ABA Antitrust Law Section
Competition/Consumer Protection Policy and North American Comments Task Force

ANALYZING THE SCOPE OF ENFORCEMENT ACTIONS AGAINST CONSUMMATED MERGERS IN A TIME OF HEIGHTENED SCRUTINY

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Despite the prominence of premerger antitrust investigations and challenges, investigations of and challenges to consummated mergers still occur. Even in the context of the recent global pandemic, some authorities have questioned whether prior mergers have contributed to medical supply shortages and warrant revisiting. As enforcement agencies continue to think about consummated mergers, the Section, through its Competition/Consumer Protection Policy and North American Comments Task Force, has prepared this discussion paper to consider the pros and cons of premerger and consummated merger review and discuss considerations of enforcement balance. The views stated in this discussion paper have not been approved by all members of the Task Force, the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

Background

The evolution of competition policy has pushed much of global merger enforcement into pre-closing analysis and remedies. In the United States the incipiency standard of the Clayton Act has long focused attention on reviewing and challenging mergers before any anticompetitive effects have a chance to materialize.[1] The notification and waiting-period provisions of the Hart-Scott-Rodino Act further emphasize premerger analysis, providing opportunity for the prospective review of mergers, facilitating governmental access to premerger evidence and

[1] The Clayton Act objective of challenging mergers before anticompetitive effects can materialize was a particular focus of courts in cases prior to the United States enacting a premerger review system. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592–93 (1957) ("[I]t is the purpose of the Clayton Act to nip monopoly in the bud." (quoting Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3d Cir 1953))).

avoiding the potential complexities of unwinding consummated transactions.[2] As a result, most U.S. merger enforcement challenges are made before the underlying merger has taken place.[3]

Despite the regularity of premerger review, consummated merger challenges do still arise in the United States.[4] This is possible because in the United States, substantive merger law is separate from and not conditioned on the premerger notification process.[5] Accordingly, as a technical matter in the United States, federal antitrust authorities may challenge a consummated merger even if it was reported, investigated and not challenged as a result of that premerger process.[6] However, in many cases, consummated merger challenges involve acquisitions that were not reportable[7] or that were not reported despite an obligation to do so.[8] In other cases the merger may have been reported under the HSR framework, but simply not investigated, or fully investigated, for numerous reasons, though such cases are rare.

Jurisdictions outside of the United States take a range of approaches to consummated merger enforcement, including approaches that have the effect of limiting when such enforcement actions can be pursued. For instance, in the EU, substantive merger law is coextensive with the premerger notification program. Only reportable transactions are subject to challenge; and once a merger is cleared, there is no opportunity for subsequent review.[9] By

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[2] *See* 15 U.S.C.A. § 18a (describing premerger notification requirements and statutory waiting periods).

[3] *Cf.* 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 941i, at 288 (4th ed. 2015) ("Most government challenges to mergers occur prior to their consummation, when there is no actual record of post-acquisition entry."); *see also* William J. Baer, Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act, 65 ANTITRUST L.J. 825, 832-41 (1997) (discussing the various ways that the HSR framework has changed and improved U.S. merger enforcement).

[4] *See* Practical Law Antitrust, *Consummated Mergers Antitrust Enforcement Chart*, PRACTICAL LAW CHECKLIST 7-532-4454 (November 11, 2019) (enumerating U.S. antitrust agency enforcement actions against consummated mergers since 2001).

[5] The substantive merger law is Section 7 of the Clayton Act, 15 U.S.C. §18; the premerger notification program is mandated by Title II of the HSR Act, 15 U.S.C. § 18a.

[6] States and private persons may have jurisdiction to challenge mergers as well regardless of any actions taken or not taken by the federal antitrust authorities in the United States.

[7] Practical Law Antitrust, *Consummated Mergers Antitrust Enforcement*, PRACTICAL LAW PRACTICE NOTE 4-525-8653 (reporting that, of the subset of consummated merger challenges in which reportability is clearly stated, 81 percent of agency challenges involved transactions for which reporting was not required). In some cases, these mergers are too small to meet the statutory or regulatory merger review size thresholds. In other cases, the structure of the transaction is not caught by the premerger notification framework.

[8] A subset of such cases involves transactions where premerger notification was made but where the filing party failed to include all of the required information (*e.g.*, Item 4(c) premerger planning documents), thereby rendering the filing ineffectual and subsequent consummation illegal. *See, e.g.*, United States v. Automatic Data Processing, 1996 U.S. Dist. LEXIS 21173 (D.D.C. 1996).

[9] The lack of EU post-consummation review in such cases, however, may not be the end of potential antitrust challenges related to a transaction. First, in federal or quasi-federal jurisdictions the member states or provinces

comparison, Canadian law allows mergers to close after the waiting period expires without "clearance," but also allows the commissioner of Competition to clear a merger by issuing an Advance Ruling Certificate. These structural differences affect the ability to undertake post-merger reviews.[10]

Each of these approaches has certain benefits and drawbacks. Accordingly, when an authority considers whether and on what basis to allow consummated merger reviews and challenges, there are a number of factors to consider to ensure an appropriate balancing of interests.

Pros & Cons of Premerger Review

At one end of the spectrum, a jurisdiction could decide not to allow consummated merger reviews at all, preferring instead to have a system of only pre-closing review and challenges. The obvious advantage of premerger review and relief is the efficiency of early intervention. Early intervention may allow a problematic merger to be corrected by divestiture, preserving efficient aspects of the merger while protecting consumers.[11] Even in cases where this type of surgical correction is not possible, or where the merging parties would be unwilling to complete the transaction if it required such modification, premerger review has advantages. When authorities have concerns, parties have an opportunity to mitigate losses for themselves and the economy at large by abandoning the merger before integration expenses and other sunk costs have been borne.

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may allow for enforcement challenges under their local legislation. *See generally* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 828 et. seq. (7th ed. 2012). Second, abuse of dominance or other substantive antitrust laws may enable an enforcement challenge independent of merger-specific law. This is the case in both the EU as well as the United States, although such provisions have not been employed since the enactment of specific merger laws. For a discussion of U.S. law in this regard, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7th ed. 2012) 331 n.1. For a discussion of E.U. law, see Heinrich Hölzer, *Merger Control*, *in* EUROPEAN COMPETITION POLICY 9 (Peter Montagnon ed., 1990).

[10] *See* CANADIAN COMPETITION ACT, RSC 1985, c 19 (2d Supp.) as amended (Canadian Competition Act), section 97. Challenges to consummated mergers may occur for up to one year after the transaction has been "substantially completed." However, if an Advance Ruling Certificate is issued by the Commissioner of Competition, the merger may not be subsequently challenged on the basis of information which is substantially the same as that which was the basis for getting the Advance Ruling Certificate. Canadian Competition Act, section 103.

[11] *See*, *e.g.*, U.S. Dept. of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies (2004), https://www.justice.gov/atr/page/file/1175136/download.

Premerger review also, of course, avoids the complexity of unscrambling the eggs in a post-consummation scenario—which may often fail to successfully preserve competition, or do so only at significant cost.[12] These are some of the reasons which led to the establishment of premerger notification systems in the first place, and which have now led to the successful spread of these programs throughout the world. Additionally, there is an important degree of predictability for parties (and financial markets) with a premerger system. For example, in the United States, parties that go through a premerger investigation and go on to close do so with the knowledge that post-consummation challenges are rare.

However, premerger review systems suffer from some important disadvantages. One obvious disadvantage is the cost inherent in identifying a relatively small number of potentially problematic mergers by reviewing a large number of non-problematic transactions. Broader reporting requirements, longer waiting periods, and larger agency budgets may increase the probability that problematic mergers will be identified during premerger review, but do so at the cost of private reporting expenses, delayed consummation of benign or procompetitive transactions, and heavier use of taxpayer dollars to review many non-problematic transactions.

Sophisticated enforcement agencies may identify problematic transactions quickly and with relatively low costs in the case of most transactions, but across the economy the review of a large number of transactions does have costs. Even for individual transactions without significant competitive concerns there can be meaningful delays, which increase transactional and personnel costs and also delay the anticipated benefits of the merger.

Also, a substantive, rather than procedural, disadvantage with premerger review is the inherent difficulty of predicting future competitive consequences on the limited record of evidence and information available at the time of premerger notification. Premerger review is *ex*

[12] *See* Baer, *supra* note 3, at 828 (quoting H.R. Rep. No. 94-1373, at 10 (1976) ("HSR House Report")); *see also* Kenneth Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. LAW & ECON. 1 (1969). For example, such costs could arise from having to unwind efficiencies generated from back office (HR, accounting, IT) consolidation, commercial agreements and IP rights which benefited multiple business units, and other efficiencies that may have been an important pro-competitive rationale for the merger, not to mention the losses in productivity that could arise with continued disruption to the workforce, following what likely was a disruptive integration process immediately after closing.

ante, and enforcers must try to predict post-consummation effects (including price changes), rather than determine observationally what actually happens ex post.

Pros & Cons of Consummated Merger Review

To address some of the shortcomings of a premerger system, jurisdictions may alternatively choose to have a system that allows for the investigation and challenge of consummated mergers. Consummated merger review can allow for less stringent premerger requirements and lower burdens for merging parties, as well as reduce general surveillance costs for an authority outside of individual investigations. It also allows for the effects of the merger and market structure to be observed, rather than predicted.

However, there is considerable debate about what weight should be given to post-closing evidence, if any, given the potential for intervening events in a market (whether involving the parties or not). Many have advocated that the standard for review ought to be whether an outcome was foreseeable based on the conditions at the time of the merger—and not the result of ex post factual developments.[13] While post-closing evidence may be relevant to whether the transaction was lawful at the time of consummation, its use risks turning a previously benign merger into a problematic one due to unforeseeable extrinsic changes.[14] Consequently, the informational advantage arguably enjoyed by consummated merger review may be less significant than it initially appears.[15] Finally, the availability and inherent threat of consummated

[13] *See, e.g.*, Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 76 (2004). Indeed punishing merged parties for post-consummation changes to the market (e.g., competitor exit or technology developments) could be viewed the same as imposing no-fault civil liability.

[14] *See infra* note 15 and sources cited therein; *infra* note 19 and sources cited therein.

[15] *See* Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION: J. INNOVATION 29 (2020) **(**arguing that post-consummation developments not foreseeable at the time of the transaction may not be used to challenge consummated mergers), *see also* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1347 & n.53 (1965) (discussing concerns about the relevance of post-acquisition evidence); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 Geo. L.J. 195, 223-24 (1992) (discussing problems with post-merger evidence as a basis for illegality), 5 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1205a at 267-70 (4th ed. 2014) (discussing the use and interpretation of post-consummation evidence in detail). *But see* Menesh Patel, *Merger Breakups* 6, 15, 31, 54, 55 (January 15, 2020) (interpreting U.S. v E.I. du Pont de Nemours & Co., 353 U.S. 568 (1957), as potentially affirming the use of subsequent evidence to retrospectively challenge a merger).

merger review may provide a marginal deterrent effect against the exercise of market power, at least where other aspects of competition policy would not provide comparable deterrence.[16]

Consummated merger review is not without drawbacks. Remedies for addressing anticompetitive effects are often less attractive—and in some cases may not be available—at the post-consummation stage. The difficulty of successfully "unscrambling the eggs"[17] is a common justification for limiting the use of divestiture relief against consummated mergers.[18] Other forms of relief, like money damages, may be difficult to compute and implement because of the complex and continuing nature of the effects of an anticompetitive merger.[19] Money damages in respect of merger transactions are not contemplated in all antitrust regimes worldwide, and behavioral remedies are generally disfavored because, amongst other things, they are hard to monitor and may undermine the competitive process as conditions change.[20] Finally, there is a question of fairness—should the acquiring party and its owner (including all shareholders) be penalized for market changes not under the control of or caused by the party?

Benefits of Allowing Both Premerger & Consummated Merger Review

Based on the pros and cons of premerger and consummated merger review, there are synergies of a system that allows for both approaches. This section describes the potential benefits of a system that allows for both premerger and consummated merger review.

Obviously, the ability to review consummated transactions is necessary where there is no requirement for premerger notification. But even when a strong premerger notification program is in place, consummated merger review may remain important in a few specific circumstances. First, not all transactions will meet the notification threshold—either because the transaction

[16] *See* Patel, *supra* note 15, at 32.
[17] *See, e.g.*, Baer, *supra* note 3, at 830; Elzinga, *supra* note 12, at 54.
[18] *See, e.g.*, Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir.), amended, 890 F.2d 569 (2d Cir. 1989) ("Erring on the side of granting the injunction becomes especially imperative in corporate control contests because once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'").
[19] *See* AREEDA & HOVENKAMP, *supra* note 15, ¶ 1205 at 310-11 (discussing the potential difficulty of proving what part of a post-merger price increase owes causally to the merger); *id.* at ¶ 1205c2 (same); *id.* at ¶ 1205d1 (same). *But cf.* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 588–89 (1957) (assessing the legality of a stock acquisition at the time of suit, which was over 30 years after the date of acquisition). Behavioral remedies and complex injunctive relief present their own administrative challenges.
[20] *See, e.g.*, John E. Kwoka & Diana L. Moss, *Behavioral merger remedies: Evaluation and implications*, 57 ANTITRUST BULL. 979 (2012).

structure does not meet the notification definition, or because they fall beneath the applicable reporting thresholds. Should any such transaction present competition concerns, post-consummation review will often represent the first and only real opportunity for intervention and remedy. Second, even if a transaction is caught by the notification provisions, it is possible, although rare, that it could avoid initial challenge, but in retrospect represent a concern. Without post-consummation review, such transaction could not be challenged.

There is always pressure to ensure that the notification thresholds are not so high as to allow for too many below threshold, potentially problematic transactions to avoid review. This pressure increases if there is no possibility of post-consummation review and increases further if only notifiable transactions can be challenged, whether premerger or post-consummation. No threshold can ever ensure that no problematic transactions are missed. However, the effort to catch more and more transactions in a notification screen, if there is no possibility of reviewing transactions which are not caught, will likely result in pressure for inefficiently low and complex notification thresholds (e.g., market shares).[21] It may also result in longer, more detailed premerger investigations, involving a painstaking examination of all possible evidence and exhaustive exploration of even highly unlikely theories of harm.[22] This is a practical concern if there is no possibility of post-consummation review as a "fail-safe" mechanism. Allowing post-consummation review and allowing transactions to be reviewed even if they are not subject to notification, reduces this inefficiency.

Aside from these impacts on the structure and efficiency of the review system, the lack of consummated merger review also increases the cost of false negatives during premerger review. Sometimes true substantive problems are missed—whether or not the transaction received premerger review.

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[21] *See* International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, Recommended Practices for Merger Notification Procedures § V (2005), *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf**.** It is not uncommon for competition authorities to justify very low merger review thresholds by stating that they have but "one bite of the apple" thereby requiring the review of a very large number of transactions the vast majority of which pose no meaningful competition issue.

[22] *But see* Patel, supra note 15 at 43 (arguing that the availability of post-consummation review may make premerger review too lax).

The appropriate scope of premerger and consummated merger review depends on many factors, including the agency's view of behavioral remedies, risk tolerance, and the willingness to accept false negatives (as opposed to false positives). This balancing act determines how much focus and investment a merger regime should place in premerger review in light of corresponding opportunities for post-consummation review, and vice versa.[23]

Important Considerations for Effective Consummated Merger Review

Effect of premerger review (or lack thereof) on the legitimacy of post-consummation review

If a merger has undergone and survived premerger review, should there be substantive differences to a post-consummation review? A jurisdiction could increase the standard for review in a post-consummation review where a merger was reviewed pre-closing and not challenged, making it higher than the standard used in a post-consummation review of a merger that was never the subject of pre-closing investigation. Certainly, there is an intuitive sense of "fairness" which suggests that, having had the transaction reviewed and not challenged—particularly if there was no indication by the reviewing agency of concern—there ought not be a "second bite at the apple" or even a potential therefor.[24]

If a merger survives premerger review, however, it should be less likely that it causes competitive harm and not likely to raise issues post-consummation. This mitigates the need to provide separate procedural or substantive standards for post-consummation review in the event of prior, premerger review, and potentially suggests a fail-safe for outlier situations should be preserved. And if a consummated merger review option is preserved for mergers that had prior, premerger review, there is arguably little or no basis for a different or higher enforcement standard, because it would be an outlier case in the first place. However, even with the same standards, any prior review could be relevant to market conditions at the time of merger.

Another consideration, aside from fairness, is the impact of allowing a second review of a merger on investment incentives. Mergers benefit the economy when they generate efficiencies,

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[23] *See* David Ginesky, *Investigating Consummated Mergers: The Antitrust Agencies' Shift Toward a Retroactive Enforcement Policy*, 32 REV. BANKING & FIN. L. 88 (2013) (concluding that an increase in post-consummation review has "caused an increase in litigation, led to uncertainty among companies and markets, and resulted in increased divestiture proceedings").

[24] This fairness consideration may not apply, however, with respect to other potential private plaintiffs.

which are typically achieved through investment and aggressive integration efforts.[25] A system which discourages such investments, by holding out the significant prospect of subsequent review on mergers that survived premerger review, may not result in an efficient approach to the economy. However, the mere threat of a potential consummated merger review may have the same negative effect on investment and integration incentives regardless of the substantive standard used for each. From this perspective, a separate standard may be unnecessary.

Interaction between conduct liability and scope of consummated merger review

There may be less concern about the need to have a post-consummation fail-safe option or overly low or complex thresholds in a premerger system if a jurisdiction provides opportunities to challenge the effects of prior acquisitions under other substantive antitrust laws. For instance, if a jurisdiction allows for challenges to unilateral conduct as an "exploitative abuse" of market power, that may militate in favor of less burdensome thresholds or less need for aggressive merger review generally, and in particular may suggest that consummated merger challenges, especially after the passage of significant time, are better undertaken as part of an abuse of dominance analysis review rather than a merger one.[26] Indeed, the availability of unilateral conduct enforcement, even in jurisdictions which do not recognize challenges for exploitative abuse, may represent a superior tool to address anticompetitive concerns while respecting long consummated transactions than does merger enforcement. For example, challenges under theories of harm involving the unilateral exercise of market power do not suffer from the same evidentiary concerns—demonstrating that the issue flows from the merger—as do merger related challenges, especially those brought significantly after the transaction is consummated.

Although core principles may be similar, there clearly are differences across jurisdictions in unilateral conduct rules and approaches to enforcement[27] and regardless of their reach,

[25] *See* Patel, *supra* note 15, at 7, 44.
[26] It is possible that laws prohibiting anticompetitive agreements can also provide an enforcement backstop to a merger review system. For example, such laws could be used in the case of a consummated transaction that, at the time of closing, had a liklihood of increased coordinated effects and such coordination has in fact come to fruition post-merger.
[27] See, e.g., Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards, ABA Section of Antitrust Law Section (Sept. 1, 2019), *available at*

enforcement of abuse of dominance (or other substantive antitrust) laws are not well suited to be a complete substitute for merger-control mechanisms and premerger review. At the margin, however, and particularly in the case of long-consummated transactions, the availability of other substantive antitrust laws as enforcement tools may be relevant to the optimal investment in merger control. This recognition does not advocate for "stronger" non-merger substantive enforcement or the necessity of an ability to challenge "exploitive" abuses with respect to issues arising from consummated mergers. Rather, it simply notes that a jurisdiction's unilateral conduct regime, among its other antitrust laws, may inform the jurisdiction's particular use of post-consummation review.

Statute of limitations for consummated merger review

The U.S. "Time of Suit Doctrine," which pre-dates the U.S. premerger review system, permits mergers to be challenged "at any time when the acquisition threatens to ripen into a prohibited effect."[28] Thus there is no statute of limitations for merger challenges by the U.S. authorities.[29] This is not entirely uncontroversial, however, as outlined in the Muris and Nuechterlein and Patel articles cited above.[30] Other jurisdictions take a different approach. In Canada, for instance, Section 103 of the Canadian *Competition Act* provides that mergers can only be challenged for up to 1 year after "substantial completion."[31]

Given the absence of a bar to delayed merger challenges in the United States, the question is how long after consummation should plaintiffs (whether government or private parties) be allowed to challenge a transaction and on what grounds? In addition to questions of fairness (to the parties and other stakeholders, such as employees), there are also questions of efficiency. Never-ending uncertainty may deter welfare enhancing transactions from occurring.

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https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

[28] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957). *See also* United States v. Gen. Dynamics Corp., 415 U.S. 484, 504 (1974).

[29] Although not addressed by the U.S. Supreme Court, there is authority that the Time of Suit Doctrine does not apply to private suits challenging a merger. Rather the statute of limitations within the Clayton Act,15 U.S.C. § 15(b), applies. *See* ABA SECTION ON ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 339 (7th ed. 2012).

[30] For example, allowing a long time period for enforcement can lead to complexities in deciphering whether effects observed in the market are as a result of the merger versus other intervening events and with formulating an appropriate remedy. *See* Patel, *supra* note 15; Muris & Nuechterlein, *supra* note 15.

[31] *See* (Canada) Commissioner of Competition v. Thoma Bravo, CT-2019-0002. *See also* Tervita Corp. v. Canada, 20150 1 SCR 161.

And post-consummation entities may delay or temper significant and beneficial investment if the threat of a post-consummation challenge looms indefinitely.[32]

Practical difficulties proving competitive harm will increase as time passes. When using a standard of what was foreseeable at the time of the merger, the ability, many years later, to reconstruct from what was known, then, and determine the foreseeability of future events will inevitably be a fraught exercise. Further, there are difficulties determining whether alleged harm flows from the merger or other exogenous post-consummation market forces. For example, years later, assets acquired in a past merger may be important to a firm's current market power. But it is difficult to determine whether it was the merger, technological developments, competitor exit, or other factors that caused the increase in market power (i.e., the but for world). Only rarely will acquired assets, independent of subsequent events, lead to competitive problems years after consummation. Punishing mergers based on post-consummation changes in the market (like technological developments or competitor exit) imposes no-fault liability on merged entities.

Finally, successfully implementing post-consummation remedies can be challenging. Remedies many years later are all the more difficult to implement. The constituent businesses of the merged firm may often be so integrated that practically no divestiture can be made which could survive independently and replace lost competition.[33] It may not even be possible to divest an asset to another operating business which could result in an effective competitive rival. Even if a remedy is possible, its costs may exceed the benefits to be achieved.[34]

All of the above noted factors suggest that merger challenges occurring long after consummation may be problematic for a variety of reasons. While this does not mean that such challenges should be prohibited, or strictly time limited, it does suggest that such challenges should be rare.

There has been recent interest in the issue of reviewing mergers significantly after closing, particularly in the context of mergers in the technology industry. These concerns have

[32] *See* Patel, *supra* note 15 at 44–45.
[33] *See* Patel, *supra* note 15 at 16, discussing the FTC's approach in Evanston Northwestern Healthcare Corporation, FTC Docket No. 9315, refusing to order divestiture after the passage of significant time (seven years), and discussion at 40 and 42.
[34] Patel, *supra* note 15 at 41.

heightened the focus on the issue of long post-consummation challenges, although our consideration of the issue is not specific to any particular industry or type of product. One question which has arisen is whether it is appropriate to consider some test for long concluded merger challenges in technology industries, which differs from the general test. In our view it would appear difficult to justify differing approaches based on different industries.[35]

Conclusion

There are benefits of both premerger and consummated merger review. As a result, efficient merger-review systems tend to include the possibility of both premerger and post-consummation review (at least for a time). The principal reason for allowing the possibility of both premerger and post-consummation review is to avoid lowering merger notification thresholds to a level that creates inefficient and excessive premerger review. By implication, therefore, an efficient merger review system typically does not tie the possibility of post-consummation substantive review to the notification thresholds.

Based on experience, consummated merger review will be much more common in cases where a transaction has not received premerger review. However, except jurisdictions that provide affirmative "clearance" for mergers, on occasion there will be legitimate circumstances in which a transaction that was substantively reviewed premerger may still be subject to post-consummation, such as new evidence or other considerations come to light. Such cases have been rare—and should be rare because excessive post-consummation review after substantive premerger review can stymie investment incentives for newly merged entities.

Further, without any associated policy recommendation, merger review generally, and consummated merger review specifically, will be less important to avoiding the anti-competitive exercise of market power where the jurisdiction has a robust unilateral-conduct enforcement regime to tackle inappropriate exercise of market power. Unilateral-conduct enforcement tools will also help avoid the difficulties in determining whether it was the merger or subsequent developments or actions which gave rise to the anti-competitive concern.

[35] *See* Patel, *supra* note 15 (noting a recent expression of interest in this topic); Muris & Nuechterlein, *supra* note 15 (same). While taking somewhat opposing approaches to the advisability of post-consummation merger challenges, neither Patel nor Muris and Nuechterlein proposes a specialized approach with respect to technology mergers.

In sum, reviewing mergers that have been consummated for a long period of time suffer from a number of difficulties, including the uncertain ability to determine what was foreseeable at the time of and merger and what reliable predictions could be made with that evidence; difficulty of determining whether it was the merger or subsequent events which gave rise to the competitive problems; and difficulty in being able to implement effective remedies. In addition, challenging long consummated mergers will inevitably create disincentives for investment in merged business. For these reasons, merger challenges of long-closed mergers have been and should be rare.

To the extent that a jurisdiction desires to explore further the right balancing of interests in designing any consummated merger review system, the following additional research and study may help inform these questions:

1. A comparison of the costs to the economy of premerger and consummated merger review regimes.

2. A cross-jurisdiction analysis of the efficacy of consummated merger reviews, focusing on how the time from closing affects the result.

3. An analysis of the public and private costs of merger reviews long after consummation.