



## 6<sup>TH</sup> ANNUAL GLOBAL MERGER CONTROL CONFERENCE

# AGENCIES AND GENERAL COUNSEL: WHAT'S ON THEIR RADAR?

### GLOBAL MERGER CONTROL CONFERENCE

#### Non-Horizontal Mergers: Recent issues raised by vertical and conglomerate mergers

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#### Interview with Elizabeth Kraus<sup>i</sup>

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Elizabeth Kraus (US FTC) has been interviewed by Mike Cowie (Dechert) in anticipation of the 6th edition of the Global Merger Control conference organised by Concurrences review in partnership with Dechert, Analysis Group, Compass Lexecon and Charles River Associates.

They will both join the second panel dedicated to common ownership by institutional investors and hedge funds together with **Étienne Chantrel** (Autorité de la concurrence), **Birthe Panhans** (DG COMP), **Alec Burnside** (Dechert) and **John Davies** (Compass Lexecon).

To read the full program and register, [click here](#).

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#### **Mike Cowie: Does the FTC take different approaches to remedies with vertical mergers?**

**Elizabeth Kraus:** As a starting point, I would note that the agencies recognize that vertical mergers can generate significant efficiencies and cost savings, but that some vertical mergers can present competitive concerns, notably as regards input or customer foreclosure or related to the use of a rival's confidential information to which the newly merged firm would have access. The number of purely vertical mergers that the agencies consider to raise anticompetitive concerns remains low, and, on average, the agencies initiate about one vertical merger challenge per year, which generally results in a consent decree. When this occurs, our overarching approach to assessing remedies in the vertical and horizontal contexts is consistent. In designing any consent decree, the FTC looks to remedy or mitigate the specific anticompetitive effects of the proposed merger while permitting the merger to proceed, thereby allowing the integrated firm to realize efficiencies associated with the merger. In doing so, the

agency prefers structural remedies both in the horizontal and vertical contexts. The benefits of structural remedies for a horizontal merger are clear: the divestiture of assets creates a viable competitor that can take the place of the acquired firm so that the merger does not reduce competition. In the vertical context, structural remedies can eliminate the incentive and the opportunity to engage in exclusionary foreclosure or information sharing and, importantly, avoid ongoing agency oversight and intervention.

Thus, the FTC first assesses whether a structural remedy is available to remedy the competitive concern or concerns identified. If a structural remedy would undermine the *raison d'être* for the proposed merger, notably important efficiencies, the FTC will consider: (i) whether a behavioral or conduct remedy can effectively prevent or mitigate the anticompetitive harm while (ii) allowing for the pro-competitive benefits of the merger, but only if (iii) the proposed remedy would not be overly complex and require the agency's active and continued intervention and oversight.

Few mergers meet these requirements for non-structural remedies, and, as a result, the agency only rarely accepts stand-alone non-structural remedies. The FTC's 2017 Merger Remedies Study identified just six such remedies, of the total 89 merger remedies issued during the seven-year period examined, 2006 through 2012. Of the six stand-alone non-structural merger remedies identified in the study, four addressed concerns raised in vertical mergers and were considered successful.<sup>ii</sup> In the intervening years, the FTC has accepted remedies in four additional vertical mergers. Two involved stand-alone non-structural remedies (Northrup Grumman/Orbital and Broadcom/Brocade), one a purely structural remedy (Par/MidPac), and one a behavioral remedy supported by separate commercial and contractual requirements (GE/Avio). This demonstrates that the agency carefully assesses proposed remedies in the context of the individual matter. If a structural remedy is available, we rely on it. If, as in some vertical mergers, a structural remedy would eliminate most or all of the efficiencies associated with the merger, we assess whether a non-structural remedy could prevent or mitigate the threatened harm while preserving the benefits of the proposed transaction and avoiding the agency taking on an extensive oversight role. In this manner, we recognize a role for non-structural remedies in vertical merger enforcement. Yet, if a suitable remedy cannot be achieved, the FTC will be prepared to block the merger, including in the vertical context, as demonstrated in the agency's challenge of the Cytec/Digene merger.

***Mike Cowie: Do you think the U.S. agencies should consider new vertical merger guidelines?***

**Elizabeth Kraus:** This is a hot topic in the United States right now. In fact, the question was the subject of much debate during the recent session of the FTC's Hearings on Competition and Consumer Protection in the 21st Century dedicated to vertical mergers. For those unfamiliar with the FTC's hearings initiative, Chairman Simons launched this series of public hearings to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy. The half-day session of panels dedicated to vertical mergers was extremely informative and, like all of the other hearing sessions, can be accessed through the FTC's website.<sup>iii</sup>

This discussion, as well as public comments received, will inform the agency's approach to vertical mergers, including on the question of whether the U.S. antitrust agencies should publish vertical merger guidelines. They also are inspiring my thinking on the issue.

As a starting point, the thinking and analytical tools on vertical merger enforcement have evolved significantly since the Department of Justice's 1984 non-horizontal merger guidelines. Although there appears to be general agreement on certain basic principles governing vertical merger analysis, there also are significant open questions with respect to how to analyze vertical mergers. In my mind, the form that any ultimate guidance or transparency takes is less relevant than the fact that the agencies provide the guidance and updated information they can. Thus, if after considering the elements that might be ripe for inclusion in guidance, the agencies determine that guidelines are not an appropriate vehicle for their transmission, we might find other forms by which to make the information available, such as a policy statement, a commentary, retrospectives or speeches. The interest in Bruce Hoffman's terrific recent speech, "Vertical Merger Enforcement at the FTC,"<sup>iv</sup> demonstrates the desire for such guidance, in any form.

***Mike Cowie: In the international context, where are you seeing similarities and differences in vertical merger analysis. What steps are you taking to avoid inconsistent outcomes in vertical mergers under common review?***

**Elizabeth Kraus:** In the area of vertical merger assessment, we've witnessed a consensus developing around the basic theories and approaches relied on by agencies. This was recently highlighted in an ICN study on vertical merger analysis, which was based on survey responses from 44 competition agencies.<sup>v</sup> For example, the study identified that virtually all agencies surveyed identified that they: (i) assess input and customer foreclosure as possible theories of harm; (ii) rely, in some way, on an "ability, incentive and effect" analytical framework (examining whether the merged entity would have the ability and incentive to harm rivals, with the resulting effect being sufficient to reduce competition in an affected market); and (iii) consider efficiencies as part of their assessment. The study also identified that, in comparison to horizontal merger enforcement, agency intervention in vertical mergers remains relatively rare.

Yet, this just scratches the surface. For example, the ICN report also identified significant variation in the use of detailed economic modeling by agencies, with a substantial portion of agencies having identified that they do not rely on such modeling in vertical merger review. Moreover, beyond foreclosure concerns, it is unclear whether agencies are examining other vertical merger theories of harm in a consistent manner. This raises the broader issue of reliance on non-horizontal theories of harm, such as conglomerate merger theories, and how to achieve consistent outcomes in matters under concurrent review when counterparts may be relying on different theories of harm.

In the context of individual mergers under concurrent review, timely and effective case cooperation can help to achieve non-conflicting outcomes and, in some circumstances, overcome differences. Agencies increasingly cooperate on vertical merger matters. In Essilor/Luxotica, for example, the FTC cooperated with ten different agencies, and in Broadcom/Brocade with three other reviewing agencies. Here, I would note that parties can help to promote effective cooperation, not just by providing waivers, but also, by promoting alignment of the reviewing agencies' timetables such that the agencies are in a position to coordinate at key decision-making points in their respective processes. In addition, the FTC continues to assess comparative approaches with counterparts bilaterally and in multilateral fora, to

gain a better understanding of our similarities and differences and to examine whether further opportunities for convergence exist.

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<sup>i</sup> The views expressed in this presentation are those of the author and do not necessarily represent those of the institutions to which she is affiliated.

<sup>ii</sup> See The FTC's Merger Remedies 2006-2012, A Report of the Bureau of Competition and Economics, January 2017, at [https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

<sup>iii</sup> See Hearings webpage at <https://www.ftc.gov/policy/hearings-competition-consumer-protection> for calendar of upcoming sessions and transcripts and video of previous panels. Also, note that the FTC is accepting public comments on issues related to vertical merger analysis through December 31, 2018.

<sup>iv</sup> See [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf).

<sup>v</sup> See ICN Vertical Mergers Survey Results paper at <http://icn2018delhi.in/images/ICN-survey-report-on-vertical-mergers-17-03-18.pdf>.