My Summer Vacation at the European Commission

Jonathan B. Baker

Among the more than 100 jurisdictions with active competition policy regimes today, the United States has the distinction of starting first, creating the most extensive set of judicial precedents, and possessing the largest and most experienced enforcement institutions. Antitrust institutions in the United States have long stood at the summit on any scale of international prestige and influence in the competition policy field. Yet any such ranking would also undoubtedly indicate that during the last decade or so, the antitrust institutions of the European Union have grown in size and sophistication to the point where they are comparably respected and as influential as their U.S. counterparts. In recent years, as competition policy has spread throughout the world, nations newly adopting antitrust enforcement have been more likely to emulate Europe than the United States.

I had an unusual opportunity to observe antitrust enforcement in this other leading jurisdiction during the past summer when I was invited to visit the major European competition policy agency, the Competition Directorate of the European Commission (DG-Comp), in Brussels. My frame of reference comes largely from my past positions at the two federal antitrust agencies in the United States, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). I was not at DG-Comp for long, and only had a chance to follow directly a small fraction of agency activity, focusing on merger review and guidelines drafting. But I also spoke with many people holding a wide range of positions throughout the organization and with a number of outside lawyers who practice before DG-Comp. My primary interest was the role of economic analysis in merger review.

At DG-Comp, I saw much that I recognized from my U.S. enforcement experience. The agency has a large and energetic professional staff. The members of the staff are bright and hardworking, with high morale. A decision-making meeting among senior officials reminded me in some respects of a meeting of the FTC. EU Commissioner Neelie Kroes, the political official in sole charge of DG-Comp, was joined at the conference table by senior agency administrators (the rough equivalents of the Director, Deputy Director, and Associate Director of the FTC's Bureau of Competition), the case or project team, personal advisors in her Cabinet (something like an FTC Commissioner's attorney advisors, but with greater line authority), a representative of the European Commission's Legal Service (who played a role resembling that of the FTC's General Counsel) and the Chief Economist (roughly comparable to the Director of the FTC's Bureau of Economics). In one non-case policy discussion, the Commissioner and her advisors paid attention to protecting collegial relations with the Commissioners in charge of other Directorates in a manner that reminded me not so much of the FTC, but more of the way senior officials in White House agencies like the Council of Economic Advisers, where I once worked, prepare for interagency working group meetings.

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Merger Enforcement

I was particularly interested in comparing merger enforcement at DG-Comp with what I recall from my service at the FTC and DOJ. As in the United States, merger investigations at DG-Comp focus on the welfare of consumers, and economic analysis is taken seriously. The European equivalent of the U.S. Horizontal Merger Guidelines sets forth a careful, economic approach to merger analysis that closely resembles the U.S. approach. In both jurisdictions, the merger guidelines help agency staff frame their investigations and help the merging parties shape their submissions. On the whole, DG-Comp undertakes merger review in a way that is comparable to how the U.S. enforcement agencies operate.

Yet differences in the outcome of merger reviews across the jurisdictions have been a particular focus of recent controversy. In 1997, while I was Director of the FTC's Bureau of Economics, the FTC declined to challenge Boeing's acquisition of rival aircraft manufacturer McDonnell Douglas, while the European Commission allowed the same transaction to proceed only on condition that Boeing modify long-term exclusive contracts with three major airlines.

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That merger review was conducted against the backdrop of a highly politicized competition for customers between Boeing, a U.S. firm, and Airbus, a European manufacturer, in the commercial aircraft market. The differences in outcome between the two regimes in that case may plausibly be explained by the subtle distinction between lessening of competition (the concern under U.S. law) and abuse of a dominant position (then the concern in merger review under EU law), combined with greater worry in Europe about the harmful potential of exclusionary vertical practices. Some commentators nevertheless cynically suggested that the competition authorities in the two jurisdictions were each protecting the interests of their national champion, a consideration that I do not ever recall being discussed in antitrust decision making during my governmental experience.

A more consequential spat arose in 2001, when the European Commission opposed General Electric's acquisition of Honeywell shortly after the same transaction had been cleared in the United States by the DOJ. With remarkable frankness, senior U.S. antitrust officials publicly questioned whether the competitive effects theory relied upon by DG-Comp in that case made economic sense. Critics also suggested that the European competition policy system is too solicitous to the concerns of complaining rivals at the expense of protecting customers and consumers, insufficiently attentive to procompetitive efficiencies, and too willing to pursue industrial policy goals rather than trusting that market outcomes will promote social welfare. European and U.S. competition law and enforcement policy also differ to some extent outside the merger area, particularly with respect to the evaluation of exclusionary conduct allegations involving vertical agreements or the practices of dominant firms. In these areas, U.S. courts and enforcers appear generally less inclined to challenge such conduct as anticompetitive and more inclined to credit efficiency justifications than are their European counterparts.

Many U.S. commentators historically preferred the U.S. enforcement system and its outcomes to what they saw in the EU. In their view, the United States was more committed to basing enforcement decisions on the economic analysis of a merger's effects and more skeptical about the validity of complaints by rivals. Whatever the merits of such concerns in the past, any such differences are disappearing in merger analysis today. In both jurisdictions, the focus of merger analysis is now squarely on identifying harm to consumers. In 2004, Europe adopted a new merger regulation that prohibited mergers creating a significant impediment to effective competition,[1]

[1] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 (EC Merger Regulation).

a standard similar to the substantial lessening of competition test employed in U.S. law. The preamble to the regulation, which noted the procompetitive potential of efficiencies from merger, decisively rejected an older view that efficiencies could harm competition, much as modern merger rulings by U.S. appellate courts have not followed U.S. Supreme Court precedents from the 1960s that could similarly be read to treat efficiencies from merger as an offense, not a defense. The new merger regulation has conferred legitimacy on the modern emphasis at DG-Comp on reviewing transactions for their effects, not their form, focusing on developing a coherent economic theory of the case, and treating efficiencies as a defense.

The new merger regulation followed several reforms in the bureaucratic structure of DG-Comp, including the appointment of a Chief Competition Economist and the establishment of an internal scrutiny panel to provide peer review in major cases. In addition, the Merger Task Force was formally disbanded, with merger review staff allocated to units within divisions assigned to broad industry sectors, although the merger units also continue to work together under the supervision of the Deputy Director-General for Mergers through what is called the Merger Network.

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The enforcement culture in Europe has changed as well. The one time I observed internal advocacy of an efficiency offense at DG-Comp, it came from outside the Merger Network, and the merger staff on the case recoiled in horror. Moreover, the Chief Economist has already established himself as a significant player in agency deliberations. His team is staffed by serious and talented Ph.D economists, and it operates like a nascent Economic Analysis Group (at the DOJ Antitrust Division) or Bureau of Economics (at the FTC). But the Chief Economist's team will probably need to triple in size before it can systematically play a role comparable to what agency economics groups do in the United States. (Other good economists with doctoral degrees work at DG-Comp, but their position outside an economics group, reporting to non-economists, likely reduces their effectiveness in making economic arguments. Other DG-Comp staffers have some economics training and an economic orientation, much like some attorneys in the U.S. agencies, but they seem more effective in advancing economic thinking when their ideas are validated by the economics group.)

Alternative Enforcement Models

The most important difference between the enforcement agencies is not in their relative commitment to economic analysis but in the institutional demands of their respective legal systems. Antitrust enforcement in the United States is built upon an adversarial model. At the end of the process, if the agency has concerns about a merger or other firm conduct that the firms involved dispute, the agency cannot insist upon its view without proving the likelihood of harm to competition to a district court judge (or to the Commissioners of the FTC acting as though they were a district court). As a result, the conversation in the agencies, law firms, and courts about firm conduct routinely centers around the development of, and comparison between, two competing stories: a "bad-guy" story of why the practice or transaction might harm competition and a "good-guy" story about why it might enhance competition or create efficiencies.

This comparison between theories can be implicit, existing unarticulated in the minds of investigators, or it can become an explicit contest, as when litigation arises. Advocates for firms under investigation use White Papers and presentations to promote a procompetitive story and undermine anticompetitive alternatives. Agency investigators, working with facts unavailable to the firms, refine both stories, and at times come up with better procompetitive theories than those of the outside advocates. The availability of alternative theories helps shape the development of evidence at the U.S. agencies—even when the prospects of litigation are remote, as in most merg-

er reviews, by focusing attention on the possible facts that would discriminate between the procompetitive and anticompetitive interpretations.

Antitrust enforcement in the European Union is not based on an adversarial model but is built instead upon an administrative model, more consistent with the civil law tradition of continental Europe. DG-Comp investigates and enforces as a neutral expert body, acting in U.S. terms both as prosecutor and judge. Particularly when undertaking a sectoral inquiry or enforcing the European prohibition on the abuse of a dominant position, the agency may tend to view itself as having an ongoing regulatory relationship with industry—not as a price regulator, but as a watchdog over market structure and competitor access to networks, inputs, and customers. Under such circumstances, only one story would naturally be on the table in the minds of investigators: an anticompetitive theory, to be proved or disproved. Agency investigation would focus on assembling and evaluating the elements of this theory. Consistent with this view, internal advocacy of an alternative theory seemed counter to the DG-Comp culture in the merger investigations I observed. Some alternative theory may (perhaps must) lurk in the background, but the focus of the internal conversation—even early in a merger investigation, before tentative conclusions had been reached—was on refining and evaluating the bad-guy story, not on testing it against a good-guy story.

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The European approach has a number of advantages. European antitrust institutions may provide more guidance to firms seeking to comply with the antitrust laws than do their U.S. counterparts. A single enforcement agency led largely by career officials can perhaps establish and adhere to precedents more readily than occurs in the decentralized U.S. system of multiple enforcers and multiple courts (notwithstanding that the concept of establishing and following precedent is not central to civil law). Moreover, an agency that does not expect to prove its case in an adversarial judicial proceeding can afford to be more transparent than one always conscious of protecting its legal position. In the merger context, transparency in the European Union is abetted by the requirement that DG-Comp affirmatively decide the case one way or the other and publish its findings and reasons and by the requirement that European enforcers provide the merging parties with a written statement of objections, laying out their preliminary concerns, with time to permit the parties to reply before a final decision is made. By contrast, the U.S. agencies need only explain their decisions when they choose to challenge a case, and in the United States, a decision not to prosecute is left to agency discretion and is not appealable. In addition, enforcement agency culture differs as to internal transparency between the European Union and the United States. The DG-Comp leadership routinely shares with its staff more information about management issues and the decision-making process in individual cases handled by other teams than is shared by its U.S. counterparts.

On the other hand, the adversarial model likely encourages developing and testing of evidence in a way that the administrative model does not. A case team at a U.S. enforcement agency envisioning the possibility of merger litigation is forced to focus on developing admissible evidence and probing for infirmities in the evidence supporting both the good-guy and bad-guy story that could be exposed during cross-examination. The agency will assemble documents, data, and testimony, and likely integrate that evidence through the testimony of an expert economist, who will be subject to cross-examination by the merging parties and scrutiny by the judge. A U.S. case team knows that it will bear the burden of proof in court and that it must establish anticompetitive effects by a preponderance of the evidence. Consequently, documentary requests are extensive. Documents are not simply read; their interpretation is confirmed through deposition testimony. Affidavits are not taken at face value. All too often, experienced agency staff have observed that

in affidavit wars—the occasional back and forth in which agency staff and the parties develop competing affidavits from witnesses at the same firm (or even from the same witness)—statements that initially seem clear become qualified to the point where they say nothing or come close to supporting the opposite position. When econometric evidence is important, the construction of data sets is reviewed in detail and the conclusions derived from data analyses are throughly tested for robustness. Even in the common situation in which the prospects of litigation are remote, investigative teams with litigation experience cannot help but think about evidence in this way, though they do not pursue testing of evidence with the same intensity as they employ when a court date is on the horizon.

A case team at DG-Comp also interviews witnesses and reviews documents and data. However, relatively more of the record in Europe comes from responses to questionnaires sent to the merging firms, rivals, and customers—sources closer to affidavits than depositions when translated into U.S. terms. My impression is that DG-Comp case teams do not feel subject to the same pressure to test and support their conclusions as do their U.S. counterparts, and may not go to the same lengths in uncovering and analyzing evidence. A flurry of decisions of Europe's Court of First Instance (CFI) during 2002 criticized DG-Comp conclusions in merger investigations as insufficiently grounded in an evidentiary record, putting pressure on the European agency to review its approach to issues of proof.[2] (The CFI undertakes the initial review when European Commission decisions are challenged; ultimate review is by the European Court of Justice.) Although these decisions have increased the care with which evidence is discussed while decisions are drafted, they do not appear to have altered fundamentally how case teams uncover and evaluate evidence.

Suggestions for the U.S. Agencies

The powerful incentives for developing and testing evidence created by the adversarial approach of the United States may at times lead to wasted resources. The extensive evidentiary production in the typical second request, supplied by the merging parties at great expense and substantial loss of executive time, is largely chaff and not wheat. Certainly, in retrospect, much appears wasted. But whether it is possible to screen out the valuable nuggets and leave behind less valuable material without first creating a large evidentiary production for agency sifting is far from clear, and is the subject of ongoing conversations between the enforcement agencies and the defense bar. In addition, much of the massive effort involved in trial preparation on both sides of the case has little social value, notwithstanding its litigation benefit to the parties.

DG-Comp's experience with evaluating mergers using the responses to questionnaires suggests a model that the U.S. enforcement agencies could test for reaching decisions with less burden to the parties after a second request has been issued. The agencies might experiment with encouraging merging firms initially to answer only a set of interrogatories (along with any other voluntary production the firms wish to supply). The agency could make a commitment to decide within a short period following receipt of those answers whether to close the investigation or to insist upon full compliance with the second request. Based on the DG-Comp experience, it may turn out that a significant fraction of investigations can be closed based on such limited information.

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[2] Airtours plc v. Commission, [2002] E.C.R. II-2585 (Ct. First Instance 2002); Cases T-310/01 & T-77/02, Schneider Elec. SA v. Commission, [2002] E.C.R. II-4071 (Ct. First Instance 2002); Tetra Laval BV v. Commission, [2002] E.C.R. II-4381 (Ct. First Instance 2002), *aff'd*, Cases C-12/03 P & C-13/03 P (Eur. Ct. Justice Feb. 15, 2005), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0013:EN:HTML.

The adversarial process also demands and, at times, creates advocates at all stages of the process and potentially among all participants. Once open-minded investigators shift in their minds to partisan advocacy, they may harden their position and lose their detachment, making it in some respects more difficult for decision makers to have a clear view of the facts and issues. By contrast, the administrative approach may encourage a more open-minded investigation throughout the process. This problem is mitigated in the U.S. agencies to some extent by the presence of multiple layers of review, which brings in new, dispassionate analysts at later stages of the investigation. The European example suggests the importance of protecting the bureaucratic independence of evaluation committees in the U.S. enforcement agencies.

Suggestions for DG-Comp

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My suspicion, based on limited observations, is that DG-Comp could benefit from increasing its effort to develop and test evidence. One possibility for encouraging this result in the merger area would be to introduce more adversarial elements into the review process. There has long been one such element: the ability of merging firms, along with the parties to potentially adverse decisions involving agreements or monopolization, to obtain a hearing at DG-Comp. Recently, however, some merging firms have declined to seek such a hearing, apparently on the view that hearings may benefit third-party complainants more than the merging parties. The reforms of the past few years—particularly the creation of the Chief Economist's role and team and the introduction of internal scrutiny panels—have also added some adversarial aspects to the administrative process. But further steps could be taken.

DG-Comp could push its internal process even more in an adversarial direction by creating in every serious (Phase II) merger investigation a small advocacy team charged with both laying out the evidence in support of a procompetitive interpretation of firm conduct and highlighting where the evidence supporting the anticompetitive theory is weak. The internal scrutiny panel, as part of its own case review, could then hold what would amount to an oral argument between the case team and the internal advocates for the merger, without witnesses, but emphasizing reference to the material in the case file, in order to sharpen the internal focus on collecting and testing evidence.

In the European system, this kind of informal mini-trial would more appropriately be held within DG-Comp than left for judicial review at the Court of First Instance. Notwithstanding the agency's recent court losses, it is hard to see how external judicial review could systematically test DG-Comp's evidence given the way the European system is now set up. Unlike a U.S. District Court, the Court of First Instance has no serious institutional capability to collect or test evidence beyond review of the file developed by DG-Comp. The European court's rules do not allow for discovery, rulings on admissibility of evidence, cross examination, or the like. When translated into U.S. terms, judicial review in the European Union appears to be closer to appellate review than to district court review. Even in its recent decisions critical of DG-Comp, the Court of First Instance at least arguably seems to be acting within the range of what U.S. appeals courts do when they review facts under a clearly erroneous standard while undertaking de novo review of the law. Although, the CFI's Chief Judge has called for a more robust review of the facts in his court,[3] it is hard to see how this system could evolve into U.S.-style judicial review without fundamentally changing its character.

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[3] Bo Vesterdorf, *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, 1 Eur. Comp. J. 3 (2005).

In theory, DG-Comp could also encourage itself to devote greater attention to evidence by empowering the merging parties to do more to challenge the agency's theory and frame an alternative during the merger review process. One possibility relates to procompetitive benefits. The parties to any merger likely to draw scrutiny in the United States routinely set forth a procompetitive explanation for their transaction (or at least a competitively benign one like tax savings) at the time of notification—not because they necessarily expect to win on an efficiency defense, but to prevent the agency from inferring an anticompetitive motive from the absence of a rationale and to frame for the agency a good-guy story of the transaction. By contrast, merging parties in the EU appear reluctant to detail any procompetitive benefits they foresee, notwithstanding the requirement on Europe's Form CO (the initial premerger notification filing) that they describe the "economic rationale" for the deal. The merging firms appear to fear that the DG-Comp staff would interpret such a pitch as a signal that the parties view their transaction as potentially raising serious competitive problems absent the efficiencies, and they may also have a lingering concern that efficiencies would be viewed as anticompetitive. This reluctance could perhaps be overcome if the DG-Comp staff would routinely seek clarification when the parties merely cite unspecified synergies or otherwise choose not to explain in more than a cursory manner why their merger is procompetitive or benign.

In addition, the merging parties could be encouraged to challenge DG-Comp's conjectures as to evidence in an early stage, in order to focus the agency on identifying where it needs to develop evidentiary support. DG-Comp already has instituted some institutional mechanisms to promote this end, including a "State of Play" meeting with the merging parties and a procedure for obtaining merging firm comment on key documents obtained from third parties. Still, merging firms appear reluctant to address potential anticompetitive theories before learning what concerns DG-Comp, for fear of directing the agency to competitive concerns that it would not otherwise investigate.

Advice for Merging Firms

How should merging firms and their attorneys and economists navigate within the European system? Notwithstanding the administrative nature of DG-Comp review, outside advocates can help shape the initial expectations of agency staff toward favoring the deal and help support that outcome by supplying evidence to favor a procompetitive theory of the case or undermine an anticompetitive one. Such evidence will get a hearing within an agency increasingly attuned to effects, economics, and efficiencies, and pressured by its reviewing court on evidence.

One practical suggestion is already employed to some extent by outside counsel: on any potentially controversial deal, use Form CO to frame and support an alternative to the anticompetitive story DG-Comp is likely to investigate. The response to the questions in Form CO can be prefaced by a mini-White Paper, laying out an integrated alternative theory of the transaction, providing evidence for it, and referring to later responses to specific questions as appropriate. The merging parties should not hesitate to set forth a procompetitive or benign explanation for the transaction up front, as the benefits from shaping the initial expectations of DG-Comp staff today likely outweigh any lingering concerns that the agency would take the wrong message or identify an efficiency offense. A clear statement of anticipated efficiencies may also discourage the staff from pursuing remedies that would undermine the procompetitive benefits of the deal and make no practical business sense for the parties.

The parties should also seek to undermine an anticompetitive theory early in the investigation by using the answer to Form CO to present evidence on issues that the merging firms must

address or defenses that the agency would expect the firms to be in the best position to address if they were important. Unlike the practice in the United States, merging firms in Europe are required to define the antitrust markets in which they participate. The merging firms should support their market definition with evidence of the likely patterns of buyer substitution that underlies it. To the extent counsel can work with friendly customers in advance to buttress that position, in preparation for customer interviews by DG-Comp staff, that too could be helpful. There is also little downside to the merging parties today in providing evidence in an initial filing as to ease of entry (or repositioning) and efficiencies. These are often areas of inquiry where it would be helpful to counteract the views of complaining rivals.

The more difficult tactical question is how far the merging firms should go initially in addressing possible theories of adverse competitive effect. If an obvious theory that DG-Comp would pursue involves the unilateral effect of loss of localized competition among sellers of differentiated products, that theory should be countered up front because the evidence involved is likely the same buyer substitution considerations as would be adduced in support of the parties' market definition. But the firms may wish to wait before addressing competitive effects theories involving coordination or exclusion until hearing how they are framed by agency staff, to avoid wasting their own effort on theories deemed implausible by enforcers and avoid suggesting avenues of investigation to agency staff. Whether or not competitive effects are addressed early, outside counsel who choose to make economic arguments from the start should work with economists on framing and testing them, much the way DG-Comp increasingly does internally. By making a sophisticated economic argument, the parties can encourage the early and in-depth involvement of the Chief Economist's team in the analysis of their transaction.

This advice is on the whole similar to the way counsel for merging firms deal with the antitrust enforcement agencies in the United States. That should not be a surprise. After all, as European antitrust enforcement has grown in sophistication, its approach to merger analysis has increasingly come to resemble the way mergers are reviewed in the United States. With the growth in cooperation between agencies in the review of transatlantic mergers, and the extensive dialogue among enforcement agencies worldwide through institutions like the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD), this trend toward convergence seems likely to continue. ●