-system interoperability. The final criterion is another signature preoccupation for the author: it is the question of whether a given regime and its competent agencies take

[102] The essay is also partly inspired by Dennis Carlton, "The Need to Measure the Effect of Merger Policy and How to Do It", 22 *Antitrust* 39 (Summer 2008).

[103] An expanded discussion of regime performance criteria going beyond merger control is provided in William Kovacic, Hugh Hollman and Patricia Grant, "How Does Your Competition Agency Measure Up?", 7 *European Competition Journal* 125 (2011); for a concrete application of the six criteria discussed in the latter article, see also Daniel Sokol, Christine Wilson and Joseph Nord, "Grading the Professor: Evaluating Bill Kovacic's Contributions to Antitrust Engineering" (2012), http://ssrn.com/abstract=2119676. On regime evaluation methodologies in relation to different parameters (accountability, ex post intervention reviews and the "broader impact of competition policy"), see also Peter Ormosi, "Stocktaking on Evaluation", OECD Discussion Note, DAF/COMP/WP2(2012)5 (22 May 2012), http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WP2%282012%295&doclanguage=en, with references.

[104] "Merger Policy Evaluation: Where Do We Stand?", this volume, pp. 105 et seq.

[105] Kovacic, "Assessing the Quality", this volume, pp. 255.

[106] Sensibly enough, the attempt to measure enforcement errors forms part of the framework advocated in the paper by Duso, Gugler and Szücs (see above).

seriously the need for permanent cycles of reassessment and improvement.[107] A prerequisite for this third criterion, which Kovacic describes in further detail, is an institution's commitment to self-study, to engage with independent critics and with the private bar, and to participate in multilateral surveillance and benchmarking.[108] The three criteria discussed in the paper are also distinguished from less rigorous and possibly useful but also possibly biased or incomplete techniques often used to assess system quality such as practitioner's surveys and isolated studies of high-profile cases, or strictly "radar screen" measures such as rates of activity and the number of blocked mergers or of other interventions. With greater attention to the pitfalls of current techniques, and with more dedicated investments and budgetary allocations to pursue the diagnostic and self-improvement measures discussed in Kovacic's essay, agencies will be able to upgrade to "broadband quality".

**Adam Fanaki** contributed a paper entitled "Convergence in Multi-Jurisdictional Merger Reviews: A Canadian Perspective", which comments on the convergence process in general but also focuses on Canada's procedural reforms and in this sense the paper picks up on the themes addressed in Cal Goldman's paper.[109] Fanaki begins by reviewing some of the virtues of convergence between merger control regimes in terms of, for example, a relative reduction of compliance and transaction costs, mitigated risk of divergent outcomes and remedies, and so on. From that perspective, the opposition of the business community to at least some aspects of the 2009 reforms in Canada aimed at enhanced convergence might seem puzzling. However, it is clear from both Goldman's paper and this one that the controversy amounted to merger regime users saying: be careful what you wish for; Second Requests in the US can entail "long delays and hefty costs",[110] so why not converge toward something at the cutting edge? However, the fact that the US model was chosen as a template is hardly a surprise; as suggested earlier, the only surprise, to an outsider, is that this harmonization exercise came so late in the day.

Following an interesting discussion of the "challenges" of multijurisdictional merger review, Fanaki proceeds in parts III and IV of the paper to review the background to and details of those aspects of the Canadian regime that were affected by the harmonization move, highlighting the controversy over the perceived prospects of the higher regulatory costs and burdens of supplementary information requests. His early assessment of the reformed system is in general positive, particularly from the perspective of more efficient agency cooperation on such things as timing, investigative steps, sharing thoughts and information, remedy design and implementation, etc. Several cases are cited with regard to coordinated remedies, the common theme being a willingness to defer to remedies

[107] Kovacic's second and third criteria are not fully captured by the Duso/Gugler/Szücs framework, which suggests (to the extent one accepts Kovacic's approach) that the latter can be a useful or essential but not exhaustive tool.

[108] Kovacic also envisages, at p. 258, "collaborative projects by which competition authorities engage in intensive side-by-side discussions of commonly reviewed completed matters".

[109] Goldman, "Contemporary US-Canada Cross-border Merger Review: Tradeoffs in Policy Objectives between Harmonization, Simplification and Accountability", pp. 165 et seq.

[110] Fanaki, "A Canadian Perspective", p. 262 (citation omitted). See also *ibid*., pp. 266-267 (discussing the high relative costs of US review where a Second Request is issued).

negotiated elsewhere if the Bureau's independent investigation confirms that the package is sufficient to resolve the competition problems with respect to Canada.[111] In part VI of his paper, Fanaki raises the question of whether, in light of reforms and trends, multijurisdictional merger reviews are less costly than before. The answer is not straightforward. He notes first of all that, "[a]lthough evidence on this point is not currently available, it is likely that the costs to merging parties of the merger review process in Canada have continued to increase following the implementation of the amendments […]",[112] especially in those (proportionately rather few) cases where the parties must respond to supplementary information requests. But he then points out that increasing costs are also due to factors unrelated to the reforms; in this regard, higher costs result not from procedural convergence but from substantive convergence toward more sophisticated and more data-intensive effects-based merger review. Although procedural economies can potentially help to offset the additional costs of more rigorous substantive analysis, Fanaki reserves judgment on whether such economies have been generated by the procedural reforms, calling for continued examination of the issue as more experience accrues under the revised framework.

The next four contributions concern merger control in the Far East (Japan, South Korea and China). The first of these is **Tadashi Shiraishi,** "Effects on Domestic Purchasers: A Descriptive Theory for Competition Law in Cross-Border Cases". The interest of this paper goes beyond merger control and addresses the more horizontal theme of the assertion of extraterritorial jurisdiction where business activity has global dimensions, whether in the field of antitrust or merger control. The paper begins with the observation that, although the "effects" basis for exercising jurisdiction is often discussed, the nature of the doctrine remains imprecise. One may refer, for example, to substantial and reasonably foreseeable effects within the territory of the State or region in which the authority concerned is competent to act – but what are the principles that govern the application of this effects test? Shiraishi suggests – as a descriptive matter – that the relevant effects in this context are effects on domestic purchasers.[113] From this point of view, the location of suppliers is immaterial. With this straightforward descriptive tool in hand, Shiraishi proceeds literally to illustrate several factual scenarios from international cartel and merger control cases and shows how his "effects on domestic purchasers" (eDP) theory can explain the assertion of jurisdiction or, in some cases (particularly with regard to the Japan Fair Trade Commission), the non-assertion of jurisdiction.

Shiraishi begins by pointing out that, despite some *katana*-rattling in the early 1990s by the Department of Justice, and the purported renunciation of footnote 159 contained in the 1988 version of the international operations

[111] On coordinated remedies and willingness to defer, see also Sven Völcker, "Dare to Defer? Towards Greater Procedural Efficiency in Multijurisdictional Merger Remedies", this volume, pp. 133 et seq.

[112] Fanaki, "A Canadian Perspective", p. 272.

[113] This suggestion logically excludes jurisdiction where, in particular, domestic sellers suffer anticompetitive harm due to market access impediments in a foreign jurisdiction.

guidelines,[114] the DOJ did not in fact pursue, *vis-à-vis* Japan, pure foreign market access theories of harm where there was no evidence of harm to US consumers (i.e., purchasers).[115] This left the eDP theory intact. Several other examples are then discussed, including the *Empagran* case, where foreign (i.e., non-US) cartel victims sought, understandably, to avail themselves of the US courts; and the *Marine Hoses* cartel, in relation to which Shiraishi notes the quite different result yielded by Japan's surcharge system (*kachokin*) compared to that of the European Commission's Fining Guidelines but then shows how these contrasting results can both be consistent with the eDP theory. Two further applications of the theory involve the issue of whether, in the context of certain merger cases, the JFTC defines geographic markets as Japan-only markets or global markets. The scope of geographic markets has been controversial in Japan, but the JFTC has generally preferred, as Shiraishi points out, to delineate Japan-only (or occasionally regional) markets – a reflection of the objective of protecting purchasers in Japan.[116]

Shiraishi concludes his paper with a different kind of scenario to show where the eDP theory breaks down. As he explains, the theory presupposes that the location of purchasers can be identified. But some purchasers move across borders. Some engage in "borderless business". The example cited by Shiraishi is the *Cathode Ray Tubes* cartel, where purchasers were located outside Japan in Southeast Asia but the corporate parents of these purchasers were situated in Japan. The purchasers were in one sense foreign but in another sense domestic (since the parent companies in Japan sometimes negotiated deals with the Japanese suppliers, who were secretly colluding, and directed their Southeast Asian subsidiaries to buy the cartelized inputs). In a "frontier" case of this kind – which can be transposed to the merger sphere *mutatis mutandis* – Shiraishi suggests that one must choose between a literal application of the eDP theory (which might conceivably lead to a regulatory gap, depending on the circumstances) and an extended version of it which presumably would broadly construe the concept of a "purchaser".

Next comes my awkward and incentive-incompatible summary of the short paper by **Etsuko Kameoka** and **Mel Marquis,** entitled "Recent Developments in Japan's Merger Control System". The formulation and application of

[114] See, e.g., Marina Lao, "Jurisdictional Reach of the U.S. Antitrust Laws: *Yokosuka* and *Yokota*, and 'Footnote 159' Scenarios", 46 *Rutgers Law Review* 821 (1994).

[115] Gradual action to strengthen domestic Japanese antitrust enforcement, following the Strategic Impediment Initiative (SII) talks (encouraged to some extent by more weapon-rattling, but on the part of Congress and the US Trade Representative), likely served as a pressure valve to ease (not to say eliminate) tensions in the early 1990s between the US and Japan. There is a small mountain of journal articles and essays regarding the trade frictions between these countries, the SSI talks and the consequences for Japanese competition law and policy. See, e.g., Michael Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, Nissan Institute/Routledge, 2002, chapter 8.

[116] In the rarer body of cases where the JFTC has identified global markets, each supplier has generally charged a uniform price irrespective of where the product is sold globally; in this scenario the global market serves as a proxy for the Japanese market, and effects on domestic purchasers are thus taken into account even though the substantive analysis examines the impact of a merger on the global market.

antimonopoly policy in Japan is marked by permanent incremental reform that adds up to transformative change when longer time periods are considered. In this paper, however, the authors focus on just a thin slice of time to report the refinements of the JFTC's merger procedures in the summer of 2011. Going back over the decades, the German model was a source of some degree of inspiration for the JFTC's rules and procedures (and indeed for Japan's entire underlying administrative law infrastructure); and, more commonly recognized, dialogue with United States federal authorities (in the shadow, in those pre-WTO days, of the infamous Section 301, the trade retaliation statute[117]) has triggered evolutions in the JFTC's rules, procedures and enforcement posture. The authors here suggest that the European Commission seems to have had some influence as well, but they could also surely attribute the most recent reforms to (apart from the Government's growth strategies) the intensified global antitrust conversation of the last decade.[118] Ultimately, the unspoken motivator in Japan is: let us do whatever will help to resuscitate the pulseless economy.[119]

In the paper the authors describe, first of all, how the JFTC's merger review procedures have been altered. For example, new discipline has been imposed to rein in the "prior consultation" system, which was not very transparent and which at least potentially warped the JFTC's timetables. Although the old system has been abolished, it remains possible, as is routine in many other jurisdictions,[120]

[117] See, e.g., Mitsuo Matsushita, "Structural Impediments Initiative: An Example of Bilateral Trade Negotiation", 12 *Michigan Journal of International Law* 436, 440 and 445-446 (1991); Industrial Structure Council, Uruguay Round Committee, *Subcommittee on Unfair Trade Policies, Complete Report on Unfair Trade Policies by Japan's Major Trading Partners*, Nova Science Publishers, 1993.

[118] The JFTC certainly understands itself to be a leader in the global antitrust community (with active participation, for example, in the ICN's Merger Working Group), and this is so above all in Asian/APEC circles, where the JFTC routinely conducts training events and dialogues (e.g., with China, Indonesia and Thailand, among others). This self-conception is hardly surprising given that Japan's grandfatherly antimonopoly framework has been in place for more than six decades. The desire to lead is also linked to a certain degree of institutional isomorphism: to be an outlier is to risk irrelevance, whereas mingling with the mainstream presents certain empowerment advantages. Commentators have noted, for example, that ICN-validated projects and trends carry weight back home, and two-level or multi-level games may be played.

[119] On this motivation, the interests of the JFTC and METI converge. Although the authors catch the scent of some possible degree of reversion to an industrial policy orientation in Japan, the context is quite different today compared to Japan's industrial policy heyday. With the progressive abolition (mid-90s to 2003) of a stunning variety of exemptions from the Antimonopoly Act (AMA), industrial policy today must be conducted with a more horizontal, pan-industrial orientation than the bad old days of vertical (sector specific, discrimination-based, cartel-friendly) industrial policy. Studies of Japan's industrial policy and the clashes between the then-MITI and the JFTC abound, but for an introduction see Mitsuo Matsushita, "The Intersection of Industrial Policy and Competition: The Japanese Experience", 72 *Chicago-Kent Law Review* 477 (1996). For a summary of the radical reduction of exemptions from the AMA, see Michael Wise, *OECD Country Study: Japan – The Role of Competition Policy in Regulatory Reform* (1999), http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/2497259.pdf, pp. 31-39. By 2004, the OECD Competition Committee opined that "[t]he process of eliminating and narrowing exemptions has been substantially completed". *Monitoring Review of Japan* (15 July 2004), DAFFE/COMP(2004)11/REV1, http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/34728075.pdf, at p. 14.

[120] For a critical view of the pre-notification *préliminaires* between would-be merging parties and DG Comp's case teams, see Bellis, Elliott and Van Acker, "Ten Areas", cited above note 35, at pp. 327-328; and *cf.* the oral remarks of John Fingleton, p. 204.

to engage in pre-notification contacts with the JFTC – contacts which might be particularly important depending on the character of a given merger.[121] Other reforms include transparency measures designed to help the merging parties understand the precise concerns of the regulator, and more detailed explanations as to the framework employed by the JFTC when delineating between Japan-only, regional and worldwide geographic markets (the background to which is discussed in Professor Shiraishi's paper). In a subsequent section of the paper the authors report on three mergers reviewed by the JFTC with reference to the recent reforms, namely, the *NSC/Sumitomo Metal* and the *hard disc drive (HDD)* cases.[122] To the extent that international convergence in merger procedures is a good thing,[123] the JFTC appears to be making its contribution to this process.

**Seonhoong Jeon** reports on South Korea's merger review apparatus in his contribution, "International Convergence and Recent Korean Experiences in Merger Control". From this paper a nice picture emerges of another merger system in transition. Jeon focuses on two convergence-related dimensions of this transition. First, he notes a trend toward greater use of state-of-the-art economic thinking about mergers. This apparent substantive turn presents a challenge to conventional merger control habits in Korea, which have depended to a large extent on market shares and concentration indicators. Indeed, until recently, difficult-to-rebut structural presumptions based on these criteria have generally been decisive. But the global trend toward predicting likely post-merger effects in this field is now also having an effect in Korea.[124] Jeon cites two examples of this phenomenon. In the *TDK/Alps* merger of 2007, despite post-merger shares of more than 50%, the transaction was approved unconditionally – most likely, according to Jeon, on account of countervailing pressure from strong buyers (Western Digital, Hitachi Global Storage, Fujitsu, Samsung and Toshiba). In the

[121] Such pre-notification contacts may at least partially alleviate concerns about the possible impact of the reform on the coordination of remedies. See Ilene Knable Gotts, "Preface", in Knable Gotts, ed., *The Merger Control Review*, 3rd edition, Law Business Research Ltd, 2012, at p. viii ("When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review.").

[122] These cases are also discussed in Yusuke Nakano, Vassili Moussis and Tatsuo Yamashima, "Japan", in *The Merger Control Review*, 3rd edition, cited previous footnote.

[123] As already seen in footnote 7, "blind" convergence for its own sake adds no value; "informed" convergence in merger control should proceed on the basis of identified net benefits and net avoidance of costs, and taking account of good reasons for diversity. If it is accepted, on the basis of such reflection, that convergence on substantive standards is desirable, then procedural convergence (apart from any independent benefits it may have) is likely to be useful as well, insofar as divergent procedures may impede consistent outcomes in substance. *Cf.* Feinstein, "Process Divergence", cited above note 92.

[124] Such a trend can only be reinforced with the roll-out of the EU-Korea Free Trade Agreement, which entered into force on 1 July 2011, and its competition chapter (Chapter 11). According to Article 11(6)(2) of the Agreement, the Parties "shall cooperate in relation to their respective enforcement policies and in the enforcement of their respective competition laws, including through enforcement cooperation, notification, consultation and exchange of non-confidential information based on [the EU/Korea bilateral cooperation agreement of 23 May 2009]". On a less formal level, the KFTC and DG Comp cooperate in accordance with their Memorandum of Understanding on Cooperation between the Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission (October 2004), http://ec.europa.eu/competition/international/legislation/korea.pdf.

*eBay/G market* two-sided market merger of 2009, concerns were identified on the seller-side of the market, as e-Bay and its affiliate company Auction held a combined share of 87.5% of the open market by transaction volume. However, the KFTC allowed the merger to proceed, subject to temporary behavioral remedies. As Jeon explains, the possibility of price or output effects due to the merger was sufficiently diminished by prospective new entry and product repositioning, presumably by virtue of negotiable market barriers. Jeon singles out this case in particular as reflecting a significant shift in analytical approach.

The second trend highlighted by Jeon is the active cooperation between the KFTC and other enforcers with regard to multijurisdictional transactions. The implicit point here is that cooperation and coordination among authorities can promote (and be promoted by) international convergence, to some degree as concerns procedure and especially in terms of substantive outcomes. In this regard, Jeon again cites two cases. First, in the *TDK/Alps* case, cooperation between the KFTC and JFTC seemed likely, since TDK and Alps were both Japanese companies and since both the KFTC and JFTC cleared the merger free of conditions within a month of each other. Second, in the 2010 *BHP Billiton/Rio Tinto* production joint venture (treated as a 3-to-2 merger in the market for worldwide seaborne lump ore), Jeon notes that international coordination played a "very important" role. The JV-merger was abandoned in October 2010 when it became clear that several competition agencies were anxious about both unilateral and coordinated effects likely to result from the parties' combined operations. With regard to this case, the KFTC conducted its examination in close cooperation with the JFTC and other authorities, exchanging information and coordinating "comprehensively" on possible remedies.

A volume on "global" merger control issues would not be very global without devoting at least some modest attention to China, and to the rather intense merger work of MOFCOM's Anti-Monopoly Bureau. **Xinzhu Zhang** and **Vanessa Yanhua Zhang** have ably monitored and reported on MOFCOM's merger activities from the time the Antimonopoly Law entered into force in August of 2008. They provide an updated contribution here entitled: "China's Merger Control Policy: A Three-Year Milestone". The paper takes account of the eleven concentrations between 2008 and December 2011 in which MOFCOM's Anti-Monopoly Bureau intervened in order to impose remedies or, in the oft-discussed *Huiyuan Juice* case of 2009,[125] to prohibit the transaction.[126] This group

[125] The would-be acquirer in that (2.4 billion-dollar) case was Coca-Coca, who owned, among other assets, Minute Maid orange juice. For discussion, see *inter alia* Wang and Su, "China's Anti-Monopoly Law", cited above note 92, at pp. 387-391). Notably, at p. 388, Wang and Su state: "based on the information disclosed during the MOFCOM Q&A session and our discussions with the case handlers, our observation is that although the lack of detail resulted in ambiguity, the *Coca-Cola/Huiyuan* decision is mainly based on the protection of competition and consumer choice and on careful competition and economic analysis." Nevertheless, these authors call for more transparency in MOFCOM's decisions (see *ibid*., pp. 390-391) in order to avoid fuelling suspicions about hidden (protectionist) motives.

[126] For the year 2011, see also, e.g., Jim O'Connell, "The Year of the Metal Rabbit: Antitrust Enforcement in China in 2011", *Antitrust* 65 (Spring 2012), at pp. 68-72. For further recent discussion and a general appraisal of Chinese merger control, see Ping Lin and Jingjing Zhao, "Merger Control

of a dozen cases should be seen in the light of the number of cases processed each year, which despite globally stalled merger activity has been ramping up steadily (17 cases in 2008, 80 in 2009, 117 in 2010 and 168 in 2011).[127] Although these numbers suggest an appreciable degree of "buy in" by users,[128] the quality of MOFCOM's decisions remains difficult to assess with much precision due to the current transparency deficit and the all-too-concise reasons given for interventions. Notwithstanding this data limitation, Zhang and Zhang provide a helpful overall view of the functioning of the system, commenting first of all on the rules and guidelines MOFCOM uses when assessing a merger (section II) before discussing the case practice (section III) and finally outlining what they like to call "patterns and implications" (section IV).

Beginning with the rules and guidelines, the authors consider two key documents: the Anti-Monopoly Commission's "Market Definition Guidelines" of 2009 (which cover more than market definition), and MOFCOM's "Interim Rules on the Assessment of Competitive Impacts of Concentrations of Undertakings" of 2011. The Guidelines and the Interim Rules are criticized for different reasons, but in each case the authors suggest that further elaboration and specificity is required, as in competitive analysis the value of general maxims and broad principles only goes so far. The author's discussion of MOFCOM's decisional practice covers both horizontal and non-horizontal mergers. With regard to horizontal mergers, MOFCOM's analysis is not very dissimilar to EU and US standards, and it takes account of unilateral and coordinated effects, although as Zhang and Zhang point out, the Interim Rules do not explain how assessments of these distinct types of effects differ. As economists, they also express concern at MOFCOM's heavy reliance on qualitative economic evidence (in particular, substitutability analysis) to the apparent exclusion of quantitative economics when defining markets. There is also too much uncertainty, we are

Policy under China's Anti-Monopoly Law", 41 *Review of Industrial Organization* 109 (2012); Yee Wah Chin, "The High-Wire Balancing Act of Merger Control under China's Anti-Monopoly Law" (August 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120280; Dan Wei, "China's Anti-Monopoly Law and its Merger Enforcement: Convergence and Flexibility, 14 *Journal of International Economic Law* 807 (2011).

[127] By the summer of 2012, MOFCOM had reviewed over 450 merger cases under the AML. Subsequent to the time period covered in Zhang and Zhang's paper, MOFCOM intervened in: the *Tiande/Henkel* joint venture in the chemicals sector (February 2012; approval with remedies); *Google/Motorola* affecting markets for smart mobile devices and operating systems (May 2012; *idem*); and *Wal-Mart/Newheight* which affected online retail sales and certain telecommunications services (August 2012; *idem*). Among these cases, *Google/Motorola* was noteworthy in that, as in *GM/Delphi* and *Seagate/Samsung* (both discussed by the authors), MOFCOM insisted on (five-year) behavioral remedies even though the transaction had already been cleared unconditionally in both the US and the EU as well as other jurisdictions.

[128] "Sales" are compulsory if the relevant thresholds are met. On 5 January 2012, MOFCOM adopted regulations that envisage sanctions for companies that fail to notify transactions under the Anti-Monopoly Law. Under the regulations, non-compliant companies may be fined up to RMB 500,000 (i.e., around 61,000 euros) and, potentially more serious than the fine, may be forced to divest assets to restore the *status quo ante*. For a flow chart of the notification and review process, see page 3 of Herbert Smith, "Merger Control: China" (June 2011), http://www.herbertsmith.com/NR/rdonlyres/0150AA9B-7A7D-40A2-BB22-5E4330A73375/22810/Merger_Control.PDF.

told, about what exact impact market shares and concentration indicators have in determining market power; how rebuttal evidence is assessed; and whether, among other things, safe harbors apply and how wide or narrow they are. Other critiques emerge as the authors discuss MOFCOM's decisions, but in the absence of more details in the published decisions the overriding concern may be the unfortunate need to engage in guesswork and to speculate about MOFCOM's theory of the case. Presumably, over time – and assuming China does not, for the foreseeable future, reshuffle and rationalize its *trio* agency structure – MOFCOM may be expected to grow increasingly confident in this regard and may ultimately open its *hefu* (I'm told this is Chinese for *kimono*) a bit wider.

MOFCOM's relatively close scrutiny of non-horizontal mergers is worth noting. Providing case examples, Zhang and Zhang observe that MOFCOM has in fact focused on vertical foreclosure and on portfolio effects in several of the cases where it has intervened. To some degree a certain affinity may thus be perceived with merger assessment in the EU, where non-horizontal effects are treated rather seriously.[129] However, the authors are also critical, on robustness and post-merger incentive grounds, of how MOFCOM has *executed* its examination of input foreclosure in particular cases (specifically, in *GM/Delphi* and in the *GE/Shenhua* joint venture case). MOFCOM's loose analysis is then used as an illustration of the need to embrace a more rigorous evidentiary analysis, i.e., to adopt a higher standard of proof when assessing vertical and conglomerate mergers. Doing so would be good practice in any event but it would also align the Chinese approach better with the standard in Europe, where the European Courts have insisted on particularly persuasive evidence when the Commission intervenes in non-horizontal cases.[130] Overall, it is perhaps no surprise to see that the authors detect the influence of the US and EU merger systems but also the signs of indigenous "characteristics". Some commentators have started to call this eclectic blend a *fusion*-style approach to merger analysis, as one finds in art or food or music, although a catch phrase such as this may pose difficulties in certain European languages (since *fusion* means "merger"). Nor is it surprising to see Zhang and Zhang praising and criticizing MOFCOM and China's merger regime at the same time. The half-full, half-empty appraisal of how far China has progressed in such a short time (in the field of merger control, since 2003 and in the field of restrictive agreements and abuse of dominance, since 2008) reflects both the youth of and unique challenges faced by a (qualified) competition regime[131]

[129] With regard to trends in the US and a hint of convergence, see above note 91.

[130] See Venit, "The Scope of EU Judicial Review of Commission Merger Decisions", this volume, pp. 113 et seq.

[131] Many commentators have noted that MOFCOM has basically (questions of correct application aside) stuck to competition criteria in its substantive merger practice. On the other hand, this regime is "qualified" in the sense that the potential for political interference and for non-competition issues to determine outcomes is something that may be inherent in China's present legal and political framework. For example, Article 27 of the AML obliges the relevant competition authority to consider, *inter alia*, "the effect of [the transaction] on the development of the national economy" when deciding whether to approve a merger. There is also the matter of national security review (again, a potential inroad for political decision making, especially where there is tit for tat with the US) and many other

superimposed on a largely State-run economy with high levels of hybridity and ambiguity.[132]

Not all the BRICS are represented in this volume (even if there have been plenty of recent newsworthy developments in India and Russia[133]), but **Abel Mateus** delivered a useful and succinct examination of "The New Brazilian Merger Control Regime", which entered into force on 29 May 2012. Distinctive "characteristics" have also long defined the Brazilian regime, particularly in its eccentric institutional and procedural dimensions, not always universally admired;[134] but now these characteristics have been substantially transformed by Law 12529 of 30 November 2011. Many of the key points in this discussion of the reforms are summarized in the first paragraph of the paper. First, Brazil has to a large extent rationalized the institutional design of the merger review process, whereby full responsibility for merger investigations is consolidated and resides with the Conselho Administrativo de Defesa Econômica (CADE),[135] now in need of additional case handlers. As Mateus points out, this rather bold institutional reform – which implies that only two national agencies (and for core work, just one) will handle the application of Brazil's competition law – responds to longstanding criticisms about overlapping agency turf and its consequences. Second, Law 12529 inverts the former Brazilian regime, which allowed parties to close transactions prior to the conclusion of merger investigations, and establishes a pre-notification regime with related accoutrement such as gunjumping penalties and, for non-notifiable mergers, a one-year "clawback"

features of the AML and of China's political structure could be discussed in this context. Ping Lin and Jingjing Zhao have argued that China should adopt a policy of giving "lexicographical" priority to competition-oriented analysis and that it should only bring in industrial policy considerations, if at all, in relation to competition-neutral transactions. Lin and Zhao, "Merger Control Policy", cited above note 126, at pp. 128-131.

[132] For recent discussion of a range of subjects regarding Chinese competition law (including merger control), see Michael Faure and Xinzhu Zhang, eds., *Regulation and Competition Policy in China: New Developments and Empirical Evidence*, Edward Elgar, forthcoming.

[133] India's new merger control regime entered into force in June 2011. See Avinash Sharma, "Merger Control under India's New Competition Law: A Comparative Perspective", 32 *European Competition Law Review* 602 (2011) (more generally, see also Mark Sansom and Priya Christian, "India's New Competition Regime: The Elephant Who Became a Tiger", 1 *Journal of European Competition Law and Practice* 62 (2010)). In Russia, the Third Antimonopoly Reform Package took effect in January 2012. For an early summary, see Mathieu Fabre-Magnan, Liza Ivanova and Valeria Ponomareva, "Russian Federation", *PLI, Multi-Jurisdictional Guide 2012*, www.practicallaw.com/6-504-6542, pp. 1-5. For further discussion of the BRICS, see Terry Calvani and Karen Alderman, "BRIC in the International Merger Review Edifice", 43 *Cornell International Law Journal* 73 (2010).

[134] The main concerns were noted in a 2005 OECD Peer Review (http://www.oecd.org/daf/competition/prosecutionandlawenforcement/35445196.pdf). See now also (covering, among other topics, merger policy and the institutional structure of the agencies), John Clark (OECD Rapporteur), *Competition Law and Policy in Brazil* (2010), http://www.oecd.org/daf/competition/45154362.pdf. For extended discussion of the former system, see Marco Botta, *Merger Control Regimes in Emerging Economies: A Case Study on Brazil and Argentina*, Wolters Kluwer, 2011.

[135] The other surviving competition authority in Brazil is the Secretary of Economic Monitoring, i.e., the SEAE (a part of the Ministry of Finance). Following the reforms, the SEAE does not function as a true enforcer but becomes a special organ that carries out competition advocacy work *vis-à-vis* Brazil's regulatory authorities and other units of government.

clause (i.e., a limited possibility to unscramble the parties' eggs).[136] With regard to notification thresholds, Brazil has also abolished the use of deviant market share-based criteria.[137] Parties may now rely solely on turnover triggers (which now include minimum turnover for the second party) to determine whether their "concentration act" must be notified to CADE. A joint decision in 2012 by the Ministries of Justice and Finance has provided further specifications as concerns the relevant turnover conditions.[138]

Overall, Mateus provides a chiaroscuro appraisal of the new system. On the one hand, he notes that Law 12529 "brings the legal regime largely in line with OECD and ICN guidelines and recommendations".[139] Yet the Brazilian legislator could not relinquish certain tokens of exceptionalism. Potentially, for example, investigations may languish for long periods (with a waiting period of 240+60 or 240+90 days), and while under the old regime the duration of the review had limited impact since merging parties could consummate before the authorities finished their work, dilatory inquiries will now impose more costs and risks.[140] Other potential problems may result from the lack of a clear two-stage review (i.e., the odd lack of an initial 25-30 day waiting period), where most untroubling transactions can be expedited while genuine risks to competition can be filtered into an in-depth investigation.[141] Among other subjects, Mateus proceeds to discuss a number of relevant procedural aspects (such as CADE's internal administrative investigation/adjudication procedures) and substantive details (pointing out the influence not just of the EU's substantive standard under Regulation 139/2004 but of Article 101(3) as well). With these significant reforms the expunged bath water did not abscond with the baby, but the grimy tub requires further scrubbing. Flaws in the legal framework might be compensated for, to some degree, if case teams and management work efficiently and concentrate their efforts on nexus-based cases; this would be a positive turn away from the days when Brazil attracted notification of many foreign-to-foreign transactions of dubious import for Brazilian consumers.

---

[136] Ironically, the flexibility that used to prevail as far as timing was concerned has been superseded, in the new regime, by a new apparent rigidity: namely, the obligation to notify within 15 days of the signing of an agreement. Such obligations are becoming increasingly anachronistic, largely because they potentially complicate the coordination of multijurisdictional filings.

[137] Worldwide, some of the countries with merger review systems that still hinge to some extent on market shares include, among others, Columbia, Lithuania, Morocco, Portugal (even after its substantial 2012 reform), Spain, Ukraine and the UK.

[138] For the thresholds and various other details, such as the (broad) definitions of the terms "corporate group" and "concentration act", see Fiona Schaeffer and Michael Culhane Harper, "A Fundamental Shift: Brazil's New Merger Control Regime and its Likely Impact on Cross-Border Transactions", *Antitrust Source* (August 2012).

[139] Mateus, "The New Brazilian Merger Control Regime", this volume, p. 315.

[140] In this regard, moreover, Law 12529 did not provide for automatic approval of transactions once the statutory review period expires. This may distort incentives to some morally hazardous extent, and may generate additional uncertainty.

[141] Superintendent General Carlos Ragazzo has felt obliged to provide public assurances in this respect, indicating that "simple" cases would be reviewed in less than 30 days, and that the 240-day limit would be reached, if ever, only in a case of extraordinary complexity. See Schaeffer and Culhane Harper, "Fundamental Shift", cited above note 138, at p. 7, footnote 33.

To close this long section 4 let us modulate to a minor key, as it were – leaving Europe, Asia and the Americas behind to consider not just a different part of the world but also an area that features countries smaller and often less resourced than those we have considered thus far. **Maher Dabbah** kindly obliges with his paper, "Merger Control in Middle Eastern Countries: A Perspective on Challenges and Opportunities". The countries belonging to this geographic group (including, for example, Egypt, Jordan, Morocco, Yemen, Tunisia and Turkey) are heterogeneous, but some exhibit strong features of state involvement in the economy.[142] Where this is so, merger policy is unlikely to be seen in a "pure" form. Either the rules themselves will allow for political intervention or, if not, the gap between rules and practice may be wide. In any case, some Middle Eastern countries seem to provide good examples of merger control systems on the outskirts of the ICN community. ICN Recommended Practices have not frequently been designed for these economies, or by them. The distinctive political context of many Middle Eastern countries helps to explain why in some areas the ICN cannot progress at a uniform rate but must move "pluralistically" at multiple speeds.

It is therefore understandable that Dabbah observes that Middle Eastern countries, taken as whole, have not yet succeeded – despite some modest progress – in establishing effective merger control. It is this mixed success that leads him to adopt a "challenges" and "opportunities" frame of analysis, which may be a normative way of saying that more principled merger control will not go down easy in many of these countries, but that it is worth the effort. Among the challenges are the need to choose rational and balanced notification thresholds and the need, among some countries (e.g., Jordan and Morocco) to renounce thresholds based on market share. It follows from the considerations above that another fundamental challenge in the Middle East is to ensure that the merger control authority, and as the case may be the courts reviewing the authority's decisions, have solid institutional and budgetary independence and cannot be unduly swayed by the government or regulators or business. Another challenge is that of national legislators, who will have to face up to the need to progressively (or more resolutely) eliminate unjustified sectoral exclusions and the hangovers of bacchanalian rent-seeking. As for opportunities, Dabbah points out that merger control allows the competent authority to help determine how competitive markets are, and though he does not say so explicitly he seems to assume that an effective merger regime produces benefits (all else equal) for both consumers and society in general. Such opportunities and benefits may be more accessible if today's global fora (e.g., the ICN, the OECD Global Forum and regional agency networks) intensify general trends toward greater inclusiveness, regular dialogue and constructive debate.

[142] A gradual and qualified retreat of the State, owing to factors such as WTO obligations, bilateral and regional trade agreements and strategic economic policy, is observed in certain countries such as Jordan. See Abdullah Nawafleh, "The Contribution of Business Law Reform to Economic Development: Lessons from the Middle East", [2012] *European Business Law Review* 309.

## 5. Merger control and best practices

### Contributions by Boyce, Burrichter/Zandt, Drauz

This last session was largely inspired by the proliferation of "best practice" and "recommended practice" documents to guide competition agencies and notifying parties through the merger review process in an effective, efficient manner. **John Boyce** is the first author here with the musical title of "Best Practice in Merger Control: It Ain't What you Do It's the Way That You Do It … And That's What Gets Results". Boyce begins by providing several definitions of best practice and then offers reasons why the best practice concept can be valuable in the context of merger control. In his view these relate, in essence, to the utility of best practices in promoting a common understanding between a reviewing agency, the merging parties and, in many cases, sister competition authorities. Common "nodes" of understanding can ideally reduce transaction costs and enforcement costs, and can help minimize the potential for conflict.

Boyce then selects three general areas in which, he suggests, further harmonization of best practice standards are desirable. Specifically, these are: (i) best practice to facilitate the merging parties' "preparatory work" (i.e., at the stage before pre-notification contacts have begun; relevant here is the relationship between strategic decisions and the rules governing potential trigger jurisdictions and the related practice); (ii) best practice for the conduct of merger investigations by reviewing agencies; and (iii) best practice when (draft) remedies are designed, pitched to the agencies and beefed up or refined. As regards the pre-notification stage, Boyce underlines the importance on the parties' side of taking account of all the relevant risks and costs associated with applicable merger filings and review. This best practice for merging parties should be matched, he says, by a strong commitment to transparency and convergence toward internationally accepted best practices. The emphasis seems to be on how agencies can reduce unnecessary search and information costs, regulatory uncertainty and risk; and Boyce provides specific suggestions to that effect.[143] In the second stage, i.e., during the pendency of the agency's (agencies') investigation, there are numerous guidelines, most of them by now incorporated in the ICN's Recommended Practices, which agencies are encouraged to follow in their merger control practice in order, once again, to reduce unnecessary costs for business, although many of them can also enhance the efficiency of the agencies themselves. Many of these guidelines (some of which are discussed in other contributions as well, including in particular Ian Forrester's paper – see above) are a matter of common sense in a globalized context and are aimed at minimizing potential negative externalities. With reference to these streamlining measures Boyce once again sets forth a series of specific suggestions, and points out where the merging parties too must assume responsibility.[144] A few

[143] See pp. 346-347, this volume.
[144] See pp. 347-349.

final observations concern the third phase, remedies. Here Boyce briefly outlines strategies for developing remedies that are coordinated and consistent across jurisdictions and tailored to address relevant competition concerns.

As an adjunct to his paper, Boyce provides three helpful annexes. Annex 1 (pp. 350-352) itemizes, in chronological order, notable guidelines from diverse sources (ICN, OECD, FTC, OFT, etc.) which cover various aspects of the merger review process as well as substantive merger analysis. Annex 2 (pp. 353-356) lists the ICN's Recommended Practices for Merger Notification Procedures.[145] And Annex 3 (pp. 356-359) contains a set of best practices used internally by the author's firm which may assist companies and their advisors where merger approval is sought from agencies in multiple jurisdictions.

**Jochen Burrichter** and **Manuel Zandt**'s paper, "Merger Control and Best Practice", provides a three-part taxonomy of best practice documents, highlights the substantial variety and lacunae in "best practice" *practice* in key regions (EU, North American and Asia/Oceana), and evaluates their benefits and usefulness. According to the authors, most best practice (and recommended practice) documents can be divided into "external" and "internal" categories, depending on whether they are internally generated by a competition authority with reference to the relevant laws, policies and practice or whether, by contrast, they are produced externally – typically by an international organization such as the ICN or the OECD, or occasionally by private interests (e.g., BIAC or the ICC).[146] The *external* and *internal* categories both promote best practices that should be adopted or pursued by competition authorities, but internal best practices feature a higher degree of specificity with regard to particular merger control systems. A third category consists of best practices in the sense of recommendations for merging parties. The authors note that only one serious set of guidelines of this kind has been promoted (namely by the private-initiative Merger Streamlining Group). One can hardly ignore the glut of practice guides published each year, some but not all freely available, which provide some practical advice to help merging companies to manage filings in at least the major jurisdictions, BRIC countries and various other strategic systems (Mexico, South Africa, Turkey, etc.). However, such guides may be only partial substitutes for a more nuanced and/or (if issued by a competition agency) authoritative document.

Part II of the paper maps out existing best practice documents.[147] The emphasis is on Europe and North America but reference is also made to Singapore, Australia

[145] See also the corresponding Implementation Report (April 2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf.

[146] Conceptually, bilaterally agreed best practices (notably, the best practice document adopted by the US-EU Merger Working Group on cooperation in merger investigations) belong to the "external" category because they do not address to merging parties the way various procedures or process elements will be handled but rather make transparent the principles on which inter-agency cooperation is conducted.

[147] Again, the various documents can be seen systematically in Annex 1 to John Boyce's paper (see main text above). However, unlike Boyce, Burrichter and Zandt exclude guidelines on substantive analysis from their definition of best practices. From their perspective, best practices relate fundamentally to procedural and process issues. Many competition authorities separate these dimensions in their published guidance as well, although a few do not.

and Japan, the latter for the absence so far of any best practices document as defined by the authors, i.e., a document focusing on procedures, process and due process, as opposed to substance.[148] The authors regret to find that agencies worldwide – including some of the EU's NCAs – have issued rather few internal best practices, or none at all, although many have issued guidelines on substantive analysis. Part III discusses the scope of the currently available best practice documents and here one sees considerable variety across jurisdictions, but a point of commonality is that comprehensive guidance is quite rare, and where best practices exist they are seldom in consolidated form. There is as yet no international best practice standard about the appropriate structure, content and level of specificity of best practices.

Having established that the overall current state of affairs is disappointing from the perspective of transparency and predictability, Burrichter and Zandt proceed in Part IV to outline the aims and benefits of best practice documents. With regard to internal best practices, it stands to reason that the ultimate objective should be the promotion of effectiveness of merger control regimes at reasonably low social and private cost (efficiency) while respecting due process. Although the specific utility of internal best practices is somewhat different for agencies and for business, they each share a common interest in having in place a set of best practices that the other finds useful. To the extent that convergence is desirable (a subject discussed earlier in this chapter), there are also benefits to be gained from aligning internal practice with the generally accepted best standards agreed at the level of, in particular, the ICN. Part V of the paper concerns the "effectiveness" of best practices. Burrichter and Zandt point out that no comprehensive survey has yet been undertaken to assess the effectiveness of internal best practices for merger control procedures. As an initial framing step in that direction they endorse, as a standard of success, a basic concept of "balance" between public and private interests. They then give reasons why internal best practices may be to liable fall short of the correct balance, particularly because in their view such documents seldom provide adequate certainty and predictability. This provides a background for the authors to discuss DG Competition's Stakeholder Survey of 2010 and the praise and critiques it elicited.[149]

In Part VI the authors collect their conclusions. Their findings are generally positive as far as external best practices are concerned. However, they point out that multilaterally prepared and propagated best practices (basically, by the ICN) present benefits that can't be matched by bilateral documents (as the latter are too limited in scope and potentially out of step with global standards) or, still less, private initiatives (lacking in authority). As for internal best practices, the current state of play is unsatisfactory for the reasons noted above. In order to arouse a stronger commitment on the part of competition agencies worldwide to assemble

[148] A 2002 document, revised in 2007, provided guidance concerning the JFTC's prior consultation procedure but this procedure was formally laid to rest in 2011. Some elements of the 2011 guidelines provide information relating to "process" issues including notably section VI, which discusses the JFTC's approach to remedies.

[149] See Eurobarometer results (18 October 2010), with various compiled reports as well as an aggregate report at http://ec.europa.eu/competition/publications/reports/surveys_en.html.

and publish more useful guidance on procedural matters, the authors recommend that the ICN should actively encourage the development and adoption of internal best practices and should advocate a standard minimum set of subjects to be addressed (including pre-notification contacts, scope of requests for information, conduct of meetings, access to file and confidentiality). According to the authors, such best practices should also have a harder edge, in the sense that *commitment softeners* such as "this guidance is in no way binding on the Authority" should be avoided as far as possible for the sake of legal certainty. Only the most sanguine agencies are likely to fully embrace this advice.

**Götz Drauz** kindly contributed the twenty-fourth and last paper to be reviewed in this introductory chapter; the title, "Promoting Best Practices within and among Competition Authorities and with Business", reflects the paper's scope and structure. As an example of the "within" part of the paper (internal best practices, to borrow the term used by Burrichter and Zandt), Drauz discusses the European Commission's merger-related best practice documents as a leading example.[150] In particular, he describes the Commission's Best Practices for merger control proceedings of January 2004[151] and, briefly, the 2008 Remedies Notice (and the related Standard Models on divestitures and trustee mandates).[152] With regard to the former, Drauz finds that the Commission has been a leader in experimenting with open and flexible dialogue with merging parties, and that such pragmatism helps to expedite the resolution of complex cases. However, he laments a certain creeping inefficiency in EU merger reviews, attributable, he says, to case teams whose lack of experience leads them to make expansive requests for data of slight probative value. Other critical remarks are provided with regard to the Commission's then-ongoing consultation on best practice in antitrust proceedings (investigations, submission of economic evidence and the Hearing Officer).

Drauz turns next to best practices and cooperation "among" competition agencies (external best practices). These include multilateral cooperation (facilitated by the work of the ICN's Merger Working Group and of the OECD) and bilateral cooperation. With regard to the ICN and the OECD, Drauz reviews the various initiatives of these organizations and underlines their value but at the same time observes, with reference to the ICN in particular, a substantial gap between its Recommended Practices and their actual reception and effective implementation by its members. This point corroborates the findings in the papers of Boyce and of Burrichter/Zandt, and serves as a reminder that, while the "take-up" of the Recommended Practices has in many ways been a success story over the last decade, global merger control still faces growing pains and is destined for some time to lumber forward at variable speeds. Turning to bilateral cooperation, the friendly

[150] For comments on the Commission's best practice documents, see also the oral remarks of Mario Siragusa, pp. 333-336. With regard to their "bindingness" *vis-à-vis* the Commission (and in particular the relevance of the principle of good administration set forth in Article 41 of the EU Charter of Fundamental Rights), see the remarks of Judge Forwood, pp. 337-338.

[151] See http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

[152] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008 OJ C267/1.

rivalry between the European Commission and the US Agencies provides an irresistible example. In this context, Drauz reviews the essential points of the 1991 bilateral cooperation agreement and then reminisces about the flare-up over *GE/Honeywell*.[153] The important point here is that high-profile disagreement need not poison working relations but should rather be seen in the wider context of generally well-functioning cooperation between the Commission and the Agencies, and that the media-stoking fallout from *GE/Honeywell* has given way to more intensive and generally positive transatlantic cooperation despite what appear to be tremendous institutional challenges.[154] Given the strategic importance and leadership role of the Commission and the Agencies, success in overcoming cross-jurisdictional conflict may also be essential in the sense that breakdowns between these authorities would hardly augur well for global cooperation more generally, and could conceivably cause collateral damage for future merging parties.

Following a short discussion of how competition authorities can involve businesses and their advisors in the process of developing the content of best practices and thereby enhance their quality and usefulness, Drauz comes back to the point that "there is still a long way to go before true convergence is reached in the way the world's competition authorities conduct their review of mergers".[155] Notable differences remain in virtually all dimensions: substance, procedure, institutional design and interstitial norms of practice. He concludes with a rather grim assessment of the global state of affairs, emphasizing the high costs of today's maze of merger control regimes; but he sees the continued advancement of best practices in their quality and concrete impact as a crucial means of managing diversity and complexity.

[153] For further discussion of the transatlantic dimension of this case, see *inter alia* the sources cited in this volume at p. 201.

[154] On the surprising success, all things considered, of the European Commission's cooperative efforts internationally in the field of merger control, see Deisenhofer, "International Cooperation in Merger Cases – An EU Practitioner's Perspective", this volume, pp. 227 et seq.

[155] Drauz, "Promoting Best Practices", this volume, p. 388.