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William E. Kovacic

An Antitrust Tribute *Liber Amicorum* - Volume II

Donald I. Baker, Jonathan B. Baker, Caron Beaton-Wells, Margaret Bloom, John DeQ. Briggs, George S. Cary, Andy C.M. Chen, Daniel A. Crane, Elaine Ewing, Eleanor M. Fox, Damien Geradin, Laurie-Anne Grelier, Omar Guerrero Rodríguez, Doris Hildebrand, Merit E. Janow, Joseph Kattan PC, Bruno Lasserre, Robert C. Marshall, Leslie M. Marx, Robert Ian McEwin, Andreas Mundt, Ali Nikpay, Maureen K. Ohlhausen, Julián Peña, Alan Ramírez Casazza, Patrick Rey, Simon Roberts, Jacques Steenbergen, John Terzaken, Thibaud Vergé, Florian Wagner-von Papp, Wouter P.J. Wils, Marc Winerman, Chris Wood, Joshua D. Wright.

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An Antitrust Tribute

Liber Amicorum - Volume II

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Editors' Note

Nicolas Charbit

Elisa Ramundo

Following the success of William E. Kovacic *Liber Amicorum*—Volume I published in 2012, the Institute of Competition Law is proud to release the second volume of this book within the European tradition of *Liber Amicorum*.

In witnessing the constant growth of antitrust regimes around the world and in recognizing the significant role played by William Kovacic in favoring the antitrust dialogue at the international level, this Volume II pays tribute to Professor Kovacic's outstanding career offering a unique combination of theoretical insights and practical knowledge of competition and antitrust law issues worldwide.

In this Volume II, thirty-seven prominent authors signed twenty-seven contributions that tackle some of the most stimulating and current topics in competition policy and antitrust laws.

PART I, entitled "**THE INTERNATIONAL DIMENSION OF COMPETITION POLICY**," includes twelve articles that offer a dynamic overview of international competition policy. Thus, **Jonathan Baker** reviews Kovacic's work on the design of antitrust enforcement institutions analyzing how antitrust norms exhibit continuity over the time; **Doris Hildebrand**, stemming from Kovacic's advocacy for convergence, discusses how the U.S./EU divide can be surpassed by superior norms; **Florian Wagner-von Papp** delineates a comparison between the U.S. antitrust laws and EU competition law pointing out some thoughts on the importance of defining the relationship between antitrust law on the federal (or EU) level and antitrust laws on (Member) state level; **Jacques Steenbergen** offers some reflections on legitimacy, accountability and independence of competition authorities; **Maureen Ohlhausen** discusses the recommendations in the "FTC at 100 Report" for improving agency performance; **John Briggs** and **Donald Baker** suggest a critical revision of the U.S. antitrust policy and administration to join the rest of the world; **Marc Winerman** steps into the past discussing the international issues arising when the FTC first opened its doors and even before; **Bruno Lasserre** highlights successes and challenges of the European Competition Network; **Wouter Wils** gives a retrospective

analysis of the EC Regulation 1/2013, after ten years since its enactment; **Ali Nikpay** tries to assess the OFT's performance by reference to the analytical framework set down by Kovacic on agency effectiveness; **Julian Peña** outlines the role of international cooperation in the development of competition law in Latin America; **Ian McEwin** delves into the existing connection between business, politics and competition law in Southeast Asia.

The fifteen articles of **PART II**, entitled “**COMPLEXITIES OF ANTITRUST RULES AROUND THE WORLD**”, guide readers through some of the intricacies in the application of antitrust rules in different countries around the world. In Part II, **John Terzaken** and **Molly Kelley** analyze the expanding role of behavioral remedies in cartel enforcements; **Damien Geradin** and **Laurie-Anne Grelier** offer some critical considerations on the EU Directive on Antitrust Damages Claims; **Omar Guerrero** and **Alan Ramírez** explore how effective criminal cartel provisions could be to deter cartel behavior; **William Marshall** and **Leslie Marx** discuss compliance with Section 1 of the Sherman Act from an economic perspective; **Caron Beaton Wells**, drawing on the Australian experience, tests effectiveness of a range of leniency policies; **Eleanor Fox** and **Merit Janow**, by examining the Vitamin C cartel case, set forth the main points at which trade and competition ought to meet; **Andy Chen** analyzes impacts and implications arising from the LCD cartel case for the Taiwanese competition policy; **Simon Roberts** reviews the approach of the South African Competition Commission to uncovering collusion in the construction sector and draws out some lessons for establishing new institutions; **Patrick Rey** and **Thibaud Vergé** outline vertical restraints treatment in the EU; **Andreas Mundt** conducts an insightful digression on some forms of vertical restraints vis-à-vis the rapid development of the Internet economy; **Daniel Crane** provides some analytical clarity on the legal rules governing predatory innovations claims; **Joseph Kattan** and **Chris Wood** explain the standard-essential patents and the related problem of hold-up; **Margaret Bloom** discusses convergence and cooperation in international merger control; **Joshua Wright** and **Jan Rybnicek** advocate for a more committed consideration of the evolution of out-of-market efficiencies in the U.S. and around the world; **George Cary** and **Elaine Ewing** consider what can the U.S./EU experience in the merger context tell us about convergence with MOFCOM.

Volume II, with its 27 papers, takes readers around the world providing them with provoking reflections, insightful thoughts, and learning experiences on competition policy and antitrust laws. This is the same world that Bill Kovacic has traveled so much to share knowledge and favor dialogue among different players in the international antitrust arena.

The editors would like to give their sincere thanks to the thirty-seven authors for their hours of labor in dedication to the Volume II of this Liber Amicorum.

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 George S. Cary, Elaine Ewing

Divergence Then and Now: What Does the U.S./EU Experience Tell Us about Convergence with MOFCOM?

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Abstract

While the globalization of antitrust—something for which Chairman Kovacic deserves significant credit—has brought competitive markets to consumers worldwide, it has also given jurisdictions around the world significant influence over the conduct of increasingly global firms. In the merger context, each reviewing jurisdiction essentially has veto power over global conduct, which can be abused to distort competition, potentially in pursuit of protectionist goals.

Recent decisions by China’s MOFCOM highlight these dangers. Acting alone among jurisdictions, MOFCOM has imposed behavioral remedies that depart from international norms and sound economic principles, which, at least in some cases, seem designed to benefit Chinese customers and consumers at the expense of foreign consumers and competitors.

This chapter seeks to put MOFCOM’s divergence from other agencies in context by considering another high profile divergence—the U.S./EU divergence reflected in the *Boeing/McDonnell Douglas* and *GE/Honeywell* decisions. We consider how the divide between MOFCOM and the rest of the world today differs from that earlier split, and also consider what we can learn from that convergence as we pursue convergence with MOFCOM.

* George S. Cary is a partner and Elaine Ewing is an associate at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C. The authors would like to thank Cunzhen Huang and Alexis Lazda for their assistance with this article.

Divergence Then and Now: What Does the U.S./EU Experience Tell Us about Convergence with MOFCOM?

The globalization of antitrust enforcement is a great success story, and one for which Chairman Kovacic deserves much credit. Today, more than one hundred countries have antitrust laws.¹ In the last five years, three major emerging economies have adopted new competition law regimes: China, where a new Antimonopoly Law (“AML”) came into force in 2008;² India, where a competition law passed in 2002 finally came into effect in 2009;³ and Brazil, where a suspensory merger control regime became effective in May 2012.⁴ Through the efforts of leaders like Chairman Kovacic, the expansion of antitrust law around the world has promoted competitive markets and facilitated increased competition that has directly benefitted consumers.⁵

But the globalization of antitrust enforcement is not without risk. The proliferation of antitrust laws necessarily increases the risk that a particular jurisdiction will block a procompetitive deal or require an inappropriate—and even anticompetitive—remedy.⁶ A mistake by a single jurisdiction has an outsized effect, as each reviewing jurisdiction essentially has veto power over global conduct.⁷ Where that veto power is used incorrectly, customers and consumers around the world suffer. And the mere prospect of being held up by even a single jurisdiction may distort the marketplace for corporate transactions⁸ by deterring companies from pursuing particular deals or leading compa-

- 1 Maureen K. Ohlhausen, Comm’r, FTC, Fourth Annual Chicago Forum on International Antitrust Issues, Northwestern University School of Law: Update on International Cooperation and Convergence (June 13, 2013), available at <http://www.ftc.gov/speeches/ohlhausen/130613antitrustchicagoupdate.pdf>.
- 2 Fan long duan fa [Antimonopoly Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), MOFCOM (Aug. 3, 2008), available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>.
- 3 The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), available at http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d; Competition Act, Competition Commission of India, available at [http://www.cci.gov.in/index.php?option=com_content&task=view&id=18; Edith Ramirez, Comm’r, FTC, Third Annual Chicago Forum on International Antitrust Issues, Northwestern University School of Law: Building Effective Global Antitrust Enforcement BRIC by BRIC \(June 7, 2012\), available at http://www.ftc.gov/speeches/ramirez/120607chicagointlforum.pdf](http://www.cci.gov.in/index.php?option=com_content&task=view&id=18; Edith Ramirez, Comm’r, FTC, Third Annual Chicago Forum on International Antitrust Issues, Northwestern University School of Law: Building Effective Global Antitrust Enforcement BRIC by BRIC (June 7, 2012), available at http://www.ftc.gov/speeches/ramirez/120607chicagointlforum.pdf).
- 4 *Law No. 12,529 of November 30, 2011*, Conselho Administrativo de Defesa Economica (“CADE”), available at <http://www.cade.gov.br/Default.aspx?c27684956fa47bb84dfa55ea46>.
- 5 For example, India fined several cement producers \$115 million for cartel behavior and Brazil fined twelve gas stations and eleven individuals approximately \$5 million for operating a cartel for fuel sales. *Tribunal Orders Indian Cement Producers to Pay \$115 Million Fine within 30 Days*, GLOBAL CEMENT NEWS, May 20, 2013, available at [http://www.law360.com/articles/483025](http://www.globalcement.com/news/itemlist/tag/India%20Cements; Melissa Lipman, Brazil Fines Gas Stations $5M Over Fuel Cartel, LAW 360, Oct. 24, 2013, available at <a href=). On the merger control side, Brazil blocked the acquisition of Franca Regional Hospital by Unimed Franca, because the combined entity would control 80% of the relevant market. Press Release, CADE, CADE Vetoes Acquisition of Franca Regional Hospital by Unimed Franca (Apr. 2013), available at <http://www.cade.gov.br/Default.aspx?3ff20316ef25fb07132030035dfd>. Mexico blocked Sherwin-Williams’ takeover of Comex. Jack Kaskey, *Mexico Blocks Sherwin-Williams \$2.3 Billion Comex Deal*, BLOOMBERG, July 18, 2013.
- 6 An agency could also “get it wrong” by clearing an anticompetitive deal. But this Type II error is of much less consequence; for an anticompetitive global deal requiring multiple clearances, it is highly likely that another jurisdiction would catch the error and seek to block the deal or require a remedy.
- 7 In some cases it may be possible to restructure a transaction in order to prevent a single jurisdiction from holding up a global deal. For instance, when Mexico’s competition authority blocked Sherwin-Williams’ acquisition of Comex, the parties closed the acquisition of Comex’s U.S. and Canada businesses while appealing the Mexican decision. See *Sherwin-Williams: Mexican Regulator Rejected Appeal on Consorcio Comex Acquisition*, WALL STREET JOURNAL, Oct. 30, 2013, available at <http://online.wsj.com/article/BT-CO-20131030-709434.html>. But for a variety of reasons, including the fact that both parties need to agree to terms of any restructuring, this is not always a realistic option.
- 8 William E. Kovacic, *Sauce for the Gander: Foreign Extraterritorial Regulation of U.S. Parties*, 97 Proceedings of the Ninety-Seventh Annual Meeting of the American Society of International Law 309, 309 (2003).

nies to select a target or bidder based on the slate of filing requirements rather than the potential synergies from the transaction.

Worse than mere divergent outcomes is when a country uses the antitrust process to benefit its own companies and consumers at the expense of global competition. This is precisely opposite to the free and open competition that the antitrust laws should protect⁹ and directly contrary to the core principles of the World Trade Organization (“WTO”), which, in addition to promoting “openness,” provide that a country “should not discriminate between its own and foreign products, services or nationals.”¹⁰

For agencies that are so inclined, merger control provides significant scope to pursue protectionist goals. Agencies blocking a deal can promote their own “national champions” by preserving local ownership of a key asset or by denying would-be merging parties efficiencies that would help them compete against local firms. Behavioral remedies—while seemingly less severe—provide even greater ability to distort competition. A behavioral consent decree provides a rare opportunity for an antitrust authority to impose conditions on the way a company manages itself or transacts business. Ongoing compliance requirements give an agency a continued view into and mechanism to control a company’s operations. These powers can be used in any number of protectionist ways, including by imposing supply guarantees or pricing terms that favor local companies or consumers at the expense of foreign counterparts. Structural remedies (divestitures) do not offer the same opportunity to distort ongoing competition, but the right to approve a divestiture buyer can provide an immediate opportunity to favor a local firm among potential buyers.

Fortunately, these situations have not been the norm. But the potential is real, and there are worrying signs that these concerns are not purely theoretical. In the almost six years since the AML was introduced, China’s Ministry of Commerce (“MOFCOM”) has issued a number of decisions that appear to depart from international norms by imposing behavioral remedies that reflect a view about antitrust law directly counter to other major jurisdictions and the fundamental principles of competitive markets. In some cases, such as MOFCOM-required supply guarantees, these decisions also appear to reflect a desire to benefit Chinese customers and consumers at the expense of foreign consumers and competitors. Worryingly, all signs are that this trend may continue, further distorting competitive markets and discouraging companies from pursuing procompetitive deals.

Avoiding this outcome requires international convergence about the purpose of the antitrust laws. Convergence does not necessarily mean converging around the standards

9 See, e.g., *OECD Guidelines for Multinational Enterprises, 2011 Edition*, ¶ 97, available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> (“The goal of competition policy is to contribute to overall welfare and economic growth by promoting market conditions in which the nature, quality, and price of goods and services are determined by competitive market forces.”).

10 World Trade Organization, *Annual Report 2013*, at 3, available at http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_chap1_e.pdf. The WTO does not require that countries seeking WTO accession have competition laws, but does require that applicants provide information regarding their competition laws, which are “an integral part of the context within which the WTO operates.” World Trade Organization, *Substance of Accession Negotiations*, available at http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s2p3_e.htm.

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of the U.S. or the EU or even having uniform rules around the world: we are not advocating for antitrust imperialism. Instead, we are advocating for consensus about the core principles that should govern antitrust enforcement: antitrust laws are about competition, not industrial policy, should promote competitive markets, and must be grounded in sound economic analysis.

How do we achieve this convergence? To answer that question, this article looks to the successful convergence between the U.S. agencies and the European Commission (“EC”) at the start of the century, in the wake of substantive divergence and allegations of protectionism in *Boeing/McDonnell Douglas* and *GE/Honeywell*. Part I of this article summarizes those decisions and the subsequent U.S./EU convergence. Part II discusses several recent MOFCOM decisions that have departed from international norms. Finally, Part III considers how the U.S./EU experience could aid convergence with MOFCOM. We hope that this analysis will contribute in some small way to the goal to which Chairman Kovacic has devoted his career: the further development of antitrust law not as an end in itself, but in service of economic growth, prosperity, equitable income distribution and efficiency through better functioning free markets.

I. 1990s and 2000s: U.S./EU Conflict, Then Convergence

The idea of protectionist antitrust enforcement entered the American consciousness in 1997 with Boeing’s proposed purchase of McDonnell Douglas. Boeing was the largest global aircraft manufacturer, with a 64% share of large commercial aircraft.¹¹ France’s Airbus was second, with a share of 30%, and McDonnell Douglas’ Douglas Aircraft (“DAC”) supplied the remaining 6%.¹² After a detailed investigation, the FTC staff concluded that McDonnell Douglas was “no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market” and that there was “no economically plausible strategy that McDonnell Douglas could follow” to improve the situation.¹³ Because McDonnell Douglas was not acting as a competitive constraint, the FTC determined that the transaction was unlikely to lead to competitive harm and cleared it without requiring a remedy.

While the EC agreed with the FTC that McDonnell Douglas was “no longer a real force in the market for the sale of new aircraft on a stand-alone basis,”¹⁴ it believed that McDonnell Douglas could be competitively significant as part of Boeing, advantaging already-dominant Boeing and making the market for commercial aircraft less

11 Statement, Robert Pitofsky, Chairman, & Janet D. Steiger, Roscoe B. Starek III & Christine A. Varney, Comm’rs, The Boeing Company/McDonnell Douglas Corporation (July 1, 1997), available at <http://www.ftc.gov/opa/1997/07/boeingsta.shtml>.

12 Commission Decision (EC) of 30 July 1997, *Boeing/McDonnell Douglas*, 1997 O.J. (L 336), ¶ 29, available at http://ec.europa.eu/competition/mergers/cases/decisions/m877_19970730_600_en.pdf.

13 Pitofsky, et. al., *supra* note 11.

14 Commission Decision (EC) of 30 July 1997, *supra* note 12, ¶ 59.

competitive.¹⁵ The EC initially indicated that it was likely to block the transaction and ultimately cleared it only with a multi-pronged behavioral remedy.

One EC theory was that the transaction would enhance Boeing's ability to negotiate exclusive deals that Airbus could not match.¹⁶ In 1996 and 1997, Boeing entered into twenty year exclusive contracts with American, Delta, and Continental that combined represented about 13% of anticipated demand for large commercial aircraft for the following twenty years.¹⁷ The EC found that the acquisition of DAC would enhance Boeing's ability to enter into exclusive contracts, because of its "broader product range . . . , its financial resources and its higher capacity which enables it to respond to airlines' needs for deliveries on a short lead time."¹⁸ Airbus would not have the same resources and lacked the full "family" of aircraft necessary to secure exclusive arrangements.¹⁹ The EC "envisioned a 'quite feasible' scenario" where Boeing could reach exclusive deals with the top ten airlines globally and foreclose 40% of the worldwide market.²⁰ To rectify its concerns, the EC required Boeing to agree not to enforce existing exclusivity provisions and not to enter into additional exclusive contracts for ten years.²¹

The EC also found that acquiring McDonnell Douglas would strengthen Boeing's dominance by giving Boeing access to additional U.S. government-funded defense R&D that would also benefit commercial applications.²² European governments spent far less on defense R&D, so this access would advantage Boeing in competition with Airbus.²³ The EC acknowledged that "the disproportion between public R&D support already existed before the proposed merger," but found that it would be exacerbated when Boeing also received McDonnell Douglas's funding.²⁴ The EC thus required Boeing to agree to "license . . . any 'government-funded patent' which could be used in the manufacture or sale of commercial jet aircraft" to a commercial aircraft competitor.²⁵

Another EC theory was that acquiring DAC would give Boeing "closer contacts" with airlines that did not currently use Boeing aircraft, which would advantage it vis-à-vis

15 *Id.* ¶¶ 61, 70-71.

16 *Id.*

17 *Id.* ¶ 46.

18 *Id.* ¶ 70.

19 *Id.* In particular, Airbus lacked a 100-120 seat aircraft. *Id.* ¶ 56.

20 William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 834 (2000) (quoting Commission Decision (EC) of 30 July 1997, *supra* note 12, ¶ 71).

21 Commission Decision (EC) of 30 July 1997, *supra* note 12, ¶ 116.

22 *Id.* ¶¶ 83-101. The EC also found that adding McDonnell Douglas' defense business would also increase Boeing's ability to offer technology offsets to other state owned carriers. *Id.* ¶¶ 109-112.

23 *Id.* ¶¶ 83-101.

24 *Id.* ¶ 101. The EC also found that Boeing's dominant position in large commercial aircraft would be strengthened by "the combination of Boeing's and MDC's know-how and patent portfolios." *Id.* ¶ 103.

25 *Id.* ¶ 117.

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Airbus as the existing DAC fleet was replaced.²⁶ The EC required that Boeing maintain DAC as a separate legal entity for ten years and provide separate financial results for DAC.²⁷ Boeing also agreed not to withhold support of DAC aircraft because a customer proposed to purchase from another manufacturer and agreed not to provide preferential support of DAC aircraft in order to persuade customers to purchase Boeing aircraft.²⁸

A final piece of the EC remedy addressed the concern that Boeing's increased buying power would "significantly weaken the competitive position of Airbus."²⁹ Boeing agreed not to "exert or attempt to exert undue or improper influence on its suppliers" in order to receive preferential treatment.³⁰

Not surprisingly, many Americans were concerned that the EC's opposition reflected a desire to protect Airbus. This concern went to the highest levels—President Clinton was "concerned about what appears to be the reasons for the objection to the [transaction]" and warned that the U.S. might complain to the WTO or impose unilateral sanctions if the EC blocked the transaction, and Congress passed resolutions condemning the EC's action.³¹ While politicians cried foul, the antitrust authorities defended against claims of protectionism. European Competition Commissioner Karel Van Miert noted that he "would not agree with the suggestion that European competition policy is somehow more concerned with competitors than competition. Our overriding objective is to promote consumer welfare by protecting the competitive process. . . . National champions are for sport, not economies."³² The FTC's closing statement also took the opportunity to explain that "[t]he national champion argument does not explain today's decision."³³

There is no question that the EC was concerned about Airbus' ability to compete against Boeing post-merger. The question is whether they wanted to protect Airbus because their relevant standard considered concern about entrenching a dominant position or

26 *Id.* ¶ 61.

27 *Id.* ¶ 115. Boeing was allowed to make strategic decisions for DAC, a significant distinction from the MOFCOM hold separates discussed *infra*.

28 *Id.*

29 *Id.* ¶ 108.

30 *Id.* ¶ 119.

31 Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. TIMES, July 18, 1997, available at <http://www.nytimes.com/1997/07/18/business/clinton-warns-europeans-of-trade-complaint-on-boeing-deal.html>. The Senate, for example, passed a resolution expressing disapproval of the EC's contemplated actions. S. Res. 108, 105th Cong. (as introduced July 16, 1997) ("declar[ing] that any disapproval on the part of the European Commission of the merger of the Boeing Company and McDonnell-Douglas would constitute an unwarranted and unprecedented interference in a U.S. business transaction that would threaten thousands of American aerospace jobs. Suggests that the President take appropriate actions to protect U.S. interests"). Vice President Gore also publicly expressed concern. See Edmund L. Andrews, *Boeing Threatened, Sees Trade War*, N.Y. TIMES, May 21, 1997, available at <http://www.nytimes.com/1997/05/21/business/boeing-threatened-sees-trade-war.html?pagewanted=all&src=pm>.

32 Karel Van Miert, Comm'r, European Comm'n, Speech at Fordham 24th Annual Conference: International Cooperation in the Field of Competition: A View from the EC (Oct. 16, 1997), available at http://ec.europa.eu/competition/speeches/text/sp1997_073_en.html.

33 Pitofsky, et. al., *supra* note 11.

because of a desire to protect a national champion. Either position was likely to inflame Americans. Even if the *Boeing/McDonnell Douglas* decision did not reflect protectionism, the U.S. abandoned “entrenchment” with the 1982 merger guidelines, recognizing that “efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally ‘good deal’ suffer loss of sales or market share.”³⁴ But the relevant EC merger control standard in 1997, that mergers that would “create or strengthen a dominant position” should be prohibited, considered the possibility of harm from entrenchment.³⁵ The authorities also differed about whether efficiencies should be credited when considering the competitive effects of a merger. The 1997 U.S. Horizontal Merger Guidelines explicitly considered efficiencies,³⁶ which the EC did not include in its Merger Regulation until 2004.³⁷

Given the EC’s substantive standard in 1997, one can develop a colorable argument that standard, rather than protectionism, drove the EC’s decision. Considering the transaction three years later, Chairman Kovacic reached that conclusion and encouraged “hesitation in accepting . . . doubting assessments” of the EC’s decision,³⁸ while acknowledging that a number of signals could be interpreted as evidence of politics.³⁹ To us, however, the EC’s decision seems to at least in part reflect a desire to protect Airbus that goes beyond concerns about strengthening a dominant firm. In particular, the EC’s requirement that Boeing abandon its *existing* exclusive deals and license government funded R&D projects based on *existing* funding are hard to justify as necessary to resolve the concerns raised by the transaction. After all, the only anti-competitive impact from the combination of the government funded R&D projects would be if the result were *less* innovation, something that would not “entrench” Boeing’s dominant position.

U.S./EU divergence continued after *Boeing/McDonnell Douglas*, reaching its zenith with the planned merger of General Electric (“GE”) and Honeywell in 2001.⁴⁰ The review of the transaction focused on conglomerate effects in aerospace parts and

34 Deborah Platt Majoras, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks before the Antitrust Law Section, State Bar of Ga.: GE-Honeywell: The U.S. Decision (Nov. 29, 2001), available at <http://www.justice.gov/atr/public/speeches/9893.htm>.

35 The EC issued new merger control rules during the pendency of the *Boeing/McDonnell Douglas* review, but both rules relied on the same standard. See Council Regulation (EC) No. 1310/97 of 30 June 1997 Amending Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, 1997 O.J. (L 180), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R1310:EN:HTML>; Council Regulation (EEC) No. 4064/89 of 21 Dec. 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 257), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML>.

36 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4 (1997), available at <http://www.justice.gov/atr/hmerger/11251.htm>.

37 Council Regulation (EC) No. 139/2004 of 20 Jan. 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24), ¶29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT>.

38 See Kovacic, *supra* note 20, at 808. Chairman Kovacic also cited to procedural differences as a reason for the divergent decisions, noting that the FTC would need to prove its case in court in order to block the deal and recognized that the absence of customer concern about the transaction would make that quite difficult. *Id.* at 844-45.

39 *Id.*

40 Commission Decision (EC) of 3 July 2001, General Electric/Honeywell, art. 8(3), 2004 O.J. (L 48), ¶ 5, available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2220_en.pdf.

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services: GE manufactured engines for a variety of aircraft types, while Honeywell supplied more than 50% of the world's non-engine aerospace equipment.⁴¹

The DOJ concluded that GE and Honeywell operated in “intensely competitive markets”⁴² and that the transaction would not lead to competitive harm, aside from a horizontal overlap in engines for military helicopters, where it required a limited divestiture.⁴³ In sharp contrast, the EC identified multiple competitive concerns with the transaction. The EC found that Honeywell had leading positions in non-engine components, and would obtain a dominant position in these markets once combined with “GE’s financial strength and vertical integration into financial services, aircraft purchasing and leasing, as well as into aftermarket services.”⁴⁴ The EC also found that the transaction would allow GE and Honeywell to bundle their complementary products, which would strengthen GE’s dominant position in engines and help create a dominant position in non-engine products.⁴⁵ GE and Honeywell would have the incentive to engage in “mixed bundling” and cross-subsidize discounts across the range of products.⁴⁶ Under the EC’s theory, these discounts would allow GE/Honeywell to gain market share, reducing competitors’ profitability and potentially leading to their eventual exit.⁴⁷ The EC did not contemplate that GE/Honeywell would engage in predatory behavior by pricing below its own cost; rather, less efficient competitors with a narrower offering would simply be unable to compete with GE/Honeywell’s above-cost prices. The EC also raised the prospect that GE/Honeywell might eventually engage in “technical bundling” and offer its products only as an integrated system.⁴⁸ Based on these concerns, the EC blocked the transaction.

Like the EC’s decision in *Boeing/McDonnell Douglas*, its *GE/Honeywell* decision was contrary to the prevailing principles of U.S. antitrust law, which did not find concern with bundling expected to *lower* prices. (U.S. law has recognized that bundling may occasionally raise competitive concerns about price *increases*. For instance, in *Time Warner/Turner*, the FTC required a consent decree prohibiting bundling out of concern that the combined entity would use “its newly-acquired stable of ‘marquee’ channels to raise prices by bundling.”⁴⁹)

41 *Id.* ¶¶ 8, 241-42.

42 Majoras, *supra* note 34.

43 Press Release, Justice Dep’t, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell, Department of Justice Press Release (May 2, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/8140.htm.

44 *Id.* ¶¶ 342-46.

45 *Id.* ¶¶ 350-55.

46 *Id.* ¶¶ 351-53.

47 *Id.* ¶¶ 398-400.

48 *Id.* ¶ 354.

49 Analysis of Proposed Consent Order to Aid Public Comment, *In re Time Warner, Inc., Turner Broadcasting System, Inc.; Tele-Communications, Inc.; & Liberty Media Corp.*, F.T.C., File No. 961-0004 (Sept. 12, 1996), *available at* <http://www.ftc.gov/os/1996/09/twanalys.htm>.

Given U.S. jurisprudence, American reaction to the EC's decision was predictable. In addition to relying on a theory discredited in the U.S., *GE/Honeywell* marked the first time the EC had blocked the merger of two American companies.⁵⁰ Like *Boeing/McDonnell Douglas*, concern about *GE/Honeywell* reached the highest levels.⁵¹ President Bush "was concerned that the Europeans have rejected [the *GE/Honeywell* merger]"⁵² and U.S. senators expressed concern about the EC's decision.⁵³ The American business community was similarly outraged and concerned that the divergence between the U.S. and Europe was "chilling the overall environment for cross-border deals."⁵⁴ DOJ officials' remarks were especially pointed. Deputy Assistant Attorney General Bill Kolasky noted of the EC's decision that "[b]locking a \$42 billion merger on this basis, with neither theoretical or empirical support, is difficult to understand, to say the least."⁵⁵ Deputy Assistant Attorney General Deborah Platt Majoras criticized the transaction for "den[ying] consumers around the world the benefits the merger might have delivered."⁵⁶

Most of the criticism of *GE/Honeywell* reflected outrage at the EC's decision to block a seemingly procompetitive transaction. There was also some concern about protectionism, but it was muted in comparison with *Boeing/McDonnell Douglas*.⁵⁷ Opposition to the transaction came from competitors in both the U.S. and Europe—Rolls-Royce and United Technologies were both strongly opposed to the deal.⁵⁸ Interestingly, it was reported that Airbus (a major customer here) did not oppose the transaction.⁵⁹

In 2001, there was serious concern that *GE/Honeywell* was emblematic of a divergent standard at the EC that threatened to undermine global antitrust enforcement and harm the global economy.⁶⁰ In hindsight, *GE/Honeywell* was just the opposite – a wake-up call for both jurisdictions. Together with some high profile losses by the EC in the

50 See *EU Blocks GE/Honeywell Deal*, BBC NEWS, July 3, 2001, available at <http://news.bbc.co.uk/2/hi/business/1420398.stm>.

51 See Jeffrey E. Garten, *The GE-Honeywell Fiasco: Where to Go from Here*, BLOOMBERG BUSINESSWEEK MAGAZINE, July 22, 2001, available at <http://www.businessweek.com/stories/2001-07-22/the-ge-honeywell-fiasco-where-to-go-from-here>.

52 George W. Bush & Aleksander Kwasniewski, The President's News Conference with President Aleksander Kwasniewski of Poland in Warsaw, Poland, June 15, 2001, available at <http://www.presidency.ucsb.edu/ws/?pid=45971>.

53 *EU Blocks \$41 Billion GE-Honeywell Merger*, FOXNEWS.COM, July 3, 2001, available at <http://www.foxnews.com/story/2001/07/03/eu-blocks-41-billion-ge-honeywell-merger/>.

54 Garten, *supra* note 51.

55 See, e.g., William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Address before the George Mason University Symposium: Conglomerate Mergers and Range Effect: It's a Long Way from Chicago to Brussels (Nov. 9, 2001), available at <http://www.justice.gov/atr/public/speeches/9536.pdf>.

56 Majoras, *supra* note 34.

57 *Protectionist Trustbusters?*, BLOOMBERG BUSINESSWEEK MAGAZINE, June 24, 2001, available at <http://www.businessweek.com/stories/2001-06-24/protectionist-trustbusters>; see also Garten, *supra* note 51.

58 Jeremy Grante & Prof. Damien J. Neven, Graduate Institute of Int'l Studies, Geneva, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, at 8 (March 2005) available at <http://ec.europa.eu/dgs/competition/economist/honeywell.pdf>.

59 *Id.*

60 See, e.g., Kolasky, *supra* note 55.

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European Court of First Instance (“CFI”),⁶¹ *GE/Honeywell* was a catalyst of significant reforms in Europe that more closely aligned U.S. and EU substantive standards.⁶² Part of this convergence was the EC’s de-emphasis on conglomerate effects. The EC has not brought a conglomerate effects case since *GE/Honeywell*,⁶³ and the case seems more and more of an outlier as time goes on. In 2008, the EC issued guidelines on non-horizontal mergers that did not reject conglomerate effects theories altogether, but explained that “conglomerate mergers in the majority of circumstances will not lead to any competition problems.”⁶⁴

Since *GE/Honeywell*, the U.S. and the EC have usually agreed. And where they have not, they have taken pains to make clear that the divergence is driven by factual differences. In 2012, for example, the EC blocked the proposed merger of NYSE Euronext and Deutsche Börse.⁶⁵ The DOJ cleared the transaction with a divestiture⁶⁶ and explained that its decision to clear the deal the EC had blocked reflected “different competitive conditions” in Europe.⁶⁷ Similarly, in *Universal Music/EMI*, where the EC required a divestiture⁶⁸ and the FTC cleared the transaction without a remedy, the Director of the FTC’s Bureau of Competition, Richard Feinstein, explained that the

61 In 2002, the CFI rejected the Commission’s prohibitions of *Airtours*, *Schneider/LeGrand*, and *Tetra Laval/Sidel*. William Kolasky, *GE/Honeywell: Narrowing, But Not Closing, the Gap*, 20 ANTITRUST MAG. 69, 74 (2006); Case T-342/99, *Airtours plc v. Comm’n*, 2002 E.C.R. II-02585, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999A0342:EN:HTML>; Herbert Smith Freehills, *United Kingdom: CFI Annuls Commission Decision in Schneider-LeGrand*, Mondaq.com, Oct. 22, 2002, available at http://www.mondaq.com/x/18390/Antitrust+Competition/CFI+Annuls+Commission+Decision+in+SchneiderLeGrand:%20http://europa.eu/rapid/press-release_IP-02-1952_en.htm. Interestingly, the CFI upheld the *GE/Honeywell* decision. Kolasky, *GE/Honeywell: Narrowing, But Not Closing, the Gap*, 20 ANTITRUST MAG. 69, 69 (2006); Press Release, European Comm’n, *Mergers: Commission Welcomes Upholding of the Commission’s Decision in GE/Honeywell Case* (Dec. 14, 2005), available at http://europa.eu/rapid/press-release_IP-05-1601_en.htm.

62 Kolasky, *supra* note 55, at 69 (identifying *GE/Honeywell* as “one of those rare inflection points where the direction of competition policy changed dramatically in a relatively short time.”); Grante & Neven, *supra* note 58, at 37 (“reform process was clearly influenced by the EC’s 3 court defeats, and the controversy surrounding the *GE* decision.”).

63 The EC did consider a conglomerate effects theory in 2004 when it reviewed *GE*’s acquisition of Amersham, but concluded that the transaction did not raise conglomerate effects concerns. Frances Dethmers, Ninette Dodo & Anna Morfey, 1 Eur. Competition J. 265 (2005); Commission Decision (EC) of 21 Jan. 2004, *GE/Amersham*, 2004 O.J. (C 74), available at http://ec.europa.eu/competition/mergers/cases/decisions/m3304_en.pdf.

64 Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC1018\(03\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC1018(03):EN:NOT).

65 The DOJ required that Deutsche Börse divest its interest in Direct Edge, the fourth largest stock exchange operator in the United States. Press Release, Dep’t of Justice, Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merge with NYSE Euronext (Dec. 22, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/278537.htm.

66 *Id.*

67 Rachel Brandenburger, Special Advisor, Int’l Antitrust Div., U.S. Dep’t of Justice, Recent Developments in Merger Control: Views from the U.S. Department of Justice’s Antitrust Division as prepared for the International Bar Association’s 16th Annual Competition Conference, at 12 (Sept. 14, 2012), available at <http://www.justice.gov/atr/public/speeches/286981.pdf>. For example, while the Chicago Mercantile Exchange was an important competitor to the parties in the U.S., it was not a significant competitive constraint in Europe. Press Release, European Comm’n, *Mergers: Commission Blocks Proposed Merger Between Deutsche Börse and NYSE Euronext* (Feb. 1, 2012), available at http://europa.eu/rapid/press-release_IP-12-94_en.htm.

68 Press Release, European Comm’n, *Mergers: Commission Clears Universal’s Acquisition of EMI’s Recorded Music Business, Subject to Conditions* (Sept. 21, 2012), available at http://europa.eu/rapid/press-release_IP-12-999_en.htm.

difference was driven by “significantly higher” concentration levels and different “market dynamics” in the EU.⁶⁹

In the few cases where the agencies have reached different results on the same facts, they have explained the distinction and have even credited the other’s remedy as an explanation. For example, when the DOJ cleared Cisco’s acquisition of Tandberg without conditions after the EC required a remedy, it noted that its decision was due both to “the evolving nature of the videoconferencing market” and to “the commitments that Cisco has made to the European Commission (“EC”) to facilitate interoperability.”⁷⁰

The highest profile divergence between the U.S. and the EC since *GE/Honeywell* came in November 2009, when the EC issued a Statement of Objections in connection with Oracle’s proposed acquisition of Sun, which DOJ had cleared without a remedy. The main competitive concern was horizontal: Oracle was one of three major database providers and Sun had a much smaller presence with its open source MySQL. After the EC issued its Statement of Objections, the DOJ issued a public statement that it “remain[ed] hopeful that the parties and the EC will reach a speedy resolution that benefits consumers.”⁷¹ After further investigation, the EC cleared *Sun/Oracle* in January 2010, finding that Oracle and MySQL were not especially close competitors, that there were several other small competitors, and that other open source alternatives could replace MySQL.⁷²

With the two primary jurisdictions closely aligned, six years ago an observer might have thought that convergence had been achieved. Indeed, some commentators said exactly that.⁷³ Instead, as antitrust enforcement continued its rapid spread around the globe, concerns about inconsistency and protectionism came from a different corner: China.

69 See Statement, Richard A. Feinstein, Director, Bureau of Competition, F.T.C., *In the matter of Vivendi, S.A. and EMI Recorded Music*, at 2 (Sept. 21, 2012), available at http://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-vivendi-s.a.emi-recorded-music/120921emifeinsteinstatement.pdf. See also Ohlhausen, *supra* note 1 (noting that the divergent outcomes in Universal Music/EMI “were not unreasonable nor unpredictable to close observers”).

70 Press Release, Dep’t of Justice, Justice Department Will Not Challenge Cisco’s Acquisition of Tandberg: Justice Department and European Commission Cooperate Closely to Resolve Competition Issues (Mar. 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257173.htm. Similarly, when the FTC required a behavioral remedy in connection with GE’s acquisition of Avio’s aviation business, the EC did not formally impose the same remedy, but noted the agreements that GE, Avio, and Pratt & Whitney had reached in its press release about the transaction. Press Release, European Comm’n, Mergers: Commission Clears Acquisition of Italian Aviation Equipment Company Avio by GE, Subject to Conditions (July 2, 2013), available at http://europa.eu/rapid/press-release_IP-13-642_en.htm; see also Note from the United States to the Directorate for Financial and Enterprise Affairs Competition Committee Working Party No. 3 on Co-operation and Enforcement, Remedies in Cross-border Merger Cases, ¶ 5 (Oct. 29, 2013), available at <http://www.ftc.gov/bc/international/docs/1310merger-remediesus.pdf> (“Both agencies recognize that the commercial agreement GE entered with P&W during the course of the investigation creates protections for future competition.”).

71 Press Release, Dep’t of Justice, Antitrust Division Issues Statement on the European Commission’s Decision Regarding the Proposed Transaction between Oracle and Sun (Nov. 9, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-at-1210.html>. DOJ added that it had a “strong and positive relationship on competition policy matters” with the EC and would “continue to work constructively with the EC . . . to preserve sound antitrust enforcement policies that benefit consumers around the world.” *Id.*

72 Press Release, European Comm’n, Mergers: Commission Opens In-Depth Investigation into Proposed Takeover of Sun Microsystems by Oracle (Sept. 3, 2009), available at http://europa.eu/rapid/press-release_IP-09-1271_en.htm.

73 See, e.g., *GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence*, in *Antitrust Stories* ch. 12 (Daniel A. Crane and Eleanor M. Fox, eds., Foundation Press, 2008); John Vickers, *Competition Law and Economics: A Mid-Atlantic Viewpoint*, 3 EUR. COMPETITION J. 1 (2007).

II. 2008 On: Conflict with MOFCOM

On August 1, 2008, China's AML came into effect. Concerns about protectionism dogged the AML from the beginning.⁷⁴ In addition to "protecting fair competition in the market [and] enhancing economic efficiency," the goals of the AML include "promoting the healthy development of the socialist market economy."⁷⁵ The AML also identifies "the influence of the concentration of business operators on the national economic development" as a relevant factor in merger review.⁷⁶

In early 2009, MOFCOM blocked outright The Coca-Cola Company's proposed \$2.4 billion acquisition of Huiyuan, a major Chinese juice company, based on a conglomerate effects theory.⁷⁷ Coca-Cola had a substantial presence in carbonated soft drinks in China, but only a limited presence in juice. MOFCOM was concerned that the transaction would allow Coca-Cola to "use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling or other exclusive transactions."⁷⁸ MOFCOM was also concerned that the transaction would make it harder for smaller juice producers to compete.⁷⁹ Unsurprisingly, MOFCOM's decision quickly met with skepticism. The concern was two-fold: First, there was concern that reliance on a largely discredited theory signaled that MOFCOM would diverge from the economic and antitrust principles adopted in other major jurisdictions. Second, there was concern that the decision reflected a desire to protect Huiyuan, an important Chinese brand and "national champion," from takeover by an American company.⁸⁰

Superficially, MOFCOM appears to have taken the reaction to *Coca-Cola/Huiyuan* to heart. MOFCOM has not blocked any transactions outright since. But that conclusion is premature. MOFCOM has required remedies in 19 cases since *Coca-Cola/Huiyuan*, several of which have been novel approaches contrary to fundamental economic principles and global antitrust norms and several of which appear designed to benefit

74 See Ramirez, *supra* note 3, at 4 (noting that when the AML was passed "there was also deep concern that enforcers would not be independent from the larger Chinese government and that the law might be used for purposes other than the promotion of competition and consumer welfare.").

75 Fan long duan fa [Antimonopoly Law], *supra* note 2 at Article 1.

76 *Id.* at Article 27 (5).

77 Press Release, MOFCOM, China Huiyuan Juice: MOC Rejects Coca-Cola's Proposed Acquisition (Mar. 18, 2009), available at <http://fdj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>, translated by Policy and Regulatory Report, available at <http://app.parr-global.com/intelligence/view/993705>; *China's Statement Blocking Coca-Cola Huiyuan Deal*, WALL STREET JOURNAL BLOG, Mar. 18, 2009, available at <http://blogs.wsj.com/china-realttime/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/> (translating MOFCOM press release).

78 *China's Statement Blocking Coca-Cola Huiyuan Deal*, WALL STREET JOURNAL BLOG, Mar. 18, 2009, available at <http://blogs.wsj.com/chinarealttime/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/> (translating MOFCOM press release).

79 *Id.*

80 See, e.g., Gordon Fairclough & Carlos Tejada, *China's Coke Decision Threatens to Chill Investment*, WALL STREET JOURNAL, Mar. 19, 2009, available at <http://online.wsj.com/news/articles/SB123742376981279233> (quoting WilmerHale attorney Lester Ross "I think it was driven by protectionism, fueled by popular resentment against a foreign company acquiring a popular Chinese brand.").

Chinese companies and consumers at the expense of others. Somewhat ironically, after blocking *Coca-Cola/Huiyuan*, a conglomerate effects case where a behavioral remedy—while unlikely to be necessary from an economic perspective—could have restricted the practices flagged as potentially problematic, MOFCOM has imposed broad behavioral remedies in several horizontal competition cases where such remedies are unprecedented and inappropriate.

MOFCOM's remedy in *Glencore/Xstrata* is hardest to explain based on traditional antitrust theories of harm. In February 2012, Glencore and Xstrata, two major international mining conglomerates, agreed to merge.⁸¹ By July 2012, the U.S. and Australia had cleared the transaction without conditions. In November 2012, the EC cleared the transaction with a limited remedy related to zinc, where it found the relevant geographic market was EEA-wide.⁸² In January 2013, the South African Competition Tribunal approved the transaction with minimal employment-related conditions.⁸³

In China, unlike in Europe, the transaction did not appear to pose significant competitive concern. The parties had combined global shares of 17.9% in zinc concentrate, 9.3% in copper concentrate,⁸⁴ and 7.6% in lead concentrate.⁸⁵ Xstrata had no Chinese sales of zinc concentrate or lead concentrate.⁸⁶ There was an overlap in copper concentrate in China, but the parties' combined share was just 12.1%.⁸⁷ Notwithstanding these shares, MOFCOM took nearly a year to review the deal, and finally approved it only subject to a substantial remedy.

MOFCOM provided only a limited rationale for its decision,⁸⁸ expressing concern that the transaction would allow Glencore and Xstrata to increase their market concentration, and thereby negatively impact Chinese customers downstream.⁸⁹ To address these concerns, MOFCOM required Glencore to sell Xstrata's interest in Las Bambas, a

81 Though the parties initially agreed to merge in February 2012, further negotiations took place over the course of the year that led to an increased purchase price by Glencore. Michael J. De La Merced, *Xstrata Board Supports Glencore's Revised Offer*, N.Y. TIMES, Sept. 30, 2012, available at http://dealbook.nytimes.com/2012/09/30/xstrata-board-said-to-support-glencores-revised-offer/?_r=0.

82 Commitments to the European Commission (EC), *Glencore/Strata*, at § B, ¶ 1 (Nov. 21, 2012), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6541_20121122_2012_2815133_EN.pdf; Press Release, European Comm'n, Commission Approves Glencore's Acquisition of Xstrata, Subject to Conditions (Nov. 22, 2012), available at http://europa.eu/rapid/press-release_IP-12-1252_en.htm.

83 Press Release, South Africa Competition Comm'n, Commission Approves Glencore/Xstrata Merger Subject to Conditions (Oct. 22, 2012), available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-approves-Glencore-Xstrata-merger-subject-to-conditions.pdf>.

84 Copper concentrate is an intermediate product that is transformed into refined copper (copper cathode) via smelting. See Commission Decision (EC) of 14 June 2001, BHP/Billiton, art. 6 (1), 2001 O.J. (C 238), ¶¶ 33-34, available at http://ec.europa.eu/competition/mergers/cases/decisions/m2413_en.pdf.

85 MOFCOM Announcement No. 20 of 2013, Apr. 16, 2013, available at <http://fdj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml> (Chinese).

86 *Id.*

87 *Id.*

88 Fei Feng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, The Antitrust Source 1, 15 (Oct. 2013), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_deng_10_29f.authcheckdam.pdf.

89 MOFCOM Announcement No. 20 of 2013, *supra* note 85.

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Peruvian copper project to a MOFCOM-approved buyer.⁹⁰ In April 2014, the parties announced that Glencore had agreed to sell Las Bambas to a Chinese consortium in a cash deal worth at least \$5.8 billion.⁹¹ The transaction is expected to close this fall.⁹² According to the MOFCOM decision, if Glencore had failed to enter into a binding sale and purchase agreement by September 30, 2014, or if the divestiture is not completed by June 30, 2015, the parties could be required to divest other copper assets of MOFCOM's choosing.⁹³

In addition to the divestiture, MOFCOM required that the parties commit to supply Chinese consumers with copper concentrate, lead concentrate, and zinc concentrate for eight years.⁹⁴ The parties are obligated to offer to supply at least 900,000 metric tons of copper concentrate (the average volume they supplied to Chinese customers under long-term contracts in 2011 and 2012) to Chinese customers annually.⁹⁵ If the parties increase their copper concentrate production forecast, the minimum volumes will be increased *pro rata*.⁹⁶ There are no clear volume or pricing terms for the supply of lead and zinc concentrate; they must be sold on fair and reasonable terms.⁹⁷ Glencore and a monitoring trustee are required to report to MOFCOM regularly regarding Glencore's compliance with these commitments.⁹⁸

MOFCOM's decision to require a divestiture in *Glencore/Xstrata* related to copper directly conflicts with other authorities that reviewed the deal. As both the EC and MOFCOM itself have recognized, the appropriate geographic market for copper concentrate is global.⁹⁹ Copper concentrate is valuable enough to be shipped globally.¹⁰⁰ And copper cathode, which is formed by smelting copper concentrate, is a globally traded commodity.¹⁰¹ Yet only MOFCOM concluded that a remedy was needed to ensure continued competition in copper concentrate.

Faced with that divergence, an impartial observer might ask whether the Las Bambas divestiture requirement was motivated by something other than antitrust, specifically,

90 Press Release, Glencore International plc, Merger Update—MOFCOM Approval and Management Update (Apr. 16 2013), available at <http://www.glencorexstrata.com/assets/Uploads/Announcement-Merger-Update-MOFCOM-and-Management-Update.pdf>; MOFCOM Announcement No. 20 of 2013, *supra* note 85.

91 Alexis Flynn, *Glencore Xstrata Sells Las Bambas Mine to Chinese Consortium*, WALL STREET JOURNAL, Apr. 13, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702303887804579499722419173960>.

92 *Id.*

93 Press Release, Glencore Int'l plc, *supra* note 90; MOFCOM Announcement No. 20 of 2013, *supra* note 85.

94 *Id.*

95 *Id.*

96 *Id.*

97 Press Release, Glencore Int'l plc, *supra* note 90.

98 *Id.*

99 See, e.g., Commission Decision (EC), *Xstrata/Falconbridge*, art. 6(1)(b), 2006 O.J. (L 2985), ¶ 5, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4256_20060713_20310_en.pdf; MOFCOM Announcement No. 20 of 2013, *supra* note 85; Commission Decision (EC) of 14 June 2001, *supra* note 84, ¶ 42.

100 Commission Decision (EC), *Xstrata/Falconbridge*, *supra* note 99, ¶ 19.

101 Commission Decision (EC) of 14 June 2001, *supra* note 84, ¶¶ 32-41.

whether MOFCOM has used the process to help Chinese companies acquire natural resources outside China. MOFCOM's decision gives it the unilateral right to approve the acquirer of Las Bambas. Reports leading up to the announcement of the buyer indicated that two of the short-listed bidders were Chinese¹⁰² and that a Chinese buyer was "widely expected."¹⁰³ These reports were confirmed when a Glencore announced that Las Bambas would be divested to a Chinese consortium.¹⁰⁴ *Glencore/Xstrata* is not the first time that MOFCOM's divestiture requirements have raised this concern. The parties in *Panasonic/Sanyo* reportedly proposed five potential divestiture buyers to MOFCOM, which approved only a Chinese company that reportedly acquired the assets at an "exceptionally low" price.¹⁰⁵ The divestiture buyer in *Pfizer/Wyeth* was also Chinese.¹⁰⁶ MOFCOM has, not unexpectedly, denied that it favors Chinese companies when selecting a divestiture buyer.¹⁰⁷

There is at least consensus that divestiture is the right *sort* of remedy for a horizontal competition concern where one exists. The *Glencore/Xstrata* supply guarantees appear to be a thinly veiled attempt to ensure supply of a valuable commodity to the country that consumes more than 40% of global copper demand.¹⁰⁸ In recent years, increased copper demand, largely from China, has led to dramatically increased prices and periodic shortages.¹⁰⁹ Through these supply commitments, China has ensured that Glencore will continue to supply at least the amount of copper concentrate it currently supplies China, with an adjustment upward if production increases, but no downward adjustment if production decreases. And it has secured that supply at a favorable price. The commitments require pricing "in accordance with the applicable annual benchmark price agreed between major miners and major smelters" for at least 200,000 metric tons and "with reference to the applicable annual benchmark price" for the remaining sales.¹¹⁰ The "benchmark" likely refers to the charges that copper miners negotiate

102 See Cecilia Jamasmie, *Rival Chinese Miners Shortlisted for Glencore's Las Bambas Copper Mine*, MINING.COM, Oct. 10, 2013, available at <http://www.mining.com/rival-chinese-miners-shortlisted-for-las-bambas-copper-mine-87178/>.

103 Lisha Zhou, Perris Lee & Joy C. Shaw, *MOFCOM Imposes Strictest Hold-Separate Remedy on Mediatek/Mstar Merger—Lawyers*, POLICY AND REGULATORY REPORT (PaRR), Aug. 28, 2013, available at <http://app.parr-global.com/intelligence/view/882012>.

104 Flynn, *supra* note 91.

105 Julie-Anna Needham & Joy C. Shaw, *Glencore Xstrata's Las Bambas Sale Puts MOFCOM's Credibility in Spotlight—Analysis*, POLICY AND REGULATORY REPORT (PaRR), Sept. 3, 2013, available at <http://app.parr-global.com/intelligence/view/884395>.

106 *Id.*

107 Joy C. Shaw, *MOFCOM Satisfied with Enforcement of 18 Conditionally Cleared Deals*, POLICY AND REGULATORY REPORT (PaRR), June 4, 2013, available at <http://app.parr-global.com/intelligence/view/829819> (quoting Cui Shufeng, Head of the MOFCOM Anti-Monopoly Bureau's Monitoring and Enforcement Division).

108 Glenys Sim, *Copper Shortage Seen Extending as China Accelerates: Commodities*, BLOOMBERG, Nov. 29, 2012, available at <http://www.bloomberg.com/news/2012-11-28/copper-shortage-seen-extending-as-china-accelerates-commodities.html>.

109 *Id.*

110 Press Release, Glencore Int'l plc, *supra* note 90.

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with a consortium of Japanese smelters, which are often used as a global benchmark.¹¹¹ This negotiated price is presumably low, reflecting the Japanese smelters' buying power, and thus the first 200,000 tons will be supplied at a very favorable price. For the remaining supply (and for the supply of lead concentrate and zinc concentrate), the language leaves much room for interpretation. The terms regarding the supply of zinc concentrate and lead concentrate require that the supply be "fair and reasonable and in accordance with prevailing international market terms."¹¹² MOFCOM will determine what is "fair and reasonable" and "with reference to the applicable annual benchmark" leaving the process open to substantial abuse, especially as there is no established standard or precedent to guide MOFCOM or help the parties understand what to expect. The bottom line is that Chinese producers should expect to get a substantial supply of copper at a low price as set by MOFCOM for the next eight years, at the expense of customers in other jurisdictions.¹¹³

MOFCOM also required merging parties to supply a commodity to China after the merger of OAO Uralkali and OAO Silvinit, two Russian potash (potassium chloride) producers. In 2011, MOFCOM cleared the transaction subject to a vague behavioral remedy that required the merged entity to continue a "steady" supply of "various and sufficient" potash product for a variety of uses to China and to maintain their regular negotiating procedures, including both contract and spot sales.¹¹⁴ The decision provided that price negotiations should consider, among other things, the "distinctiveness of the Chinese market."¹¹⁵ Compared with *Glencore/Xstrata*, the shares in that transaction were much closer to the levels that typically raise antitrust concerns, with the transaction giving the parties a 33% combined global share and concentrating more than 70% of global supply in the two largest suppliers.¹¹⁶ But in both cases, attempting to remedy a horizontal overlap with supply requirements and price regulation is antithetical to a competitive market and again suggests an intent to use merger enforcement to ensure preferential treatment for domestic businesses and consumers.

Another clearly global market where MOFCOM diverged from the rest of the world was hard-disk drives ("HDDs"), where two transactions, *Samsung/Seagate* and *Western*

111 Commission Decision (EC) of 14 June 2001, *supra* note 84, at n.13 ("As Japanese smelters have tended to negotiate for the purchase of concentrate as a consortium, the terms concluded in Japan are typically used as a worldwide benchmark."). Smelters' payments for concentrate are usually based on the LME copper price two to three months later, less the TC/RCS. This insulates the smelters from the risk (or reward) from shifts in global copper prices. *Id.* ¶ 36.

112 Press Release, Glencore Int'l plc, *supra* note 90.

113 The continued compliance monitoring (eight years of annual reports) prescribed by MOFCOM's decision offers further potential to promote protectionist goals. MOFCOM and the trustee will receive information about Glencore's business plans, production forecasts, and pricing, and there can be little confidence that this information will not be shared with others in the Chinese government and used to facilitate other policy goals.

114 Alert Memorandum, Cleary Gottlieb Steen & Hamilton, LLP, MOFCOM Conditionally Approves Potash Merger (June 16, 2011), available at <http://www.cgsh.com/files/News/ab02fb59-5f6b-42e6-9996-864ca588839b/Presentation/NewsAttachment/e046dd26-6521-4bd5-83ed-5ed128e58f6c/CGSH%20Alert%20-%20MOFCOM%20Conditionally%20Approves%20Potash%20Merger.pdf>; MOFCOM Announcement No. 33 of 2011, June 2, 2011, available at <http://fdj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html?4122827148=3182119977> (Chinese).

115 *Id.*

116 *Id.*

Digital/HGST,¹¹⁷ were reviewed in close proximity. In the spring of 2011, Western Digital announced that it would acquire Hitachi Global Storage Solutions (“HGST”), an HDD competitor. Shortly thereafter, Seagate announced that it would acquire Samsung’s HDD business. Among other jurisdictions, the EC, U.S. FTC, the Korean Fair Trade Commission, the Japan Fair Trade Commission, and MOFCOM reviewed both deals.

In some ways, the jurisdictions considered the relevant markets similarly. MOFCOM, the EC and the FTC all concluded that the relevant geographic market for HDDs was global.¹¹⁸ The EC and the FTC subdivided the HDD market based on form factor size and end-use, finding a distinct relevant product market for 3.5” desktop drives. MOFCOM’s decision, which came to the view that the combined Western Digital/HGST market share would be about 50%, did not so segment the market.¹¹⁹ All three jurisdictions required the divestiture of some HGST assets related to 3.5” HDDs used in desktop computers.¹²⁰ (The FTC required a buyer-up-front divestiture to Toshiba,¹²¹ while the EC and MOFCOM simply required divestiture to a third party, as did Japan and Korea.¹²² None of the jurisdictions required a divestiture in connection with *Seagate/Samsung*, which was reviewed first.)

In addition to the divestiture requirements, MOFCOM alone required in both cases that the merging parties after closing “hold separate” their existing HDD businesses and continue to operate them as independent businesses and competitors. Seagate was required to maintain the Samsung brand with an independent pricing mechanism for at least one year,¹²³ to continue its ongoing production expansion, and to invest at least

117 The authors represented Western Digital in connection with its acquisition of HGST. The discussion of that transaction here is based entirely on publicly available information.

118 Commission Decision (EC) of 19 Oct. 2011, *Seagate/HDD Business of Samsung*, art. 8 (1), 2011 O.J. (C 7592), ¶ 282, available at http://ec.europa.eu/competition/mergers/cases/decisions/m6214_20111019_20682_2390485_EN.pdf; Complaint ¶ 6, *In the matter of Western Digital Corp., F.T.C.*, Docket No. C-4350 (Mar. 5, 2012), available at <http://www.ftc.gov/os/caselist/1110122/120305westerndigitalcmpt.pdf>; MOFCOM Announcement No. 9 of 2012 Regarding the Conditional Approval of the Acquisition of Hitachi Global Storage Technologies by Western Digital Corp., translated by Jones Day (Feb. 3, 2012), available at <http://www.jonesday.com/files/upload/03-09-12%20Alert%20Attachment.pdf>.

119 Complaint ¶ 2, *In the matter of Western Digital Corp.*, *supra* note 118; Commission Decision (EC) of 23 Nov. 2011, *Western Digital Ireland/Viviti Technologies*, art. 8(2), 2011 O.J. (C 8644), ¶ 109, available at http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf. The European Commission’s publicly released decision did not include data on market shares.

120 F.T.C., Analysis of Agreement Containing Consent Order to Aid Public Comment: *In the Matter of Western Digital Corporation*, File No. 111-01221 (Mar. 5, 2012), available at <http://www.ftc.gov/os/caselist/1110122/120305westemdigitalanal.pdf>; Commission Decision (EC) of 23 Nov. 2011, *supra* note 117; MOFCOM Announcement No. 9 of 2012, *supra* note 118.

121 Complaint ¶ 2, *In the matter of Western Digital Corp.*, *supra* note 118.

122 Note from the United States to the Directorate for Financial and Enterprise Affairs Competition Committee Working Party No. 3 on Co-operation and Enforcement, Remedies in Cross-border Merger Cases, ¶ 6 (Oct. 29, 2013), available at <http://www.ftc.gov/bc/international/docs/1310merger-remediesus.pdf>.

123 The Samsung/Seagate hold separate was initially subject to review December 12, 2012. Feng & Huang, *supra* note 88; Press Release, MOFCOM, *Samsung HDD/Seagate: China’s Ministry of Commerce Grants Conditional Approval* (Dec. 12, 2011) available at <http://app.parr-global.com/intelligence/view/1016175> translation by Policy and Regulatory Report. At press time, the hold separate was still in place.

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\$800 million annually in R&D.¹²⁴ MOFCOM required Western Digital and HGST to maintain HGST “as an independent competitor in the relevant market.”¹²⁵ The parties were also required to continue to use HGST’s existing production lines and production team—located in China—and to continue to invest in R&D at “their usual speed.”¹²⁶ The parties can apply for the hold separate to be lifted after two years.¹²⁷

The HDD cases are not the only hold separates MOFCOM has required. In 2012, Marubeni, a Japanese trading company, agreed to acquire most of Gavilon, an American grain and fertilizer company whose products include soybeans.¹²⁸ China is the world’s largest importer of soybeans, with imports accounting for 80% of Chinese supply.¹²⁹ MOFCOM considered the relevant market to be the import of soybeans into China, where Marubeni’s share was below 18%, and Gavilon’s share was below 1%.¹³⁰ Because of concern that this combination would “substantially increase Marubeni’s control over China’s soybean important market” MOFCOM cleared the transaction only with stringent conditions.¹³¹ In particular, MOFCOM required Marubeni and Gavilon to maintain as separate their respective soybean business units supplying China for at least two years, at which point Marubeni can seek relief from the hold separate.¹³²

Marubeni/Gavilon is notable because MOFCOM chose to impose a remedy in a transaction where the combined market share of the parties was below 20% (even assuming MOFCOM’s market definition of soybeans imported to China, a narrow market definition excluding domestic soybeans for reasons not clearly explained in its decision), far below the level where the U.S. or the EC would even give a transaction a second look absent extraordinary circumstances. MOFCOM’s decision identifies no such extraordinary circumstances, noting only that Chinese soybean customers are small and have limited bargaining power.¹³³ In theory, the decision to require a remedy could reflect a very aggressive approach to enforcement, rather than a desire to influence industrial policy. But MOFCOM is not generally especially aggressive overall. MOFCOM cleared unconditionally more than 95% of the transactions reviewed in the

124 *Samsung HDD/Seagate Deal Receives Conditional Approval from Chinese Ministry of Commerce—Report*, POLICY AND REGULATORY REPORT (PaRR), Dec. 12, 2011, available at <http://app.parr-global.com/intelligence/view/1016172>; Joy C. Shaw & Lisha Zhou, *Hitachi/Western Digital: China Hints at Clearing Merger with Tough Conditions*, POLICY AND REGULATORY REPORT (PaRR), Dec. 27, 2011, available at <http://app.parr-global.com/intelligence/view/1016499>.

125 MOFCOM Announcement No. 9 of 2012, *supra* note 118.

126 *Id.*

127 *Id.* At press time, the hold separate was still in place.

128 Press Release, MOFCOM, MOFCOM Approves Gavilon/Marubeni with Restrictive Conditions (Apr. 23, 2013), available at <http://english.mofcom.gov.cn/article/counselorsreport/asiareport/201304/20130400103388.shtml>.

129 *Id.*

130 *Id.* In 2012, China imported 58 million tons of soybeans and Gavilon exported about 400,000 tons of agricultural produce to China. *Id.* Thus, even if all of Gavilon’s exports to China were soybeans, Gavilon still represented less than 1% of Chinese soybean imports.

131 *Id.*

132 *Id.*

133 *Id.*

first five years of the AML,¹³⁴ and one suspects many of these involved a far greater increase in concentration than adding a 1% player to an 18% player. Instead, it appears that a key basis for the *Marubeni/Gavilon* decision was concern from the Chinese Ministry of Agriculture about the impact the transaction would have on the supply of soybeans in China.¹³⁵

Most recently, MOFCOM required a hold separate in *MediaTek/MStar*, requiring that the parties hold separate their overlapping LCD TV controller chip businesses.¹³⁶ In contrast to the other hold separate decisions, that conditional clearance required the parties to design a hold separate implementation plan within three months, and prevented the parties from closing until that plan was approved.¹³⁷ According to a public statement by MediaTek on November 29, 2013, MOFCOM has granted formal approval of the proposed merger.¹³⁸ However, MOFCOM has yet to release a statement about the matter, so the details of the hold separate are still unknown.¹³⁹

MOFCOM has taken pride in these hold separate remedies as creative solutions that might ultimately be adopted by other jurisdictions.¹⁴⁰ But there is no basis in economic theory for a long-term hold separate as a merger remedy. The misguided idea behind a hold separate as a merger remedy is that it can maintain the status quo, while still allowing the companies to merge as a technical matter. MOFCOM's view appears to be that a hold separate should operate indefinitely until market conditions change such that combining the businesses would not have anticompetitive effect.¹⁴¹

By definition, hold separates mean that the companies cannot fully realize the efficiencies from their merger. Any number of integrations that could provide cost savings and product improvements—such as production and distribution optimization, technological and R&D integration, and overhead cost savings—are impossible. (If limited integration is allowed, the parties might realize some efficiencies, e.g., overhead savings, but these are unlikely to constitute the bulk of the efficiencies from a transaction.) Moreover, a hold separate brings additional inefficiencies. First, it may not work. Even if there is a firewall between the held-separate entities, individuals on each side

134 See Feng & Huang, *supra* note 88 (“Up through the third quarter of 2013, MOFCOM completed the review of 693 filings in total, of which 672 were cleared unconditionally.”).

135 *MOFCOM Clears Gavilon/Marubeni Deal, Imposing Remedies to Ensure Independence of Soybean Business*, POLICY AND REGULATORY REPORT (PaRR), Apr. 23, 2013, available at <http://app.parr-global.com/intelligence/view/806814>.

136 Zhou, Lee & Shaw, *supra* note 103.

137 *Id.*

138 *MediaTek's Merger with MStar Approved by MOFCOM*, POLICY AND REGULATORY REPORT (PaRR), Dec. 1, 2013, available at <http://app.parr-global.com/intelligence/view/1044244>.

139 *Id.*

140 See Lisha Zhou, Perris Lee & Joy C. Shaw, *MOFCOM's Hold-Separate Orders Can Be Deemed as Quasi-Structural Remedies*, *DG SAYS*, POLICY AND REGULATORY REPORT (PaRR), Aug. 2, 2013, available at <http://app.parr-global.com/intelligence/view/871962>.

141 Shaw, *supra* note 107 (quoting Cui Shufeng, Deputy Director of the MOFCOM Anti-Monopoly Bureau's Supervision and Enforcement Division: “if the competition conditions stay the same, then for sure this type of complete separate arrangement must be maintained.”).

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are aware that their interests are ultimately aligned, and may not compete aggressively with the company they are separate from, as sales lost to that competitor still go to the corporate entity's overall bottom line. Second, compliance with the hold separate and MOFCOM's monitoring requirements is a significant drain on resources; even if this does not immediately affect pricing or output decisions, adding extra corporate overhead may deter increased capital investment or investment in R&D. Third, particularly where its duration is uncertain (as with MOFCOM's hold separates) a hold separate harms employee productivity and encourages employee migration. In ordinary circumstances, a pending merger generates significant anxiety for employees, who understand that reorganization may change or eliminate their positions.¹⁴² A long-term hold separate extends that uncertainty over months or years. A final concern, particularly relevant to the HDD industry, where competitor collaborations and supply relationships are common and efficiency enhancing, is that the nature of the hold separate and MOFCOM oversight may prevent or delay beneficial arrangements between the held-separate entities that would have been legal had they remained independent competitors.

Compared with *Coca-Cola/Huiyuan* and *Glencore/Xstrata* remedy, the recent hold separates are not so obviously protectionist. They do not protect a national champion, favor Chinese consumers or customers, or create an opportunity for Chinese companies to buy valuable foreign resources on the cheap. It would be easy to take the view that these transactions reflect aggressive enforcement and a belief that an indefinite hold separate is an appropriate remedy to handle concentration. But here, too, there is reason to be concerned about protectionism. China is the world's largest importer of HDDs and soybeans¹⁴³ and has identified these as areas where it has a particularly strong interest,¹⁴⁴ and imposed remedies far more rigorous than any other agency because of this concern. Moreover, the hold separates are not simply edicts that the companies must operate separately. Like the supply commitments, compliance with each of the hold separates is enforced with ongoing monitoring that gives MOFCOM more opportunity to observe and regulate details of the companies' operations, management decisions and strategies during the course of ensuring they are complying with the hold separate. MOFCOM is the sole arbiter and there is no established precedent about how it will assess the companies' compliance. Nor is there any independent body to whom arbitrary decisions can be appealed for relief as a practical matter. In short, under the rubric of merger enforcement, MOFCOM has claimed the authority to second guess internal management decisions, a power that is inconsistent with the

142 See, e.g., *The Human Side of Mergers: Those Laid Off and Those Left Aboard*, Knowledge@Wharton, Mar. 30, 2005, available at <http://knowledge.wharton.upenn.edu/article/the-human-side-of-mergers-those-laid-off-and-those-left-aboard/>.

143 Isaac Thompson, *Computer Hard Drives: Export/Import Profile of Global and U.S. Trade*, WORLD TRADE DAILY, Aug. 21, 2012, available at <http://worldtradedaily.com/2012/08/21/computer-hard-drives-export-import-profile-of-global-and-u-s-trade/>; *MOFCOM Clears Gavilon/Marubeni Deal, Imposing Remedies to Ensure Independence of Soybean Business*, POLICY AND REGULATORY REPORT (PaRR), Apr. 23, 2013, available at <http://app.parr-global.com/intelligence/view/806814>.

144 See *MOFCOM Clears Gavilon/Marubeni Deal, Imposing Remedies to Ensure Independence of Soybean Business*, supra note 135; See *Hitachi/Western Digital: China Weighs on M&A with Far Reaching Conditions*, POLICY AND REGULATORY REPORT (PaRR), Mar. 8, 2012, available at <http://app.parr-global.com/intelligence/view/1018014>.

notion of free enterprise. Consumers around the world will thereby lose the benefits of the enhanced competition that full integration would have enabled.

There are noticeable differences among the four hold separates in the scope of obligations, the geographic coverage, and the range of products under the hold separate obligation. In the two HDD cases, Seagate and Samsung's hold separate order encompasses only pricing and sales. They are otherwise free to rationalize production capacity and, critically in a high technology market, are permitted to integrate R&D to some extent. Western Digital and HGST, on the other hand, are required to remain completely independent HDD competitors.¹⁴⁵ This lack of symmetry creates another danger in behavioral remedies: that competing firms are treated differently, thereby distorting competition in the market overall to the detriment of consumers. In *Marubeni/Gavilon*, MOFCOM explicitly limited its hold separate order to the Chinese market. Although the most recent hold separate order imposed on *MediaTek/MStar* is in some respects the strictest so far (for example, it permits very limited shareholder rights, allows expansive trustee powers, and prohibits closing the transaction until the implementation plan is approved), it is expressly limited to the LCD TV chip business subject to the competitive concerns.¹⁴⁶ These limits on the scope of these hold separate orders are an improvement, but it is not yet clear whether this represents a new policy in recognition of the dislocations caused by more comprehensive hold separate requirements. If MOFCOM cannot be persuaded to abandon hold separates as a horizontal merger remedy in the future, the international antitrust community should at a minimum commend this step in the right direction and encourage China to limit hold separates to the specific commercial activities and geographic regions where MOFCOM identifies competitive issues.

Not all of MOFCOM's decisions have been inconsistent with those in other jurisdictions. MOFCOM's required divestitures in *Pfizer/Wyeth* (2009),¹⁴⁷ *Panasonic/Sanyo* (2009),¹⁴⁸ and *UTC/Goodrich* (2012)¹⁴⁹ were broadly consistent with divestitures required

145 MOFCOM Announcement No. 90 of 2011 Regarding the Conditional Approval of the Acquisition of Samsung Electronics by Seagate Technology LLC (Chinese), available at <http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml>; MOFCOM Announcement No. 9 of 2012 Regarding the Conditional Approval of the Acquisition of Hitachi Global Storage Technologies by Western Digital Corp., translated by Jones Day (Feb. 3, 2012), available at <http://www.jonesday.com/files/upload/03-09-12%20Alert%20Attachment.pdf>.

146 Feng & Huang, *supra* note 88.

147 Alert Memorandum, Lester Ross & Kenneth Zhou, WilmerHale, *China's Clearance of the Panasonic/Sanyo Transaction with Conditions* (Nov. 13, 2009), available at [148 Ross & Zhou, *supra* note 147; Press Release, F.T.C., FTC Order Sets Conditions for Panasonic's Acquisition of Sanyo \(Nov. 24, 2009\), available at <http://www.ftc.gov/opa/2009/11/sanyo.shtm>; Press Release, European Comm'n, Mergers: Commission Clears Proposed Acquisition of Sanyo by Panasonic, Subject to Conditions \(Sept. 29, 2009\), available at \[http://europa.eu/rapid/press-release_IP-09-1383_en.htm\]\(http://europa.eu/rapid/press-release_IP-09-1383_en.htm\).](http://www.wilmerhale.com/pages/publicationsandnewsdetail;F.T.C., Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment: In the matter of Pfizer Inc. and Wyeth, File No. 091-0053, Docket No. C-4267 (Oct. 14, 2009), available at http://www.ftc.gov/os/caselist/0910053/091014pywyethanal.pdf; Commission Decision (EC) No 139/2004 of 17 July 2009, Pfizer/Wyeth Merger Procedure, art. 6(1)(b) and art. 6(2), 2009 O.J. (C 5874), available at http://ec.europa.eu/competition/mergers/cases/decisions/m5476_20090717_20212_en.pdf.</p></div><div data-bbox=)

149 Katy Oglethorpe, *China approves UTC/Goodrich*, GLOBAL COMPETITION REVIEW, June 19, 2012, available at <http://globalcompetitionreview.com/news/article/31984/china-approves-utcgoodrich/>; United States v. United Technologies Corporation and Goodrich Corporation, No. 1:12-CV-01230 (D.D.C. July 26, 2012); Press Release, European Comm'n, Mergers: Commission Approves Acquisition of Aviation Equipment Company Goodrich by Rival United Technologies, Subject to Conditions (July 26, 2012), available at http://europa.eu/rapid/press-release_IP-12-

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elsewhere. Nor has MOFCOM seized every opportunity to use its antitrust process for protectionist goals. MOFCOM has cleared several deals involving foreign takeovers of major Chinese companies, including Yum! Brands' acquisition of a controlling interest in Little Sheep Group, a major Chinese restaurant company and Nestlé's acquisition of a majority stake in a Chinese candy company.¹⁵⁰ But taken as a whole, MOFCOM's decisions raise serious concerns that the Chinese government has used the merger control process to micromanage global enterprises and to distort international markets for the benefit of Chinese companies and consumers.

III. Convergence, Not Cooperation

Can the rapid convergence between the U.S. and the EU after *GE/Honeywell* inform how we pursue convergence with MOFCOM? Perhaps, but the comparison also reveals several reasons why convergence with MOFCOM will be much more difficult than the earlier U.S./EU accommodation.

First, the divergence between MOFCOM and the U.S. and the EU is far greater than the divergence between the U.S. and the EU was. *Boeing/McDonnell Douglas* and *GE/Honeywell* attracted tremendous attention, but they were just two decisions. MOFCOM has on several occasions diverged sharply from other regulators. Beyond the numbers, MOFCOM and the U.S. and EU fundamentally disagree about whether the antitrust laws should protect national interests. While *Boeing/McDonnell Douglas* and *GE/Honeywell* triggered allegations about protectionism, the agencies agreed that protectionism was inappropriate—the only question was whether the decisions were driven by that inappropriate concern. MOFCOM's ability to protect the Chinese economy is written into the law, and MOFCOM has not abandoned this goal since the AML was passed. Indeed, MOFCOM takes pride in its success at using antitrust law to advantage Chinese companies. In 2013, MOFCOM called its decision in *Coca-Cola/Huiyuan* a success because it reduced “the potential risks of China juice industry's monopoly by transnational corporations” and noted that its decisions in *Panasonic/Sanyo* and *Pfizer/Wyeth* “strengthened China's international competitiveness.”¹⁵¹

The fact that MOFCOM has relied so heavily on behavioral remedies may also deepen the divide. Enforcing remedies may make it difficult to abandon the reasoning that led to their imposition. MOFCOM is currently enforcing remedies that run through at least 2020 (for example, the *Glencore/Xstrata* supply commitments). Changing its approach to align with the rest of the world would require MOFCOM to grapple with its existing decisions in addition to how it considers new deals. In this respect, one interesting data point in the months to come will be whether MOFCOM lifts the hold

858_en.htm.

150 Ramirez, *supra* note 3 (citing Jim O'Connell, The Year of the Metal Rabbit: Antitrust Enforcement in China in 2011, 26 ANTITRUST MAG. 65, 68-69 (2012)).

151 Press Release, MOFCOM, Positive Progress Made in Enforcement of the Anti-monopoly Law (Aug. 6, 2013), available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201308/20130800231761.shtml>.

separates in the HDD cases and *Marubeni/Gavilon*, where MOFCOM's decisions give the parties the right to apply for relief after one to two years, but offer no guarantee of success.

Second, the cultural and political differences between MOFCOM and the U.S. and EC dwarf the equivalent differences between the U.S. and the EC. Though there are some distinctions between the U.S. and the EC,¹⁵² these are minor distinctions when compared with wholesale divergence with a command economy. The Chinese government's control over the Chinese economy is fundamentally different from the market-based American approach and belief that governmental restrictions should be limited to the circumstances where they address market failures. Under the American approach, the goal of a merger control remedy is to replicate a market outcome with minimal government intervention; this desire explains the American preference for structural remedies. In addition to its different approach to the role of government, China's experience with state-owned enterprises, which involves firms under common ownership acting as competitors, may have informed MOFCOM's willingness to use hold separates. Such a conclusion runs counter to the fundamental principles governing publicly traded companies in a free market economy, where management has a fiduciary duty to shareholders to maximize the efficiency and therefore the value of their company. U.S. antitrust law recognizes this duty via the *Copperweld* doctrine, which insulates internal decision making from antitrust scrutiny.

The language barrier with MOFCOM also poses a challenge for convergence. While the EU has twenty-four official languages,¹⁵³ much of the EC's business is conducted in English, and most merger decisions, including *Boeing/McDonnell Douglas* and *GE/Honeywell*, are published in English.¹⁵⁴ When those decisions were published, there was no doubt in American minds about what the EC intended. In contrast, MOFCOM has published most of its decisions only in Chinese, requiring American and European observers to rely on informal translations, which may or may not perfectly evidence MOFCOM's intent.

Despite these caveats, there are still lessons to be learned from *GE/Honeywell* and its aftermath. The first and most important is that the goal must be convergence, not cooperation. After *GE/Honeywell*, regulators on both sides of the Atlantic expressed a clear need for similar standards, with Deborah Platt Majoras recognizing that "divergent standards between the U.S. and Europe are almost certain to increase transaction costs associated with the merger clearance process. The result may well be to deter mergers that would have been pro-competitive and efficiency-enhancing."¹⁵⁵ The EC's Mario Monti noted that the U.S. agencies and the EC were "deeply committed"

152 Majoras, *supra* note 34 ("In the United States, we have much greater faith in markets than we do in regulators. Some commentators have suggested that by contrast the European Union comes from a more statist tradition that places greater confidence in the utility of governmental intervention in markets.").

153 *Official EU Languages*, EC.EUROPA.EU, http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm.

154 Commission Decision (EC) of 30 July 1997, *supra* note 12.

155 Majoras, *supra* note 34.

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to “convergence in competition law.”¹⁵⁶ Monti further explained this included convergence of both process (the jurisdictions’ use of the “same micro-economic analytical tools”) and substance (their agreed “focus on the economic welfare of consumers”).¹⁵⁷

However, “cooperation” rather than “convergence” has often been the focus of recent efforts to globalize antitrust enforcement. There is no question that cooperation offers significant benefits. Sharing information across jurisdictions makes the regulatory process more efficient and allows each jurisdiction to make a more informed decision about a transaction. And cooperation has been an invaluable way for newer agencies to learn about antitrust and economic concepts and investigatory practices from more established agencies. Cooperation may well facilitate convergence. But cooperation must be a means, not an end.

The limitations of cooperation are well illustrated by MOFCOM’s cooperation with other agencies. MOFCOM has “set up cooperative mechanism[s] with the United States, Europe, BRICS [Brazil, Russia, India, China, and South Africa], and the neighboring countries and regions and made good exchanges with foreign counterparts.”¹⁵⁸ In 2011, MOFCOM entered into a Memorandum of Understanding promoting cooperation with the U.S. agencies, following years of interaction with the U.S. agencies, including FTC training of MOFCOM staff.¹⁵⁹ Since the MOU was entered, the U.S. regulators have met regularly with MOFCOM officials.¹⁶⁰ The U.S.-Chinese cooperation extends to individual transactions: eleven government agencies, including the FTC and MOFCOM, coordinated their review of the *Western Digital/HGST* transaction.¹⁶¹ Yet China still imposed a hold separate remedy contrary to fundamental economics and without the support of any other jurisdiction. To fix that problem, we need more than cooperation—we need a common understanding of the goals of antitrust law.

The second key lesson from *GE/Honeywell* and the subsequent U.S./EU convergence, is that achieving convergence may require a catalyst, e.g., a particular decision or a conscious effort by an agency. The *GE/Honeywell* decision brought the differences between the U.S. and the EU to the fore and spurred the increased

156 Mario Monti, European Comm’n for Competition Policy, Speech at UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions: Convergence in EU-US antitrust policy regarding mergers and acquisitions: an EU perspective, (Feb. 28, 2004), available at http://europa.eu/rapid/press-release_SPEECH-04-107_en.htm?locale=en (“Put simply, the EU and US agree on what competition policy should be all about. We share a common fundamental vision of the role and limitations of public intervention. We both agree that the ultimate purpose of our respective intervention in the market-place should be to ensure that consumer welfare is not harmed.”).

157 *Id.*

158 Press Release, Positive Progress Made in Enforcement of the Anti-monopoly Law, *supra* note 151.

159 See Ramirez, *supra* note 3; Press Release, MOFCOM, China and US Anti-monopoly and Anti-trust Enforcement Agencies Sign Anti-trust MOU (July 28, 2011), available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201107/20110707669840.html>.

160 See, e.g., Press Release, F.T.C., Federal Trade Commission and Department of Justice Meet with Chinese Ministry of Commerce on Merger Enforcement Matters (Nov. 29, 2011), available at <http://www.ftc.gov/opa/2011/11/chinacommerce.shtml>; see also *China Affected by Almost Every International Antitrust Case*, NDRC Official says, POLICY AND REGULATORY REPORT (PaRR), available at <http://app.parr-global.com/intelligence/view/1039227>.

161 Ohlhausen, *supra* note 1.

convergence that followed,¹⁶² not only because of the profile of the decision, but because U.S. regulators and politicians seized the opportunity and were openly and severely critical of the decision and the conglomerate effects theory.¹⁶³ This criticism was not bitter complaining but a deliberate and ultimately successful attempt to draw attention to the U.S. and the EC's disagreement.¹⁶⁴

To date, there has been no flashpoint like *GE/Honeywell* with MOFCOM. None of the deals where MOFCOM has required a remedy has a profile on par with *GE/Honeywell*. And MOFCOM's reliance on remedies also means that its decisions attract less attention. "Conditional clearance subject to hold separate" does not make the front page of the Wall Street Journal or attract presidential interest.

Even without an immediate event to react to, U.S. regulators have been willing to question some of MOFCOM's recent actions. However, the measured nature of their criticism is far from the blunt critiques of the EC a dozen years ago. Commissioner Ohlhausen's recent statement that "I hope that . . . the Chinese competition authorities also will show consistent movement away from considering non-competition factors in their decisions"¹⁶⁵ lacks the edge and clear urgency of the statements about *GE/Honeywell* made by Kolasky and Majoras. Commissioner Ramirez's statements about the HDD cases that "the overall experience was positive, and we anticipate closer ties as we review more cases in common" similarly avoids pressing the issue.¹⁶⁶ These measured remarks are undoubtedly intentional. Openly criticizing a foreign regulator is always controversial. This may be particularly true with regard to China, where close relations between the countries are nowhere near as well established as between the U.S. and the EU.

Indeed, given these considerations, pushing for cooperation and soft convergence first may be the best course for ultimate substantive convergence with China. Another reasonable approach might be to first focus on procedural convergence and reducing the extraordinary length of many MOFCOM merger reviews, a topic that U.S. regulators have been willing to be a bit more outspoken about. Commissioner Ramirez recently flagged this concern, noting that "[a]s MOFCOM itself has acknowledged, it takes longer to clear transactions that do not present significant competitive concerns than it should."¹⁶⁷ But if we pursue these softer

162 William J. Kolasky, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address before the BIICL Second Annual International and Comparative Law Conference: North Atlantic Competition Policy: Converging Toward What? (May 17, 2002), available at <http://www.justice.gov/atr/public/speeches/224128.htm> ("The silver lining to the GE/Honeywell cloud is that it has opened up a much more substantive dialog between Washington and Brussels.").

163 See *supra* text accompanying notes 62-63.

164 Majoras, *supra* note 34 ("[F]or cooperation . . . to contribute significantly to effective global antitrust enforcement, it must include honest discussion of areas of agreement and disagreement, and careful dissection of divergent decisions.").

165 Maureen K. Ohlhausen, Comm'r, FTC, Remarks at the Competition Policy in Transition China Competition Policy Forum: Nurturing Competition Regimes: Evaluation and Evolution (July 31, 2013), available at <http://www.ftc.gov/speeches/ohlhausen/130731compolicychina.pdf>.

166 Ramirez, *supra* note 3, at 5.

167 *Id.* at 4.

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courses to convergence, we should recognize that we are taking the long, slow road, and should not expect the rapid results realized after *GE/Honeywell*.

* * *

As Chairman Ramirez recently put it, “[t]here is no substitute for a competitive market.”¹⁶⁸ The efforts of Chairman Kovacic and others to spread competitive markets around the world are to be lauded. But just as Chairman Kovacic continues to proselytize for sound substantive and procedural antitrust rules in the service of competitive markets, we must also recognize that this goal is still a work in progress and that the globalization of antitrust enforcement has not always meant the globalization of competitive markets. As we pursue convergence with MOFCOM and other emerging agencies, it is essential that we keep an eye on this fundamental goal, so that we can realize the full benefits of globalized antitrust.

168 *Id.*

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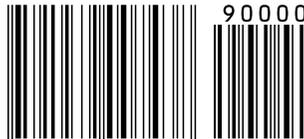
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