Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC

Philip J. Weiser*

* Professor of Law and Telecommunications, University of Colorado. Thanks to Brad Bernthal, Dale Hatfield, and Sean Lindsay for helpful comments and encouragement as well as to James Crowe and Micah Schwalb for excellent research assistance.

I. INTRODUCTION

The AT&T antitrust case produced, for a twelve-year period, a world of two regulators: the AT&T consent decree court (with assistance from the U.S. Department of Justice) and the FCC. In general, the two authorities worked in tandem with one another, but the mismatch of tasking a judge with overseeing an ambitious regulatory regime led Congress to terminate the AT&T consent decree in the Telecommunications Act of 1996 (1996 Act) and replace it with FCC oversight.[1] At the same time, however, the 1996 Act left in place a regime of dual merger review. In so doing, Congress ignored the concerns of the dual regulation in this context. Over the last twelve years (the same time period that the AT&T consent decree was in force), the limitations of dual regulation in the merger review context have become clear and call for reform.

Many calls for reform of merger review in the telecommunications industry begin with a premise of the 1996 Act: one regulator is enough, and the reign of the redundant regulator should be ended. To that end, Harold Furchtgott-Roth, a former FCC Commissioner, has called for an end to FCC oversight of mergers between telecommunications providers, developing his critique in a number of his separate statements while he served on the FCC and in testimony to the U.S. Antitrust Modernization Commission.[2] In so doing, he amplified the criticism offered by a number of commentators, former FCC officials, and practitioners, all of whom bemoan the FCC's lack of a clear competition policy standard, penchant for imposing conditions unrelated to the merger itself, and tendency to delay the ultimate approval of the transaction.[3]

Over the last decade, the FCC has vacillated in its approach to merger review and offered plenty of ammunition to its critics. One constant is that, except for the very rare case,[4] it does not bar two firms from merging on competition policy grounds. Rather, it generally imposes conditions on the merger. In the worst of cases, the FCC, as former Chairman Powell once

---

1. *See* 47 U.S.C. § 271 (2000).

2. *See* Harold W. Furchtgott-Roth, Testimony Before the Antitrust Modernization Comm'n (Dec. 5, 2005) (transcript available at http://govinfo.library.unt.edu/amc/commission_hearings/regulated_industries.htm (follow "Harold Furchtgott-Roth" hyperlink).

3. See, e.g., Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29 (2000); Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers By The Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143 (2002); Bryan Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary Agreements,"* 53 FED. COMM. L.J. 49 (2000).

4. *See* Application of EchoStar Comm. Corp., General Motors Corp., & Hughes Elec. Corp., *Hearing Designation Order*, 17 F.C.C.R. 20559 (2002).

criticized, "places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale."[5] In the best of cases, the FCC imposes conditions that address competition policy concerns raised by the merger and enables the Department of Justice's Antitrust Division (DOJ) or the Federal Trade Commission (FTC) to clear a merger that would otherwise pose potential objections.

Taking a lesson from the experience with the AT&T consent decree, the challenge for reforming the existing merger review regime is to design a system where antitrust authorities play the central role in analyzing a merger's competitive effects and regulators play the central role in imposing and enforcing regulatory remedies. At present, the U.S. system sometimes veers toward a worst case scenario where federal antitrust authorities—the FTC and DOJ—impose regulatory remedies that overlap with regulatory policy and regulatory agencies perform duplicative merger reviews and impose remedies unrelated to the mergers themselves. Moreover, antitrust merger remedies themselves are often not developed through a transparent, consistent, or predictable process. In short, there is compelling need for institutional reform of antitrust merger remedies in general and in particular with respect to how the FCC oversees mergers between telecommunications companies.

Part II of this Article explains the practice of the FCC in reviewing mergers involving regulated firms. Part III discusses the practice of the DOJ, FTC, and European Union in reviewing mergers of telecommunications companies. Part IV outlines some directions for reforming the U.S. system of merger review and merger remedies in the telecommunications arena. Part V offers a short conclusion.

II. THE VICES AND VIRTUES OF REDUNDANT REGULATORY MERGER REVIEW

As a technical matter, the FCC does not review mergers *qua* mergers. Although the FCC does have authority under the Clayton Act to review mergers involving regulated firms, it instead relies on its authority to evaluate whether the acquiring firm should be permitted—under the broad and ill-defined "public interest" test—to acquire and operate the licenses held by the to-be-acquired firm.[6] As discussed in subpart A, this

5. Applications of Ameritech Corp., Transferor, & SBC Comm., Inc., Transferee, *Memorandum Opinion and Order*, 14 F.C.C.R. 14712, 15197 (1999) (statement of Comm'r Powell, concurring in part and dissenting in part).

6. To be sure, the FCC picks and chooses when to utilize this authority; it does not, for example, "examine the effect of the merger on taxi service to the public" even though it "might be required to approve the transfer of control of various radio licenses." Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time

unrestrained mandate creates considerable opportunity for mischief.[7] Nonetheless, as discussed in subpart B, FCC merger-related actions can address competition policy concerns raised by a merger and aid the DOJ or the FTC in overseeing regulatory remedies.

A. *The Perils of FCC Merger Review*

In questioning the role of regulatory merger review, critics such as former FCC Commissioner Furchtgott-Roth focus on the unnecessary delays and costs occasioned by this process. More problematic, however, is how regulatory merger review invites a process of negotiated "voluntary" conditions that often substitute for careful policymaking.[8] Notably, such conditions are developed without the benefit of notice and comment, are often negotiated in haste, and are not subject to judicial review. Nonetheless, given the FCC's ability to simply withhold approval of a license transfer—without any time limitation[9]—parties understandably view such conditions as a cost of doing business.

For a case in point, the merger between AOL and Time Warner demonstrates how FCC merger review invites questionable policy judgments. In that case, the FCC's decision was suspect in three distinct ways. First, the agency's authority to review that merger resulted from the fact that the merger was structured as AOL's acquisition of Time Warner rather than the other way around. Notably, because AOL did not possess any licenses granted by the FCC, there would have been no statutory basis

---

Warner, Inc. and America Online, Inc., *Memorandum Opinion and Order*, 16 F.C.C.R. 6547, para. 146 n.396 (2001) [hereinafter *AOL Order*]. In principle, however, the FCC could do just that, as its oversight over all licenses authorizes it to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (2000).

7. The Commission has attempted to provide some analytical structure for its merger analysis in a series of orders. *See, e.g.*, Application of Nynex Corp., Transferor, and Bell Atl. Corp., Transferee, *Memorandum Opinion and Order*, 12 F.C.C.R. 19985, para. 7 (1997); *see also* Verizon Comm., Inc. and MCI, Inc., Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18433, para. 19 (2005) [hereinafter *Verizon Order*] ("Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes." (citations omitted)). Nonetheless, because its remedies invariably take the form of a set of "voluntary conditions" that may or may not be closely tailored to address competitive harms arising from the merger, it is difficult to view the framework set out in these orders as a real constraint on the Commission's authority.

8. *See, e.g.*, *Verizon Order*, *supra* note 7, at 142 (statement of Comm'r Abernathy criticizing use of merger review-based conditions as opposed to "the customary administrative weaponry in the Commission's arsenal").

9. The FCC has instituted a self-imposed six month period for merger reviews. *See* Ted Hearn, *Winds of Change*, MULTICHANNEL NEWS, Jan. 28, 2008, http://www.multichannel.com/article/CA6525874.html. Not only is this "shot clock" not mandatory, it is regularly circumvented by requests that parties "stop the clock." *Id.*

for FCC review had Time Warner acquired AOL. Second, the FCC used its authority over the merger to impose a regulatory mandate unrelated to the merger itself (imposing an interoperability mandate as to the instant messaging system previously operated by AOL).[10] Finally, the FCC's cursory judgment on a matter outside its traditional realm of regulation was highly questionable on the merits[11]—a fact the FCC later recognized when it lifted the condition only two years later.[12]

The interoperability mandate imposed by the FCC in the AOL/Time Warner merger illustrates the tendency of the agency to reach judgments in haste that are better considered as part of a more deliberate inquiry. In that case, the FCC conducted a very cursory inquiry, not only of the merits of its action, but also into the thorny question of whether it possessed jurisdiction to regulate instant messaging at all. With little analysis of this question, the FCC concluded that instant messaging and "AOL's [names and presence database] are subject to our jurisdiction under Title I of the Communications Act."[13] As then-Commissioner Powell pointed out in dissent, it was questionable for the FCC to reach such a judgment in haste, as "such a grand conclusion should only be reached after very careful and thoughtful deliberations and full comment by a wide range of interested parties."[14] By divorcing the FCC's analysis from real-world adjudication or even the need to justify its decisions, this practice has the effect of deferring the need to address issues properly considered in a broader and more thorough rulemaking or adjudicatory context.

---

10 . Unlike the DOJ, the FCC does not ask whether there is "a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions." ANTITRUST DIV., DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) [hereinafter POLICY GUIDE], *available at* http://www.usdoj.gov/atr/public/guidelines/205108.pdf.

11. For a critique of this decision, see Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822, 842 (2001).

12. *See* Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS, *Memorandum Opinion and Order*, 18 F.C.C.R. 16835 (2003).

13. *AOL Order*, *supra* note 6, at para. 148.

14. The entirety of Powell's response is worth considering:

> There may be a case for asserting our jurisdiction over IM services, and then finding that they must interoperate as a matter of law, though I doubt it. But such a grand conclusion should only be reached after very careful and thoughtful deliberations and full comment by a wide range of interested parties, which can only be achieved in a rulemaking proceeding. The record here and the limited comment are woefully insufficient for considering and anticipating the reverberations of our conclusions. This merger, involving only two members of the industry is not an appropriate vehicle for taking our authority where the Majority does today.

AOL Order, *supra* note 6, at 6713 (dissenting statement of Comm'r Powell).

B. Regulatory Oversight as Complementary to Antitrust

Despite cases like AOL/Time Warner, the FCC can play a constructive role in merger review in certain cases. For a perfect illustration of the FCC's use of such authority, consider, for example, its review of the News Corp./DirecTV merger. In that case, the FCC concluded that the union of DirecTV and News Corp.'s programming interests (including the Fox broadcast network, cable channels like FX and Fox News, and regional sports channels) raised a plausible risk of vertical leveraging whereby News Corp. would abuse its ownership of those properties so as to disadvantage rival distributors.[15]

To address the competitive concerns raised in the News Corp./DirecTV merger, the FCC required DirecTV not only to be subject to a regime similar to the "program access rules,"[16] which govern vertically integrated cable providers, but also to adhere to additional requirements related to its control over regional sports channels and local television stations.[17] As to the imposition of program-access-like rules on the merged firm, the FCC harmonized them with its program access rules by making them applicable so long as the program access rules remained in effect and subjected complaints related to the merger conditions to the same process used for the program access rules.[18] As to the rules governing regional sports networks and local television stations, the FCC developed a special procedure (i.e., an arbitration regime) to ensure that cable companies continued to receive reasonable access to such programming.[19]

In acting in the News Corp./DirecTV case, the FCC carefully coordinated its decision with the DOJ. In the wake of the FCC's action, the DOJ concluded that "[t]he restrictions imposed by the FCC as a condition for granting its approval of the transaction will reduce News Corp.'s ability to withhold, or to threaten to withhold, its programming content from cable television and [Direct Broadcast Satellite (DBS)] providers that currently compete with DirecTV."[20] Moreover, the DOJ explained that it "consulted

---

15. General Motors Corp. and Hughes Electronic Corp., Transferors, and News Corp. Ltd., Transferee, *Memorandum Opinion and Order*, 19 F.C.C.R. 473, para. 4 (2004) [hereinafter *News Corp. Order*].

16. The program access rules constitute a protective measure against vertical leveraging, requiring all cable providers to allow rivals access to program channels on non-discriminatory terms and conditions. For a discussion of the program access rules, see JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 369-71 (2005).

17. *See News Corp. Order, supra* note 15, at paras. 172-79.

18. *See id.* at paras. 127-32.

19. *See id.* at para. 177.

20. Press Release, Justice Department Will Not Challenge News Corp.'s Acquisition of Hughes Electronics Corp. (Dec. 19, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/December/03_at_714.htm.

with and provided assistance to the FCC," the FCC action "addresse[d] the Department's most significant concerns with the proposed transaction," and the FCC's decision motivated the DOJ's decision to close its investigation.[21]

In the 2005 Verizon/MCI and SBC/AT&T mergers,[22] it is difficult to determine whether the FCC coordinated its review with the DOJ, but it is clear that many of the conditions imposed by the FCC address issues far beyond the effects of the merger. In a defensible move possibly intended to safeguard against competitive concerns related to the Internet backbone, the FCC required that the Internet backbone affiliates of the two companies disclose their policies on publicly accessible Web sites.[23] As a remedy to address plausible concerns, a disclosure mandate is a reasonable safeguard that may well facilitate future antitrust oversight of this market. In a less antitrust-friendly move, the FCC also adopted the insurance policy of imposing price freezes as well as nondiscriminatory access requirements in the affected market of high capacity circuits (called "special access")—despite suggesting that the DOJ's remedy for competitive concerns in the relevant market was adequate.[24]

Among the many conditions the FCC imposed on the Verizon/MCI and SBC/AT&T mergers, the agency followed its AOL/Time Warner precedent by addressing a number of matters related more to industry-wide issues than to the merger itself. In particular, the FCC used the merger as an opportunity to address an issue pending in an industry-wide rulemaking by imposing the requirement that the companies provide the so-called "naked DSL" (i.e., DSL service without providing a telephone line).[25] It also used the merger to take another incremental step toward "network neutrality" safeguards by mandating that the companies follow the FCC's Internet Policy Statement.[26] In both cases, it is difficult to see how the public is better served through such ad hoc decisions made in the merger review context—which leave incumbent providers not involved in mergers free of the relevant obligations—than through a greater commitment to

---

21. *Id.*

22. *See Verizon Order*, *supra* note 7; SBC Comm., Inc. and AT&T Corp., Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18290 (2005) [hereinafter *AT&T Order*].

23. *See AT&T Order*, *supra* note 22, para. 133; *Verizon Order*, *supra* note 7, para. 134.

24. *See AT&T Order*, *supra* note 22, para. 24; *Verizon Order*, *supra* note 7, para. 24.

25. *See AT&T Order*, *supra* note 22, para. 211; *Verizon Order*, *supra* note 7, para. 221.

26. *See AT&T Order*, *supra* note 22, para. 108; *Verizon Order*, *supra* note 7, para. 143.

addressing those issues through industry-wide rulemaking or adjudication.[27]

III. THE ANTITRUST AGENCIES' EMERGING STANCE ON MERGER REMEDIES

The modern era for antitrust merger review in the United States began in 1976 with the enactment of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act).[28] Before the HSR Act, antitrust agencies often did not learn of mergers until after they were consummated, making it difficult to remedy an anticompetitive merger where they would be forced to "unscramble the egg." To address the concern that merger challenges resulted in only "Pyrrhic victories,"[29] the HSR Act requires mergers of a certain size to be reported to the antitrust agencies and subject to an initial waiting period before the merger is permitted to close. Not only does the HSR Act ensure that the antitrust agencies receive notice of an array of mergers, it also provides them an opportunity to request information before a merger is allowed to close. In practice, the notification requirement and limitations on consummating a merger have transformed the process of merger review, leading companies to increasingly address competition concerns via consent decrees (or "fix-it-first" arrangements where the parties sell off duplicative businesses or assets to avoid antitrust concerns).[30]

The transformation of merger control from a litigation-centric model to a negotiation-centric model represents an unintended consequence of the HSR Act. In practice, this new model of merger review involves a flexibly structured negotiation over the scope of acceptable remedies. In this context, "flexibly structured" means that such negotiations are not subject to either established procedures or substantive requirements. In many cases, this negotiation resembles a form of three-dimensional chess, as it may not only include a regulatory dimension, but an international one as well (particularly as to the European Union). From 1995 to 2001, for example,

27. *See, e.g.*, *Verizon Order*, *supra* note 7, at 142 (statement of Comm'r Abernathy) ("[T]he customary administrative weaponry in the Commission's arsenal—rulemaking, enforcement, and so on—does not suddenly evaporate once a merger is approved.").

28. Pub. L. No. 94-435, 90 Stat. 1383 (1976).

29. *See* Kenneth G. Elzinga, *The Antimerger Laws: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969).

30. This change has attracted some criticism. *See, e.g.*, Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 935-36 (2001).

fifty of fifty-eight mergers reviewed by both the U.S. antitrust agencies and the European Union resulted in conditional approvals.[31]

The current system of merger control is still adapting to the HSR Act model and the jurisprudence on merger remedies remains a work-in-progress. On the question of whether a merger violates antitrust law, counsel can consult both case law and the 1992 Merger Guidelines (which set forth the standards used by the antitrust agencies). As to what merger remedies are appropriate, there is no authoritative source of guidance and, in general, the reliance on previously negotiated remedial consent decrees that are neither explained nor justified creates an unfortunate lack of transparency.[32] To bridge the gap, both the DOJ and the FTC have issued statements addressing this issue. These pronouncements, however, are not binding and, at best, explain the agencies' respective practices vis-à-vis consent decrees and fix-it-first solutions to otherwise anticompetitive mergers.[33] Thus, even more so in the case of merger remedies than in other areas, "consent decrees have so enriched—or supplanted—case law that the advice antitrust lawyers give their clients frequently may be entirely divorced from recent case law authority."[34]

With their recent pronouncements, the antitrust agencies are moving toward a more consistent and transparent framework for evaluating merger remedies, but they have yet to coalesce on a clearly identified strategy for evaluating merger remedies in general or cooperating with regulatory agencies in particular. Highlighting the importance of this issue, former FTC Chairman Pitofsky concluded that "there is no more important set of policy questions facing the antitrust community than defining the nature

31. François Lévênque & Howard Shelanski, *Introduction*, *in* MERGER REMEDIES IN AMERICAN AND EUROPEAN UNION COMPETITION LAW, xix-xx (François Lévênque & Howard Shelanski, eds.) (2003).

32. This failing has not gone unnoticed by the antitrust agencies. "Some believe that one negative consequence to 'litigation by consent decree' is the lack of global transparency as compared to litigation in court." Deborah Platt Majoras, Deputy Assistant Gen., Dep't of Justice, Houston, We Have a Competitive Problem: How Can We Remedy It? (Apr. 17, 2002) (transcript available at http://www.usdoj.gov/atr/public/speeches/11112.pdf).

33. The DOJ published an *Antitrust Division Policy Guide to Merger Remedies* and the FCC issued a set of best practices on merger remedies. *See* POLICY GUIDE, *supra* note 10; *see also* FED. TRADE COMM'N, STATEMENT OF THE FED. TRADE COMM'N BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (2003), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

34. Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, 10 ANTITRUST 4, 4 (1995). Part of the reason for the divorce between case law and practice is that "it appears that defendants commonly enter into consent decrees where the alleged violation is uncertain and the costs of the consent decree remedy are likely to be less than the costs of even a successful defense in litigation." A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 13-14 (1995).

and limits of appropriate restructuring in merger review."[35] The importance of this issue is two-fold. First, as Pitofsky explains, a theoretically clean divestiture of the overlap can still result in a consumer welfare loss if the acquirer is unable to provide the same level of pre-merger competition.[36] Second, the toolkit for merger remedies is notably different from evaluating the competitive effects of mergers and, until recently, the choice of remedial strategies has received very little academic (or judicial) attention.

A. Conduct Remedies Imposed Pursuant to Merger Review

In general, antitrust agencies eschew the administration of conduct remedies as a perilous exercise. As the DOJ's Policy Guide explains, "[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[37] To be more precise, in cases involving direct horizontal overlap between the two merging firms, the antitrust agencies are extraordinarily skeptical that any form of behavioral remedy will be appropriate, whereas cases involving vertical concerns are viewed as more amenable to such relief.[38]

---

35. Robert Pitofsky, Chairman, Fed. Trade Comm'n, The Nature and Limits of Restructuring in Merger Review (Feb. 17, 2000) (transcript available at http://www.ftc.gov/speeches/pitofsky/restruct.htm).

36. As former Chairman Pitofsky explained, "[e]xperience shows that even when companies invest substantial resources and therefore have incentives to succeed, they may not successfully replace the eliminated firm." *Id.* From the standpoint of merger law, such results constitute policy failures, as the Supreme Court calls for remedies "effective to redress the violations" and "restore competition." Ford Motor Corp. v. United States, 405 U.S. 562, 575 (1972) (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961)). In so doing, the agencies enjoy wide discretion to accomplish this goal, including requiring the divestiture of non-overlapping assets. *See* Olin Corp. v. Fed. Trade Comm'n, 986 F.2d 1295 (9th Cir. 1993), *cert. denied*, 510 U.S. 110 (1994); *see also* Jacob Siegel Co. v. Fed. Trade Comm'n, 327 U.S. 608, 611 (1946) (noting the FTC's "wide discretion in its choice of a remedy" to address antitrust violation).

37. POLICY GUIDE, *supra* note 10, at 7, 8. The Supreme Court's longer discussion of the point bears notice as well:

> Of the very few litigated [merger] cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of [Section 7 of the Clayton Act] has been found.

E.I. du Pont de Nemours, 366 U.S. at 329-31 (citations omitted).

38. Skepticism is not the same as a complete bar. For starters, it is an established practice for the antitrust agencies to impose some form of ongoing conduct remedies to supplement structural relief. Moreover, there are cases where the agencies will conclude that the mandated conduct remedies will address a horizontal concern. *See, e.g.*, Browning-Ferris Indus., 59 Fed. Reg. 64,701, 64,709 (Dep't of Justice, Dec. 15, 1994) (proposed final judgment) (explaining that "divestiture was not necessary in the Baltimore market and that a change in the types of contracts used" was deemed sufficient to address any competitive concerns).

A quintessential form of regulatory relief often proposed to address horizontal overlap is price regulation, particularly when the firms claim that the loss of competition will only be temporary. Despite some support from state Attorneys General (who also possess authority to enforce both federal and state antitrust laws), the federal antitrust agencies have consistently rejected such measures as insufficient to justify approval of an otherwise anticompetitive merger.[39] As the DOJ's Policy Guide notes, regulatory guarantees as to price are notoriously unreliable, hard to enforce, and may lead a firm "profitably, and inefficiently, to reduce its costs by cutting back on quality—thereby effecting an anticompetitive increase in the 'quality adjusted' price."[40] Moreover, for declining cost industries, a price freeze may actually allow for higher prices than would otherwise be obtained absent the merger. Finally, pricing flexibility—such as that necessary to facilitate pro-consumer price discrimination (i.e., offering discounts to certain customers who would not otherwise purchase the product)—can benefit consumers in some cases, meaning that restrictive regulations may actually undermine consumer welfare.[41]

In the telecommunications arena, Echostar tested the DOJ's skepticism of price regulation in 2002 by committing to nationwide pricing in the event that the DOJ approved its merger with DirecTV.[42] In that case, the DOJ brought suit nonetheless, reflecting its concern that any such commitment would be difficult to enforce and would restrict the operation of market forces—i.e., cutting rates in response to competition is pro-competitive and such a regime would (at least in some cases) deter such strategies. In so doing, the DOJ highlighted its reluctance to superintend such relief and its awareness that, in any event, unintended consequences might well render such measures anticompetitive.

---

39. *See* United States v. Long Island Jewish Med. Ctr., 983 F.Supp. 121, 135 (E.D.N.Y. 1997) (challenge to merger in the face of a price freeze agreed to by state Attorney General); Fed. Trade Comm'n v. Butterworth Health Corp., 946 F. Supp. 1285, 1298 (W.D. Mich. 1996) (FTC motion for preliminary injunction in face of "Community Commitment" that included price freeze). *See also* Mary Lou Steptoe & David Balto, *Finding The Right Prescription: The FTC's Use of Innovative Merger Remedies*, 10 ANTITRUST 16, 20 (1995) ("The FTC has consistently rejected [price regulation proposals] on the grounds that it is not a price-regulatory agency, compliance is difficult to monitor, and competition is the proper driving force for pricing decisions.").

40. POLICY GUIDE, *supra* note 10, at 8.

41. POLICY GUIDE, *supra* note 10, at 8-9.

42. *See* Jennifer Beauprez & Anne Mulkern, *Justice Dept. Sues to Bar EchoStar Merger, 23 States Join In, Dooming DirecTV Deal*, DENVER POST, Nov. 1, 2002, at C1. Technically speaking, Echostar—and later, News Corp.—proposed transactions with Hughes Corp. Because of the competitive issues which arose from Hughes Corp.'s ownership of DirecTV, this essay discusses the merger as one between Echostar (and later, News Corp.) and DirecTV.

The antitrust agencies' preference for structural remedies reflects, in significant part, the legacy of the AT&T consent decree. That legacy underscores that such ongoing supervision presents a challenge to antitrust authorities because, as Judge Posner explained, "the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly."[43] Notably, the AT&T consent decree provides support for this proposition, living up to Judge Greene's fear that "in the end, a judicially-created bureaucracy would [not] be any more capable than the FCC itself of performing the unending task of vigilance and oversight" necessary to regulate incumbent monopolies.[44]

In entering the AT&T consent decree, Judge Greene believed he avoided the fate of regulation-through-antitrust by rejecting the option of a detailed regulatory decree, noting that "courts have generally rejected this type of detailed injunction in favor of the 'surer, cleaner remedy of divestiture.'"[45] Judge Greene failed to anticipate, however, that the AT&T consent decree's provision for waivers from the line-of-business restrictions that accompanied the mandated divestiture would create an ongoing set of messy questions for him to address (with the aid of the DOJ's Antitrust Division).[46] In other cases of judicial management of complex access arrangements, notably New Zealand's effort to ensure reliable cooperation between incumbents and new entrants on matters such as interconnection arrangements, courts were on their own and the effort at regulation by antitrust failed miserably.[47] In the context of merger review, the challenges of devising an appropriate conduct remedy are even greater because not only does the antitrust agency lack the industry experience of an industry-specific regulator, but it also must act under severe time

---

43. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001).

44. United States v. AT&T, 552 F. Supp. 131, 168 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

45. *Id*. at n.155 (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961)).

46. One commentator has defended this system. *See* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395 (1999). However, many have criticized it on the ground that "[g]etting answers to simple questions often took months or even years." John Thorne, Testimony to the Antitrust Modernization Comm'n (Dec. 5, 2005) (transcript available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Thorne.pdf).

47. *See* Mary Newcomer Williams, *Comparative Analysis of Telecommunications Regulation: Pitfalls and Opportunities*, 56 FED. COMM. L.J. 269, 277 (2003); *see also* JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 34 (2000) (the New Zealand case demonstrates the "difficulty of ensuring competition in the absence of regulation").

constraints.[48] In short, the AT&T case represents an exceptional remedial strategy, as "[c]ourts are, by definition, not the expert regulators that these kinds of degrees really call for."[49]

In cases of vertical mergers involving issues of access to complementary resources, the antitrust agencies are far more willing to entertain regulatory-type remedies. Because vertical mergers often create substantial efficiencies,[50] along with possible competitive concerns, they are far more likely than horizontal ones to fall into the class of cases where "a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would also sacrifice such efficiencies or is infeasible."[51] Moreover, the DOJ pursues such relief "almost always in industries where there already is close government oversight," such as the telecommunications industry.[52]

When the DOJ imposes a behavioral requirement to address concerns about vertical relations, it often replicates or anticipates efforts taken by the FCC. A notable case in point—and a starkly different strategy than that used in the News Corp./DirecTV matter—is the DOJ's consent decree imposed in the Primestar case. In that case, the DOJ concluded that the Primestar joint venture (which consisted of a number of cable companies who operated a direct-to-home satellite service) sought "to raise barriers to entry by other firms into [direct broadcast satellite] by, among other things, restraining the availability, or the terms and conditions of availability, of partner-controlled or owned programming to possible entrants" in the multi-channel video programming distribution market.[53] Rather than require a divestiture of the satellite service, the DOJ negotiated a highly regulatory consent decree that included a bar on exclusive access to

48. *See* Patrick Rey, *Economic Analysis and Choice of Remedies*, *in* MERGER REMEDIES, *supra* note 31, at 129, 131.

49. Diane P. Wood, *A Comparison of Merger Review and Remedy Procedures in the United States and the European Union*, *in* MERGER REMEDIES, *supra* note 31, at 67, 70. In *Verizon v. Trinko*, 540 U.S. 398, 415 (2004), the Court concluded that compulsory access requirements should be deeded irremediable when granting them would "require[] the court to assume the day-to-day controls characteristic of a regulatory agency" (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

50. For a discussion of efficiencies resulting from vertical integration, see Joseph Farrell & Philip J. Weiser, Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age, 17 HARV. J.L. TECH. 85, 97-106 (2003).

51. POLICY GUIDE, *supra* note 10, at 18.

52. *Id.* at 20.

53. Primestar Partners, L.P., 58 Fed. Reg. 33,944, 33,948 (Dep't of Justice June 22, 1993) (proposed final judgment).

programming unless a rival DBS firm obtained a similar exclusive program offering.[54]

The DOJ's action in the Primestar case highlights the perils of imposing regulatory requirements as part of merger approvals. In the Primestar case, the DOJ instituted a regime related to the "program access rules" superintended by the FCC—a fact noted by the DOJ[55]—but made no effort to ensure that its regime did not duplicate the FCC requirement that cable providers make available access to their affiliated programming.[56] Similarly, in the TCI/Liberty matter, the DOJ imposed a particularly questionable mandate that the merged firm not engage in discriminatory practices related to the sale of video programming so as to "unreasonably [] restrain competition."[57] Whether that concept merely mirrored the antitrust laws or some approximation of the FCC's program access rules, it was questionable of the DOJ to condition a merger on an ill-defined requirement that would be difficult for it to enforce.

Like the DOJ, the FTC is willing to mandate access arrangements that require regulatory oversight to address vertical concerns. First, in its review of Time Warner's merger with Turner Broadcasting, the FTC imposed a requirement that all Time Warner cable systems carry an alternative news channel to CNN.[58] In so doing, the FTC instituted a protective measure against foreclosure of program channels not affiliated with cable systems.[59] Second, in the AOL/Time Warner merger, the FTC mandated access to Time Warner's broadband access service for independent Internet service providers, appointing a special monitor to evaluate any complaints that Time Warner had breached the relevant requirements.[60] Notably, at the

---

54. In particular, this exception provided that "if a competing DBS venture obtains any exclusive programming, Primestar may, upon sixty (60) days prior written notice to the Department, obtain a reasonably comparable amount of programming of a reasonably comparable type and quality on a reasonably comparable exclusive basis." Primestar Partners, L.P., 58 Fed. Reg. at 33,947.

55. The DOJ explained, in its Competitive Impact Statement, that the program access rules "are intended to prevent unreasonable restrictions on access to programming." Primestar Partners, L.P., 58 Fed. Reg. at 33,950.

56. For a discussion of the program access rules, see NUECHTERLEIN & WEISER, *supra* note 16, at 369-71.

57. Tele-Communications, Inc. & Liberty Media, 59 Fed. Reg. 24,723, 24,727 (Dep't of Justice May 12, 1994) (competitive impact statement).

58. Time Warner, Inc., File No. 961-0064 (Fed. Trade Comm'n Sept. 12, 1996) (agreement containing consent order), *available at* http://www.ftc.gov/os/1996/09/twconsnt.pdf.

59. In particular, the FCC has—in recent years—restricted the number of affiliated channels that a cable providers can have as well as the total percentage of cable homes that a single provider can serve. *See* NUECHTERLEIN & WEISER, *supra* note 16, at 375-78.

60. Am. Online, Inc., File No. 001 0105 (Fed. Trade Comm'n Dec. 14, 2000) (decision and order), *available at* http://www.ftc.gov/os/2000/12/aoldando.pdf.

time it did so, the FCC was superintending just this type of requirement for local telephone companies' broadband operations and was in the process of concluding that these access obligations did more harm than good.[61]

B. Structural Remedies Revisited

The antitrust agencies' strong preference for divestiture remedies can backfire both in that some divestiture remedies prove anything but clean and some conduct remedies—particularly if policed by an industry-specific regulator—can be enforced in a relatively effective manner. In the late 1990s, antitrust authorities increasingly realized the potential limitations of divestiture remedies, particularly when they were crafted with relatively little analysis. From an economic perspective (particularly new institutional economics), the difficulties in ensuring effective divestitures come as no surprise.[62] After all, new institutional economics explains that firms engage in strategic behavior designed to maximize their profits (often called "ex post opportunism") unless contractual or structural arrangements deter them from doing so.[63]

To appreciate the limits of divestiture remedies, consider the divestiture of InternetMCI (as part of the approval of the MCI/Worldcom merger). In that case, the divestiture did not involve any ongoing oversight, apparently on the theory that failures to live up to contractual commitments are matters for courts competent to hear breaches of contract claims. In practice, however, MCI/Worldcom demonstrated little interest in living up to such commitments, apparently viewing any contract law liability as an acceptable cost of doing business and undermining a competitor.[64]

Like the MCI/Worldcom case, the DOJ's approval of the merger of AT&T and SBC and the merger of MCI and Verizon underscores why a divestiture remedy may appear simpler in theory than in practice. In those cases, the DOJ imposed a requirement that the merged firm divest an

---

61. For a discussion of the FCC's policy on providing ISPs with "open access" to broadband platforms, see NUECHTERLEIN & WEISER, *supra* note 16, at 159-68.

62. Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L., ECON. & ORG. 95, 114 (2002) ("It seems to me that divestiture remedies should be used very cautiously and only in conjunction with careful analysis reflecting [transaction cost economics] considerations.").

63. *See, e.g.*, Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchanges*, 73 AM. ECON. REV. 519, 519-20 (1983).

64. For a discussion of the nature of the divestiture requirement, see Application of Worldcom, Inc., and the MCI Comm. Corp. for Transfer of Control, *Memorandum Opinion and Order*, 13 F.C.C.R. 18025, paras. 151-56 (Sept. 14, 1998). For a discussion of the failings with regard to the divestiture, see Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, (FCC, Working Paper No. 32, 2000); *Mergers in the Telecommunications Industry: Hearing Before The Commission On Commerce, Science & Transportation*, 107th Cong. 55-57 (1999) (statement of Mike McTighe, CEO, Cable & Wireless) (transcript available at http://bulk.resource.org/gpo.gov/hearings/106s/77325.txt).

indefeasible right of use (IRU) to lateral connections to major office buildings as well as for certain transport facilities. In explaining the necessity for such relief, the DOJ explained that "[f]or hundreds of commercial buildings located in the metropolitan areas of [several major east coast cities], Verizon and MCI are the only two firms that own or control a direct wireline connection to the building,"[65] meaning that, for a substantial set of customers, the Verizon/MCI and SBC/AT&T deals constituted a merger to monopoly.[66] The DOJ added that those customers could not expect new entry in the foreseeable future, as "such entry is a difficult, time-consuming, and expensive process."[67] In its Competitive Impact Statement, the DOJ did not evaluate whether simply divesting these assets—which were not divested along with the associated customers (or revenue)—would be effective in practice. Based on its Policy Guide, however, it presumably was "persuaded that these assets will create a viable entity that will restore competition."[68]

In light of the DOJ's stated preference for divesting existing lines of business as well as the failure of the InternetMCI divestiture, its choice of remedy in the Verizon/MCI and SBC/AT&T cases is difficult to understand.[69] The DOJ might well have eschewed divesting the existing businesses in areas where Verizon and SBC competed against AT&T and MCI because customers prefer a single provider for all nationwide accounts, as opposed to being served by the merged firm in areas without any overlap and by a different firm in the incumbent's service territory. Nonetheless, by taking the additional step of separating the facilities from the associated traffic and revenue (as opposed to merely the customer relationship), the DOJ greatly lessened the likelihood of preserving an alternate provider. In particular, the market moved from one where an

---

65. United States v. Verizon Comm., Inc., Competitive Impact Statement, Civ. Action No. 1:05CV02103, at 7 (2005), *available at* http://www.usdoj.gov/atr/cases/f213000/21 3028.htm.

66. Other governmental analyses of the merger concurred with this judgment. *See* N.Y. Dep't of Pub. Sev. Staff White Paper, Proposed Mergers Regarding Verizon N.Y. Inc. and MCI, Inc., Case 05-C-0237- (N.Y. Dep't of Pub. Serv. July 6, 2005), *available at* http://www3.dps.state.ny.us/pscweb/webfileroom.nsf/Web/ (hyperlink "new search", then search by case number) ("Staff tentatively concludes that the merger [between Verizon and MCI] could affect business customers by potentially increasing T1 prices, and/or cause deterioration of retail service quality.").

67. *Verizon Comm., Inc.*, Competitive Impact Statement, at 8.

68. POLICY GUIDE, *supra* note 10, at 13.

69. The recent European Commission report on merger remedies provides even further basis for concern, as it concluded that, of the seven mergers studied in which less than the overlap was divested, five of the divestitures were deemed to be of doubtful effectiveness. EUROPEAN COMM'N DIRECTORATE-GENERAL FOR COMPETITION, MERGER REMEDIES STUDY 38 (2005) [hereinafter MERGER REMEDIES STUDY], *available at* http://europa.eu.int/comm/ competition/mergers/others/remedies study.pdf.

alternative provider existed to one where it was possible that such a provider would emerge. Put differently, AT&T and MCI had constituted effective competitors against the incumbent providers (SBC and Verizon) before the merger, but it was far from clear that the firms that purchased the divested assets would emerge as effective competitors after the merger.

Because the DOJ's Competitive Impact Statement only explained its theory of liability, and not of remedy, it is unclear how the DOJ justified its remedial strategy in this case. Notably, it is far from clear why the DOJ apparently sanctioned the generally unacceptable scenario where a merger decreases the number of providers from three to two (which went unremedied).[70] Finally, the DOJ's action did not explain an apparent contradiction with its stance as to the proper remedy in the earlier (and never consummated) Qwest/Allegiance merger, where it reportedly called for Qwest to sell off all Allegiance facilities and customers within the Qwest territory.[71]

Not only does the remedy in the Verizon/MCI and SBC/AT&T cases appear to mean less competition than the status quo ante, but even its promise of facilitating an alternate provider may well be a Pyrrhic one. Notably, the DOJ may have underestimated the challenges associated with managing the terms of dealing between an incumbent and a new entrant. In particular, the DOJ called for "commercially reasonable IRUs" to be negotiated so as to enable entrants to have "the cost structure necessary to be effective."[72] In the event that the merged firm did not identify firms willing to contract for access to the IRUs, the DOJ would have selected a trustee to "promptly locate and divest [the IRUs] to an acceptable purchaser."[73] But this trustee was not empowered to oversee any breaches of obligations connected with the commercially reasonable arrangements,[74] raising the question of whether Verizon and SBC will undertake strategies

70. *See* Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 715-17, 724-25 (D.C.C. 2001) (merger to duopoly held presumptively unlawful); *see also* William J. Baer, Deborah L. Feinstein & Randal M. Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, 18 ANTITRUST 15 (2004) (transactions that reduce significant competitors from four to three tend to trigger enforcement action).

71. *See* Qwest Comm. Corp. Comments on Dep't of Pub. Serv. Staff White Paper at 19-20, Joint Petition of Verizon N.Y., Inc. and MCI, Inc., Case No. 05-C-0237- (rel. Aug. 5, 2005) (recounting Department request), *available at* http://www.dps.state.ny.us/Quest_Comment_on_NYDPSWhitePaper.pdf.

72. Proposed Final Judgment by the United States, United States v. Verizon Comm., Inc. & MCI, Inc., Civil Action No. 1:05CV02103 (Oct. 27, 2005).

73. *Id.*

74. In general, the DOJ eschews the appointment of a monitoring trustee, reserving it for the "relatively rare situations where a monitoring trustee with technical expertise unavailable to the Division could perform a valuable role." POLICY GUIDE, *supra* note 10, at 40. Similarly, the DOJ recognized that the use of Special Masters is also disfavored for such situations. *Id.* at 43 n.58.

similar to that of MCI Worldcom in the wake of the InternetMCI divestiture.

In short, any time an antitrust agency requires divesture of assets that are not already part of an ongoing line of business (sometimes called a "clean sweep"), it takes a risk that the buyer will fail to compensate for the loss of competition caused by the merger. As new institutional economics explains, the merged firm will act strategically and, in the absence of offsetting incentives, can be expected to undermine the success of its rival firm. Famously, Oliver Williamson emphasized that, in scenarios where one firm is potentially at the mercy of another, strategies such as "hostage taking" may be necessary to ensure effective ongoing cooperation.[75] As suggested by the InternetMCI divestiture as well as, perhaps, the Verizon/MCI and SBC/AT&T IRU arrangements, the DOJ appears to take a skeptical stance that such strategic behavior is either possible, likely, or difficult to address after the fact.[76] Alternatively, the DOJ might simply have concluded that the measures necessary to address the relevant competitive risks were themselves problematic and not justified.[77]

---

75. Williamson, *supra* note 63, at 519-20.

76. One notable strategy is a "crown jewel" provision. Such a provision generally requires that if certain assets that must be divested as part of a merger cannot be sold to a viable purchaser within a certain time frame, then more valuable assets will be added to sweeten the divestiture package for prospective purchasers. *See* POLICY GUIDE, *supra* note 10, at 36-37. While the FTC utilizes such provisions, the DOJ frowns upon them. In its *Policy Guide*, the DOJ deems "crown jewel" provisions punitive and indicates its concern about a different form of strategic behavior—i.e., that purchasers will intentionally delay negotiation for access to the divested assets so as to gain access to the crown jewel. *Id.* at 37-38.

77. Yet another possibility is that the DOJ believes that the risks of strategic behavior are simply less substantial than the relevant competitive benefits of the merger (including merger-specific efficiencies). For an argument that antitrust agencies should consider this claim more seriously, see Sims & McFalls, *supra* note 30, at 947 ("When the overall deal is large relative to the divestiture package, and when the deal is likely to produce significant cost savings, the parties and consumers lose significant benefits simply to give the agencies some marginal assurance that divestitures will be implemented quickly."). In the MCI/Verizon case, this explanation is certainly plausible, as the DOJ's antitrust chief explained in its press release that, except for the few required IRU divestitures, "the Division concluded that the transactions will not harm competition and will likely benefit consumers, due to existing competition, emerging technologies, the changing regulatory environment, and exceptionally large merger-specific efficiencies." Press Release, Department of Justice, Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T (Oct. 27, 2005) (quoting Thomas O. Barnett, Acting Assistant Att'y Gen.), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/212407.htm. Nonetheless, if the DOJ concluded either that the efficiencies or weaknesses of the acquired firms justified the merger, that conclusion would certainly be controversial. United States v. Franklin Elec. Co. Inc., 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000) ("It would be odd if a merger of the kind at issue, from two producers to one, could be justified by either the efficiencies it would generate or because the company to be acquired is failing.").

In contrast to the DOJ, the FTC takes a more concerned stance toward strategic behavior, generally insisting on divestiture of an ongoing business, an up-front purchaser of the divested assets and, where appropriate, a "crown jewel provision" (designed to ensure an effective divestiture).[78] This strategy emerges from the FTC divestiture study that highlighted several recommendations for future merger remedies.[79] In particular, the study suggested a norm of "[u]p-front buyers, requirements for 'as is' divestitures of ongoing businesses, and contingent divestitures of 'crown jewel' assets for failing to meet the agency's timetable."[80] This norm follows the study's conclusion that "divestiture of an on-going business is more likely to result in viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that the Commission should prefer the divestiture of an on-going business."[81] Similarly, as to the use of crown jewel provisions, former FTC Bureau of Competition Director William J. Baer explained that they "may be particularly valuable when there are some uncertainties about the salability or viability of the divestiture package, or where the [merged firm] may be able to frustrate the viability of a divestiture."[82]

Like its use of divested IRUs in the Verizon/MCI and SBC/AT&T merger cases, the DOJ sometimes uses compulsory licenses to ensure continued competition after the merger. In the 3D/DTM case, for example, the DOJ mandated compulsory licensing to critical technology that, once licensed by a foreign firm with a demonstrated ability to compete in the market for developing prototypes, would ensure a continued presence of three major firms in the market.[83] Such technology licensing arrangements

---

78. *See* Platt Majoras, *supra* note 32 (comparing Antitrust Division's stance on up-front buyers to FTC's and explaining approach).

79. *See* STAFF OF THE BUREAU OF COMPETITION OF THE FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), *available at* http://www.ftc.gov/os/1999/9908/divestiture.pdf.

80. William J. Baer & Ronald C. Redcay, Solving Competition Problems in Merger Control: The Requirements for an Effective Remedy, in MERGER REMEDIES, supra note 31, at 48.

81. STAFF OF THE BUREAU OF COMPETITION OF THE FED. TRADE COMM'N, *supra* note 79, at 12.

82. William J. Baer, Director, Bureau of Competition for the Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act (Oct. 29, 1996) (prepared remarks available at http://www.ftc.gov/speeches/other/hsrspeec.htm) (the DOJ strongly disfavors crown jewel provisions).

83. *See* Platt Majoras, *supra* note 32, at 9 ("In [the 3D/DTM merger], the Division chose to require the non-exclusive licensing of technology, . . . [because] the competitors were just a license away."); Competitive Impact Statement of Plaintiff, United States v. 3D System Corp. & DTM Corp., Civil No: 1:01CV01237(GK) (Sept. 4, 2001), *available at* http://www.usdoj.gov/atr/cases/f9000/9019.pdf.

(presumably like IRUs) will not always be sufficient to justify approval. Consider, for example, that the DOJ concluded (and was upheld in *United States v. Franklin Electric Co.*[84]) that such an arrangement was inadequate because neither of the two suggested licensees had experience in the relevant market.

The lack of transparency as to merger remedies leaves a series of unanswered questions. Without more explanation, it is extremely difficult to discern where the line is between confidence that a viable purchaser can be found (Verizon/MCI and 3D/DTM) or not (*Franklin Electric*). Similarly, it is also difficult to judge the basis for the DOJ's confidence that its remedies will work effectively without an insistence on an up-front buyer or special back-end oversight measure. Particularly, in light of the failure of the InternetMCI spinoff, it is critical that the DOJ be sensitive to the margin for error inherent in remedies such as the IRU arrangement called for in Verizon/MCI and the licensing mandate called for in 3D/DTM.

In defense of U.S. antitrust enforcers, there may be reasons for their reluctance to allow greater transparency. In particular, they may worry about criticisms leveled at their European counterparts related to focusing on the interests of individual competitors as opposed to the competitive process more generally. Moreover, transparency requirements can, if taken too far, limit constructive discussions, valuable deliberation, and expeditious decision making. Nonetheless, the lack of disclosure as to their remedial actions is difficult to defend because, as Justice Brandeis famously wrote, "[s]unlight is [] the best of disinfectants" and gives rise to a more understandable process and more predictable results.[85]

C. European Union Stance on Antitrust Remedies

The European Union's charter charges its European Commission (and, in particular, the Directorate General for Competition) with analyzing mergers (which it defines as "concentrations") to determine if they are "compatible with the common market."[86] A merger is incompatible if it "creates or strengthens a dominant position as a result of which effective

84. 130 F. Supp. 2d 1025, 1032-33 (W.D. Wis. 2000).

85. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1913). As former Director Baer of the FTC Bureau of Competition stated recently, "[a]gencies enhance understanding of the process and foster better antitrust risk assessment by companies when they explain why they decided to act or not to act. Transparency matters. Critical review of agency performance and of outcomes is not possible without access to information." William J. Baer, Testimony Before the Antitrust Modernization Comm'n on U.S. Merger Enforcement Policy 12-13 (Nov. 17, 2005) (statement available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/BaerStatement_.pdf).

86. European Union Council Reg. No. 139/2004, On The Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1, para. 21 (EC).

competition . . . would be significantly impeded."[87] In terms of substantive standards, the European Commission analyzes mergers in a similar fashion to the U.S. antitrust agencies, although the EU's concern with "conglomerate effects," among other factors, contributes to some notably different conclusions, such as those highlighted by the different results in the GE/Honeywell merger.[88] In terms of procedure, the EU system differs dramatically from the U.S. model in that the European Commission can bar a merger without judicial involvement. In contrast to the U.S. model, where the antitrust agencies must go to court to enjoin a merger, the EU model calls for judicial review—by the Court of First Instance—only after the European Commission decides whether to bar the merger.[89]

The European Commission conducts its merger review process in two phases. Phase I is the preliminary inquiry, where after receiving all relevant documents, the agency will consider whether there are "serious doubts" about the merger's competitive impact. During this phase, or even pre-notification, the European Commission will consider proposed remedies to address competitive harms.[90] In principle, the Phase II process is a three-month review of the competitive issues raised by the merger that culminates—in the event the European Commission identifies concerns with the merger—in a statement of objections. To provide parties with more insight into the process, the European Commission has developed a set of best practices, which call for meetings at key points in the process, at which parties are free to suggest "undertakings" to make their concentration compatible with the common market.

Like the U.S. antitrust agencies, the European Commission historically did not focus carefully on the selection of merger remedies. In 2001, influenced by the FTC Divestiture Study, the European Commission presented a Notice on Remedies that set forth a similar caution toward certain divestiture remedies.[91] In so doing, the European Commission

---

87. *Id.* at para. 24.

88. See Pinar Karacan, *Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers*, 17 TRANSNAT'L LAW 209 (2004).

89. For a discussion of the EU's procedural framework and its impact on merger review, see Eric S. Hochstadt, *The* Brown Shoe *of European Union Competition Law*, 24 CARDOZO L. REV. 287, 297-301 (2002).

90. *Id.* at 298.

91. Euopean Union Comm'n Notice on Remedies Acceptable Under Council Reg. No. 4064/89 and Under Comm'n Reg. No. 447/98, 2001 O.J. (C 68) para. 13, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf; Mario Monti, European Comm'r for Competition Policy, The Commission Notice on Merger Remedies—One Year After, at 2 (Jan. 18, 2002) (transcript available at http://europa.eu/rapid/setLanguage.do?language=en (search "18/01/2002", then follow "Speech by Mario Monti" hyperlink)). *See also* Gencor Ltd. v. Comm'n, Case T-102/96

called for: increased use of up-front buyers, broader divestiture requirements to ensure a viable operation post-merger, a willingness to use crown jewel provisions, and a strict commitment to hold separate orders.[92] Like the U.S. antitrust agencies, the European Commission does not rule out conduct remedies, concluding that "whether such commitments can be accepted has to be determined on a case-by-case basis."[93] Finally, the European Commission has recognized the black box nature of merger remedies decisions and has sought—like its U.S. counterparts—to "enhance transparency about [its] remedies' policy,"[94] not only by issuing a Notice on Remedies, but also best practice guidelines.[95]

The European Commission, more so than its American counterparts, is comfortable mandating regulatory remedies. Notably, even for mergers that create efficiencies—such as the Vodafone AirTouch/Mannesmann merger that enabled the merged firm to provide greater roaming capability—the European Commission took the position that the firm's unique ability to provide such roaming could create a competitive concern. To remedy that concern, the European Commission approved the merger on the condition that the merged firm provide its competitors access to its network for three years so that they could compete on equal footing.[96] This remedy not only stoked fears that the European Commission is overly influenced by competitor complaints,[97] but that it is insufficiently appreciative of efficiencies borne of innovation and the possibility that its ruling would deter innovative conduct in the future.[98] Notably, it is clear

(Mar. 25, 1999), *available at* http://www.curia.eu.int/en/actu/activites/act99/9909en.htm (follow "T-102/96" hyperlink).

92. See Antoine Winckler, Some Comments on Procedure and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of Merger Control?, in MERGER REMEDIES, supra note 31, at 75, 82-85 (François Lévênque & Howard Shelanski, eds.) (2003).

93. Commission Notice on Remedies, *supra* note 91, at para. 9.

94. Monti, *supra* note 91, at 4.

95. European Comm'n, Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate Under the EC Merger Regulation para. 6 (May 2, 2003), *available at* http://europa.eu.int/comm/competition/mergers/legislation/explanatory_note.pdf.

96. Vodafone Airtouch/Mannesman, Case No. COMP/M. 1795 (Dec. 4, 2000), *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m1795_en.pdf.

97. As one commentator noted:

> [T]here is a growing sense among practitioners that because of the huge administrative burden that is placed upon the [Merger Task Force] staff, the insufficient time allowed to test the arguments fully, and the (well-meant) open-door policy towards complainants, the Commission is sometimes led to rely significantly on comments of, or inspired by, competitors.

Winckler, *supra* note 92, at 87.

98. In criticizing the Vodafone/Mannesmann merger, two commentators remarked that:

> This is a worrying precedent as it can reduce the incentive to invest or innovate

that complaints by competitors are taken seriously in the EU process because, unlike the United States, the EU relies on a process of "market testing," whereby proposed remedies are evaluated by competitors (as well as customers and suppliers).

For both the EU and U.S. antitrust agencies, the recent study on merger remedies conducted by the European Commission suggests the importance of reconsidering the use of conduct remedies. Of the four conduct remedies providing access to infrastructure that were analyzed in the study, three of them were judged unnecessary.[99] Although the study does not identify particular companies, it seems highly likely that the Vodafone AirTouch/Mannesmann merger remedy is one of the three unnecessary remedies, as shortly after that merger, France Telecom and Orange merged so that they could provide seamless roaming. Fortunately, the EU, like the FTC in the AOL/Time Warner case, used sunsets so as to limit the harm from an unnecessary remedy. Nonetheless, a merger review regime better calibrated to avoid or limit the imposition of such remedies would clearly improve the poor record of antitrust authorities in imposing regulatory-type remedies.

IV. TOWARD A NEW STRATEGY FOR MERGER REMEDIES

The current U.S. approach to merger remedies is in a state of creative ferment. As former FTC Chairman Muris acknowledged, the antitrust "enforcement agencies must become more sophisticated in their analysis of alternative remedies."[100] Unfortunately, the selection of remedies is not only a matter of more sophistication, but also consistency, transparency, and adherence to rule of law values (i.e., following or explaining departure from precedent). In theory, courts might have applied and interpreted the Tunney Act,[101] which requires judicial review of DOJ consent decrees, to require a level of consistency and transparency. In practice, however, the

---

> through merger. In a market economy, profit opportunities play a key role in directing innovative activity and investment. Public policy should not be concerned about supernormal profits being made by the innovator for a transitory period.

Bill Bishop & Cristina Caffarra, *Merger Control in New Markets*, 22(1) EUR. COMPETITION L. REV. 31, 31 (2001) (U.K.); see also Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 458 (2005) ("Despite the apparent embrace of the consumer surplus standard, several instances of European merger enforcement in the past fourteen years have treated efficiencies as negative factors because of their potential for damage to competitors.").

99. *See*, MERGER REMEDIES STUDY, *supra* note 69, at 115.

100. Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 23 (2003).

101. Antitrust Procedures and Penalties Act (Tunney Act), Pub.L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 16(b)-(d) (2000)).

DOJ does not explain its choice of remedies in its competitive impact statements and courts defer greatly to the DOJ's decision to settle rather than challenge an antitrust case.[102] This leaves matters, both at the DOJ and the FTC, in the unfortunate situation of following a set of procedures and practices "developed in an era when administrative or judicial litigation was the expected end result of an investigation," leading to "too much of a litigator's hide-and-seek approach."[103]

Unlike the issues related to substantive merger analysis, the lack of transparency on the theory of remedies as well as the extraordinarily rare judicial oversight of remedies leaves the issue of remedies as one where the antitrust agencies possess considerable discretion. The discretion has led some observers to bemoan the departure from a "law enforcement" model in favor of a more regulatory one where "antitrust counselors find themselves focusing, not just on whether conduct contemplated by their clients is illegal," but on what antitrust officials think and are likely to seek in the nature of remedies.[104] The consequences of this transition are significant, as "[a]ntitrust, which has always been subject to political pressure, loses its voice as a law enacted by Congress and becomes just one more policy to be applied or not, depending on the overall economic and political policies of a particular administration."[105] Put differently, "the

---

102. The classic case emphasizing the DOJ's discretion under the Tunney Act, which only calls for a review of whether the proposed consent decree is in the "public interest," 15 U.S.C. § 16(e) (2000), is *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995). In that case, the D.C. Circuit concluded that courts enjoyed a circumscribed mandate under the Act and emphasized that "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place." *Id.* at 1459-60. In so doing, it rejected the broader mandate suggested by Judge Sporkin, who insisted that "Tunney Act courts are not mushrooms to be placed in a dark corner and sprinkled with fertilizer." *United States v. Microsoft Corp.*, 159 F.R.D. 318, 333 (D.D.C. 1995) (internal quotations omitted). *See also* John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 LOY. U. CHI. L.J. 749 (2003) (criticizing the D.C. Circuit's interpretation of the Tunney Act).

103. William J. Kolasky & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 894 (1997).

104. Melamed, *supra* note 34, at 14. Or, as Harry First explained, "particularly with respect to mergers, the [DOJ] more closely resembles a regulatory agency, with administrative 'rules' and processes that seldom involve litigation." Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 10 (1995) (citing Thomas Kauper, *The Department of Justice and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 105 (1990)).

105. First, *supra* note 104, at 11; *see also* Robert Pitofsky, The Nature and Limits of Restructuring in Merger Review, Remarks at the Cutting Edge Antitrust Conference (Feb. 17, 2000), http://www.ftc.gov/speeches/pitofsky/restruct.htm ("I believe that the bipartisan consensus that strongly supports vigorous antitrust enforcement in this country depends in no small part on the view that agency enforcement decisions ultimately will be reviewed by an independent judiciary.").

pattern of enforcement actions has a mutable quality that is largely dependent on the whims of the individuals who hold office at a given moment."[106]

The relative lack of transparency and standards at the antitrust agencies on the matter of merger remedies pales next to the process often used by the FCC. As the AOL/Time Warner merger review illustrates, the agency often will use merger reviews as an opportunity to address industry-wide issues by extracting voluntary conditions. At the same time, there are instances, such as the News Corp./DirecTV merger, where the FCC's merger review authority facilitates an antitrust agency's review of the transaction. Moreover, there are occasions, such as the FTC's review of the AOL/Time Warner transaction, where antitrust review encroaches on regulatory policy. In short, the challenge of reforming merger remedies for regulated industries is both to develop a more effective framework for the antitrust agencies and to cabin and integrate the role of regulatory agencies within that framework.

A. Reforming Antitrust Remedies

As of this writing, I have not developed a comprehensive strategy for cabining and structuring antitrust merger remedies. I am confident, however, that the current state of affairs, where "the fashioning of merger remedies is subject to standards that that are not well-defined or consistent,"[107] is unhealthy and unsustainable. Ultimately, Congress or the agencies will need to develop a more effective substantive and procedural framework for developing merger remedies. In so doing, however, it is important that they act prudently and avoid unintended consequences, such as further slowing down merger review, overly proceduralizing the selection of merger remedies, or creating opportunities for competitors to use the process of remedy selection for their strategic advantage.

On the question of substantive standards, I acknowledge that any system designed to provide more structure as to the selection of merger remedies will need to allow for some flexibility to adapt to different circumstances. Such flexibility can be accommodated, for example, by using a set of presumptions that, whenever not followed, would be explained by the antitrust agency.[108] By emphasizing the need to justify departures from the relevant presumptions, a structured framework would

106. William Blumenthal, *Reconciling the Debate over Merger Remedies: A Discussant's Proposed Decision Rule*, 69 GEO. WASH. L. REV. 978, 987 (2001).

107. *Id.* at 978.

108. *See id.* at 995.

shed light on the realities behind the often diverging practices of the two federal antitrust agencies as well as between seemingly similar cases.[109]

On the procedural front, there is a need for more transparency both during the process and after the fact to provide greater guidance to parties in future cases. At present, the discussions of appropriate remedies occur informally and, as a result, only those with highly effective counsel are able to take part in them. Moreover, these discussions occur in an environment influenced by previous less-than-transparent negotiations and parties often have a difficult time invoking any form of precedent (thereby undermining the ability to plan effectively regarding the scope of likely remedies).[110]

Finally, as to the antitrust agencies' policy of carefully scrutinizing certain types of divestitures (i.e., ones of less than a going concern), there are no procedural commitments or checks on them to ensure that they do so effectively.[111] Despite such concerns, commentators have barely begun to consider what type of a structured framework could achieve these goals.[112] Unfortunately, I do not have much to offer to advance this discussion, but it is clear that recent steps (like the issued guidelines) are positive developments and that further ones—such as discussing remedial considerations in competitive impact statements—would continue to improve the process of designing, selecting, and implementing effective merger remedies.

---

109. With the actual reasons for different approaches unrevealed, commentators and officials often conjecture—veiled by unrevealed facts (sometimes to protect confidentiality)—as to why the agencies acted in a particular manner. *Compare* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Looking Forward: Merger and Other Policy Initiatives at the FTC, at 10 (Nov. 18, 2004) (transcript available at http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf) ("[D]ifferences among industries may be the primary explanation for any variation in approach to remedy crafting, be it 'fix-it-first,' 'up front buyer,' the use of monitors, and the inclusion of crown jewel provisions.") *and* U.S. GEN. ACCOUNTING OFFICE, STUDY NEEDED TO ASSESS THE EFFECTS OF RECENT DIVESTITURES ON COMPETITION IN RETAIL MARKETS 13 (Sept. 2002), *available at* http://www.gao.gov/new.items/d02793.pdf (reporting on FTC Staff explanation that "because FTC's decisions are largely tied to companies' trade secret information, which FTC is statutorily prevented from disclosing to the public, FTC can provide to the public only limited information on the basis for its decisions") *with* Albert A. Foer, *Toward Guidelines For Merger Remedies*, 52 CASE WESTERN L. REV. 211, 218 (2001) ("Agency desires to retain maximum discretion, to minimize creation of 'precedents' that can be invoked by merging parties in subsequent cases, and to avoid acknowledgment of weaknesses in investigative conclusions" help explain the resistance to explaining the rationale behind remedial decisions.).

110. *See* Sims & Mcfalls, *supra* note 30, at 942.

111. *See* POLICY GUIDE, *supra* note 10, at 13 (noting that the DOJ "should scrutinize carefully" such mergers and that "the [DOJ] must be persuaded that [non-integrated] assets will create a viable entity that will restore competition").

112. A notable exception is Albert A. Foer, *supra* note 109.

B. The Role of Regulatory Agencies in Merger Review

In theory, the existing system—involving both antitrust and regulatory review—integrates the abilities of the antitrust agencies and the FCC. As Deputy Assistant Attorney General Bruce McDonald related in his testimony to the Antitrust Modernization Commission, shared authority "allows us better to share our respective expertise—the [Antitrust] Division with competition issues and the FCC with the regulatory framework and technical knowledge of the telecommunications industry as a whole."[113] In the News Corp./DirecTV case, the two agencies worked together to resolve the competition policy concerns in a manner that enabled the DOJ to clear the merger with confidence that the FCC would superintend an access regime necessary to facilitate competition in the post-merger environment. Nonetheless, the level of formal cooperation and the harmonized result in that case are the exceptions, with cases like AOL/Time Warner representing the rule.

The gap between the theory and practice of antitrust and regulatory merger review begs the question of whether harmonization is truly warranted or the current system should remain intact. Significantly, there are two notable disadvantages inherent in any system that relies on regulatory action: a lack of enforcement credibility and a lack of a secondary system of oversight. As to both issues, and for other reasons, it makes sense to empower the regulators to act effectively rather than to eviscerate their role. Consequently, I conclude that the lack of harmonization in merger review is not an effective long-term strategy, but instead is a quirk of the U.S. system that should be reformed.

In considering the value of continued reliance on regulatory agencies to effectuate antitrust merger review goals, it is important to consider whether the regulatory agencies possess the necessary competence and power to enforce efficacious conduct remedies. Historically speaking, the FCC has not developed a culture of enforcement and, for both legal and institutional reasons, regulated parties sometimes adopted an attitude of "ask forgiveness, not permission." On the legal front, the limitations on the FCC's fining authority are such that former Chairman Powell commented that legislative reform raising the applicable limits is warranted so that FCC imposed obligations are "something [that] carriers take seriously, and not merely a cost of doing business."[114]

---

113. Bruce McDonald, Dep't of Justice, Testimony to the Antitrust Modernization Comm'n 7 (Dec. 5, 2005).

114. Michael K. Powell, Chairman, FCC, Competition Issues in the Telecommunications Industry Before the Senate Committee on Commerce, Science, and Transportation 12 (Jan. 14, 2003) (statement available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A1.pdf).

The FCC's limited effectiveness as an enforcement agency actually provides a rationale for elevating its importance in enforcing conduct remedies imposed as part of merger reviews between regulated firms. Apart from merger review issues, the FCC's future role in managing competition policy should be one guided by antitrust principles—as is already the case in the European Union[115]—and characterized by fewer rules that are enforced very effectively.[116] This mission, however, requires the institutional competence necessary to enforce merger remedies, meaning that a commitment to enforcing merger remedies will go hand-in-hand with regulatory reform goals.

Even assuming the FCC's competence to enforce merger remedies, there is a still an independent concern about placing all of the enforcement eggs in one basket. Stated differently, even if a regulatory agency is an effective enforcer, there is an arguable value to having "two cops on the beat." The danger, however, is that a double enforcement strategy will be contradictory, duplicative, or, at best, a poor use of social resources. To be sure, if the regulatory body is consistently off-base or ineffectual, an enhanced role for antitrust—as in the AT&T consent decree—is potentially justifiable. But the best of all worlds is one where the regulatory body maintains all oversight of conduct remedies and thus is able to harmonize and enforce them consistently with the general regulatory regime.[117]

The irony of the persistence of antitrust-imposed conduct remedies—such as the Primestar case and the AOL/Time Warner merger—is that they ignore some of the lessons of the AT&T consent decree. As I have argued elsewhere, the critical lesson is not that antitrust agencies should not impose such remedies, but that they should enable competent regulatory agencies to superintend the remedies in question (and harmonize them with

115. In principle, the EU approach enables "the reconciliation of sector regulation with competition law in which the application of *ex ante* regulation should become redundant as 'effective competition' develops." Ian Dobbs & Paul Richards, *Innovation and the New Regulatory Framework for Electronic Communications in the EU*, 25(11) EUR. COMPETITION L. REV. 716, 716 (2004). In practice, however, some have criticized it as a disappointment because national regulatory authorities exercising authority under its framework are "inclined to regulate on a 'just in case' basis and so perpetuate regulation under the 'original sin' hypothesis of the previous regime." *Id.*

116. *See* NUECHTERLEIN & WEISER, *supra* note 16, at 429, 458; Philip J. Weiser, *Toward a Next Generation Regulatory Strategy,* 35 LOY. U. CHI. L.J. 41, 65-84 (2003).

117. As Martin Cave and Peter Crowther noted, "[t]he second best [option]—'regulatory anti-trust'—carries the danger of over-regulation, and poor enforcement by an inexperienced and (possibly) inexpert body. Such intentions may be preferable to the alternative of doing nothing, but the sooner the situation is regularised by regulation the better." Martin Cave & Peter Crowther, *Pre-emptive Competition Policy Meets Regulatory Anti-trust*, 26(9) EUR. COMPETITION L. REV. 481, 490 (2005).

the relevant regulatory regime).[118] In the monopolization context, Professor Areeda recognized that regulatory agencies changed the antitrust equation, explaining that forced sharing "[r]emedies may be practical" in instances where "a regulatory agency [] exists to control the terms of dealing."[119] Notably, the Supreme Court has employed such a strategy even where regulatory agencies existed to oversee the terms of dealings, but were not previously doing so.[120] By following such a strategy, antitrust agencies can take advantage of their comparative competence over regulatory agencies while minimizing or avoiding the pitfalls cautioned against by Professor Areeda.[121]

In terms of consent decrees that call for continuing oversight or limitations in industries subject to regulatory oversight, there is a powerful rationale for institutionalizing greater regulatory involvement in such cases. Take, for example, the DOJ's consent decree that limited the ability of Nextel to purchase additional licenses that could be used for the so-called "specialized mobile radio" (SMR) services.[122] In that case, the DOJ defined the market as one for "dispatch services," particularly those provided using spectrum in the 800 and 900 MHz bands, and concluded that cellular telephone service was not a reasonable substitute.[123]

From the outset, the DOJ's review of Nextel's merger activity placed it in a regulatory role for which the FCC was better suited. First, in permitting the merger, the DOJ suggested that it allowed more consolidation than it would otherwise because it recognized that "Nextel's consolidation of SMR spectrum [could] enable it to create a third mobile telephone service."[124] Second, the DOJ expected that technological, business, and regulatory forces would remain relatively constant over the decade during which the decree was in effect. In particular, the DOJ's analysis envisioned that spectrum licenses would be restricted to certain uses and that a viable stand-alone dispatch market would continue in the wake of wireless technological advances. The DOJ was wrong on both scores. In the wake of the collapse of the standalone commercial dispatch market, the emergence of a thriving cellular market as well as an FCC

---

118. See Philip J. Weiser, Goldwasser, *The Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003); Philip J. Weiser, *The Relationship of Antitrust and Regulation in A Deregulatory Era*, 50 ANTITRUST BULL. 549 (2005).

119. Areeda, *supra* note 49, at 853.

120. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

121. For a more developed discussion of this point, see Weiser, *Antitrust Remedies*, *supra* note 118, at 16-18.

122. United States v. Motorola, Inc., No. CIV. A. 94-2331, 1995 WL 866794 (D.D.C. July 25, 1995).

123. *Id.* at *8.

124. *Id.* at *11.

commitment to promote flexible uses of spectrum through a secondary markets initiative,[125] Nextel requested a waiver from the consent decree restrictions. After initially resisting the request,[126] the DOJ agreed to loosen its restrictions and terminate it altogether one year later.[127]

Even to the extent that the antitrust agencies develop competence or hire a highly qualified special monitor (as the FTC did in the AOL/Time Warner case), the agencies will always lack the economies of scope and scale enjoyed by the regulatory body. In the case of the Verizon/MCI and SBC/AT&T mergers, for example, the FCC is currently overseeing access arrangements of a similar kind (to local loops and transport) and is thus well-positioned to enforce the relevant IRU divestiture requirement. Moreover, in cases like Primestar, the rationale for FCC enforcement is even greater, as the DOJ's effort to craft and enforce shadow program access rules was suspect from the outset.

Finally, whether or not the regulatory agencies possess greater expertise and resources, it is also clear that they benefit from the dynamics of repeat games. In the case of the DOJ, it is quite possible that the Verizon/MCI and SBC/AT&T merger commitments will haunt them later if not taken seriously—as indeed some suggested was the case for MCI WorldCom after the failed InternetMCI divestiture. It is an absolute certainty, however, that those firms will face repeated interactions with the FCC, meaning that front-end measures like crown jewel provisions are unnecessary where the agency must preserve its good will and credibility or face repercussions.

C. Toward New Practices for Merger Review and a New Institutional Regime

The current state of merger review and merger remedies in the telecommunications industry is a second-best world where antitrust authorities encroach on the turf of the regulatory authorities and vice versa. The antitrust agencies may adopt this posture either because of a hesitancy to cede authority to a regulatory agency because of concerns that the

---

125. *See* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 20604 (2003) (establishing secondary markets in spectrum); Memorandum of the United States In Opposition To Nextel's Motion To Vacate The 1995 Consent Decree at 9-10, United States v. Motorola, Inc., No. CIV. A. 94-2331 (TFH) (D.D.C. Feb. 29, 1999), *available at* http://www.usdoj.gov/atr/cases/f2200/2288.htm (acknowledging lack of competition in the dispatch market) [hereinafter Nextel Memorandum].

126. *See* Nextel Memorandum, *supra* note 125.

127. Response of the United States to Public Comments on the Proposed Modified Consent Decree, United States v. Motorola, Inc., No. CIV. A. 94-2331 (TFH) (D.D.C. Aug. 26, 1999), *available at* http://www.usdoj.gov/atr/cases/f3600/3676.htm.

regulators will get it wrong (or lack the competence to enforce conduct remedies effectively), or, most likely, because they have not developed consistent and structured practices on merger remedies more generally. The regulatory authorities (the FCC and, in some cases, state public utility commissions) are reluctant to cede authority to the antitrust agencies and thus engage in duplicative competition policy analysis as well as impose remedies above and beyond those called for by the antitrust agencies.

To the extent that the antitrust efforts by regulatory authorities and the regulatory efforts of the antitrust agencies compensate for the failings of the other, there is some value in this system. Nonetheless, this value is a clear second-best to a more rationally designed system that allocates authority and channels the competition policy analysis more efficiently and effectively. This section outlines some tentative suggestions for a new structure for a merger review system that would accomplish this goal.

In the HSR Act era, the antitrust agencies have developed remedies in a remarkably informal manner with little analysis of their relative effectiveness. To some degree, the agencies have developed certain norms—including the preference for divestitures of stand-alone operations—but the selections of merger remedies remain relatively opaque and under-analyzed. Relatedly, there are still few guideposts to structure the analysis of what remedies are appropriate and whether they are enforced effectively.

This era of informality has produced some successes and benefits. Viewed charitably, one might conclude that the antitrust agencies have moved away from the regulatory efforts of Primestar, TCI/Liberty, and AOL/Time Warner and toward the path taken in News Corp./DirecTV. Significantly, the DOJ explained its lack of action in News Corp./DirecTV and expressly deferred to the FCC's enforcement regime. Unlike the EU system, the antitrust authorities in the United States do not generally explain a lack of action, although that has started to change.

In crafting a more formalized system for developing merger remedies, the antitrust authorities should commit to a system whereby all appropriate conduct remedies are developed through formal consultation with and by lodging ultimate enforcement authority with the appropriate regulatory agency. By so doing, the antitrust agencies could avoid becoming shadow regulators and, at the same time, empower the regulatory agencies to harmonize merger remedies with industry regulation. In particular, any merger remedy calling for a conduct remedy should be subject to an FCC veto on the ground that it is redundant with respect to current regulation or otherwise unnecessary. In the cases of Primestar, TCI/Liberty, and AOL/Time Warner, for example, there is a reasonably good chance that the imposed remedies would have failed this test and not have been imposed (or at least would have been lifted more quickly than they were).

A central challenge for regulatory agencies such as the FCC is to defer to the competition policy analysis of the DOJ as well as its choice of merger remedies. On balance, the agency's duplicative analysis has yielded few benefits while it has delayed merger approvals and imposed significant administrative costs. Moreover, because the imposition of "voluntary conditions" provides an inviting (but less deliberative) alternative than industry-wide rulemaking or formal adjudications, a cessation of that practice would encourage the FCC to rely on such procedures to address industry-wide issues like the instant messaging interoperability issue addressed in the AOL/Time Warner merger.

In insisting on a high level of deference to the antitrust authorities, I do believe that the FCC can provide some added value in merger review. In particular, not only do I see the agency as crucial in evaluating the wisdom of conduct remedies, I also believe that it should be able to evaluate competition policy harms related to the merger and to suggest solutions. As a prerequisite to imposing any conditions on a merger, however, the FCC should be required to justify them as truly necessary to address a competitive concern raised by the merger—as opposed to resolving an industry-wide question. Moreover, before any FCC-proposed solutions could go into effect, they would be subject to a veto by the antitrust agency charged with reviewing the merger. Finally, these remedies—whether termed voluntary or not—should be subject to judicial review to ensure that they are truly necessary to address a competitive issue raised by the merger and to ensure consistency in the use of regulatory merger remedies.

V. CONCLUSION

The current U.S. system for reviewing mergers in the telecommunications industry and imposing appropriate remedies reflects a series of independent decisions and unintended consequences. For a system not designed in a careful and coherent manner, the U.S. model of merger remedies—despite its high degree of informality, periodic inconsistency, and questionable allocation of authority—works reasonably well. Nonetheless, this second-best model is structurally flawed and in need of reform. To date, no opportunity or notable failure has driven a systematic reform of the system and addressed the concerns outlined herein. Consequently, this area is ripe for reform and deserves serious reexamination.