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EDITOR’S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In Phonak/ReSound (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year’s edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. The intended
readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a de minimis exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of ‘competitively significant influence’. Although a few merger notification jurisdictions remain ‘voluntary’ (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for ‘late’ notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Greece, Portugal, Ukraine and the US). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first ‘gun jumping’ fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the
pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EU model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to ‘stop the clock’ on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are to be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent CSC/Complete transaction). Norway is a bit unusual, in that the Authority has the ability to
mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil’s CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has ‘consulted’ with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an ‘acquisition of control’. Many of these jurisdictions, however, will include as a reportable situation the creation of ‘joint control’, ‘negative (e.g., veto) control’ rights to the extent that they may give rise to de jure or de facto control (e.g., Turkey), or a change from ‘joint control’ to ‘sole control’ (e.g., the EU and Lithuania). Minority holdings and concerns over ‘creeping acquisitions’, in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has ‘material influence’ (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal
Editor’s Preface

even viewed as an ‘acquisition’ subject to notification the non-binding transfer of a
customer base.

For transactions that raise competition issues, the need to plan and to coordinate
among counsel has become particularly acute. Multijurisdictional cooperation facilitates
the development of cross-border remedies packages that effectively address competitive
conscerns while permitting the transaction to proceed. The consents adopted by the US
and Canada in the Holcim/Lafarge merger exemplify such a cross-border package. As
discussed in the International Merger Remedies chapter, it is no longer prudent to focus
merely on the larger mature authorities, with the expectation that other jurisdictions
will follow their lead or defer to their review. In the current environment, obtaining the
approval of jurisdictions such as Brazil and China can be as important as the approval of
the EU or the US. Moreover, the need to coordinate is particularly acute to the extent
that multiple agencies decide to impose conditions on the transaction. Although most
jurisdictions indicate that ‘structural’ remedies are preferable to ‘behavioural’ conditions,
a number of jurisdictions in the past few years have imposed a variety of such behavioural
remedies (e.g., China, the EU, France, the Netherlands, Norway, South Africa, Ukraine
and the US). For instance, some recent decisions have included as behavioural remedies
pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee
retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g.,
Mexico). Many recent decisions have imposed behavioural remedies to strengthen the
effectiveness of divestitures (e.g., Canada’s decision in the Loblaw/Shoppers transaction,
China’s MOFCOM remedy in Glencore/Xstrata, France’s decision in the Numericable/
SFR transaction). This book should provide a useful starting point in navigating cross-
border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2015
Chapter 3

HIGH-TECHNOLOGY ASPECTS IN EU AND US MERGER CONTROL

Paul McGeown and Victoria Luxardo Jeffries

I INTRODUCTION

For more than a decade, the gaze of the world’s leading antitrust agencies has been firmly set on household names in technology such as Microsoft, Intel, Google, Facebook, Samsung and Apple. Investigations have targeted the allegedly exclusionary conduct of these corporations: the bundling of Internet Explorer with Microsoft’s operating system, the operation of Intel’s rebate scheme, the distribution of e-books, and the exploitation of patent portfolios by Samsung and others. These conduct inquiries have often been long and unwieldy, and the European Commission (EC) has attempted to justify them to the business community as a legitimate means for it to explore in detail how technology markets function and where the antitrust touch points lie. Merger investigations in the technology industry pose a different set of challenges: on what basis can an agency take jurisdiction over a transaction? What antitrust markets are in fact affected? How is market power to be measured? Is market power in the technology space prone to be ephemeral? What standard of proof must an agency satisfy if it is to block a merger or make approval conditional on commitments in a nascent and volatile market?

The importance of the jurisdictional question for the development of the law should not be underestimated because, except in the United States, where the Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have extensive jurisdiction to scrutinise M&A transactions even when they are not reportable under the Hart-Scott-Rodino Antitrust Improvements Act, the competence of the world’s major merger control authorities to vet a deal is usually only triggered if the target has generated significant local sales in the preceding financial year to satisfy local nexus rules. As the targets for M&A activity in high-technology industries are frequently still in

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1 Paul McGeown is a partner and Victoria Luxardo Jeffries is an associate at Wilson Sonsini Goodrich & Rosati.
start-up mode or do not yet generate significant revenues, the thresholds for mandatory review may not be met and potentially important transactions may escape *ex ante* review altogether. This dearth of reportable transactions makes it difficult for even the most sophisticated agencies to develop a corpus of evidence-based decisions that accurately reflect antitrust policy.²

More challenging again is the eye-watering pace at which many technology markets are evolving. On the supply side, a near-constant feed of new and innovative products, or improved iterations of better-established products, means that competition is dynamic and unstable. As a result, at a technological level, defining the relevant market for merger control purposes is fraught with uncertainty. On the demand side, the fickle and sometimes faddish nature of many consumer markets, especially those driven by youth demand, means that there can be sudden, sizeable and unforeseen shifts in use. For those observing the industry – potential investors, market research organisations and antitrust agencies – robust data can be difficult to collect and test. In many instances, figures that are barely six or 12 months old may already be inaccurate, making it practically impossible in many cases for merger control agencies to predict how a market is likely to evolve.

While no criticism is intended, the fact is that it is sometimes difficult to discern a clear pattern in the decisional practice of certain merger control agencies. The purpose of this chapter is to highlight a handful of areas where the DOJ, the FTC and the EC have grappled with some of the thornier questions asked in high-technology merger cases:³

- the role played by market shares in merger control analysis;
- whether the existence of network effects in the merging parties’ markets inevitably makes unconditional approval less likely;
- whether the wide-scale imposition of interoperability remedies is justified; and
- the relevance of standard essential patents (SEPs) acquisitions to competition analysis.

² The paucity of EC merger control decisions in the high-technology sector explains why some European decisions mentioned in this article (i.e., Facebook/Instagram and Motorola Mobility Holding (Google)/Waze) are cases handled by the competition agencies of the UK, which can take jurisdiction over mergers where the parties account for at least 25 per cent of the share of supply of a product or service in the UK, even if the target’s local sales are insignificant.

³ For a discussion of pre-2009 cases where the transient nature of market power in technology markets was considered, and where antitrust agencies examined the circumstances in which network effects and lock-in might lead to anti-competitive outcomes, see I Knable Gotts, SA Sher and M Lee, ‘Antitrust Merger Analysis in High-Technology Markets’, *European Competition Journal*, December 2008 at p. 463. For a review of recent US merger cases on content providers and database software, see JA Eisenach and I Knable Gotts, ‘In Search of a Competition Doctrine for Information Technology Markets’, in Fabrizio Cugia di Sant’Orsola, Rehman Noormohamed and Denis Alves Guimarães, eds, *Communications and Competition Law: Key Issues in the Telecoms, Media and Technology Sectors*, September 2014 at p. 69.
II VALUE OF MARKET SHARES

The building blocks of day-to-day merger control analysis are market definition and market shares.

Criticised by some as a blunt instrument in the hands of the world’s competition agencies, in many jurisdictions, ‘market share’ is a ubiquitous tool for market analysis. It is used to identify cases that are suitable for simplified treatment or early termination; in the European system, it is used to identify affected markets that are deemed to merit a closer look; and throughout the world, when the figure is high enough, it is used as a lever by the regulatory agencies to persuade purchasers to offer concessions (typically a commitment to divest a business to a suitable buyer) to secure approval for their transactions. This is true whether the transaction affects goods or services in the ‘old’ economy or in the ‘new’. Nonetheless, the dynamic nature of the technology industry and agencies’ fear of making Type I or Type II errors in merger enforcement can make outcomes harder to predict in this sector than in longer-established and better-documented areas of the economy.

i Measuring market share in nascent and dynamic markets

In mature markets, monitored by trusted market research organisations with tried and tested data-gathering and interviewing techniques, industry reports are often a reliable indicator of the shape and size of an industry:

- patterns will be discernible;
- the impact of earlier mergers will be observable;
- shocks in the data will have been tested and explained through interviews; and
- the growth of segments or niches within the market will quickly be picked up by market-savvy observers.

In the high-technology industry, however, levels of confidence in the quality of market research and in the pertinence of ‘market shares’ as a metric for assessing mergers are inevitably lower. For example:

- How are ‘sales’ monitored?
- If the product is offered free, what is a credible measure of market power?
- Are there tangible ‘sales’ to count, or is a record kept of product downloads?
- Which other products are captured by the researchers?
- How is ‘use’ measured?
- Will sales of the new product cannibalise sales of other products or services, or complement existing products?

These complications have featured in a number of European merger cases. In 2012, the UK’s competition agency (at the time, the Office of Fair Trading (OFT)) took jurisdiction over Facebook’s planned acquisition of Instagram. As Instagram had not generated any revenue since its creation, the OFT took jurisdiction on the basis that there was a

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4 OFT, ME/5525/12 – Facebook Inc/Instagram Inc, decision of 14 August 2012.
horizontal overlap between the parties’ activities in what was called ‘the supply of virtual social networking services’ and that, based on hit data, Facebook’s share of supply in this market exceeded 25 per cent. In their filings with the OFT, the parties also submitted download data showing that, at that time, Instagram had been downloaded more than 45 times more than Facebook Camera. The OFT conceded that downloads were ‘an imprecise measure of market share’, but relied on the figures as ‘some indication of the availability and popularity’ of various photo sharing apps. More recently in Google/Waze,\(^5\) the OFT took jurisdiction over the transaction on the basis of data provided by the parties as to the number of downloads of turn-by-turn navigation apps in 2012.

It is highly debatable whether download figures are a reasonable proxy for market power in relation to apps. This is particularly so given the number of apps that are downloaded but scarcely used. However, in the absence of reliable data based on a more reasonable or accurate metric, it is one of the devices that the UK competition authority has exploited to take jurisdiction over cases that would otherwise escape regulatory review in Europe.

A better – but still flawed – metric would appear to be ‘reach data’ of the type submitted by Facebook to the EC in Facebook/WhatsApp\(^6\) in 2014. Those figures, owned and generated by Facebook (and so not independent), recorded the percentage of panelled users that had used a specific app on iOS and Android smartphones at least once in the preceding 30 days. Third parties claimed that ‘minutes of use’ data would be the best metric, but this was rejected by the EC. Instead, the EC expressed a preference for use per month and day, and for number of messages data, only to be forced to concede that there was no realistic prospect of capturing such data. The Facebook and Google matters serve to illustrate the challenge in capturing or characterising market share even in markets where copious amounts of data are produced and tracked.

\(^{ii}\) When a high market share is not indicative of market power

A second question that arises in relation to market shares in technology markets is whether a high post-transaction market share is genuinely indicative of ‘market power’ (and therefore likely to lead to an anti-competitive outcome). An issue that arises by extension is whether a merger control agency can in good conscience approve an acquisition where the new business will have a non-trivial market share.

In Europe, the leading case in this area is Microsoft/Skype\(^7\). In that case, the EC approved the acquisition without conditions despite the fact that there was a significant horizontal overlap between the parties’ businesses in the market for consumer (as opposed to enterprise) communications video calls on Windows-based PCs (Windows Live Messenger, 30 to 40 per cent share; Skype, 40 to 50 per cent).\(^8\) In a key passage in

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5 OFT, ME/6167/13 – Motorola Mobility Holding (Google)/Waze, decision of 11 November 2013.
6 COMP/M.7217 – Facebook/WhatsApp, decision of 10 October 2014, at Section 97 and footnote 45.
7 COMP/M.6281 – Microsoft/Skype, decision of 7 October 2011.
8 Prior to Microsoft/Skype, there were a handful of technology cases where unconditional clearances had been granted in circumstances where the merged business would have a market
the EC decision – destined to be cited verbatim in many Form COs – the EC observed that:

[… the consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and therefore of lasting damage to competition which Regulation 139/2004 seeks to prevent.’

The EC’s decision was upheld on appeal to the General Court (GC) in Luxembourg. Beginning its decision with the oft-cited mantra that market shares of 50 per cent or more ‘are liable to constitute serious evidence of the existence of a dominant position’ (a rebuttable presumption established by the Court in earlier cases), the GC nonetheless conducted a forensic review of the EC’s analysis of the data. First, the GC observed that the figures in the EC decision ‘show a significant fluctuation in [Windows Live Messenger’s] market share over a relatively short period of seven months’. It went on to conclude that, irrespective of whether the market share losses benefitted Skype or other providers of video communications services, the reality was that market shares were unstable. The GC gave weight to the submission that users expect video calls to be supported not only on PCs but also on other platforms (such as tablets and smartphones), where Microsoft was weaker. The GC also stressed that the fact that consumer communications services were received free of charge meant that:

[…] the potential for the new entity to set its pricing policy freely is significantly restricted. […] Any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge.’

share in excess of 80 per cent. In Philips/Agilent, for example, the parties’ combined market shares in several Member States were above 40 per cent and sometimes 50 per cent, but the market investigation confirmed what had been claimed by the parties in Form CO – that the market for cardiac ultrasound is ‘R&D intensive and largely driven by technological innovations which take place at relatively rapid pace’. New products could capture market share quickly and any individual supplier’s share was liable to fluctuation, said the EC. See COMP/M.2256 – Philips/Agilent, decision of 2 March 2001; see in particular Section 31. In HP/Compaq, the EC found that the merged business would bring together the first and second players in the market for personal digital assistants (the forerunner of the smartphone) running on Microsoft’s operating system, with a combined market share of more than 85 per cent, but that the market investigation suggested that ‘any market leading position is temporary as PDAs have a very short technological life cycle’, that the barriers to entry were low and that Microsoft had ‘every incentive to attract as many OEMs as possible to operate its OS’. See COMP/M.2609 – HP/Compaq, decision of January 31, 2002.

9 See Microsoft/Skype, at Section 69.
11 See Cisco Systems v. Commission, at Section 68.
12 See Cisco Systems v. Commission, at Section 73.
While there was no one EC case in 2014 where the findings of the Court in Microsoft/Skype could be said to be dispositive, the impact of the decision and the subsequent judgment can be seen in a handful of decisions.

In Dolby/Doremi,\textsuperscript{13} for instance, the EC examined a merger between the two leading suppliers of standalone digital servers (used to load, store, decrypt, decode and re-encrypt films for projection in theatres and cinemas). The parties were first-to-market in the period between 2006 and 2010; both developed and sold high-quality second-generation products; and early sales of Doremi’s third-generation server were promising. In the EEA, Doremi’s share of servers in the last calendar year was 50 to 60 per cent, the parties’ combined share exceeded 70 per cent, and their installed base in servers (which had a life span of eight to 10 years) exceeded 80 per cent. Among their competitors, only Sony (which offered customers a bundle integrating the server and a Sony projector) had a market share of more than 10 per cent. Notwithstanding the combined business’s high pro forma market share, the appreciable overlap in sales and high barriers to entry in the form of research and development (R&D) costs, the EC concluded that the operation did not raise concerns meriting concessions. Critically, the EC found that the parties’ high share of the installed base (globally and in the EEA) ‘can be considered to be mainly the reflection of a first-mover advantage, rather than a reflection of their actual market power’. The EC further noted that a ‘trend towards integrated solutions’ (second and third-generation solutions) of the type offered by Sony and latterly by two other competitors meant that a stand-alone supplier such as the merged entity ‘could have a potentially weaker position’ than its pro forma market share suggested.\textsuperscript{14}

iii When zero market share does not guarantee regulatory approval

A third and more controversial question is whether agencies can and should take enforcement action when the antitrust market does not yet exist and where the merged entity’s market share is therefore zero.

The EC has been careful not to pursue aggressively mergers where there is as yet no market to monopolise. By contrast, however, the US antitrust agencies have increasingly advanced merger theories of harm that are premised on future potential competition (even where the transaction would not eliminate current head-to-head competition). Although the agencies have previously pursued this theory in pharmaceutical mergers (e.g., in relation to pipeline products), they are now applying potential competition analysis to technology industries too. Two clear examples of this expanded approach are to be found in the DOJ conclusions regarding Applied Materials Inc’s proposed acquisition of Tokyo Electron Ltd, and in the FTC’s challenge of Nielson Holding’s proposed acquisition of Arbitron Inc.

Applied Materials announced its proposed acquisition of Tokyo Electron for US$29 billion in September 2013. The combined firm would have had an approximately 33 per cent share in the overall market for semiconductor manufacturing equipment
but, other than in silicon etching and depositing, the firms were not head-to-head competitors; instead, they supplied the industry at different levels of the manufacturing process. The parties publicly stated that, to address possible competition concerns around the scale of the merged business, they were prepared to divest assets that generated up to US$600 million in revenue to purchasers approved by the competition agencies. Nonetheless, after undergoing an astonishing 580 days of review and protracted negotiations at the DOJ, the parties decided to abandon the transaction after the DOJ rejected the parties’ proposed remedy. In its press release commenting on the abandonment of the deal, the DOJ asserted that the proposed merger ‘would have combined the two largest competitors with the necessary know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment’. As stated by Acting Assistant AG Renata Hesse, the DOJ had concluded that ‘the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors’.

The finding in *Applied Materials/Tokyo Electron* is particularly noteworthy, because the DOJ rejected the combination not due to the elimination of head-to-head competition between the parties, but rather because of the potential anti-competitive effect on future R&D efforts in the overall market for semiconductor manufacturing equipment.

While unusual, a sortie of the type made by the DOJ in *Applied Materials/Tokyo Electron* is not unique in the US. In 2014, the FTC’s challenge in *Nielsen/Arbitron* was premised on a relevant market that did not exist at the time of the complaint — the prospective market for national syndicated cross-platform audience measurement services. The FTC alleged in its complaint that ‘Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service’, while simultaneously acknowledging that such as service is not ‘commercially available today’ and that ‘efforts to date have produced only custom projects or customer-sponsored beta-tests’. The parties settled the FTC’s allegations through a commitment by Nielsen to divest and license the ‘assets and intellectual property needed to develop national syndicated cross-platform audience measurement services’.

17 Ibid.
These recent US cases clearly demonstrate that although market share analysis is usually the starting point for merger inquiries, it is not the end of the analysis. Indeed, the FTC’s action in *Nielsen/Arbitron*, when viewed together with its recent decision to close its investigation into Zillow Inc’s acquisition of Trulia Inc, suggests strongly that both US agencies are focusing on marketplace realities. In *Zillow/Trulia*, the FTC concluded that the economic evidence could not support a relevant market definition limited to online real estate portals because a significant portion of Zillow’s customers (for instance) would not switch to Trulia in the face of a small but significant increase in price, but rather to other means of real estate advertising. The FTC further noted that the evidence in the case also did not support the notion that the ‘combined company would have a reduced incentive to innovate either on the consumer side or the advertiser side of its platform’.

### III WHEN NETWORK EFFECTS ARE A BARRIER TO ENTRY OR EXPANSION

A defining characteristic of network industries is that they involve products that are more valuable to customers the more widely they are used. A DVD player, for instance, is more valuable to the extent that it is in a widely used format for which a large number of films and television series are produced. This phenomenon, known as a ‘network effect’, can be critical to the functioning of many technology markets but need not necessarily be harmful to competition.

One lesson that can fairly be drawn from the EC’s decision in *Microsoft/Skype* is that, all else being equal, when the barriers to entry or expansion in a technology market are low, a high combined market share is not an insurmountable impediment to antitrust clearance. Where the relevant market is characterised by network effects, however, absent evidence of ease of consumer switching, the prospect of unconditional approval reduces.

Verisk Analytics’ proposed acquisition of EagleView Technology for US$650 million is a case in point. The deal concerned the market for rooftop aerial measurement products, where the merged entity’s pro forma market share would have been just short of 100 per cent. The market was new, and the mere existence of the acquiring company in the market proved that actual successful entry within less than two years was possible. Highlighting the fact that the market was characterised by network effects, in December 2014, the FTC unanimously voted out a complaint to block Verisk’s proposed acquisition, and the parties subsequently abandoned the merger.

In its administrative complaint, the FTC alleged that the combination would eliminate Verisk’s ‘largest and most significant competitor for rooftop aerial measurement services

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20 Ibid.
and reports [...] for insurance purposes.\footnote{FTC Complaint \textit{In the Matter of Versik Analytics, Inc}, FTC No. 9363, at Section 1, 16 December 2014, www.ftc.gov/system/files/documents/cases/141216veriskcmpt.pdf.} The FTC further alleged that the merging parties’ remaining fringe competitors would comprise only approximately 1 per cent of the total market.

The market for rooftop aerial measurement products for insurance carriers did not exist until 2008 when EagleView first entered. Prior to that time, insurance carriers had relied on insurance adjusters or contractors to climb up on to roofs and to take the necessary measurements to evaluate a claim for roof damage. The FTC contended that the traditional manner of measuring roofs did not exert a competitive constraint on the merging parties, and that therefore the transaction was effectively a merger-to-monopoly.\footnote{See FTC Complaint, \textit{Versik Analytics/EagleView}, at Section 26.} The FTC conceded that Verisk had entered and taken share from EagleView in under two years, but asserted that barriers to entry were high and that the parties had failed to show cognisable efficiencies that could rebut the presumption of illegality given the combined entity’s very high market share. In its allegations related to entry, the FTC distinguished Verisk from other potential entrants as uniquely positioned to withstand EagleView’s aggressive patent litigation practices. Its complaint noted that ‘within the past three years, EagleView has eliminated almost all of these competitors, either by threatening and/or bringing intellectual property challenges or by acquisition’.\footnote{Ibid., at Section 44.} Although the FTC acknowledged that EagleView’s patent infringement claims against competitors had yet to be litigated to completion, it concluded that ‘any competitor or new entrant must be prepared to defend its products from EagleView’s patent infringement claims, have access to a national library of high-resolution images and data, and be able to access insurance carriers through Claims Estimation Software’.\footnote{Ibid., at Section 45} The FTC’s allegations point not only to potential network effects as a barrier to successful new entry, but also to the important role of a firm’s patent portfolio – and the defensive possibilities therein – in its viability as a new entrant.

In Europe, the existence and impact of network effects in the technology industry was explored in some depth in \textit{Microsoft/Skype}. In relation to consumer-oriented video services, the EC concluded, on the facts, that any harmful network effects that might be experienced as a result of that transaction would be mitigated by the fact that most consumers used video call services to contact a small group of family and friends, so that were the quality of the combined business’s service to deteriorate, any particular circle (or circles) of friends or colleagues could easily switch to a competing provider. Secondly, and more importantly perhaps for the treatment of later cases, the EC – confirmed by the GC on appeal – stressed that the phenomenon of multi-homing, whereby users download and regularly use a variety of complementary apps (often free) to interact with
professional colleagues, friends and family, meant that network effects were unlikely to harm competition.  

2014 saw the notion of network effects put through its paces again, in *Facebook/WhatsApp*. The primary focus of the EC’s analysis was the overlap between the parties’ consumer messaging services: between Facebook Messenger, which had more than 250 million users worldwide (more than 100 million of whom were in the EEA), and WhatsApp, which had approximately 600 million users worldwide (of whom between 50 and 150 million were in the EEA). The EC’s market investigation indicated that the size of the user base and the number of friends and relatives using the same consumer app was either ‘important’ or ‘of critical value’ to customers, and therefore that network effects exist and are an important feature of the market. The EC went on, however, to acknowledge that the ‘existence of network effects does not *a priori* indicate a competition problem’ and that intervention would only be merited if those effects were to empower the merged entity to foreclose competitors or make it more difficult for them to expand their customer base. According to the EC, three factors mitigated harmful network effects in the market for consumer apps:

First, the EC characterised the market for consumer apps as having a long track record of entry by new players and low customer switching costs. It found that competing apps are able to establish themselves, and grow and manage shocks or other disturbances in the market, such that ‘any leading market position, even if assisted by network effects, is unlikely to be incontestable’.

Second, the EC noted that a consumer’s use of one app does not exclude the use by the same consumer of one or more other apps, and that, indeed, a majority of users had installed and regularly used two or more consumer apps. Multi-homing of this type is facilitated, observed the EC, by the ease with which apps can be downloaded, because most are free, and because they do not take up much capacity on a modern smartphone. The fact that a large number of users would be on the merged entity’s network would not, concluded the EC, preclude them from using or being on competitors’ apps.

Third, the EC concluded that neither Facebook nor WhatsApp has the ability to lock in users to their networks. While third parties had contended that the combined business’s ability to limit the portability of a user’s message history meant that users would be locked in to its product, the EC found instead that users retain access to their message history on their handsets even if they use another app.

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25 The GC noted that the products (apps) were free, that innovation cycles were short and that users were ‘easily portable’. The GC expressly observed that ‘the existence of network effects does not necessarily procure a competitive advantage for the new entity’, at Section 76.

26 COMP/M.7217 – *Facebook/WhatsApp*, decision of 10 October 2014.

27 The EC specifically mentioned in its decision the fact that, immediately following the announcement of the *Facebook* deal, thousands of *WhatsApp* users (some allegedly worried about the operation of *Facebook*’s privacy policy) downloaded one or more new messaging apps (e.g., there was an almost-immediate surge, said the EC, in downloads of *Telegram*). See *Facebook/WhatsApp*, at footnote 79.

28 See *Facebook/WhatsApp*, at Sections 132 to 134.
IV HOW FREQUENTLY ARE INTEROPERABILITY REMEDIES ACTUALLY NEEDED?

The EC is anxious to avoid the situation where the merging parties would be able, post-transaction, to use their intellectual property to reserve to themselves a significant time or technological advantage. In furtherance of this enforcement goal, the EC has made effective interoperability a precondition for the approval of a handful of mergers.

Cisco/Tandberg concerned two suppliers of video communications services. In that matter, the EC feared that the grant of a licence of Cisco’s proprietary TIP video screen protocol to smaller rivals might be delayed or that Cisco would otherwise degrade the interoperability of the merged entity’s products and those of its competitors. The EC conditioned the merger by requiring Cisco to divest the rights attached to its proprietary protocol TIP to an independent industry body. The condition was designed to ensure interoperability with Cisco’s solutions and to allow other vendors to participate in the development and in the updates of the protocol.

In Intel/McAfee, the EC analysed the likely effect of a conglomerate merger between the world’s largest computer chip firm (Intel) and the second-largest supplier of IT security software used to protect internet-connected devices from malicious content or malware. Unlike at the EC, the transaction was approved without conditions by the FTC. The EC, for its part, concluded that, post-transaction, the merged business would have both the ability and the incentive to degrade the interoperability of Intel CPUs and the products marketed by security software vendors competing with McAfee, and McAfee’s security products and the CPUs of Intel’s competitors (notably AMD). EC staff were particularly concerned by complainants’ allegations that Intel would reserve for the exclusive use of McAfee certain performance-related parameters, allowing McAfee to develop better security solutions faster than its rivals, ultimately ‘leading to the exit or at least significant weakening of McAfee’s main competitors within the next two to five years’. The transaction was only approved once Intel had committed to make instruction, interoperability and optimisation information available for use on a royalty-free basis by third-party security software vendors, and to dedicate no fewer than 10 full-time software engineers to assist McAfee’s competitors in implementing Intel technological changes into their security software. All of these measures were subject to oversight by a monitoring trustee.

In the wake of the Intel/McAfee decision, a senior EC official was reported as stating that the release of information by Intel to its competitors was likely to set the tone for future mergers in the technology space, and that the Intel/McAfee package would likely serve as a benchmark for the construction of commitments packages. The term ‘interoperability’ remains a buzzword used in informed conversation about high-technology mergers subject to review by the EC. But the reality is that, since Intel/McAfee, the European mergers that have cleared subject to interoperability commitments have been few and far between.

29 COMP/M.5669 – Cisco/Tandberg, decision of 29 March 2010.
30 COMP/M.5984 – Intel/McAfee, decision of 26 January 2011.
31 See Cisco/McAfee, at Sections 130 and 125.
The dearth of interoperability cases may reflect the fact that, in absolute terms, the number of problematic high-technology cases up for review is modest. The better view probably is that, having put technology businesses on notice that well-founded and properly articulated non-horizontal concerns could lead to the imposition of an interoperability commitment, the EC has concluded later investigations in one of two ways. In some cases, the EC has been able to satisfy itself that, while all manner of technical options might be available to the merged entity to enable it to take action to foreclose an upstream or downstream rival, the commercial or financial incentive to do so is weak. Alternatively, in other matters, the EC has concluded it had insufficient evidence that the anti-competitive effects of an implemented foreclosure strategy would occur within the two-to-five year time frame mentioned in *Intel/McAfee*.

In *Microsoft/Skype*, announced less than four months after the conditional approval of *Intel/McAfee*, the EC’s conglomerate concern centred on enterprise communications, and specifically on the fear expressed by telecommunications operators and by Skype’s other competitors that the merger would create a preferential link between Lync (Microsoft’s system) and Skype’s larger user base. The parties’ rivals alleged that the combined entity could accomplish this either by degrading Skype’s interoperability with rivals’ operating systems, or by degrading the interoperability of Microsoft’s Windows operating system with video services competing with Skype.32 The EC gave short shrift to these allegations. First, it dismissed the ability of the merged business to degrade the interoperability of Skype with other operating systems. Second, the EC found that, assuming the integration of Lync and Skype could be successfully completed, any possible negative effects were ‘unlikely in the next three years time frame relevant for this assessment’.33 Against this backdrop of uncertainty, in a market characterised by relatively short innovation cycles, the EC was unable to assert that it harboured serious doubts sufficient to warrant intervention.

The EC’s track record since *Intel/McAfee* indicates that it may be the high watermark for remedies enforcement in Europe, and that contrary to expectations in 2011, there is no EC ‘policy’ of seeking interoperability commitments (less still a divestiture of the type seen in *Cisco/Tandberg*) in technology mergers.

**V IMPACT OF INHERITED LIABILITIES ON ABILITY TO FORECLOSE**

One last published decision from 2014 that merits mention is Lenovo’s purchase of Motorola Mobility. The acquisition included 100 per cent of the shares in Motorola Mobility, the assignment of more than 2,000 design patents relating to the ornamental appearance of Motorola Mobility products and components, more than 100 patents and patent applications for infrastructure network and mobile handsets, and a broad licence to Google-retained patents.34 In its description of the transaction, the EC noted that in

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32 See *Microsoft/Skype*, at Sections 204 to 208.
33 Ibid., at Section 221.
34 COMP/M.7202 – *Lenovo/Motorola Mobility*, decision of 26 June 2014.
April 2014, more than two months after it had agreed to acquire Motorola Mobility but before notification, Lenovo had also acquired around 110 patents from Unwired Planet Inc. The Unwired Planet transaction included seven European and 14 US patents that had been declared standard essential to the operation of smart mobile devices.

While the acquisition of the Unwired Planet assets was not subject to the EC’s jurisdiction, the EC had regard to the impact of the SEPs in its substantive assessment. The EC considered whether, as a result of the transaction, Lenovo would have the ability and incentive to foreclose rival suppliers of smart mobile devices from the market by restricting access to the patents recently acquired from Unwired Planet.

Lenovo submitted that it would continue to be constrained by the fair, reasonable, and non-discriminatory (FRAND) commitments that Unwired Planet had made in relation to the SEPs, and that those commitments ‘substantially reduce[d] its ability to engage in input foreclosure by threatening injunctive relief against willing potential licensees’. Lenovo added that its ability to foreclose was further impeded by the fact that the SEPs that it had acquired had already been widely licensed to a large number of corporations, representing a ‘significant proportion of competing suppliers of smart mobile devices’.

Having secured confirmation from Lenovo that the burden of the FRAND commitments was transferred to Lenovo in its patent purchase agreement with Unwired Planet, the EC concluded that it was ‘unlikely that Lenovo would be able to engage in an input foreclosure strategy’.

VI OUTLOOK AND CONCLUSIONS

In the same way that unstable market shares make it more difficult for an antitrust agency to allege that a firm enjoys market power, the different approaches that have been taken by the EC and by US agencies to recent high-technology mergers indicate that regulators – despite their best efforts – are still coming to terms with the issues in this dynamic area of the global economy.

The different positions taken by the FTC and the EC on Intel/McAfee (following on the heels of the divestment of intellectual property rights to an industry association in Cisco/Tandberg) had sent a strong signal to dealmakers that the EC might take a harder line in enforcing the merger rules than its counterpart agencies in the US. Four years on, however, and the pendulum has swung. The EC’s analysis of the ability and incentives of the merging parties to profitably pursue a foreclosure strategy has become more sophisticated, and the EC has not seen fit to seek commitments ‘as a matter of

36 Ibid., at Section 41.
37 Ibid., at Section 47.
course’ as might have been understood. At the same time, both the DOJ and the FTC have begun to explore theories of harm that focus not on the positions that the merging businesses have secured but on their unique ability to leverage their know-how and technical expertise to monopolise future markets.

38 This is not to say that the EC does not seek commitments in appropriate cases. Indeed at the end of 2014, it secured an extensive access commitment from IMS Health to ensure that post-transaction, the combined business would continue IMS’s then-current practice of entering into third-party access agreements that enable pharmaceutical companies to share information about IMS’s IP-protected ‘brick structure’ with providers of health-care professional databases and customer relationship management and master data management software. COMP/M.7337 – IMS Health/Cegedim Business, decision of 19 December 2014.
Appendix 1

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Paul McGeown is one of the founding partners of WSGR’s Brussels office. With more than 20 years’ experience in private practice and in industry, he advises clients in a wide range of industries on all aspects of European and UK competition law, with a particular focus on complex merger cases and industrial partnerships. Recent representative merger cases include Glencore/Sumitomo/Clermont, Dolby/Doremi, Cypress/Spansion, HP/Aruba and Intel/Altera.

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