The Antitrust Risks of Four to Three Mergers: Heightened Scrutiny of a Potential ThyssenKrupp/Kone Merger

Eric Fruits
Geoffrey A. Manne

ICLE Antitrust & Consumer Protection Research Program

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ICLE | 2117 NE Oregon St. Suite 501 | Portland, OR 97232 | 503.770.0076
icle@laweconcenter.org | @laweconcenter | www.laweconcenter.org

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Summary

Although not always with legitimate economic grounding, competition authorities have been applying stricter scrutiny to "four to three" mergers. This heightened scrutiny can result in outright rejection of proposed mergers or demands for costly divestitures that can delay closure of the merger by a year or more.

Whether the merger would *actually* entail anticompetitive risk may, unfortunately, be of only secondary importance in determining the likelihood and extent of a merger challenge or the imposition of onerous conditions.

This is particularly true where the resulting, merged firm would become the largest or most dominant firm in the industry (although this stricter scrutiny is also applied even where the merged firm would be only the third largest, arguably mounting a more credible competitive challenge to the remaining two largest firms).

And the complexity, cost, and length of regulatory approval is multiplied for global deals across multiple jurisdictions in which a single jurisdiction can hold up the merger and demand divestitures.

* Chief Economist and President, respectively, of the International Center for Law & Economics (ICLE). ICLE is a nonprofit, nonpartisan research center based in Portland, OR. ICLE promotes the use of law & economics to inform public policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth. ICLE has received financial support from numerous companies, foundations, and individuals, including firms with interests both supportive of and in opposition to the ideas expressed in this and other ICLE-supported works. Unless otherwise noted, all ICLE support is in the form of unrestricted, general support. The ideas expressed here are the authors' own and do not necessarily reflect the views of ICLE's advisors, affiliates, or supporters. Please contact the authors with questions or comments at icle@laweconcenter.org.

Even where there may be credible and competent arguments to support such a deal, deal makers cannot assume that enforcers will readily accept such arguments. Indeed, to the extent the arguments in favor of merging are tied to the size of the resulting firm (e.g., economies of scale or geographic scope), the size of the firm alone will trigger excessive scrutiny. Deal makers must thus be aware of and account for the uncertainties, timing, and costs associated with mergers in today's increasingly hostile regulatory environment.

ThyssenKrupp, for example, is reported to be running a process to sell its elevator and escalator business, and one of the reported bidders for that business is its competitor, Kone. A potential combination of ThyssenKrupp and Kone would almost certainly be viewed by enforcers as a four to three merger that would create a dominant global firm in the supply of elevators, escalators, and related services. The deal would be reportable in many jurisdictions, including the US, EU, Canada, and potentially also in the UK and Australia (although technically filings are voluntary in those jurisdictions). Each of those jurisdictions would likely raise significant concerns with the transaction and subject it to duplicative, lengthy review—and any of them could independently block the merger. Risk factors would include:

- In many jurisdictions, the four to three merger would likely trigger a "highly concentrated" market designation, with the merging firms having a dominant share of the market;
- "Hot docs" associated with competition or cooperation between the merging firms;
- Political risks in the US and globally of the perception the merger would strengthen a foreign firm at the expense of a domestic supplier;
- In the US, other political incentives to block or challenge the merger and the risk and cost of review or challenge by both federal enforcers and state attorneys general;
- Review by EC, UK, Canadian, and Australian competition authorities, each of which has exhibited increased willingness to thwart such mergers;
- Economic factors pointing to possible anticompetitive effects of the contemplated merger, including barriers to entry, the potential for unilateral effects, and a history of coordinated conduct.

Further, acquisitions of minority stakes involving a strategic bidder like Kone, or an IPO with a minority stake taken by a competitor, would not likely resolve the competitive issues raised by a deal. Such minority acquisitions are often still reportable in multiple jurisdictions, and the arrangement would invite scrutiny of the parties' incentives to continue to compete with each other once they have a partial ownership relationship.

I. Introduction and background

Competition authorities have been applying stricter scrutiny to "four to three" mergers.[1] The scrutiny tends to be even stricter in capital intensive industries with little new entry and in industries in which governments are buyers of the products. In fact, the US Department of Justice (DOJ) just announced the formation of a special antitrust "strike force" focused directly on companies doing business with the government.[2]

This heightened scrutiny can result in outright rejection of proposed mergers or demands for costly divestures that can delay closure of the merger by a year or more. For example, it took more than a year for the DOJ to approve the four to three Sprint/T-Mobile merger, which requires a $5 billion spinoff of Sprint's prepaid businesses and spectrum.[3] And despite the settlement with the federal government, a significant group of states (including New York and California) continues to challenge the merger in court.[4]

The complexity is multiplied for global deals across multiple jurisdictions in which a single jurisdiction can hold up the merger and demand divestitures. Danaher's acquisition of GE's biopharma business is now in its tenth month. Despite Danaher's agreement to sell some of its businesses, approval is still uncertain and will not likely

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[1] For example, the recent T-Mobile/Sprint merger and the Sprint/T-Mobile (2014) merger attempt were challenged in the US. The EU has challenged a number of four to three mergers in recent years, including UPS/TNT Express (2013), General Electric/Alstom (2015), ABI/SABMiller (2016), and Bayer/Monsanto (2018).

[2] *See* Brent Kendall, *Justice department targets bid-rigging with new strike force*, WALL STREET JOURNAL (Nov. 5, 2019), https://www.wsj.com/articles/justice-department-targets-bid-rigging-with-new-strike-force-11572990035.

[3] *US v. Deutsche Telekom*, Stipulation and Order, Case 1:19-cv-02232 (DC) (July 26, 2019). The US Department of Justice approved the merger in July 2016; the Federal Communications Commission formally confirmed approval on November 5, 2019.

[4] *See, e.g.*, Mariella Moon, *Texas joins other states' effort to block T-Mobile and Sprint merger*, ENGADGET (Aug. 2, 2019), https://www.engadget.com/2019/08/02/texas-t-mobile-sprint-lawsuit/. The current count of states joining the challenge stands at 15. Most recently, Colorado withdrew from the suit only after extracting a promise from Dish (which is buying the spun-off Sprint assets) that it would build its new wireless headquarters in the state. *See* Makena Kelly, *Colorado drops its T-Mobile-Sprint lawsuit after Dish agrees to house headquarters in the state*, THE VERGE (Oct. 21, 2019), https://www.theverge.com/2019/10/21/20925150/tmobile-sprint-merger-dish-network-colorado-attorney-general-lawsuit-fcc-doj.

occur until 2020.[5] The Tronox acquisition of Cristal's titanium dioxide business took more than two years to be approved after an agreement to divest Cristal's North American titanium dioxide assets, as shown in Table 1. And E.on's acquisition of Innogy took 18 months to receive EU approval.[6] Table 1 provides examples of multi-jurisdictional mergers that took more than a year to be cleared (with conditions) or were blocked by regulators.

Of course, despite the challenges, complexity, and cost associated with four to three global mergers, such deals are still proposed from time to time. And it is by no means clear that such mergers always deserve the extent of scrutiny—or the inevitable conditions or prohibitions—they attract.[7] But such deals do indeed attract significant scrutiny, and deal makers must account for the hurdles as well as the uncertainties, timing, and costs associated with today's regulatory environment.

In recent years, regulators around the world have become more aggressive in merger enforcement stemming from populist calls to rein in "big business," as well as criticism in mainstream media—and across the political spectrum—of perceived lax merger enforcement.[8] The charges may not be accurate, but they are having an effect on

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[5] *Danaher reaches agreement to sell certain businesses to Sartorius AG as part of the GE Biopharma acquisition regulatory process*, Press Release (Oct. 21, 2019), *available at* http://investors.danaher.com/2019-10-21-Danaher-Reaches-Agreement-To-Sell-Certain-Businesses-To-Sartorius-AG-As-Part-Of-The-GE-Biopharma-Acquisition-Regulatory-Process.

[6] Aoife White and William Wilkes, *EON Wins Conditional EU Approval to Take Over Utility Innogy*, BLOOMBERG (Sept. 17, 2019), https://www.bloomberg.com/news/articles/2019-09-17/eon-wins-conditional-eu-approval-to-take-over-innogy-k0njunyw.

[7] *See, e.g.,* Eric Fruits, et al., *A Review of the Empirical Evidence on the Effects of Market Concentration and Mergers in the Wireless Telecommunications Industry*, ICLE ANTITRUST & CONSUMER PROTECTION RESEARCH PROGRAM WHITE PAPER 2019-09-12, *available at* https://laweconcenter.org/resource/a-review-of-the-empirical-evidence-on-the-effects-of-market-concentration-and-mergers-in-the-wireless-telecommunications-industry-2/ ("As regards the effect of [wireless telecommunications] mergers, including so-called 4-to-3 mergers, on price, the results might best be characterized as conclusively inconclusive.").

[8] *See, e.g.,* Yves Faguy, *Merger reviews: Abandoning the Chicago School*, NATIONAL MAGAZINE (Nov. 5, 2019), https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/merger-reviews-abandoning-the-chicago-school ("'There's this view that this hands-off attitude has allowed big business and consolidation to grow,' says Elizabeth Bailey, an economist with NERA Economic Consulting. . . . Bailey explained that there are growing concerns that antitrust regulators have cleared too many merger deals and overlooked new forms of competitive harm."). *See also* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69 (2019), *available at* http://faculty.haas.berkeley.edu/shapiro/protectingcompetition.pdf; Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST 29 (Summer 2008), *available at* https://faculty.haas.berkeley.edu/shapiro/detecting.pdf.

antitrust authorities' transaction reviews. In this environment, it is easy to imagine regulators thinking that intense and lengthy scrutiny of a merger that raises red flags regarding increased market shares and market concentration could attenuate some of the popular criticism of competition authorities.

II. The structural consequences of a potential ThyssenKrupp/Kone deal would likely trigger protracted reviews in multiple jurisdictions

The next opportunity for antitrust authorities to dispel criticism by flexing their muscles in a four to three merger review may be just around the corner. It is widely reported that ThyssenKrupp is contemplating the sale of its elevator business, with Kone as a potential buyer.[9] This potential deal provides a good opportunity to highlight the likely challenges, complexity, and cost that regulatory scrutiny of such mergers actually entails— and it is likely to be a far cry from the lax review and permissive decisionmaking of antitrust critics' imagining.

Germany's ThyssenKrupp, the fourth largest maker of elevators in the world, is putting its elevator division up for sale, apparently in large part because the German conglomerate needs to raise cash.[10] Finland's Kone, the third largest maker of elevators in the world, has expressed an interest in acquiring its German rival for up to an estimated $19 billion dollars.

Whether justified or not, such a deal would virtually *inevitably* present significant regulatory risk and potential delay. Indeed, this risk has caused ThyssenKrupp to consider an IPO, where Kone might take a significant minority interest instead of purchasing the assets outright.[11] While, if successful, the IPO would help ThyssenKrupp raise the cash it needs, a deal structured in this way would not necessarily lessen the regulatory risk, and, in fact, might increase it. Minority investments are reportable in many jurisdictions, and antitrust agencies will often scrutinize such deals involving competitors closely, out of concern that the partial ownership rela-

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[9] *See, e.g.,* Christoph Steitz, Arno Schuetze, Tom Kaeckenhoff, and Edward Taylor, *ThyssenKrupp poised to get elevator bids this week–sources*, REUTERS (Nov. 6, 2019) *available at* https://www.reuters.com/article/us-thyssenkrupp-m-a/thyssenkrupp-poised-to-get-elevator-bids-this-week-sources-idUSKBN1XG2CX.

[10] *Factbox: Thyssenkrupp puts units up for review due to cash drain*, REUTERS (Aug. 12, 2019), https://www.reuters.com/article/us-thyssenkrupp-restructuring-businesses/factbox-thyssenkrupp-puts-units-up-for-review-due-to-cash-drain-idUSKCN1V218O.

[11] Christoph Steitz, et al., *Exclusive: Kone looks at options for potential ThyssenKrupp elevator deal*, REUTERS (May 15, 2019).

tionship could be a smokescreen to permit otherwise illegal coordination or otherwise to reduce the vigor of competition between the companies. In this sense the scrutiny is particularly problematic because it deters or prevents the sort of basic economic reorganization and reallocation of assets that is endemic to a dynamic economy and necessary to ensure that assets can be put to their highest-valued use.

Yet, from the perspective of global antitrust enforcers, a ThyssenKrupp/Kone deal in any form would undoubtedly attract substantial attention. First and foremost, the merger would be viewed as a four to three merger that would create a dominant global firm in the supply of elevators, escalators, and related services. The combined firm would likely become the dominant player with a substantial share in concentrated markets in the US (elevators), Canada (elevators and escalators), Northern Europe (elevators and escalators), and the UK (escalators). Under US merger guidelines, these market shares and concentration levels would trigger a presumption of anticompetitive effects.[12]

It hardly matters that such concentration metrics *shouldn't* necessarily trigger heightened scrutiny or heightened anticompetitive risk.[13] Especially in today's politicized antitrust environment, such numbers alone would draw significant scrutiny—regardless of whether a more nuanced and accurate analysis might counsel against it. For example, as buildings continue to increase in height and complexity of placement and design, and as innovative construction techniques are increasingly rolled out, enhanced elevator innovation will surely be crucial.[14] It is plausible that the increased complexity, novel problems from ever-taller buildings, and organizational demands of ongoing elevator R&D could be better accommodated by a larger firm with more diverse bases of knowledge and expertise. Yet such R&D synergies are unlikely to

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[12] UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES (2010), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[13] *See* Steven T. Berry, Martin Gaynor and Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, NBER WORKING PAPER NO. 26007 (June 2019) 5-6, *available at* https://www.nber.org/papers/w26007 ("Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates.").

[14] *See, e.g.,* Kheir Al-Kodmany, *Tall Buildings and Elevators: A Review of Recent Technological Advances*, 5 BUILDINGS 1070 (2015), *available at* https://www.researchgate.net/publication/283198314_Tall_Buildings_and_Elevators_A_Review_of_Recent_Technological_Advances.

move regulators. Indeed, in some previous instances (most notably Bayer/Monsanto), the merger of R&D capabilities has been the primary *cause* of heightened scrutiny and the locus of required divestitures.[15]

What will matter most to regulators—and what will, alone, ensure that any potential ThyssenKrupp/Kone merger entails significant regulatory costs and enforcement risk—are the nominal concentration ratios. Post-merger, industry reports and sources indicate that several relevant markets in many jurisdictions would be highly concentrated, with the merged firm having a relatively large—and substantially increased—share of the market. Drawing from these sources, we estimate the following concentration numbers:

- **Elevators**: The merger would be viewed as problematic in the US (share > 35%, HHI > 3,000, HHI increase > 700), Canada (share of 50%, HHI > 2,900, HHI increase of 1,000), Australia (share > 40%, HHI > 3,100, HHI increase > 500), and Europe (shares of 33–65%, HHIs in excess of 2,700, and HHI increases of 270 or higher in Sweden, Finland, Netherlands, Austria, France, and Luxembourg).
- **Escalators**: The merger would be viewed as problematic in Canada (share approximately 45%, HHI > 2,500, HHI increase > 800), UK (share of 40%, HHI > 2,800, HHI increase > 700), Australia (share of nearly 70%, HHI > 5,000, HHI increase > 500), and much of Europe, with over 50% share of the markets in Sweden, Norway, Finland, Belgium, and Austria.
- **Service contracts**. The merger would be viewed as problematic in the US and Canada (share > 30%, HHI > 1,800, HHI increase > 400), and Europe (such as Sweden, Netherland, and Belgium with shares of more than 40%, HHIs of approximately 3,000 and higher, and HHI increases higher than 600).

In addition, there is broad industry acknowledgement of high concentration, leading to recognition of potential regulatory scrutiny. Former ThyssenKrupp CEO, Guido Kerkhoff noted in a shareholders' meeting that, worldwide, the company is "in the

[15] *See* European Commission, *Mergers: Commission clears acquisition of parts of Bayer's Crop Science business by BASF, subject to conditions*, Press release IP/18/3622 (Apr. 30, 2018), *available at* https://europa.eu/rapid/press-release_IP-18-3622_en.htm; *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto*, Press Release (May 29, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened. In addition to the divestiture of overlapping seed business, a condition of approval was the divesture of one of the firms' most innovative enterprises (Bayer's digital agriculture business) and several key lines of R&D.

top 4 [elevator/escalator firms] that cover 70% of the market."[16] Bloomberg characterizes the world market as a "jolly oligopoly" that is "quite consolidated" and points to this structure as a "big attraction" for potential buyers or partners for ThyssenKrupp's elevator unit.[17] Seeking Alpha describes the market as being "dominated by only a handful of companies" and a ThyssenKrupp/Kone merger would "neutralize a major competitor."[18] Sky News, quoting Thomas Oetterli, CEO of Schindler, describes the industry as "one of the most consolidated in the world":

> Our industry, in general, is one of the most consolidated in the world. So any strategic move between, let's say, big players would immediately generate a lot of questions about anti-trust. I think this will generate a lot of huge hurdles for any attempt if any two of the big ones would like to come close with each other.[19]

Reuters reports Kone CEO Henrik Ehrnrooth describes his company and ThyssenKrupp as dominating certain geographic markets and recognizes that a merger between the two could result in lengthy negotiations and, ultimately, divestitures to obtain EU approval:

> An acquisition would need approval by European competition authorities, but Kone Chief Executive Henrik Ehrnrooth told Reuters that talks with them would only begin once there was "a real case on their table".
>
> He pointed out that the two companies dominate in different geographies, with Kone being strong in Asia while ThyssenKrupp's best markets are in the Americas.

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[16] ThyssenKrupp AG Annual Shareholders Meeting—Final, FD (FAIR DISCLOSURE) WIRE (Feb. 1, 2019).

[17] Chris Bryant, *The elevator market is being cornered*, BLOOMBERG (Sept. 10, 2019), https://www.bloomberg.com/opinion/articles/2019-09-10/kone-and-thyssenkrupp-elevator-deal-would-raise-oligopoly-fears.

[18] Christopher Liu, *Kone Oyj should buy ThyssenKrupp Elevators even at a high price*, SEEKING ALPHA (Oct. 14, 2019), https://seekingalpha.com/article/4296490-kone-oyj-buy-thyssenkrupp-elevators-even-high-price.

[19] Ian King, *Going down? ThyssenKrupp could exit elevator business as pressure grows*, SKY NEWS (Aug. 29, 2019), *available at* https://news.sky.com/story/going-down-thyssenkrupp-could-exit-elevator-business-as-pressure-grows-11797069.

> "We haven't discussed selling any of our own assets," Ehrnrooth said, adding "it could well be that we would have to give up some parts of Thyssenkrupp".[20]

This industry recognition itself, whether *economically* accurate or not,[21] also heightens the enforcement risk and cost, as most jurisdictions view such industry assessments as indicators of anticompetitive risk. In Europe, in fact, the search for documentary evidence of such internal information has led to a marked increase in the references to such "hot docs" in merger reviews and heightened document production demands. "The extent of the Commission's new approach has become evident in a number of recent complex merger cases. . . . [T]he CEO of Bayer described EU merger proceedings in Bayer/Monsanto last year as going to 'unimaginable depths' after having to provide 2.7 million documents to the Commission."[22]

Finally, a potential ThyssenKrupp/Kone deal would be reportable in many jurisdictions, including the US, EU, Canada, and potentially the UK and Australia,[23] all of which would likely subject the transaction to lengthy review. This multi-jurisdictional risk can substantially increase the expected cost of a deal.

In the EU, for example, the number of decisions open to a Phase II investigation (thus entailing more scrutiny, a longer timeline, and, often, the imposition of more onerous merger conditions to remove the "serious doubts" that trigger a Phase II

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[20] Anne Kauranen and Christoph Steitz, *Kone Signals ThyssenKrupp Elevator Interest, Might Have to Sell Some Assets*, REUTERS (Oct. 23, 2019) *available at* https://www.reuters.com/article/us-thyssenkrupp-kone/kone-signals-thyssenkrupp-elevator-interest-might-have-to-sell-some-assets-idUSKBN1X21QG. *See also* Stephen Singer, *UTC Chief Sees Possible, Though Complicated, Deal between Otis and German Elevator Manufacturer*, HARTFORD COURANT (May 21, 2019), https://www.courant.com/business/hc-biz-utc-outlook-20190521-7p37aoahcrd55fqcto4m22tnu4-story.html (noting that a potential , analogous Otis/ThyssenKrupp deal would require "major divestitures").

[21] *See generally* Geoffrey A. Manne and E. Marcellus Williamson, *Hot Docs vs. Cold Economics*, 47 ARIZ. L. REV. 609 (2005).

[22] Tilman Kuhn, *EC focus on internal documents: Time to rethink the architecture of the EU merger control process?*, WHITE & CASE (Mar. 8, 2019), https://www.whitecase.com/publications/article/ec-focus-internal-documents-time-rethink-architecture-eu-merger-control-process (further noting that "[t]he European Commission's increasing reliance on internal documents in EU merger control proceedings places an excessive burden on the notifying parties, but it seems debatable if the practice results in higher-quality decisions.").

[23] Technically, the UK and Australia are voluntary filing jurisdictions, but in deals that significantly increase concentration, merging parties often opt to file the transaction to avoid the uncertainty of potentially facing a merger challenge after the deal is consummated.

investigation[24]) increased considerably in 2018 from previous years.[25] In the first half of 2019, the average merger in the EU took more than 15 months; the average US merger review ran for just over a year.[26] While many of these reviews run concurrently, of course, and while many jurisdictions will cooperate to share information, there is no escaping the reality that such duplicative reviews add considerably to the time and the cost—and thus also the deterrent effect—of regulatory scrutiny.

For deals requiring clearance in the US, parties must also anticipate the possibility of litigation, which can add significantly to the merger timeline. Not only does an increased risk of litigation extend the time and complexity of settlement negotiations, but if an agreement cannot be reached, litigation itself adds considerably to the timeline. Thus, for example, more than a year passed before settlement talks over the AT&T/Time Warner transaction fell through and the DOJ filed a complaint. Nearly seven months passed after that before the district court issued its decision in favor of the merger and the merger was finally closed. And it took yet *another* eight months before the DOJ's appeal of the decision was completed and the DOJ finally dropped its challenge.[27]

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[24] Council Regulation 139/2004 of 20 January 2004, on the control of concentrations between undertakings, 2004 O.J. L24/1, art. 6.1(c).

[25] Kyriakos Fountoukakos, Dafni Katrana, & Samuel Hall, *European Union: Merger Control*, in GLOBAL COMPETITION REVIEW'S EUROPE, MIDDLE EAST AND AFRICA: ANTITRUST REVIEW 2020 (2020), available at https://globalcompetitionreview.com/edition/1001354/europe-middle-east-and-africa-antitrust-review-2020 ("The 12 Phase II investigations opened by the Commission in 2018 represent a sharp increase from the seven opened in 2017, although there were no prohibition decisions in 2018 (but there have already been two prohibitions in early 2019)." In addition, many deals that would otherwise pass to Phase II (and a few that have passed to Phase II) are withdrawn before the Commission reaches a (presumably problematic) decision).

[26] *How long does it take to conduct significant antitrust merger investigations?*, DAMITT: Dechert Antitrust Merger Investigation Timing Tracker, *available at* https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html (last visited Oct. 24, 2019).

[27] *See* Farrell J. Malone and Ian C. Thresher, *Leaving time to litigate: Lessons from recent merger challenges*, ANTITRUST SOURCE (Oct. 2018), *available at* https://www.lw.com/thoughtLeadership/leaving-time-litigate-merger-challenges; Diane Bartz & David Shepardson, *U.S. Justice Department will not appeal AT&T, Time Warner merger after court loss*, REUTERS (Feb. 26, 2019), https://www.reuters.com/article/us-timewarner-m-a-at-t/us-justice-department-will-not-appeal-att-time-warner-merger-after-court-loss-idUSKCN1QF1XB ("The three-judge panel on the U.S. Court of Appeals for the District of Columbia ruled unanimously in favor of the deal on Tuesday, saying that the government's case that the merger would result in higher consumer prices was 'unpersuasive.' The decision ended a 15-month effort by the Justice Department to block the deal.").

Of course, this risk is further heightened in the US where all 50 state attorneys general, as well as private plaintiffs, have the ability to challenge proposed mergers in court—even if they have been approved by federal antitrust authorities. State AG challenges following approval by the FTC or DOJ are fairly uncommon because federal enforcers and state AGs usually coordinate their merger reviews. Nevertheless, they do occur, as in the T-Mobile/Sprint merger challenge currently pending in district court.[28]

Private challenges are even less common, but they, too, do happen. In the most recent of these, a competitor filed suit to challenge the consummated JELD-WEN/Craftmaster merger four years after the DOJ approved the merger without conditions. The challenge was lengthy, but successful, and a district court ordered damages and the divestiture of one of the combined firm's manufacturing facilities six years after the merger was closed.[29] As some commentators have noted, "[t]he court's decision in the JELD-WEN case could make [the divestiture] threat far more real, encouraging other aggrieved private parties to sue under Section 7 and seek an order of divestiture (or, even, unwinding) under Section 16."[30]

Notably for global companies and cross-border deals, this sort of risk isn't confined to US-based deals; even international transactions can face substantial delays associated with US litigation. More than a year passed before a complaint was filed by the FTC opposing the Tronox/Cristal deal, for example, and almost a year and a half after that (and an administrative adjudication and trial in US district court) before the FTC finally approved the deal with substantial conditions.[31]

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[28] *See supra* note 3-4 and accompanying text.

[29] *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 16-545 (E.D. Va. Oct. 5, 2018), Memorandum Opinion (ECF Nos. 1783 [redacted] and 1784 [under seal]). *See also* Edward B. Schwartz and Karl E. Herrmann, "*Not So Fast!" District Court Orders Divestiture Of Assets In Private Clayton Act Case Six Years After DOJ Clears Deal*, REEDSMITH CLIENT ALERT (Oct. 25, 2018), *available at* http://www.mondaq.com/unitedstates/x/748900/wealth+management/Not+So+Fast+District+Court+orders+divestiture+of+assets+in+private+Clayton+Act+case+six+years+after+DOJ+clears+deal.

[30] *Id.*

[31] *In the Matter of Tronox Ltd., et al., and Cristal USA, Inc., FTC Docket No.* 9377 (Dec. 5, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristal-usa.

III. Factors likely leading to heightened scrutiny by the US of a ThyssenKrupp/Kone merger

A. Increased concentration

The antitrust world is currently in the thrall of a populist movement, centered on coopting antitrust enforcement to further non-competition and non-economic outcomes. In large measure this movement is rooted in arguments that markets in the US and around the world have become more concentrated, and that, in addition to harming consumers, this increased concentration harms workers and exacerbates inequality.[32]

While the literature on which these claims are based is increasingly being undermined,[33] media and political uptake of the claims has been unrelenting and resolute. The net effect is that corporate decisions that increase concentration are likely to come under increased scrutiny. And this is so even if a proposed merger could be shown to have beneficial consumer welfare effects: The scrutiny upon antitrust enforcers as alleged "enablers" of the alleged depredations of increased concentration, and the easy public relations benefit of being seen to challenge further concentration, are simply too powerful to resist.

B. Hot docs

The US Federal Trade Commission reports that 80% of four to three mergers are challenged when "hot docs" are present.[34] As virtually every such merger before it, a

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[32] *See, e.g.*, *Capitalism is becoming less competitive*, THE ECONOMIST (Oct. 10, 2018), https://www.economist.com/open-future/2018/10/10/capitalism-is-becoming-less-competitive; David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARVARD BUSINESS REVIEW (Mar.-Apr. 2018), *available at* https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy; Suresh Naidu, Eric Posner, and Glen Weyl, *More and more companies have monopoly power over workers' wages. That's killing the economy*, VOX (Apr. 6, 2018), https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality.

[33] *See, e.g.*, Joshua D. Wright, *Market Concentration*, OECD Hearing on Market Concentration (June 7, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Chang-Tai Hsieh and Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, NBER Working Paper No. 25968 (June 2019), *available at* https://www.nber.org/papers/w25968; James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements* (Feb. 8, 2018), *available at* https://ssrn.com/abstract=3120849 *or* http://dx.doi.org/10.2139/ssrn.3120849.

[34] US Federal Trade Commission. *Horizontal Merger Investigation Data: Fiscal Years 1996–2011*, (Jan. 2013), Table 6.1. *See also* Manne & Williamson, *supra* note 21.

potential ThyssenKrupp/Kone merger would likely generate hot documents, especially in light of past allegations of price fixing in the industry and a decision by the European Commission in 2007 to fine certain companies in the industry for alleged anticompetitive conduct (including ThyssenKrupp and Kone, discussed below). The FTC also reports that nearly two-thirds of deals with as similar risk profile (HHI of 3,000–3,999; HHI increase of 500–799) triggered enforcement actions.[35]

C. Government contracts

Whether appropriate or not, enforcers are virtually certain to assess the effects of such a merger in multiple purchaser markets, including a distinct "government contracts" market. To the extent that US federal, state, and local governments purchase products from the merging parties, the deal would likely be subjected to increased attention. Indeed, as noted above, the US Department of Justice (DOJ) has created a "Procurement Collusion Strike Force" focused on "deterring, detecting, investigating and prosecuting antitrust crimes . . . which undermine competition in government procurement. . . ."[36] Such increased attention on potentially anticompetitive conduct that might raise government contract prices is sure to entail enhanced scrutiny of potentially anticompetitive mergers.

For example, the aborted Sysco/US Foods proposed merger was scrutinized for its possible price effects on sales to federal and state governments, including the US military.[37] If a potential ThyssenKrupp/Kone merger were perceived to increase building construction costs for federal, state, and local governments, competition authorities would have an increased incentive to block the merger or to demand substantial remedies.

In fact, US agencies have been become more demanding about what they view to be sufficient divestiture remedies in general. The Sprint/T-Mobile merger was approved by the DOJ only after the parties agreed to a complicated, costly, and tenuous deal for Dish to stand up an independent, additional mobile wireless competitor based

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[35] US Federal Trade Commission. *Horizontal Merger Investigation Data: Fiscal Years 1996–2011*, January 2013. Table 3.1.

[36] US Department of Justice, Antitrust Division, *Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding*, Press Release (Nov. 5, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

[37] *FTC v. Sysco*, Memorandum Opinion, Civ 1:15-cv-00256 (DC) (June 29, 2015) (granting preliminary injunction).

on its purchase of divested Sprint assets.[38] At the same time, because the current DOJ has doubled down on the agency's aversion to behavioral remedies, it has put all of its eggs into the structural remedies basket. In the most prominent fall out from this strategy, the DOJ demanded such excessive structural remedies from AT&T for approval of its merger with Time Warner that the company chose to litigate (in that case, of course, successfully, but such an outcome is costly and far from guaranteed) rather than acquiesce to the agency's demands.[39]

D. Protectionism

In the US, as in the rest of the world, political pressures to protect domestic industry are on the rise.

> "There was direct interference from the government when we wanted to acquire a target in western Europe," an unnamed Chinese tech executive told White & Case. "We tolerated this to an extent but when the interference got to the strategic level, we had no option but to walk out of the deal". . . .
>
> About 62 per cent of respondents [] have walked away from deals citing uncertainty around competition regulations, the White & Case/Mergermarket survey found.
>
> Some politicians and regulators are now questioning whether the core principles of antitrust policy should extend beyond their traditional focus on competition and consumer welfare, Freshfields said.[40]

In addition to a potential ThyssenKrupp/Kone merger, US-based United Technologies is spinning off its Otis elevator division. A ThyssenKrupp/Kone merger could be seen as strengthening a foreign firm at the possible expense of a US firm—and one newly independent of its larger corporate environment and potentially looking to strike its own deal with ThyssenKrupp's elevator division, at that.[41] President Trump's administration has demonstrated a keen interest in protecting what it sees

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[38] *See US v. Deutsche Telekom*, Stipulation and Order, *supra* note 3.

[39] Steven Overly, *Sources: AT&T, Time Warner under pressure to dump CNN*, POLITICO (Nov. 8, 2017), https://www.politico.com/story/2017/11/08/att-time-warner-dump-cnn-244697.

[40] Chad Bray, *Rising protectionism, concerns about technology's reach are politicising, delaying merger reviews, lawyers say*, SOUTH CHINA MORNING POST (Feb. 17, 2019), https://www.scmp.com/business/companies/article/2186343/rising-protectionism-concerns-about-technologys-reach-are.

[41] *See* Singer, *supra* note 20.

as US interests vis-à-vis foreign competition.[42] In fact, shortly after his election, President Trump announced a package of tax credits to entice United Technologies' Carrier division from moving manufacturing operations to Mexico. Whether because of an ideological preference for protectionism or because the Administration has the ear of United Technologies' executives, the administration may be especially sensitive to a deal it views as harmful to Otis because of the United Technologies-Carrier-Otis nexus or a possible preference for an Otis/ThyssenKrupp tie-up to a ThyssenKrupp/Kone deal.

Meanwhile, a merger of foreign elevator and escalator manufactures does not have a clear, pro-American synergy rationale. In contrast, the argument that the Sprint/T-Mobile merger would allow for investment in 5G technology in competition with China provided some political cover for allowing that four to three merger to proceed.

E. Other political factors

As a high-rise and hotel developer who has demonstrated a keen willingness to intervene in antitrust enforcement to protect his interests, President Trump may have a heightened personal interest in a ThyssenKrupp/Kone merger. He may be especially attuned to potential price effects that would come from a dominant supplier selling in a concentrated industry. He may also claim technical expertise regarding elevator and escalator operations and offer opinions in speeches or over Twitter disparaging the quality of the merging parties' products and services and opposing a merger of two foreign companies operating in the US. Such political interference in antitrust decision-making by the Trump Administration was arguably the driving force behind the DOJ's otherwise questionable decisions to put a thumb on the scale in favor of Disney's purchase of some of Fox's assets at the expense of Comcast's efforts to purchase the same assets,[43] to challenge an agreement over auto emissions between car

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[42] Among other things, the administration has been active in using CFIUS review to block foreign investment in the US, and it encouraged passage of (and the president signed) the Foreign Investment Risk Review Modernization Act, which significantly expanded the government's authority to block foreign transactions. *See* White House, *Statement by the Press Secretary Supporting the Foreign Investment Risk Review Modernization Act* (Jan. 24, 2018), *available at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-supporting-foreign-investment-risk-review-modernization-act/.

[43] *See, e.g.,* Ted Johnson, *How the Disney-Fox Deal Got DOJ's Greenlight Quicker Than Expected*, VARIETY (Jun. 27, 2018), https://variety.com/2018/politics/news/disney-fox-merger-justice-department-1202859900/.

makers and the state of California,[44] and, of course, to challenge the AT&T/Time Warner deal.[45]

Moreover, in addition to federal review of a ThyssenKrupp/Kone merger, the deal may be opposed by states' attorneys general. Several state AGs have become more active in pursuing antitrust issues they believe the federal government has not adequately pursued. For example, several states have filed complaints to halt the Sprint/T-Mobile merger,[46] and nearly every state AG has joined in investigating, or has expressed support for pursuing antitrust complaints against, "Big Tech."[47] State AGs often have their own idiosyncratic, political incentives for these sorts of actions, but they always entail either additional regulatory clearance costs or direct payouts to prevent litigation.

IV. Factors likely leading to heightened scrutiny by non-US enforcers of a ThyssenKrupp/Kone merger

European competition regulators will focus on local and national markets even if a merger is reviewed by the European Commission. And the fact that the potential merger is between European firms will not save it from excessive scrutiny. The EU recently blocked a proposed merger between the transport (rail) services of EU firms, Siemens and Alstom. As one report noted:

> The European Commission, the EU's executive arm, said that it received a number of complaints during its investigation, including from customers and industry associations, as well as negative comments from several national competition authorities.
>
> The EU's competition authority specified that the proposed merger would have created an "undisputed" market leader in several mainline

[44] *See, e.g.,* Hiroko Tabuchi and Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, NEW YORK TIMES (Sep. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.

[45] *See, e.g.,* Callum Borchers, *Aiming at AT&T and Time Warner, Trump shot from the hip and missed*, WASHINGTON POST (Jun. 12, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/12/aiming-at-att-and-time-warner-trump-shot-from-the-hip-and-missed/.

[46] *See* Moon, *supra* note 4.

[47] *See* Mario Loyola, *The Problem With the State-Level Investigation of Google*, THE ATLANTIC (Sep. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/09/texas-v-google/598597/.

> signaling markets, as well as reducing the number of suppliers by removing one of the two largest manufacturers of very high-speed rolling stock.[48]

Notably, not even vigorous lobbying by the interested member state officials and many antitrust observers that the merger would enable more viable competition for the combined company with its competitors—including foreign competitors—was sufficient to move the Commission.

As noted above, several national markets have risk profiles that indicate the likelihood of lengthy and thorough review by competition authorities. Canada and Australia also have a risk profile that points to substantial scrutiny by regulators.

Further, the UK Competition and Markets Authority will review deals independently of the EC, once Brexit is complete. The UK recently blocked a series of major deals that had only limited competitive effects on the UK. In one of these, Thermo Fisher Scientific's proposed acquisition of Roper Technologies' Gatan subsidiary was not challenged in the US, but the deal was abandoned after the UK CMA decided to block the deal despite its limited connections to the UK.[49] In another, Sabre's acquisition of Farelogix recently entered Phase II despite limited connections to the UK.[50] And in a particularly firm display of its willingness to exercise its independent enforcement muscle, in October the CMA announced its "provisional view" that Illumina's proposed acquisition of Pacific Biosciences—two US-based firms—would "result in a substantial lessening of competition" in the market for next generation sequencing systems in the UK.[51] The CMA concludes, "[a]t this stage, the only structural remedy that CMA has identified as being likely to be effective would be prohibition of the Proposed Merger."[52] Global Competition Review reports that 75% of

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[48] Sylvia Amaro, *EU blocks Alstom-Siemens rail merger due to 'serious competition concerns,'* CNBC (Feb 6, 2019), https://www.cnbc.com/2019/02/06/eu-blocks-plan-for-alstom-siemens-rail-merger.html.

[49] See *Thermo Fisher scraps Roper deal after U.K. antitrust hurdle*, REUTERS (Jun. 10, 2019), https://www.reuters.com/article/us-roper-tech-thermo-fisher/thermo-fisher-scraps-roper-deal-after-u-k-antitrust-hurdle-idUSKCN1TB1OE.

[50] *CMA refers Sabre / Farelogix merger to a Phase 2 investigation*, THOMPSON REUTERS PRACTICAL LAW (Sept. 2, 2019), https://uk.practicallaw.thomsonreuters.com/w-021-9018.

[51] UK Competition & Markets Authority, *Anticipated acquisition by Illumina, Inc (Illumina) of Pacific Biosciences of California, Inc. (PacBio): Summary of Provisional findings*, (Oct. 24, 2019) *available at* https://assets.publishing.service.gov.uk/media/5db1685940f0b609bdf449fc/Summary_of_the_provisional_findings.pdf.

[52] UK Competition & Markets Authority, *Anticipated acquisition by Illumina, Inc of Pacific Biosciences of California, Inc.: Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups*, (Oct. 24, 2019) *available at*

the UK's Phase II investigations concluded during 2018 and 2019 year to date have either resulted in a prohibition, abandonment of the deal, or significant required remedies in order to clear the deal.[53]

V. Economic factors that may lead to blocking a four to three merger

It should not be sufficient—or even relevant—to block or scrutinize a deal based on structural presumptions and political considerations. But, right or wrong, the reality is that such concerns play a significant role, and can, on their own, scuttle a deal or at least add significant time and cost to its conclusion.

But in addition to the structural and political factors that may lead to blocking a four to three merger, several economic factors may further exacerbate the problem. While these, too, may be wrongly deemed problematic in particular cases by reviewing authorities, they are—relatively at least—better-supported by economic theory in the abstract. Moreover, even where wrongly applied, they are often impossible to refute successfully given the relevant standards. And such alleged economic concerns can act as an effective smokescreen for blocking a merger based on the sorts of political and structural considerations discussed above.

A. Entry barriers

The existence of barriers to entry is commonly cited by merger review authorities as a basis for stopping or burdening a proposed merger. In particular, although not a valid economic consideration,[54] the simple existence of high costs of entry (e.g., from the high costs of manufacture or the existence of long-standing deals or commercial relationships) can scuttle such deals.

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https://assets.publishing.service.gov.uk/media/5db02682e5274a090e1458a4/Illumina_Pacbio_-_Remedies_Notice.pdf.

[53] Peter Harper & Kate Newman, *United Kingdom: Merger Control*, GLOBAL COMPETITION REVIEW: EUROPE, MIDDLE EAST AND AFRICA ANTITRUST REVIEW 2020 (Jul. 12, 2019), *available at* https://globalcompetitionreview.com/insight/europe-middle-east-and-africa-antitrust-review-2020/1195128/united-kingdom-merger-control.

[54] In pioneering work, George Stigler demonstrated barriers to be costs of producing at various output levels incurred by entrants *but not incurred by existing firms*. The contrary view—that any advantage of established sellers over entrants constitutes a barrier to entry—is, however, still commonly accepted by many enforcers. *Compare* GEORGE STIGLER, THE ORGANIZATION OF THE INDUSTRY (1968) *with* JOE BAIN, BARRIERS TO NEW COMPETITION (1956).

With regard to the elevator industry, IBISWorld concludes that barriers to entry in the elevator market are "moderate."[55] Nevertheless, the report indicates that incumbents can exploit economies of scale, long-standing relationships with existing buyers, as well as long records of safety and reliability. Similarly, elsewhere IBISWorld's survey of industry participants reports that "[n]ew industry entrants are likely to be significantly disadvantaged by the existing relationships between contractors, machinery suppliers and leading customers, as establishing repeat customers is essential to gaining a foothold in this industry.[56] In addition, new entrants will have up-front costs associated with capital investment and adherence to safety and manufacturing standards and regulations. Indeed, IBISWorld concludes that regulations and policies present a "heavy" barrier to entry.

These factors are similar to those cited by the European Commission in announcing the remedies imposed on the JLT/Marsh & McLennan merger: "The Commission found that barriers to entry are high on both markets, as customers require suppliers to have a proven track record, access to scarce expertise, and global reach in order to compete effectively."[57]

A Canadian Bar Association journal reports when assessing the 2017 deal between Dow and DuPont, the EC scrutinized barriers to entry.[58] The journal cites Frank Montag, of Freshfields Bruckhaus Deringer in Brussels: "in a concentrated industry with a high degree of R&D activity and high barriers of entry, a merger between two of the top five players will lead to a reduction in overall competition." The EC cleared the deal but forced DuPont to sell a significant portion of its R&D facilities.

Seeking Alpha reports that the elevator industry has a "relatively high barrier to entrance" and concludes it would be "relatively unlikely" a new or existing competitor

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[55] Jack Curran, *Elevator manufacturing in the US*, IBISWORLD INDUSTRY REPORT OD4684 (Aug. 2019), available at https://www.ibisworld.com/industry-trends/specialized-market-research-reports/specialist-engineering-infrastructure-contractors/construction-machinery-manufacturing/elevator-manufacturing.html.

[56] *23829–Elevator installation & service in the US*, IBISWORLD (Jun. 2019), *available at* https://www.ibisworld.com/united-states/market-research-reports/elevator-installation-service-industry/.

[57] European Commission, *Mergers: Commission approves acquisition of Jardine Lloyd Thompson by Marsh & McLennan Companies, subject to conditions*, Press Release IP/19/1808 (Mar. 22, 2019) *available at* https://europa.eu/rapid/press-release_IP-19-1808_en.htm.

[58] Yves Faguy, *Merger reviews: Abandoning the Chicago School*, NATIONAL (Nov. 5, 2019) *available at* https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/merger-reviews-abandoning-the-chicago-school.

would be able to "join the leader group anytime soon."[59] That report also indicates that entry in the service sector of the market may be difficult because long-term maintenance contracts are entered into upon purchase of a unit.

As noted, strictly speaking, these are not costs borne only by a new entrant, and thus should not be deemed competitively relevant entry barriers. Yet merger review authorities the world over fail to recognize this distinction, and routinely scuttle mergers based simply on the costs of additional competitors entering the market.

B. Unilateral effects

A merger that eliminates competition between two firms may by itself constitute a substantial lessening of competition sufficient to trigger an enforcement action. Thus the extent of direct competition between the products and services sold by the merging parties is a key part of the evaluation of unilateral price effects. To the extent the products and services of the merging firms are considered by buyers to be the next best alternative to each other, the likely unilateral price effects of a merger would be greater.

Competition authorities would likely consider a significant range of information to evaluate the extent of direct competition between the products and services sold by ThyssenKrupp and its merger partner. In addition to "hot docs," this information could include won/lost bid reports as well as evidence from discount approval processes and customer switching patterns. Because the purchase of elevator and escalator products and services involves negotiation by sophisticated and experienced buyers, it is likely that this type of bid information would be readily available for review.[60]

In markets involving relatively undifferentiated products, such as the market for commodity elevators, antitrust enforcers will likely consider that the merged firm may find it profitable unilaterally to suppress output and elevate the market price. Enforcers will assume a risk that the merged firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or

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[59] Liu, *supra* note 18.

[60] Indeed, IBISWorld reports that "[c]ustomers often assess competing products by looking at the total costs over the life of the equipment, including upfront purchase, maintenance, running, downtime costs, and resale value," surely generating scads of relevant data. IBISWORLD INDUSTRY REPORT OD4684, *supra* note 55. Such information, in turn, is likely to prompt agency economists to engage the parties in a lengthy process consisting of sophisticated data analyses and arguments.

eliminate pre-existing production capabilities. The US Horizontal Merger Guidelines provide an example:

> *Example 20*: Firms A and B [e.g., Kone and ThyssenKrupp] both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A [e.g., Kone] is the market leader. Firm B [e.g., ThyssenKrupp] produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.[61]

To the extent that competition authorities identify data consistent with the example above, they may conclude the merger would result in potentially anticompetitive unilateral effects.[62]

C. Coordinated effects

Competition authorities will also consider the risk that a four to three merger will increase the ability and likelihood for the remaining, smaller number of firms to collude. This risk is, traditionally, particularly heightened in markets involving large industrial producers and among firms with a history of collusion. Both would apply here.

In 2007 the European Commission imposed a €992 million cartel fine on five elevator firms: ThyssenKrupp, Kone, Schindler, Otis, and Mitsubishi. At the time, it was the largest-ever cartel fine.[63] According to the Commission, the nine-year scheme involved elevators and escalators for hospitals, train stations, shopping centers, and commercial buildings in Belgium, Netherlands, Luxembourg, and Germany. The Commission said the companies "did not contest the facts" found by EU regulators.

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[61] HORIZONTAL MERGER GUIDELINES, *supra* note 12.

[62] For example, Bloomberg reports that ThyssenKrupp's operating margins are lower than Kone's. *See* Bryant, *supra* note 17.

[63] *EU hands down its biggest price-fixing fine ever for elevator 'rip-off,'* NEW YORK TIMES (Feb. 21, 2007), https://www.nytimes.com/2007/02/21/business/worldbusiness/21iht-cartel.4677255.html.

Several companies, including Kone and United Technologies, admitted wrongdoing.[64]

ThyssenKrupp was assessed the largest fine, more than €479 million, because the company was labeled a "repeat offender" by EU regulators. On appeal, the court ruled ThyssenKrupp's infringements could not be considered "repeated" and its fine was reduced.[65] But Kone's appeal of its fines was rejected by the EU Court of Justice.[66]

ThyssenKrupp and Kone's participation in a long-running cartel scheme would likely become a focus of a coordinated effects analysis in a potential ThyssenKrupp/Kone deal.

VI. Perceived problems with a four to three merger may not be resolved with a minority investment

ThyssenKrupp has indicated that it is considering an IPO of its elevator business, in which Kone might take at a certain point in time a significant minority interest. Another reported possibility is that Kone will team up with a private equity fund to buy ThyssenKrupp's elevator business.[67] Such arrangements may not reduce or eliminate the risk of lengthy and exacting review by competition authorities. In particular, minority investments are often treated much like full mergers. Thus, in addition to the "standard" regulatory review, the parties will have to address questions regarding the incentives associated with partial ownership. In the US, such an arrangement may also raise Section 1 concerns because the companies would still be considered competitors, and thus coordination between the two could be construed as a conspiracy in restraint of trade.

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[64] *In re* Elevator Antitrust Litig., No. 04 CV 1178, 2006 WL 1470994, at *2 (S.D.N.Y. May 30, 2006), *aff'd*, 502 F.3d 47 (2d Cir. 2007).

[65] General Court of the European Union, *The General Court reduces the fines imposed on a number of companies in the ThyssenKrupp group for their participation in a cartel on the market for the sale, installation, maintenance and modernisation of elevators and escalators*, Press release No. 72/11, July 13, 2011, *available at* https://europa.eu/rapid/press-release_CJE-11-72_en.htm.

[66] Court of Justice of the European Union, *Judgment in Case C-510/11 P, Kone and Others v Commission*, Press release No. 142/3, Oct. 24, 2013, *available at* https://europa.eu/rapid/press-release_CJE-13-142_en.htm.

[67] *See* Steitz, et al, *supra* note 11.

In fact, in the 1998 decision clearing Thyssen's acquisition of Krupp, the EC required that Krupp—which at the time held a 10% interest in Kone—give up the rights afforded by its shares in Kone. The EC in that case noted that:

> Krupp however holds a 10% shareholding in Kone, has privileges regarding the acquisition of further Kone shares and has a seat on the board of directors of Kone. Furthermore, non-compete clauses exist between both companies. The merger as originally notified would have combined the escalator business of Thyssen with Krupp's links to Kone. In the course of the procedure Krupp proposed to durably renounce its right to appoint a member to Kone's board of directors. Krupp will further enter into negotiations with Kone to annul the noncompete clauses and give up the privileges regarding the acquisition of further shares of Kone.[68]

Enforcement agencies' awareness of theoretical problems with minority ownership are particularly acute today as the alleged problem of "common ownership" is gaining traction.[69] The common ownership literature undergirding this movement is primarily focused on institutional investors, and in that aspect it is roundly and compellingly criticized.[70] But whatever modicum of merit the theory may have, its implications are far more robust for overlapping ownership interests among directly competing firms. And of course, as noted, the economic validity of such a theory may ultimately be less important to the agencies' decision-making around it than their efforts to mollify the vocal chorus of activists touting these claims.

Conclusion

Competition authorities have been applying stricter scrutiny to "four to three" mergers of late. Much of this increased scrutiny is driven by political or politicized considerations, and it is occurring regardless of the adequacy of the economic grounding of heightened review in any particular case. This heightened scrutiny can result in

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[68] European Commission, *Commission clears Thyssen/Krupp merger*, Press Release IP/98/503, June 3, 1998, *available at* https://europa.eu/rapid/press-release_IP-98-503_en.htm.

[69] *See, e.g.*, Einer Elhague, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016); José Azar, et al., *Anti-Competitive Effects of Common Ownership* (Uni. of Navarra IESE Bus. Sch., Working Paper No. 1169-E, Mar. 23, 2017); Miguel Antón, et al., *Common Ownership, Competition, and Top Management Incentives* (Ludwig-Maximilian Uni. Center for Economic Studies, Working Paper No. 6178, Aug. 15, 2016).

[70] In particular, see Thomas A. Lambert and Michael E. Sykuta, *The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms* (University of Missouri School of Law Legal Studies Research Paper No. 2018-21), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173787.

outright rejection of proposed mergers or demands for costly divestures than can delay closure of a merger by a year or more. The complexity is multiplied for global deals across multiple jurisdictions in which a single jurisdiction can hold up the merger and demand divestitures. And the risks are further heightened by deals that would result in a dominant firm, rather than a newly invigorated third competitor.

Although, as noted, the reasons for this increased scrutiny may not always be based on sound economic consideration, they are nonetheless very real. As "populist" antitrust gains more traction among enforcers aiming to stave off criticisms of lax enforcement, superficial and non-economic concerns have increased salience. The simple benefit of a resounding headline—"The US DOJ challenges increased concentration that would stifle the global construction boom"—signaling enforcers' efforts to thwart further increases in concentration and save blue collar jobs is likely to be viewed by regulators as substantial. Coupled with the arguably more robust, potential economic arguments involving unilateral and coordinated effects arising from such a merger, a four to three merger like the potential ThyssenKrupp/Kone transaction would be sure to attract significant scrutiny and delay. Any arguments that such a deal might actually decrease prices and increase efficiency are, even if valid, less likely to gain as much traction in today's regulatory environment.

Table 1

Examples of mergers taking a year or more to be cleared or blocked

Parties	Announced	Cleared / Blocked	Days to Clear / Block	Products at Issue	Market Concentration	Major Jurisdictions that Reviewed the Deal	Resolution
1. Tronox-Cristal	21-Feb-17	10-Apr-19	778	titanium dioxide	3-2	EU, USA	Divesture
2. Halliburton-Baker Hughes	12-Nov-14	1-May-16	536	oilfield service	3-2	EU, USA, Brazil, Australia	Terminated
3. Novelis-Aleris	26-Jul-18	Ongoing	450+ (litigation/arbitration ongoing)	aluminum automotive body sheet (ABS)	4-3	USA; EU; China	Divestiture/On-going
4. Praxair-Linde	20-Dec-16	22-Oct-18	671	industrial gases,medical gases and related services,specialty gases andhelium	4-3	USA; EU	Divestiture
5. Ball-Rexam	19-Feb-15	28-Jun-16	495	aluminum beverage cans	4-3 (less than 4-3 in some countries within EU)	USA, EU, Brazil, and Mexico	Divestiture
6. Dow-Dupont	11-Dec-15	15-Jun-17	552	certain pesticides and certain petrochemical products	4-3 (some more cocentrated market, but includes 4-3)	USA; EU	Divestiture
7. Boehringer Ingelheim-Merial	15-Dec-15	28-Dec-16	379	canine vaccines; feline vaccines; rabies vaccines (macrocyclic lactone cattle parasiticide is a 3-2)	4-3	USA; EU; India; Mexico	Divestiture
8. Westinghouse-Faiveley	27-Jul-15	26-Oct-16	457	freight car brake components (hand brakes, slack adjusters, truck-mounted brake assemblies ("TMBs"), empty load devices, and brake cylinders.)	3-2 (fourth "marginal" competitor in hand brakes)	USA; EU	Divestiture
9. Evonik-PeroxyChem	8-Nov-18	On-going	350+ (litigation on-going)	hydrogen peroxide	3-2; 5-4 (3-2 in PAcific Northwestgeographic area; 5-4 in Southern and Central United States geographic area)	USA; EU	On-going litigation (U.S.; cleared in EU)

Sources

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