GCR

Economic Analysis of Merger Remedies

Martha Samuelson, Ishita Rajani and Alex Robinson
Analysis Group
08 November 2021

Introduction

When a US antitrust agency (i.e., the Federal Trade Commission (FTC) or the Department of Justice (DOJ) Antitrust Division) challenges a proposed merger, there are a number of possible outcomes. The parties may abandon the transaction, the agency may enter into a settlement with the parties,[2] the courts may rule in favour of the agency and block the proposed transaction, or the courts may rule in favour of the parties and allow the transaction to proceed.[3] A settlement between an agency and the merging parties – the second outcome – typically includes remedies that modify the proposed transaction.[4] These remedies can be structural, behavioural or both.[5] Structural remedies address changes in the structure of the relevant markets as a result of the merger (e.g., consolidation from three to two market participants) and generally require the merging firms to divest certain assets. Behavioural or conduct remedies address potential changes in the conduct of the merging firms after the merger (e.g., raising rivals' cost) and may involve monitoring the merged firm's behaviour. Although structural remedies have always been more common than behavioural remedies, the prevalence of structural remedies has increased during the past two decades. Of the mergers with publicly disclosed remedies between 1999 and 2003, approximately 75 per cent of those remedies were structural and 25 per cent were behavioural. This gap between the use of structural and behavioural remedies has since widened: between 2013 and 2017, approximately 85 per cent of remedies were structural and only 15 per cent were behavioural.[6]

When choosing an appropriate remedy to address concerns about a merger's potential to reduce competition, the agencies have two primary objectives: to preserve pre-merger competition with as much certainty as possible and to preserve the merger's efficiency-enhancing potential.[7] Conversely, the agencies try to avoid remedies that are unnecessary for preserving competition or that 'unjustifiably restrict companies' ability to compete and raise costs to consumers'.[8] The agencies consider several economic questions when evaluating a potential remedy: the effect of a merger on competition in a relevant market, the viability of monitoring and enforcing the remedy, the strength of the efficiency justifications for the merger and the trade-offs between these factors.[9]

The most important consideration in the design of a merger remedy is that it must restore competition to the pre-merger level.[10] When assessing potential harms to competition, the agencies typically seek answers to the following questions:[11]

- What are the relevant product and geographical markets?
- Would the merged entity be able to profitably raise prices or lower quality?
- Would the merged entity in a vertical merger have incentives to foreclose competitors' access to any of the merged entity's products?

The processes by which the DOJ or FTC enters into a settlement with merging parties differ statutorily. Settlements with the DOJ are subject to review under the Antitrust Procedures and Penalties Act (known as the Tunney Act), which stipulates that a US district court must review and approve any consent decree the DOJ issues.[12] Since the passage of the Act in 1974, most 'Tunney proceedings' have been procedural, with judges accepting proposed settlements without detailed review.[13] A 2004 amendment, however, encouraged increased judicial scrutiny of proposed settlements,[14] and in 2019, CVS/Aetna was the first merger to go through an evidentiary proceeding in a Tunney Act review.[15] By contrast, the FTC is not subject to a court approval requirement and instead issues consent decrees after reaching settlements with merging parties and seeking public comments.[16]

In the following sections, we review the key economic issues the agencies consider when analysing the competitive effects of horizontal and vertical mergers, discuss recent developments in the economic analysis of merger remedies and offer case examples that illustrate these issues and developments.

Horizontal mergers

A key economic issue in analysing the competitive effect of a horizontal merger is the potential loss of head-to-head competition between the merging firms.[17] Prior to a merger, the merging firms may compete with one another and with other competitors on price, quality and innovation. Post-merger, the merging firms would internalise the effects of any strategic decisions on the overall profits of the merged entity rather than their individual profits, which may change their incentives. Any changes in the merging firms' incentives may lead to higher prices, lower output, lower quality or less innovation by the merging firms. Changes in the merging firms' incentives may also lead to strategic actions by the merged firms' competitors as they respond to the changed landscape of the industry.

When the agencies determine that a horizontal merger is likely to cause harm to competition that would not be offset by countervailing factors such as merger-specific efficiencies (e.g., lower operating costs owing to economies of scale), entry or expansion, they may propose a remedy to preserve competition in one or more relevant markets. For horizontal mergers, the agencies typically require a divestiture – the sale of businesses or assets by the merging firms. A divestiture can preserve competition by maintaining the same number of competitors who have similar incentives and abilities to compete pre-merger and post-merger. At the same time, the merging firms can realise efficiencies and proceed with the merger in relevant markets without competition concerns.

Example 1: Dairy Farmers of America (DFA)/Dean Foods

The DFA/Dean Foods acquisition is a recent example of the DOJ requiring the divestiture of assets in specific geographical markets while allowing the efficiencies of the acquisition to be realised in other geographical markets. DFA, a cooperative of dairy farmers, was awarded the winning bid for 44 fluid milk processing facilities owned by Dean Foods after Dean Foods filed for bankruptcy and auctioned off its assets.[18] On the one hand, DFA's acquisition of Dean Foods' facilities would ensure that many dairy farmers would continue to have outlets to sell their raw milk, given the vertical supply relationship between dairy farmers and processing facilities. On the other hand, the DOJ was concerned that the acquisition would harm competition in certain geographical markets by reducing the number of head-to-head competitors. The DOJ noted that because high transportation costs make it impossible to source milk from more distant producers, the geographical markets for fluid milk are localised.[19] The agency identified (1) north-eastern Illinois and Wisconsin and (2) New England as relevant markets where DFA's acquisitions would leave just two competitors and substantially reduce competition.[20] DFA agreed to divest three at-issue fluid milk processing facilities located in these regions, and the acquisition was consummated

The agencies consider three primary economic issues when designing a remedy for a horizontal merger: (1) whether a structural remedy is sufficient, or whether additional remedies are necessary to ensure the success of the divestiture; (2) in the case of a structural remedy, which assets should be divested; and (3) whether the firm buying the divested assets will be able to compete effectively. We discuss recent developments on these three issues in the rest of this section.

Emphasis on structural remedies

Although the agencies have always preferred structural remedies over behavioural remedies for horizontal mergers, the DOJ strongly emphasised its preference for structural remedies in its 2020 Merger Remedies Manual, stating that '[s]tructural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market'.[21] The DOJ prefers structural remedies over behavioural remedies in part because the latter attempt to restrict the merged firm's behaviour in ways that constrain its ability to maximise profits. Behavioural remedies may also be incomplete – it is difficult to account for all potential post-merger behaviours in an agreement. Additionally, if restrictions are imposed on the merged firm's behaviour for a long period, they may prevent the firm from efficiently responding to changes in market conditions.

However, the DOJ also noted that '[t]ailored conduct relief may be useful in certain circumstances to facilitate effective structural relief'.[22] For example, if a buyer is unable to start manufacturing a product or providing a service immediately after acquiring the divested assets (e.g., because negotiating contracts or acquiring licences can take time), then behavioural remedies imposed on the merging parties, such as short-term supply agreements, may help the new buyer start to compete in the relevant market immediately. In certain circumstances, the buyer may also be subject to certain terms under the consent decree to ensure the success of the divestiture.[23] Imposing terms on divestiture buyers may help assuage concerns that behavioural remedies could reduce the buyer's incentive to develop the capabilities necessary to compete independently – for example, by relying on supply agreements with the merged firm instead of developing its own manufacturing infrastructure.

Example 2: Sprint/T-Mobile

The 2019 Sprint/T-Mobile merger is a recent example of a merger that involved (1) both structural and behavioural remedies (the DOJ emphasised that the behavioural remedies were meant to facilitate the divestiture) and (2) commitments from the buyer to ensure that it would compete with other wireless mobile providers. Prior to the DOJ's complaint, Sprint and T-Mobile made several commitments to the Federal Communications Commission (FCC) to facilitate the merger, including (1) divestiture of Boost Mobile (Sprint's prepaid mobile brand), (2) a freeze on prices for three years and (3) the deployment of 5G and in-home broadband in rural areas.[24] The DOJ's proposed final judgment took into account the parties' FCC proposal and included a multifaceted set of incentives and penalties, including both structural remedies (e.g., divestiture of Sprint's prepaid business and other assets to DISH Network Corporation (DISH)) and behavioural remedies (e.g., requiring the merged firm to provide DISH access to cell sites, retail locations and T-Mobile's network for seven years, and to provide transition services to DISH for up to two years).[25] The proposed final judgment also required the parties to comply with their commitments to the FCC to build out their network and for DISH to comply with its commitment to the FCC to deploy a nationwide 5G network by June 2023.[26]

There was extensive discussion of the economic issues underlying this merger in the public comments submitted during the Tunney Act proceedings, including (1) DISH's incentives and ability to compete in the mobile wireless market, and (2) the enforceability of several behavioural remedies proposed by the DOJ.[27] Regarding DISH's incentives and ability to compete, several commentators questioned DISH's viability as a buyer, noting that DISH had acquired spectrum for a number of years prior to the merger but had not deployed a network on that spectrum. The DOJ argued that DISH had been waiting to develop a 5G network instead of a 4G network, and that it was more likely to compete successfully with other mobile wireless providers after the acquisition of the divested assets. Regarding the enforceability of proposed behavioural remedies, commentators argued that the behavioural remedies included in the merger were difficult to monitor and would reduce DISH's incentives to compete independently because it could just rely on T-Mobile's networks. The DOJ argued that the divestiture was at the heart of the proposed remedy, and that the proposed behavioural remedies were meant to complement this divestiture in the short term.[28]

Identifying a firm to buy divested assets

When approving a buyer for divested assets, the agencies' primary goal is to determine whether the potential buyer has the incentives, capabilities and resources to replace the competition that otherwise would be lost as a result of the merger. In addition, the potential buyer's acquisition of the divested assets must not itself create a competitive concern – for example, divesting assets to the dominant player in an industry may not preserve pre-merger competition.

Example 3: CVS/Aetna

CVS's acquisition of Aetna, which was finalised in September 2019, illustrates some economic issues considered during the merger review process to assess the viability of a divestiture buyer. CVS, which offers retail pharmacy services, pharmacy benefit management (PBM) services and prescription drug plans (PDPs), and Aetna, a health insurance company, competed for individual Medicare Part D PDPs prior to their merger.[29] The DOJ alleged that CVS's acquisition of Aetna would significantly reduce competition in the PDP market in 16 specific geographical regions,[30] and that it would potentially result in increased premiums and costs paid by Medicare beneficiaries, higher subsidies paid by the US federal government, a lessening of service quality and a reduction in innovative product features.[31] To alleviate the concerns with the proposed merger, the DOJ filed a proposed consent decree requiring the parties to divest Aetna's entire PDP business to an independently owned competitor, WellCare.[32] The DOJ argued that this divestiture, with the proposed conduct remedies, would provide WellCare with the incentives and resources necessary to compete 'vigorously' in the 16 geographical areas of concern where Aetna previously operated.[33]

The DOJ received more than 1,800 pages of public comments on its proposed consent decree, and the merger became the first case to go through an evidentiary proceeding in a Tunney Act Review.[34] The viability of WellCare as a buyer was a widely discussed topic, both in the public comments and during the evidentiary proceedings. Commentators questioned WellCare's ability and incentives to compete with the merged firm in the PDP market when WellCare relied on CVS in adjacent markets, including the market for PBM services.[35] Commentators also argued that CVS's ability to restrict WellCare's access to PBM and other pharmacy services could threaten the divestiture and weaken competition in the PDP market. CVS and the DOJ argued that the PDP market was already highly competitive, and that the recent success of WellCare as a competitor in the PDP market – as demonstrated by growth in its customer base – suggested that WellCare would continue to remain competitive post-merger after acquiring Aetna's assets.[36] CVS also argued that it faced intense competition for the retention of PBM customers, and that PBM customers possessed multiple tools to ensure they received a fair market offer for their PBM services.[37] The court agreed that if faced with a potential price increase for PBM services, WellCare 'could simply switch to a less expensive PBM or stop contracting for those PBM services altogether', and the merger was cleared with the proposed divestiture.[38]

The merging firms may identify and propose different types of buyers for the assets to be divested, including strategic buyers (i.e., buyers that already operate in the industry in question), private equity (PE) buyers (i.e., buyers funded by PE or other investment firms) and others. Different types of buyers present different risks and benefits, and the agencies have to assess the viability of a proposed buyer based on its specific characteristics. For example, the agencies may only consider strategic buyers for a divestiture of assets that comprise less than a stand-alone business because the buyer may need to own complementary assets to be able to compete effectively in that situation.[39]

The DOJ expressed its greater openness to PE buyers in its 2020 Merger Remedies Manual, explicitly stating that 'in some cases a private equity purchaser may be preferred'.[40] PE buyers possess some characteristics that can make them attractive in certain cases. For example, the DOJ highlighted that a PE buyer may possess greater flexibility in its investment strategy, as well as the resources and willingness to make larger investments when necessary; the FTC's retrospective study of its merger orders from 2006 to 2012 also found that a buyer's financial flexibility can be an important factor in determining a divestiture's success.[41] However, the agencies have also noted that other characteristics of PE buyers may reduce their attractiveness as buyers. PE buyers may be more likely than strategic buyers to exit or sell the divested assets after a short period, creating additional uncertainty about the likely success of the divestiture.[42] For example, Sycamore Partners, a PE firm, purchased 330 discount retail stores that were divested during the Dollar Tree/Family Dollar merger,[43] but Sycamore sold the stores to rival discount retail chain Dollar General and laid off approximately 3,000 employees within 18 months of acquiring the stores.[44]

Development of new remedies to address new types of assets

As antitrust agencies encounter mergers involving new industries and new competitive dynamics, both economic considerations for assessing competition and potential remedies evolve over time. For example, data can be a significant asset in the mergers of digital companies, and antitrust authorities have begun to design remedies that are intended to prevent the merged firm from using its combined data to foreclose competition. In a recent decision, and for the first time, the European Commission (EC) accepted a 'data silo' remedy to address concerns about Google combining its data with Fitbit's to further personalise ads and stifle competition in online advertising.[45] To address the EC's concern, Google offered to not use Fitbit data for Google Ads, instead storing the data collected using Fitbit devices in a '"data silo" . . . separate from any other Google data that is used for advertising'.[46] In June 2021, EC executive vice president Margrethe Vestager discussed the potential for such remedies to become more common as data become increasingly important in merger cases involving digital platforms. She also stated that, with reliable technology, a data silo can in fact be more like a structural remedy than a behavioural remedy.[47] This type of remedy may gain broader attention in the United States following a July 2021 Executive Order that, among other things, encourages antitrust agencies to pay particular attention to data accumulation during merger reviews.[48]

Vertical mergers

Although vertical mergers have accounted for only 5 per cent of the US antitrust agencies' enforcement actions in the past 25 years, a few recent cases have drawn significant public attention.[49] In addition, the release of the DOJ's and FTC's updated 2020 Vertical Merger Guidelines may signal the agencies' increased scrutiny of vertical mergers.[50]

The economic analysis of vertical mergers is often more complex than that of horizontal mergers. Unlike horizontal mergers, which involve firms at the same level of the supply chain, vertical mergers involve firms at different levels of the supply chain that are not direct competitors. A merger of such firms may lead to pro-competitive efficiencies by (1) allowing the firms to combine complementary assets and (2) eliminating double marginalisation, thereby lowering costs for the vertically integrated firm and potentially leading to lower prices and other benefits for consumers. However, a vertical merger may also change the merging firms' incentives in ways that could lead to competitive harm.

As articulated in the 2020 Vertical Merger Guidelines, the agencies are concerned about at least four categories of potential anticompetitive harm arising from a vertical merger: (1) foreclosure of rival firms from inputs or other complementary products; (2) increased costs to rival firms for such products; (3) harm resulting from the merged firm having access to competitively sensitive information about rival firms; and (4) increased likelihood of coordinated actions (e.g., tacit collusion).[51] The first two categories of potential harm – foreclosure and raising rivals' costs – arise from changes in incentives as the merged firm internalises costs and benefits to the combined entity instead of the individual firms.[52] The third category arises from the combination of firms at different levels of the supply chain, where a firm at one level may have competitively sensitive information about rival firms at another level owing to pre-merger supplier or customer relationships.[53] Finally, an increased likelihood of coordinated actions may occur as a consequence of the merged firm having access to competitively sensitive information, or because of the elimination or weakening of a rival firm.[54]

The varied categories of potential harm and efficiencies that can arise from vertical integration may lead to different considerations for remedies in vertical mergers in comparison to horizontal mergers, and across different vertical mergers. Similarly, each vertical merger may present unique challenges for the analysis and monitoring of proposed remedies. In light of the agencies' increased scrutiny of vertical mergers in recent years, we discuss two current developments in the realm of remedies for vertical mergers: (1) discussion of the use of structural versus behavioural remedies, and the trade-offs between these different types of remedies; and (2) merging parties' reliance on prior mergers in their economic analyses and proposed remedies.

Discussion of structural versus behavioural remedies

During the past few years, the DOJ and FTC have each expressed a preference for structural remedies over behavioural remedies for both horizontal and vertical mergers. As noted above, the DOJ explicitly noted its preference for structural remedies for vertical mergers in its 2020 Merger Remedies Manual.[55] In remarks made at the FTC in 2018 about vertical merger enforcement, the FTC's director of the Bureau of Competition, Bruce Hoffman, also noted that the agency prefers structural remedies, explaining that they 'eliminate both the incentive and the ability to engage in harmful conduct, which eliminates the need for ongoing intervention'.[56]

However, the agencies have also recognised that in some vertical mergers, a behavioural remedy may be preferred over a structural remedy if it enables the pro-competitive efficiencies from the merger to be realised when a structural remedy would not.[57] For example, a behavioural remedy such as a supply or licensing agreement – which requires the merged firm to sell or license products or technologies to downstream competitors at a given price for a given period – may address concerns about foreclosure while allowing consumers to benefit from efficiencies such as the elimination of double marginalisation. In contrast, a structural remedy such as a divestiture may eliminate concerns about foreclosure but also preclude pro-competitive efficiencies.

If effectively crafted and monitored, behavioural remedies can counter the merged firm's incentives to disadvantage competitors while allowing the merged firm (and customers) to realise the efficiencies of the vertical integration. The FTC's 2017 retrospective study of merger remedies found that all four vertical mergers challenged by the FTC between 2006 and 2012 involved settlements with behavioural remedies only, and that those remedies were successful in maintaining competition at pre-merger levels.[58] Nevertheless, there remains some inherent tension in the economic justifications for behavioural remedies in vertical mergers and the viability of their enforcement. On the one hand, a behavioural remedy such as a supply agreement may have some appeal as a means of targeting concerns about foreclosure and raising rivals' costs. On the other hand, such a remedy restricts only the merged firm's ability to engage in anticompetitive behaviour without changing its incentive to do so, necessitating continuing monitoring. This tension has manifested in recent vertical merger court challenges in the United States.

Example 4: Illumina/Grail

The FTC challenged Illumina's proposed acquisition of Grail in 2021. Grail produces early detection liquid biopsy tests that can screen for multiple types of cancer at early stages (multi-cancer early detection (MCED) tests).

Grail's technology relies on DNA sequencing and, according to the FTC's complaint, Illumina is the only viable provider of DNA sequencing for MCED tests in the United States.[59] To allay concerns about Illumina either foreclosing Grail's competitors from – or raising their costs for – accessing its technology, Illumina publicly offered its US oncology customers a 12-year supply contract guaranteeing access to Illumina's technologies, as well as no increase in prices for the sequencing products covered by the agreement.[60], [61] The FTC nevertheless filed an administrative complaint to block the transaction, in which it expressed concerns about the limitations of any supply agreements: 'Any existing or potential supply agreements between Illumina and third-party MCED tests cannot offset the likely anticompetitive effects of this Acquisition because these agreements cannot account for each and every current and future method by which Illumina may foreclose, raise the costs of, or otherwise disadvantage Grail's rivals'.[62]

Although the proceedings in Illumina/Grail are ongoing at the time of writing, the case illustrates both (1) the incentive that merging parties have to propose remedies and resolve the agencies' competitive concerns to avoid a complaint and further proceedings and (2) the agencies' renewed caution with respect to behavioural remedies in vertical mergers, particularly reflecting the need for behavioural remedies to comprehensively address competitive concerns and not require burdensome continuing monitoring for the agencies.[63]

Reliance on prior mergers in remedy design and economic analysis

In the wake of the FTC's retrospective analysis of merger remedies, and given the many potential complexities of vertical mergers and the lack of conclusive evidence in the economic literature about their effects and effective remedies,[64] merging parties have turned to prior mergers as a foundation for designing and proposing remedies, and as natural experiments for economic analysis. The merger of AT&T and Time Warner is one such example, in which the parties proposed a remedy based on a prior merger and the parties' economic expert relied on prior vertical mergers in his economic analysis.

Example 5: AT&T/Time Warner

AT&T's acquisition of Time Warner was the first litigated vertical merger in decades and one of the largest mergers in US history.[65] AT&T was the largest distributor of traditional TV subscriptions in the United States and Time Warner was the owner of numerous prominent US television networks.[66] The DOJ was concerned that the transaction would create an incentive for AT&T to charge rival distributors higher prices for Time Warner's networks. To alleviate this concern, the parties committed to abide by an arbitration process modelled after a remedy resulting from the DOJ's challenge of the NBC Universal/Comcast merger in 2011.[67] The arbitration process would give rival downstream distributors recourse if negotiations for the merged firm's upstream content broke down.[68] During the trial, the DOJ's economic expert argued that the transaction would increase the merged firm's bargaining leverage with rival downstream distributors, while the parties' economic expert argued that after accounting for the proposed remedy, efficiency gains from the merger would outweigh any competitive harm.[69] The parties' economic expert also argued that prior similar vertical mergers between content creators and content distributors provided no evidence of higher prices.[70] The judge ultimately ruled in favour of the parties, primarily on the grounds that real-world evidence suggested a low probability of foreclosure.[71]

Designing and proposing remedies based on prior successful mergers may have appeal, especially when the circumstances of the industry are comparable to the merger at issue. However, as antitrust scrutiny of vertical mergers continues, there is no guarantee that remedies used in the past will be viewed as acceptable means of alleviating competitive concerns for mergers in the future, particularly as industries evolve and new issues arise. Rapid changes in the media industry serve as illustrative examples of how quickly business models can change, especially in the technology sector. In May 2021, only three years after its merger with Time Warner, AT&T

announced a deal to sell its content unit, Warner Media (formerly Time Warner), to content provider Discovery, attributing the change in focus to (1) a shift in the media industry away from paid television to streaming services and (2) a need to invest in spectrum and fibre for AT&T's core communications business.[72] Rapid changes such as this highlight a need for merger remedies to be able to withstand or adapt to changing industry conditions – which could pose a particular challenge for behavioural remedies by requiring increased monitoring of the merged firm and requiring that the remedies be designed in a way that accounts for changes in the industry.[73] Changing industry landscapes also highlight the need for economists and antitrust practitioners to continue to analyse and learn from past vertical mergers while also developing tools that can be applied broadly to different circumstances that may arise in the future.[74]

Conclusion

In this chapter, we have reviewed the economic foundations for different types of merger remedies and discussed examples of recent developments and cases illustrating the application of these principles. As antitrust enforcement continues to evolve, the economic analysis of mergers and their remedies are likely to evolve in parallel, with particular attention to growing sectors such as technology, issues with data accumulation and vertical mergers.

Looking ahead, President Biden's July 2021 Executive Order on Promoting Competition in the American Economy signals greater antitrust scrutiny, which may contribute to continued evolution in the design, proposal and analysis of remedies by merging parties, enforcement agencies and practitioners. For example, the Order encouraged the US antitrust agencies to consider whether the horizontal and vertical merger guidelines needed to be revised to address consolidation in several markets;[75] and immediately after the president's order, FTC chair, Lina Khan, and the Antitrust Division's acting assistant attorney general, Richard Powers, announced that they would initiate a review of the agencies' joint merger guidelines, updating them to reflect 'a rigorous analytical approach'.[76] Any revisions to the agencies' merger guidelines may affect the design and analysis of merger remedies as well.

Notes

[1] Martha Samuelson is the CEO and chairman and Ishita Rajani and Alex Robinson are managers at Analysis Group, Inc. The authors would like to thank Victoria Hopcroft, Isaiah West and Sam Yu for their contributions to this chapter.

[2] A negotiated settlement between the US Federal Trade Commission [FTC] and the merging parties before the FTC files an administrative complaint is known as a 'consent order'. A negotiated settlement between the US Department of Justice [DOJ] Antitrust Division and the merging parties is filed to a US district court as 'a complaint with proposed settlement'. An agency and the merging parties may also reach an agreement during trial.

[3] See, e.g., Joseph J Simons and Makan Delrahim, 'Hart-Scott-Rodino Annual Report – Fiscal Year 2019', FTC, Bureau of Competition and DOJ, Antitrust Division 2019, available at **https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf**; 'U.S. District Court Blocks Aetna's Acquisition of Humana', DOJ, 23 January 2017, available at **https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana**.

[4] Merger Remedies Manual, DOJ Antitrust Division, September 2020 [DOJ Merger Remedies Manual], available at **https://www.justice.gov/atr/page/file/1312416/download**, p. 1.

5 Peter Mucchetti, et al., 'Merger Control in the United States: Overview', Thomson Reuters (December 2020), available at **https://uk.practicallaw.thomsonreuters.com/5-501-2849**.

6 Internal database maintained by Analysis Group, Inc.

7 David A Balto and Richard G Parker, 'The Evolving Approach to Merger Remedies', FTC (1 May 2020), available at **https://www.ftc.gov/es/public-statements/2000/05/evolving-approach-merger-remedies**. See also DOJ Merger Remedies Manual, pp. 1–5.

8 DOJ Merger Remedies Manual, p. 1.

9 id., p. 2.

10 id., p. 3.

11 See, e.g., 'Economic Analysis in Merger Investigations – Contribution from the United States', Organisation for Economic Co-operation and Development (2 December 2020), available at **https://www.justice.gov/atr/page/file/1345091/download**; Horizontal Merger Guidelines, DOJ and FTC (19 August 2010) [HMG], available at **https://www.justice.gov/atr/horizontal-merger-guidelines-08192010**; Vertical Merger Guidelines, DOJ and FTC (30 June 2020) [VMG], available at **https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf**.

12 Thomas J Rosch, 'Consent Decrees: Is the Public Getting Its Money's Worth?', FTC (7 April 2011), available at **https://www.ftc.gov/sites/default/files/documents/public_statements/consent-decrees-public-getting-its-moneys-worth/110407roschconsentdecrees.pdf**.

13 Joseph G Krauss, David J Saylor and Logan M Breed, 'The Tunney Act: A House Still Standing', The Antitrust Source (June 2007), available at **https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/tunneyact_pdf.pdf**.

14 15 USC §§ 16(e)(1)(A) & (B).

15 In *United States and Plaintiff States v. CVS Health Corporation and Aetna, Inc.*, civil case No. 18-2340 (RJL), Memorandum Opinion (4 September 2019), pp. 13–14. See also Bryan Koenig, 'The $69 Billion Questions From The CVS-Aetna Judge', *Law360* (6 June 2019), available at **https://www.law360.com/articles/1166632/the-69-billion-questions-from-the-cvs-aetna-judge**; Michael A Gleason, et al., 'It Ain't Over till It's Over: Review of DOJ M&A Settlements under the Tunney Act', *The M&A Lawyer*, Vol. 23, No. 9 (October 2019).

16 Thomas J Rosch, op. cit. (footnote 12, above); 'Public Comments', FTC, available at **https://www.ftc.gov/policy/public-comments**.

17 Loss of head-to-head competition is central to the analysis of unilateral effects in a differentiated product market. Other economic issues may arise in analysing coordinated effects or in a homogeneous product market in which firms compete in quantities. See HMG, §§ 6–7.

18 In *United States and Plaintiff States v. Dairy Farmers of America, Inc. and Dean Foods Company*, case No. 20-2658, Complaint (1 May 2020) [DFA-Dean Foods Complaint], ¶¶ 7–8.

19 DFA-Dean Foods Complaint, ¶ 17.

20 id., pp. 1–2. See also 'Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy', DOJ (1 May 2020), available at **https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa**.

21 DOJ Merger Remedies Manual, p. 13.

22 id., p. 14.

23 id., p. 32.

24 Overview of *ex parte* presentation, *Sprint Corporation* (20 May 2019), available at **https://www.sec.gov/Archives/edgar/data/101830/000119312519151128/d738710d425.htm**.

25 *United States of America, et al, v. Deutsche Telekom AG, et al*, Proposed Final Judgment, Case 1:19-cv-02232 (26 July 2019).

26 id.

27 *United States of America, et al, v. Deutsche Telekom AG, et al*, Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, Case 1:19-cv-02232 (6 November 2019).

28 id.

29 *United States and Plaintiff States v. CVS Health Corporation and Aetna, Inc.*, civil case No. 18-2340 (RJL), Complaint (4 September 2019 [CVS-Aetna Complaint], ¶¶ 15–16, 23–26; *United States and Plaintiff States v. CVS Health Corporation and Aetna, Inc.*, civil case No. 18-2340 (RJL), Memorandum Opinion (4 September 2019) [CVS-Aetna Opinion], pp. 2–3.

30 CVS-Aetna Complaint, ¶ 29.

31 id., ¶¶ 1, 36 and 40.

32 The proposed divestment to WellCare included five major components: (1) Aetna's individual Medicare and Medicaid prescription drug plan [PDP] contracts; (2) all data relating to Aetna's individual PDP business; (3) the opportunity for WellCare to hire current Aetna employees with relevant PDP expertise; (4) the option to enter into an agreement wherein CVS would provide services required to manage the divested assets until the end of 2019; and (5) permission for WellCare to use the Aetna brand for such assets until 2019. See CVS-Aetna Opinion, p. 4.

33 'Questions and Answers for the General Public', DOJ, available at **https://www.justice.gov/opa/press-release/file/1099806/download**, pp. 3–4. See also CVS-Aetna Opinion, pp. 15–16.

34 Bryan Koenig, 'CVS-Aetna Merger Cleared After Unprecedented Court Battle', *Law360* (4 September 2019), available at **https://www.law360.com/articles/1189727/cvs-aetna-merger-cleared-after-unprecedented-court-battle**. See also CVS-Aetna Opinion, p. 6.

35 CVS-Aetna Opinion, pp. 13–14.

36 id., p. 15.

37 id., p. 18.

38 id., pp. 18–19, 21.

39 'The FTC's Merger Remedies 2006-2012', FTC (January 2017) [FTC's Merger Remedies 2006–2012], p. 23. available at **https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf**.

40 DOJ Merger Remedies Manual, p. 24.

41 FTC's Merger Remedies 2006–2012, op. cit. (footnote 39, above), p. 24.

42 See, e.g., 'Statement of Commissioner Rohit Chopra in the Matter of Linde AG, Praxair, Inc., and Linde PLC', FTC (22 October 2018), available at **https://www.ftc.gov/public-statements/2018/10/statement-commissioner-chopra-matter-linde-ag-praxair-inc-linde-plc**.

43 *In the Matter of Dollar Tree, Inc., and Family Dollar Stores, Inc.*, Decision and Order, FTC, Docket No. C-4530 (17 September 2015), available at **https://www.ftc.gov/system/files/documents/cases/150702dollartreedo.pdf**.

44 *In the Matter of Dollar Tree, Inc., and Family Dollar Stores, Inc.*, Application for Approval of Proposed Sale of Dollar Express Assets and Request for Expedited Treatment, FTC, Docket No. C-4530 (30 March 2017), available at **https://www.ftc.gov/system/files/documents/cases/dollar_store_-_public_-_20170330_dollar_express_application_for_approval_final3.pdf**. See also, Lisa Fickenscher, 'Dollar Tree accused of squashing spinoff', *New York Post* (2 June 2017), available at **https://nypost.com/2017/06/02/its-the-battle-of-the-dollar-stores-in-new-lawsuit/**.

45 'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions', European Commission (17 December 2020), available at **https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2484**.

46 id.

47 'Defending competition in a digital age', European Commission (24 June 2021), available at **https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defending-competition-digital-age_en**.

48 'FACT SHEET: Executive Order on Promoting Competition in the American Economy', The White House (9 July 2021), available at **https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/**.

49 Craig Waldman and Michael A Gleason, 'A Dealmaker's Guide to the Final DOJ/FTC Vertical Merger Guidelines', *The M&A Lawyer*, Vol. 24, No. 7 (July/August 2020), p. 10, available at **https://www.jonesday.com/en/insights/2020/08/a-dealmakers-guide-to-the-final-doj-ftc-vertical-merger**.

50 VMG. See also Rebecca K Slaughter, 'Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power', FTC (18 March 2021) [FTC Reviving Competition], p. 6, available at **https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf** ('Another area in which we can build to more effective enforcement is vertical mergers. To date, vertical mergers analysis has been too reliant on assumed procompetitive benefits.

Furthermore, even where competitive concerns are identified, they have nearly always been remedied by behavioral consent decrees. I do not believe this approach to vertical enforcement is adequately capturing the competitive consequences of these transactions'.).

51 The guidelines and recent commentary emphasise that the specific types of unilateral and coordinated effects discussed in the VMG are not exhaustive. See VMG, §§ 4–5; FTC Reviving Competition, p. 6 ('A good starting point to build more effective vertical enforcement would be to reconsider the vertical guidelines issued last year; though the guidelines reasonably reflect past agency practice, they overly emphasize the benefits of vertical mergers, and fail to address a number of important competitive concerns').

52 VMG, § 4.a.

53 id., § 4.b.

54 id., § 5.

55 DOJ Merger Remedies Manual, p. 13.

56 Bruce D Hoffman, 'Vertical Merger Enforcement at the FTC', FTC (10 January 2018), available at **https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf**.

57 DOJ Merger Remedies Manual, pp. 13–17; Bruce D Hoffman, 'Vertical Merger Enforcement at the FTC', op. cit. (footnote 56, above), p. 8 ('But in some cases we believe that a behavioural or conduct remedy can prevent competitive harm while allowing the benefits of integration. For example, in our experience, and as the cases I discussed above suggest, firewalls can prevent information sharing, and nondiscrimination clauses can eliminate incentives to disfavor rivals. The Commission's recent Remedy Study included four orders related to vertical mergers, and each one succeeded in maintaining competition at pre-merger levels [footnote omitted]. This is a small sample, but it does suggest that we can, and we do, and we have fashioned conduct remedies in vertical mergers that curtail opportunities and incentives for anticompetitive behavior.').

58 FTC's Merger Remedies 2006–2012, pp. 7–8, 17. See also Bruce D Hoffman, 'Vertical Merger Enforcement at the FTC', op. cit. (footnote 56, above).

59 'Illumina, Inc., and GRAIL, Inc., In the Matter of', FTC, 27 April 2021, available at **https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter**.

60 In May 2021, after the European Commission embarked on its investigation of the merger in April 2021, the FTC sought to have the US district court complaint dismissed to preserve FTC and judicial resources and instead focus on its in-house trial before an administrative law judge. See Christopher Cole, 'FTC's Illumina-Grail Court Case Dropped Despite Cos.' Protest', *Law360* (1 June 2021), available at **https://www.law360.com/articles/1389876**; 'Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case', FTC (20 May 2021), available at **https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth**. See also 'Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition', Illumina (29 April 2021), available at **https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=e2c75c6a-6cbe-4e45-b8a6-6d90d40c253e**.

61 'Oncology contract terms', Illumina, available at **https://www.illumina.com/areas-of-interest/cancer/test-terms.html?SCID=2021-270ECL5522**. See also 'Letter and Exhibit A – Supply Agreement', Illumina (29 March 2021), **https://www.illumina.com/content/dam/illumina-marketing/documents/applications/cancer/illumina-open-offer.pdf**.

62 *In the Matter of Illumina, Inc. and GRAIL, Inc*., Complaint, Docket No. 9401 (30 March 2021), ¶ 70. See also 'Illumina/Grail – FTC's First Vertical Merger Challenge in Decades', Crowell & Moring LLP, available at **https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Illumina-Grail-FTCs-First-Vertical-Merger-Challenge-in-Decades**.

63 The recent dispute between T-Mobile and DISH regarding T-Mobile's plan to shut down its CDMA services, which many DISH customers use, and DISH's request for the DOJ's assistance to resolve this dispute provides an example of the types of continued monitoring and enforcement of behavioural remedies that may be performed by the agencies. See 'Form 10-Q', DISH Network Corporation, Exhibit 99.1, available at **https://dish.gcs-web.com/static-files/d0097e8d-56b9-486a-bc0a-1190e7141481**.

64 Marissa Beck and Fiona M Scott Morton, 'Evaluating the Evidence on Vertical Mergers', *SSRN* (31 December 2020), available at **https://ssrn.com/abstract=3554073**. See also Margaret E Slade, 'Vertical Mergers: A Survey of Ex Post Evidence and Ex Ante Evaluation Methods', *Review of Industrial Organization*, Vol. 58, 2021, pp. 493–511; Bruce D Hoffman, 'Vertical Merger Enforcement at the FTC', op. cit. (footnote 56, above).

65 'Is the AT&T-Time Warner Decision a Blow Against Antitrust?', Knowledge@Wharton (19 June 2018), available at **https://knowledge.wharton.upenn.edu/article/impact-att-time-warner-decision/**.

66 *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc*., Complaint (20 November 2017) [AT&T/Time Warner Complaint], p. 1.

67 Bryan Koenig, 'AT&T-Time Warner Expert Defends Turner Arbitration Offer', *Law360* [16 April 2018), available at **https://www.law360.com/articles/1033679**.

68 AT&T/Time Warner Complaint, p. 11.

69 Charles McConnell, 'AT&T's Expert: Shapiro's Analysis Critically Flawed', *Global Competition Review* (13 April 2018), available at **https://globalcompetitionreview.com/atts-expert-shapiros-analysis-critically-flawed**.

70 id.

71 *United States v. AT&T Inc*., Memorandum Opinion of the US District Court for the District of Columbia (12 June 2018), pp. 109–150, available at **https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2511-146**.

72 Lauren Feiner, 'AT&T battled the DOJ to buy Time Warner, only to spin it out again three years later', CNBC (17 May 2021), available at **https://www.cnbc.com/2021/05/17/**att-fought-doj-for-time-warner-only-to-spin-out-three-years-later.html; Elizabeth Blair, 'AT&T To Spin Off WarnerMedia And Merge It With Discovery', NPR (17 May 2021), available at **https://www.npr.org/2021/05/17/997546087/at-t-to-spin-off-warnermedia-and-merge-it-with-discovery**.

73 Pedro Gonzaga and Gabriella Erdei, 'Vertical Mergers in the Technology, Media and Telecom Sector', Organisation for Economic Co-operation and Development (7 June 2019), available at **https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf**, p. 36.

74 Marissa Beck and Fiona M Scott Morton, 'Evaluating the Evidence on Vertical Mergers' (see footnote 64, above). See also Margaret E Slade, 'Vertical Mergers: A Survey of Ex Post Evidence and Ex Ante Evaluation Methods', *Review of Industrial Organization*, Vol. 58, 2021, pp. 493–511; Bruce D Hoffman, 'Vertical Merger Enforcement at the FTC', op. cit. (footnote 56, above).

75 'Executive Order on Promoting Competition in the American Economy', The White House, 9 July 2021, available at **https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/**.

76 'Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines', FTC, 9 July 2021, available at **https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant**.

Martha Samuelson

Author | CEO and Chairman
martha.samuelson@analysisgroup.com

View full biography

Ishita Rajani

Author | Manager
ishita.rajani@analysisgroup.com

View full biography

Alex Robinson

Author | Manager
alex.robinson@analysisgroup.com

View full biography