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I. INTRODUCTION

The antitrust world is abuzz as the Antitrust Division of the Department of Justice ("DOJ") reviews Comcast Corp.'s $45.2 billion bid for Time Warner Cable, Inc. The transaction and its competitive implications have captured antitrust and general public attention in part because it involves multiple complex markets that are developing at the accelerated rate of the underlying technology itself. Whatever the DOJ decides to do, it will affect important markets for years to come.

Comcast and Time Warner are the two largest companies to offer internet, phone, and cable television services to consumers throughout the United States. In a typical deal between the top two companies in the same market, it is an easy decision for an antitrust agency to say no. But this isn't the typical deal, and the action isn't even in these consumer markets.

Comcast and Time Warner have the largest market shares in these markets, but they don't really compete. Their overlap is quite minimal—nothing a quick divestiture wouldn't solve. The issues are on the other side of these markets: the companies as buyers of content for cable and as controllers of the increasingly crowded bridge to customers—broadband. It is here where the DOJ should and will spend its energy and resources.

II. SOMETIMES FEWER OPTIONS ARE BETTER THAN MORE OPTIONS

The heading does not refer to the number of cable channels we have to flip through to find a good one. Nor am I about to jump into a common insight from behavioral economics about how too many choices often just overwhelm people.

No, I am instead describing the remedies available to the DOJ to serve the goal of protecting competition in addressing the proposed merger. More specifically, the DOJ's toolbox overflows with several shiny, but odd-shaped, gadgets that would tempt anyone, but often don't work or end up creating more damage. These tools are called behavioral or conduct remedies.

Although the mainstream media often approach the DOJ's decision on a merger as a binary thumbs-up or thumbs-down, it is much more complicated than that. While one question for the DOJ is whether to file a lawsuit challenging it or not, that is just a single step in an elaborate back-and-forth between the businesses and the government.

The DOJ has many remedies or tools at its disposal and it will likely negotiate with the parties on an agreement that will incorporate some of these remedies into a final deal. The DOJ could just say no, then challenge it, but that doesn't happen much anymore. And the current

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consensus—which, although it can be wrong, is usually right—is that the deal will go through in some form.

So what are these possible remedies? In 2011, the DOJ published a *Policy Guide to Merger Remedies*, updating a previous guide from 2004, explaining possible remedies.[2] Besides trying to kill the deal altogether with a legal challenge under Section 7 of the Clayton Act, the DOJ can seek or negotiate structural remedies, conduct remedies (also known as behavioral remedies), or devise some combination of the two.

A structural remedy is a one-off solution that changes the actual composition of the combined entity by forcing it to divest certain assets or business units. This may occur, for example, where merging parties compete in multiple geographic markets and would collectively achieve market or monopoly power in a particular region through the merger. The government will often insist that the parties sell or transfer certain business units to a third-party that can maintain the competition after the transaction. It is likely that the Comcast-TWC merger, if approved, will, at the least, include divestitures related to the minimal consumer overlap of the two parties.

Conduct remedies, also known as behavioral remedies, permit integration, but place operating rules on the combined entity going forward. According to the DOJ, "[t]ailoring a conduct remedy to the particular competitive concern(s) raised by a vertical merger can effectively prevent harmful conduct while preserving the beneficial aspects of a merger."[3] This is a worthy goal, but antitrust enforcers don't easily achieve it. At first exposure, these remedies sound like a great idea—we can keep the merger (and attached efficiencies), but strip it of any anticompetitive harm. If only it were that easy.

III. THE DANGER OF CONDUCT AND BEHAVIORAL REMEDIES

The predictable problems, of course, are that the conduct remedies (i) don't always work, (ii) are costly to administer, and (iii) often create more harm than good. At the same time, these remedies look quite alluring to an antitrust body reviewing a proposed transaction.

Despite the teams of economists and specialized nature of antitrust and competition law, the government's decision on a transaction is, at its core, a political decision. No matter how much antitrust and economic jargon fills the reasoning submitted with the decision, the enforcer is (i) choosing among alternatives based upon incomplete evidence about the future and (ii) making what are ultimately normative judgments about how to structure competition going forward.

Strong political judgments cost political capital, particularly when the consequences are great, as they are in the Comcast-TWC deal. Lobbyists and stakeholders (and even senators) line up on both sides of the issue and, no matter how professional its attorneys, the DOJ must feel the heat. Indeed, here, the Department of Justice, of course, is ultimately controlled by the President and his appointees. Deciding one way or another is going to upset people.

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[2] U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, (June 2011), "Merger Remedies."

[3] Merger Remedies, 13.

The beauty of a conduct remedy from the perspective of a political actor is that it can approve the transaction, but tell the merger's opponents "don't worry," we forbid them from doing anything harmful. And, at the beginning, the parties and government may genuinely believe it will work just how they wrote it down. But, as time goes on, problems inevitably arise. That is because the conduct remedies restrain natural competitive activity with "laws" that apply only to the merged entity. As the markets and its players change, the company will see opportunities it wants to exploit, large parts of its business will grow smaller and small parts will grow larger, new competitors will emerge and others will disappear, and the conduct remedies become an unwanted vestige that limits the company from competing. This is as inevitable as change itself.

The company will likely test the agreed-upon restraints, which become cloudier in different market conditions. The antitrust agency—perhaps even controlled by a different administration—will then reappear, negotiate, and possibly seek court enforcement of the prior conditions, which may or may not make sense in the current market structure. This dance, which may repeat itself during the remedy's lifetime, is unlikely to lead to optimal competitive conditions.

An even more significant (and underappreciated) problem, however, is that the conduct remedies—and a company's future attempts to manage around them—disturb the natural competitive flow and allocation of resources that would normally occur in a competitive market. The antitrust enforcer becomes a puppet-master of important markets into the future, as strings they pull today cause significant market changes months and years into the future. These decisions limit competition's ability to effectively allocate resources and undercut the basic purpose of our antitrust laws.

The decision to challenge or defeat a merger, or to require asset or business-unit divestment will also affect how competition develops, but in a very different way. That remedy will determine the structural starting point of a market, but won't interfere with how it develops in the future. A conduct remedy, by contrast, directly inhibits the merged entity's decision-making and how it allocates its resources. A lot can happen in a market over a short period of time, and these strings can tangle an important player as it tries to adjust to those changes. This resource misallocation harms our economy. Indeed, the merged entity, in a way, becomes a public-private partnership as the government is a partner in the company's decision-making.

Unfortunately, these remedies create costs that don't have an obvious victim that can hire a lobbyist, and they are diluted enough that only a few economists or philosophers will point them out. But they are real and go to the core of what antitrust law seeks to achieve and prevent. In the name of protecting competition, the government can thwart it. In fact, it would serve competition and antitrust if the antitrust agency didn't have the option of the shiny, but dangerous, tool known as a conduct remedy.

IV. THE COMCAST-TWC MERGER

Conduct remedies will tempt the DOJ in the Comcast-TWC merger. For example, "net neutrality" and other non-discrimination concepts are favored by some, and were part of the DOJ settlement with Comcast in its previous deal with NBC Universal.

Interestingly so far, some of the likely complainants to the deal, like Netflix and other online video programming distributors, have remained relatively quiet. They are likely to lose negotiating power, as the combined Comcast-TWC would have greater negotiating strength in a regime that allows broadband conduits like the cable companies to charge these distributors for accessing customers. The DOJ should not, however, interpret this quiet as any sort of competitive signal, as it would be rational for the merging parties to cut deals with these distributors before the merger that would lock in lower pricing than the cable companies' market power would typically reflect. That is, it would not be surprising to see the video distributors split the monopoly profits in some fashion as payment to limit their complaints, at the ultimate expense of consumers and future video programmers or other competing technologies that don't receive the benefit of the lower-cost structure from the deal.

In other words, if a company like Netflix thinks the DOJ will likely approve the Comcast-TWC deal (even with conditions), it is a smart business move for them to cut a long-term deal with the cable companies that would lock in a lower cost-structure than their own competitors and future competitors, even if they have to pay more than they are paying now. That deal, combined with the DOJ merger approval, would raise entry barriers for their competitors and future competitors and could lock-in some market power.

The DOJ should examine the evidence and make a decision to either approve the Comcast-TWC deal with or without divestitures, or should challenge it. Then let competition run its course, instead of manipulating markets years into the future with the dull hands of government.