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ANTITRUST

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EDITOR'S NOTE

Monopolization and the Grassroots Mind

BY MICHAEL A. LINDSAY

ALMOST A HALF-CENTURY AGO, HIStorian (and my uncle) Conal Furay wrote about the grassroots mind in America. He argued that the grassroots mind is oriented "not toward ideas but toward concrete realities and ways to deal with them." It was not that "ideas . . . are of no importance" to the grassroots mind, but that "such abstractions bump against the priorities of concrete life and fixed principle" and "are most often fended off."[1] This thesis seemed particularly relevant as I reviewed the articles published in this issue of ANTITRUST. Some of our articles deal with the intellectual content and doctrinal integrity of antitrust law (and specifically monopolization), but as you will see, some also deal more with what is important to the grassroots mind.

This issue's theme is monopolization. One important issue today is the concept of a monopolist's ability to engage in "self-preferencing"—giving preference to the monopolist's own products over those of the monopolist's rivals. Professor Herbert Hovenkamp reviews the case law and concludes that current law restricts a firm's self-preferencing only when the firm has market power in the dominant good and competitive harm results from the refusal to give equal treatment. Mere harm to a competing seller is insufficient. Professor Hovenkamp then explores legislative efforts to address self-preferencing–proposed in the U.S. and adopted in Europe.

Jonathan Jacobson and Ada Wang continue the discussion of self-preferencing, examining it through the lens of antitrust injury. They posit that preferencing one's own products is the very essence of competition, and they see the current assaults on self-preferencing as a trend of preferring competitors instead of preferring the process of competition. After examining recent U.S. and European case law, they conclude that competitive harm can be addressed through existing categories (including tying, exclusive dealing, and refusals to deal). Self-preferencing, in their view, should be presumptively legal.

Next, editorial board member Ian Simmons leads a panel discussion on best practices in trying a Section 2 case. Doug Melamed, Bonny Sweeney, Professor Christopher Yoo, and John Roberti discuss why we are seeing more monopolization enforcement and whether there are more sectors of the economy where firms have significant market power. On the practical aspects of trying a monopolization case, Sweeney, Yoo and Roberti emphasize the need for good storytelling, including the role of the villain. Melamed stresses the importance of an expert economist who can explain things clearly. In other words, doctrine is important to us as judges and lawyers, but the grassroots mind needs the concrete, the particular, the story.

Wyatt Fore explores an alternative U.S. competition regime—the Federal Maritime Commission's administration of the Shipping Act. He notes some substantive differences (more common-carrier law and less emphasis on market definition, for example). He also identifies some lessons that antitrust enforcers might draw from the Shipping Act regime, such as swifter time from complaint to decision, and a stronger role for the administrative law judge.

Janet Hui, Wei Huang, and Vanessa Yanhua Zhang take us across the Pacific for a review of Anti-Monopoly enforcement in China. They note an annual increase in the number of merger filings that the State Administration for Market Regulation (SAMR) received since 2020, as well as a lengthening of the time that reviews require. They find significant SAMR investigations in the semiconductor and platform industries—a focus that they expect to continue. Interestingly, they also note SAMR investigations in transactions that fall below the filing thresholds, which is similar to an interest that the U.S. antitrust agencies periodically take as well. They also note the increasing importance of economic analysis in SAMR merger investigations.

This issue includes several valuable articles on nonmonopolization matters as well. One particularly important article is a roundtable discussion of the history and status of the Antitrust Division's Leniency Program. Editorial board member Kellie Lerner leads a panel with Anna Pletcher, Jane Norberg, Anne Riley, and Richard Powers—an excellent mix of government-enforcement, private firm, and in-house experience. They first discuss the mechanics of how the program works and how its requirements can be satisfied. They then discuss some of the practice challenges of the program, such as the leniency applicant's balancing the requirement of prompt reporting with the need to conduct a sufficient investigation. They also consider whether there has been a drop in cartel detection and what role the leniency program might be playing in that phenomenon. Next they explore the relationship between the Antitrust Division's program and the Securities & Exchange Commission's whistleblower program—and the lessons that each might learn from the other.

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Hugh Hollman, Charles Pommiès, and Nicholas Putz describe some lessons of the trans-Atlantic challenge in the Illumina/GRAIL transaction. They observe that the Federal Trade Commission was able to challenge the transaction through the FTC's own administrative process without seeking an injunction in district court, because the European Commission had suspended the transaction through its own administrative process. The authors describe how the inter-jurisdictional process unfolded and the role that Article 22 of the EU Merger Regulation played. Overall, they stress the need for appropriate checks and balances to protect the legitimacy of administrative processes while still preventing potential administrative overreach.

Michal Halperin offers another take on multinational merger enforcement. After examining three recent multijurisdictional mergers (Illumina-Grail, Sabre-Farelogix, and Microsoft-Activision), she proposes three lessons: that American courts are reluctant to broaden the causes or grounds for blocking mergers; that the EU, UK, and U.S. antitrust agencies are more willing to adopt a less conventional approach and take more risks; and that merger filing thresholds, as they are currently designed, do not capture the most crucial mergers in the technological sector (and thus may lead to under-enforcement in that sector).

Alex Sweatman takes us into the world of private equity and interlocking directorates. The basic idea behind Clayton Act Section 8's prohibition on interlocks is that if an agreement between two companies would be illegal, the companies should not be able to reach the same result simply by having the same personnel making decision for both companies. Sweatman explores the extent to which Section 8 applies to private equity funds that are not structured as "corporations," the legal status of the "deputization" theory, and the standards that a private plaintiff invoking Section 8 must satisfy.

Michael Hamburger and Daniel Grossbaum take us back to merger reviews and particularly the "efficiencies" defense. Indeed, they posit that the primary reason for permitting competitors to merge is the potential to generate efficiencies. They argue that courts and competition agencies focus only on possible harms from a merger and either do not fairly consider, or at least place an inappropriate evidentiary burden on, proof of efficiencies. They emphasize that the potentially serious error may well have deprived consumers of lower costs and improved products by preventing procompetitive mergers.

Finally, Jonathan Edelman and Meegan Hollywood discuss the issue of personal jurisdiction in antitrust class actions. The U.S. Supreme Court's *Bristol-Myers* decision had held that a state could not assert personal jurisdiction over claims brought by non-residents in a mass action where the defendant was not subject to general jurisdiction in the state.[2] Edelman and Hollywood find that courts have largely applied the *Bristol-Myers* principle to named plaintiffs, but the results for absent plaintiffs are more mixed: some have applied it, some have not, and others have sidestepped the issue. The authors' main point is that counsel (whether plaintiff or defense) need to make sure they consider the implications of *Bristol-Myers* for their case.

With this issue we say farewell to our executive editor Kim Van Winkle. Kim has proven to be a tremendous asset to this publication, and we are very grateful for all her efforts. We wish her the best as she joins the Market Analysis division of the Public Utility Commission of Texas. We are sad to lose her, but we welcome her back to the ranks of Antitrust Section volunteers.

All of us at one time or another are called upon to explain our area of law to people not as immersed as we. As you read the issues in this magazine, I encourage you to think about our work and how we explain it to those who are oriented "toward concrete realities and ways to deal with them." ■

[1] Conal Furay, The Grass-Roots Mind in America: The American Sense of Absolutes viii (1977).

[2] *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 (2017).

Please join Conference Co-Chairs Daniel Francis (NYU) & D. Daniel Sokol (USC) for this two-day long Next Generation of Antitrust, Data Privacy & Data Protection Scholars Conference. The conference provides an opportunity for professors in law, economics, accounting, finance, management, information systems, operations management, and marketing who began their full-time tenure-track career in or after 2016 to present their latest research. Senior scholars and practitioners in the field will comment on the papers. This free, non-CLE conference is co-sponsored by the ABA Antitrust Law Section and NYU School of Law and will take place on **January 26, 2024**.

Antitrust and Self-Preferencing

HERBERT HOVENKAMP

"SELF-PREFERENCING" REFERS TO situations in which a firm favors, or "preferences," its own products over those of rivals. Of course, it is literally "self preferencing" for a firm to sell nothing but its own product. For example, Farmer Jane might market her own cucumbers and refuse to sell those of her neighbors. But that type of self-preferencing has not provoked much concern outside of the law of refusal to deal, which applies only to monopolists. It may violate some proposed legislation. Rather, the idea is that harmful self-preferencing occurs when a firm sells one or more brands in addition to its own and gives its own brand favorable treatment, or else when it tries to steer customers of some primary product to its own brand of a secondary product or its own repair service.

Self-preferencing can come in many varieties, ranging from outright exclusion of competing alternatives to simple favored placement or promotion of the seller's own version. Here are a few examples:

- A Google search for video content might be biased to favor videos posted on YouTube, which is an Alphabet (Google) asset; or the search engine might give higher placement to firms that have paid for that privilege.
- An Amazon search for a product, such as a toaster, might favor Amazon's own Amazon Basics brand by ranking it first on a listing, although buyers can still make a different choice.
- A cellular phone manufacturer whose operating system is Android, a Google product, might make Google Search the preinstalled "default" search engine on its new device; however, users are free to download and install competing search engines.
- A manufacturer of a durable product, such as an automobile, might refuse to supply aftermarket parts to independent repair technicians or void the warranty if a user installs non-OEM aftermarket parts.
- That same manufacturer may cover aftermarket parts with design patents that make it difficult for independent parties to produce their own lookalike parts.
- A manufacturer may design its product in such a way as to make access complex, and thus out of reach for consumers; or it may refuse to license diagnostics software to third party repair technicians.
- A search for movies on a video streaming service such as Netflix or Amazon Prime might list that firm's in-house films prominently on the top row of search results, and place films licensed from others lower down.
- A firm using products with its own operating system or other operational software may make the program incompatible with any ancillary products that the firm does not produce; or it may limit sales of complementary apps to its own preinstalled appstore.

United States antitrust law is built on a common law tradition that every firm has a qualified right to choose its dealing partners and has no obligation to aid its competitors. The Supreme Court declared in 1919:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[1]

That view accounts for the restrictive approach that antitrust law takes to unilateral dealing duties.[2] The Supreme Court explicitly tied any duty to deal in a rivals' products to a "purpose to create or maintain a monopoly."[3] Except for naked horizontal agreements, all limitations on self-preferencing that antitrust law currently recognizes incorporate a product-specific market power requirement.

The Existing Law Governing Self-Preferencing

Restrictions on self-preferencing have a surprisingly long history in American law, antedating the Sherman Act. Patent law is an important precursor. In *Wilson v. Simpson* (1850), the Supreme Court held that someone who purchased a patented wood planing machine could not be forced by a patent license to use the patentee's own replacement blades.[4] To this day, this doctrine of patent "exhaustion" protects the freedom of users of patented goods to select their own aftermarket or complementary goods unless they have contractually agreed to do otherwise.[5]

In addition, patent law's distinction between "reconstruction" and "repair" also protects the right of a patented good's purchaser to install replacement parts provided by someone

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other than the patentee. For example, the *Aro Manufacturing* decision held that the owner of a traditional "ragtop" convertible could replace the entire fabric top when it wore out. That was a permissible "repair" of a patented product, rather than an infringing "reconstruction."[6]

Patent law was thus an important, although limited source of the "right to repair." As the Court observed in 1863, someone who legally acquires a patented good may "use it until it is worn out, or he may repair or improve upon it as he pleases."[7] By contrast, third-party makers of aftermarket automobile parts have not had much luck preventing automobile manufacturers from using design patents to prevent the use of lookalike designs for such things as bumpers and mirrors.[8] Rather, they have to provide a dissimilar-looking part by inventing around the patented design, and this has provoked consumer resistance.

The Supreme Court briefly relaxed the patent exhaustion rule in *Henry v. A.B. Dick Co.* (1912), sustaining an office equipment manufacturer's suit against someone who purchased consumable supplies from a third party.[9] Congress immediately responded by amending the antitrust laws, rather than patent law, to include Section 3 of the Clayton Act.[10]

That statute became antitrust law's first explicit "self-preferencing" provision, making it unlawful to sell a good, "whether patented or unpatented," on the condition that the user of the good not deal in the goods of a competitor.[11] One important limitation was that the refusal must threaten either to "substantially lessen competition" or "tend to create a monopoly."[12] Early decisions applied that provision to prevent IBM Corp. from mandating that users of its computational machines use its own data cards,[13] and Standard Oil from requiring its franchised but independently-owned gasoline stations to pump its own gasoline exclusively.[14] Section 3 might require a seller to (1) permit users of its projector to select rivals' films;[15] (2) permit a food franchisee to select single-use products of its choosing rather than selling those that are supplied or approved by the principal firm;[16] or (3) permit the owner of a device such as a photocopier to select its repair technicians and parts, rather than those insisted on by the seller.[17]

The sellers of goods in these patent and antitrust cases preferred that purchasers of their products procure aftermarket parts or complementary products only from themselves. By contrast, users wanted a choice. Tying law, in particular, went through a period of rapid expansion in the mid-twentieth century, and then contraction and even some legislative pushback[18] in the 1970s and after. Tying law also has additional technical requirements, including market power in the tying product, and a requirement that the tying and tied good be "separate products."[19]

Section 3 of the Clayton Act and the Sherman Act can additionally prohibit conditional discounts or rebates intended to encourage self-preferencing. For example, a seller who offers a discount on the condition that someone not deal in a competitor's good would be covered.[20] There is also some Sherman Act law of "quasi" exclusive dealing that occasionally reaches things such as market share discounts given to buyers who limit their purchases from rivals by a specified percentage.[21] Alternatively, "slotting" allowances are discounts for favorable treatment given to retailers in exchange for preferred promotion, display, or shelf space. They are occasionally illegal under Section 2,[22] or else under the Robinson-Patman Act.[23]

Other than conditional discounts or rebates, tying and exclusive dealing rules do not usually reach mere preferential ordering of goods that falls short of prohibitions on dealing. There must be a "tie," which is a coercive condition requiring purchase of the tied good.[24] While the issue has not been fully adjudicated at this writing, default rules that tie only presumptively, but then permit the buyer to swap away from the seller's product, are very likely not ties under existing law. They may sometimes violate Section 2 of the Sherman Act if they unreasonably create or maintain monopoly.[25] There is some law indicating that even if a tying condition is not stated, it can be inferred from situations where a very high percentage of sales (say, 90%) are in fact tied.[26] At this writing that rule has not yet been applied to defaults.

Even though consumers are free to opt away, being the default can be extremely valuable. For example, Alphabet reportedly pays Apple $12 billion annually for default search engine status on the iPhone.[27] Nevertheless, an iPhone purchaser can easily and quickly download other search engines, and the iPhone Appstore even provides them at no cost. At this writing, a court has denied the defendant's motion for summary judgment on the Government's claim that various default provisions governing Google Search are unlawful under Section 2, and the case is in trial. One issue is whether a default amounts to the type of "foreclosure" that exclusive dealing is thought to require, particularly when the defendant has a dominant position in the affected market.[28]

Another instance of Apple self-preferencing is its technological constraint limiting sales of applications (apps) for the iPhone to the phone's own Appstore, where it charges a substantial commission. In *Epic Games*, the Ninth Circuit held that this limitation was permissible under Section 2 of the Sherman Act, mainly because the plaintiff failed to show sufficient market power. But it was found to violate California's unfair competition law[29] and the court issued an injunction that the 9th Circuit subsequently stayed pending a decision on a certiorari petition.[30] Assuming the Supreme Court does not grant certiorari and reverse, questions remain about the scope of the injunction. In affirming, the Ninth Circuit noted that its scope was limited to Epic's injuries, but also noted that "an injunction limited to Epic's subsidiaries would fail to address the full harm caused by the anti-steering provision."[31] The injunction, which is entirely under state law, has no stated geographic limitation. While both Apple and Epic are headquartered in California, iPhones are used worldwide and many firms that would be affected by a broad injunction are located outside California.

Existing law does not ordinarily reach forms of self-preferencing that are limited to mere display or convenience. For example, a retailer might place a preferred brand at eye level or at the front of the store, while relegating others to less visible space. Netflix might display its internally produced video content in the top row of its website, while relegating third party offerings to a lower position, or an Amazon product search might rank its "Amazon Basics" house brand more highly than other brands. While these practices are literally a form of brand "preferencing," they are ordinarily not reachable under current U.S. law, at least if they are unilateral.

The Robinson-Patman Act sometimes leads to liability for discriminatory promotional services.[32] One important limitation, however, is that while the Robinson-Patman Act does not require market power, it does require discrimination between two *independent* purchasers. That is, the statute does not generally apply to "self" preferencing at all, but rather when a firm grants different terms to two independent dealers.[33] Even if one of the resellers is an independent dealer while the other is a subsidiary, the statute does not apply.[34] Indeed, one of the great ironies of the Robinson-Patman Act is that it very likely induced a great deal of vertical integration by firms wishing to avoid its "sale" requirement—not something its framers contemplated.

Most instances of product design that limit consumer repair access are permissible under current law, although the EU is moving toward greater oversight.[35] One prominent exception under United States law is the *C.R. Bard* litigation, in which the Federal Circuit upheld a jury verdict against a firm who redesigned a biopsy "gun's" connection point attaching it to single-use needles so that it could use only Bard's needles.[36] Prior to that a range of generic manufacturers had supplied the needles. The approved instruction entitled the jury to find that, not only did the revised gun work no better, but that Bard never intended for it to work better; it wished only to engineer incompatibility of third-party needles. Similar litigation involving Keurig, whose attempt to redesign its famous coffee maker to work only with its own coffee pods, ended in a settlement.[37] In both *C.R. Bard* and *Keurig*, essential premises were substantial market power and a finding that the "improved" product was not seriously intended to be an improvement, but only to limit compatibility with a complementary product. In the previously referenced *Epic Games* case, by contrast, the court credited Apple's defense that it needed to be able to control its Appstore in order to protect the integrity and security of its operating system.[38]

The design problem also raises significant questions about the efficacy of ex ante regulation of product design and perhaps repair infrastructure. Consumers support technology evolution that makes products smaller and with more features. However, those same trends make repair more difficult and in many cases require that they be undertaken by trained technicians. As products are more technologically complex, responding effectively to possible government mandated right-to-repair obligations becomes more difficult as well. Some manufacturers may be able to respond only by reverting to older less appealing product designs. An EU Report indicates that it will also require greater investment in repair infrastructure, including investment in additional repair technicians.[39] Finally, product manufacturers must have reasonable protection from the consequences of negligent third-party repairs.[40]

The principal existing antitrust rules governing self-preferencing also include the Sherman Act's highly restrictive law of unilateral refusal to deal, which may in a very few instances require a firm to deal in the goods of a rival. For example, under the narrow *Aspen* rule a market dominant ski company had a duty to sell a lift ticket combination that included its rival's slopes as well as its own.[41] But that was only because the plaintiff and defendant had previously done this by agreement, and then the defendant pulled out without a good explanation. In the *Epic Games* case, the Ninth Circuit dismissed for failure to show sufficiently durable market power the claim that Apple refused to share app sales on the iPhone. If durable power had been found, however, the case could very well have encompassed issues relevant to unilateral dealing obligations.

To generalize, while current United States antitrust law has many prohibitions on self-preferencing, they apply only when the firm in question has market power in the dominant good and competitive harm results from the refusal to give equal treatment. Mere harm to a competing seller is insufficient. Further, the refusal must be more than merely suggestive, although at this time default rules remain an open question. On the other side, however, these rules apply to the full range of activities and products covered by the antitrust laws, including both traditional and online sales.

In evaluating self-preferencing it is important to remember that a firm's preferencing among the various products that it sells is less exclusionary than refusing to deal in them altogether.[42] Further, unreasonably onerous restrictions on self-preferencing may induce a firm simply to drop a third party's goods. That was the basis of Justice Douglas' dissenting opinion in the *Standard Oil* exclusive dealing case. The majority condemned Standard's rule that forbade its franchised dealers from selling gasoline supplied by third parties.[43] Justice Douglas, one of the most pro-antitrust enforcement Justices ever on the Supreme Court, dissented. He presciently observed that requiring "split pump" stations would deprive Standard of its ability to control its gasoline sales. It would be forced to terminate its franchise agreements and sell gasoline directly.[44] In some cases an effective rule against self-preferencing may also require a compulsory duty to deal, something that U.S. antitrust law has resisted. Otherwise firms might comply with a burdensome self-preferencing requirement by dropping rivals' merchandise.

Every multibrand retailer continuously makes choices about which brands to handle and which should receive "preferred" attention in display or promotion. Retailers

generally make these decisions by weighing such factors as customer evaluation, rate of product turnover, handling difficulties, supply availability and speed. For example, the United States has approximately 187 manufacturers or importers of ordinary kitchen cutting boards, in a wide variety of sizes, materials, and prices.[45] Presumably, retailers will not stock and sell all of them. They select a few based on internal assessments of profitability. This forces the manufacturers to compete with one another for that retailer's business. In the absence of evidence of monopoly or restraint of trade, the costs of antitrust control of a retailer's choices seem to far outweigh any advantages. This is true even though some manufacturers will be excluded or will not get the favorable treatment that they want.

On the other hand, self-preferencing by a dominant firm in a dominant product, such as Google Search, might be anticompetitive to the extent that it unreasonably excludes rivals from a market. But the all-important ingredient is the presence of product-specific market dominance.

Proposed Self-Preferencing Legislation: the Choice Online Act

Legislation proposed at this writing is both broader and narrower than existing antitrust rules governing self-preferencing. The most important of these is the American Innovation and Choice Online Act (AICOA). *First*, unlike existing antitrust rules, its coverage is limited to digital, or online, firms. *Second*, covered firms, or "gatekeepers," are identified on the basis of overall size. *Third*, the proposed rules generally do not require an agreement; they can be triggered by purely unilateral conduct. *Fourth*, unlike the antitrust provisions the new rules do not generally require proof of market power or competitive harm. *Fifth*, the new self-preferencing rules reach not only absolute exclusion of rivals' goods, but also apply to weaker forms of preferencing, including favorable treatment or default rules. Finally, in its present form the AICOA is not an antitrust law. It can be enforced by the federal agencies and state attorneys general, but not by private parties.

The AICOA was initially proposed and debated in the 117th Session of Congress and failed to pass. At this writing, it has been resubmitted to the 118th Session.[46] While the provision has bipartisan support, sponsored by Senators Amy Klobuchar (Dem., Minn.) and Charles Grassley (Rep., Iowa), it has also faced stiff resistance.

The following discussion considers the most important features of the AICOA's approach to self-preferencing and how they deviate from current antitrust law.

Restricted Application to Online Firms. The proposed American Innovation and Choice Online Act (AICOA) applies only to large digital platforms, and not to traditional ("offline") businesses. For example, while Amazon and Walmart are retailers of roughly equal size, Amazon is covered but not Walmart, whose online presence is much smaller. Both engage in self-preferencing behavior.

Singling out online firms for harsher treatment is inconsistent with good antitrust enforcement policy. Suitable targets for antitrust scrutiny are concentrated markets exhibiting stagnant growth, a propensity toward collusion, and lack of new entry or innovation. The large online firms identified in the AICOA fit none of these criteria. For example, data from the U.S. Bureau of Economic Statistics estimates that the economic growth rate in digital markets is roughly four times higher than in old economy markets.[47] At least as measured by patent grants, large digital firms are also highly innovative. Among the top 300 utility patent recipients in 2022, Apple, Alphabet, Amazon, and Microsoft ranked #14, #15, #16, and #18, while Meta (Facebook) was #42. Most of the top patent-receiving entities in 2022 were in Tech.[48]

While comparative data are scarce, digital markets have not been shown to be more concentrated or resistant to competition than offline markets. In most sectors of the digital economy entry is fairly easy.[49] Digital firms often compete in larger geographic markets than offline firms, and therefore the effective range of consumer choice is typically larger—or at least, it has never been shown to be smaller.

Further, the presence of digital sellers often reduces concentration. For example, a community may have had two or three stores selling small appliances. When Amazon or other online retailers start making sales in that community the number of competitors increases, perhaps significantly. Movie streaming and online media selling have considerably reduced retail concentration in that market. Online book selling has reduced concentration there. One could go on with examples, but the idea should be clear: online sellers have considerably reduced retail concentration by increasing the number of competitive options available to buyers.

There is little evidence of traditional collusion among large digital players. "Algorithmic" collusion, which substitutes mathematical models for individual announcements or decisions, has been a hot topic of scholarship about digital markets, and it may become more significant in the future.[50] Anecdotally, however, even the largest digital firms appear to be competing aggressively with each other. There is no reason for thinking that price fixing or other anticompetitive horizontal restraints are more prevalent on digital markets. Witness, for example, the competitive race featuring mainly Microsoft, Alphabet, Meta, and Amazon over incorporation of AI technology,[51] and the fierce battle emerging between Twitter and Threads, which is Meta's new social networking competitor.[52] At this writing, big tech seems to be a reasonably competitive landscape. There might be counterexamples, but they would have to be proven.

For the majority of products and services, the internet offers a wide range of choices, with lower search costs than offline searching. To be sure, there are a few market-dominating products. Google Search steadily commands more than 90% of the consumer search market.[53] Amazon has about 67% of a market for ebooks, although ebooks

constitute only 36% of the number of books that are sold, and only 19% if measured by revenue.[54]

The extent to which online and offline products compete with one another varies immensely from one product to another. Digital search engines are so far superior to any traditional form of offline search that they are almost certainly a relevant market unto themselves. But in some cases the large consumer search engines may compete with more focused search engines used in specific markets. Aside from this, Google Search is very likely an antitrust monopoly. By contrast, online grocers have struggled. While Amazon and Walmart have roughly equal volumes of retail sales overall, Walmart has around 20% of the grocery market,[55] and Amazon has roughly 1.3%. If one includes Amazon's Whole Foods sales that number rises to 2.4%, but most of the Whole Foods sales are in physical stores, not online.[56] Yet Amazon's online grocery sales would be covered by the AICOA, because gatekeeper status under that act attaches to the overall size of the firm, not to the market share of any product. Walmart's sales would not be covered. While it is as large as Amazon, it is not substantially an online firm.

In between are a host of products in which online and offline sellers compete with each other, but to various degrees. For example, Amazon and Walmart have roughly equal shares in the low twenties of small electric appliances.[57] Amazon's decisions about how to prioritize or rank brands could be challenged, while Walmart's could not be.

As a result of these vast differences, there is no good substitute for product-specific inquiries into market power and competitive harm from any type of self-preferencing. Concededly, those inquiries are costly, but one reason for them is the extremely large number of false positives that more generalized tests will produce.

Looking from consumers' perspective, online search costs are lower than in traditional markets.[58] For example, someone unhappy with product choices in Walmart can get into her car and drive to a different store. Someone facing the same predicament on Amazon can escape with a mouse click, and generally to a great number of choices. Other things equal, as search costs are lower prices tend to move toward competitive levels.[59]

To be sure, online commerce does invite problems, such as fraud, information security, or protection of vulnerable groups such as children. These are not antitrust problems under U.S. law, however, and are best addressed through more direct regulation of the particular behavior. Antitrust law is not a Swiss Army-knife directed at solving every problem, but only those that involve threats to competition.

Application to Large Firms Rather than Products with Market Power. Existing U.S. antitrust law imposes sharing requirements infrequently. When a firm is acting unilaterally, it must have substantial market power in the particular product at issue. The law of unilateral refusals to deal applies only to "monopolists," which is a reference to a firm's position in a particular product, not to the size of the overall firm. The law of tying and exclusive dealing require less market power than the law of monopolization, but they do requires some and it must be in the "tying" product.[60] By contrast, the "gatekeeper" provisions in self-preferencing legislation such as AICOA apply to firms. Once a firm has been designated a gatekeeper, self-preferencing limitations can apply to any product it sells. There is no market power requirement.

For example, Microsoft very likely has a dominant position in its Windows operating system, but not in its search engine Bing (market share = 3%)[61] or its internet browser Edge (market share = 5.4%).[62] Amazon has a significant market position in the market for ebooks, but much less in the market for groceries. But self-preferencing duties under proposed statutes such as AICOA are attached to *firms*, who are selected on the basis of large overall size rather than the market share of any particular product. For any customer, however, the relevant power question is the range of realistic options available to that customer for that particular purchase. The overall size of the platform really does not matter that much.

Imposing self-preferencing duties on products whose sellers lack market power is particularly harmful if it is done selectively. The AICOA does not impose its rules on everyone, but only on the small number of firms designated as gatekeepers—very likely as few as five or six large internet platforms. A seller designated as a gatekeeper, but operating in a highly competitive market such as groceries, could be placed at an immense competitive disadvantage, perhaps enough to drive it out of that market altogether—and all for no obvious competitive benefit.

In contrast to AICOA, the European Digital Markets Act proceeds with Gatekeeper selection in two stages. First it selects Gatekeeper firms, which are Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft. Then for each of these it identifies "Core Platform Services," which include some but not all of the products offered by each of these firms. For example, for Alphabet, the designated core services are Google Search, Maps, Play, Shopping, Android, Ads, Chrome, and YouTube, giving Alphabet the highest number.[63] This is certainly an improvement over the AICOA approach of simply selecting covered platforms.

Scope of Self-Preferencing Obligations: Product Placement and Default Rules. To see how a self-preferencing obligation might work under AICOA in its current formulation, consider Amazon.com, which sells a very large variety of products, most of them offered by multiple sellers. Some are pure commodities, but many are differentiated to some degree. When the customer does a search, Amazon selects a particular seller from the undifferentiated products that match the search criteria. It uses a ranking system that is based on price, customer satisfaction, delivery speed, and some other factors.[64] The supplier who gets the highest rating goes into the "buy box" at the upper right corner of Amazon's search results screen. By a large margin customers

select the supplier that wins the buy box, even though they are free to choose an alternative.[65] By contrast, if a customer does a more general product search in a differentiated market—say, for "bath towels"—then the search result will show up as a list. Because Amazon has a house brand—"Amazon Basics"—that will appear on the search result, although not necessarily at the top.

Because Amazon has no duty to deal in a rival's products under current law, the way it ranks choices or its selection of a particular vendor for the "buy box" is up to Amazon, although a more complex practice such as tying might be unlawful. At least one court has sustained a complaint that Amazon unlawfully tied access to the Buy Box to an agreement to sign a most-favored-nation clause, which prevented the seller from offering better terms on a non-Amazon site.[66] There has also been some non-antitrust litigation involving claims that third-party sellers have manipulated information in order to win the buy box.[67]

For many products sold on Amazon, its selection of a vendor is simply a choice to deal through a third party rather than sell directly.[68] That is, Amazon could take care of purchase, inventory, resale, credit, and shipping of a product itself, or it could engage a third party to do it in Amazon's behalf. Nevertheless, because Amazon is likely to be a covered platform under the AICOA, its ranking choices could be subject to review.

While the AOCOA's text is not final at this writing, the current proposals would make it unlawful for any firm to "advantage" the operator's "own products, services, or lines of business over those of another business user."[69] Another makes it unlawful for Amazon to "discriminate" between multiple business users. An overlapping provision makes it unlawful to "exclude[] or disadvantage[] the products services, or lines of business of another business user relative to the covered platform operator's own products…"[70] The term "exclude" is both ambiguous and loaded. Does "exclude" imply a global duty to deal? If Amazon decides to sell its own house brand of scissors[71] does that mean it must carry scissors for every one of the other 177 listed manufacturers?[72]

Further, how do the AICOA's nondiscrimination requirements apply to differentiated products? Amazon's house brands are mainly manufactured products with at least modest differentiation from those of rivals. For example, an Amazon search for "electric toasters" (July 2023) reveals a large variety, with many different features. Prices on just the first three pages of the search result range from $13.49 to $399.95. Further, they are not listed in any readily comprehensible sequence. The first one on a search conducted in late July, 2023, was a $349 model with a touchscreen. It is made by Revcook, Inc., a small manufacturer that specializes in high end toasters. The fourth one was a simple 2-slice Proctor Silex model for $26.99. Procter-Silex is a brand of electric appliances owned by Hamilton Beach, which is a large firm. The first listing for an "Amazon Basics" toaster came in at $24.00 and is in the middle of the first page.

In some cases, a search is limited to a particular model of a particular brand, and there could be multiple vendors. In that case, there might be more objective criteria for ranking them, such as price, shipping speed, customer satisfaction, and so on. But what should be the ranking order for a $349 and a $13.49 toaster which differ significantly in features. And what if Amazon, responding to low sales, removes a particular model from its search results?

The text of the AICOA does provide an affirmative defense, with the proof burden on the defendant and a "clear and convincing" evidence standard that the conduct "would not result in harm to the competitive process. . . ."[73] Why the statute uses this milquetoast definition of antitrust "harm to the competitive process" is unclear. It adds to the statute's ambiguity because it says absolutely nothing. A "competitive process" standard does not identify violating conduct in terms of higher prices, lower output, or even something like equal access. In any event, however, satisfying this burden of proof by clear and convincing evidence is going to be a major challenge, particularly if the only evidence of discrimination is that the defendant did not include a particular supplier among the dozens that were available, or perhaps because it ranked a particular firm's product fourth on the list instead of second.

Conclusions: Competitive Harm from Self-Preferencing. There are pretty good reasons for leaving things like product selection and display to individual firms' market selections. They involve a large number of choices about price, quality, performance, features, brand recognition, to name just a few. The choices generally reflect seller experience. For example, a firm will give prominent shelf space to items that sell quickly. But the important thing is that competition and the wish to maximize sales drives these choices, and it is very hard to believe that a government agency can make them better by substituting its own judgment. It forces firms to compete with one another for a firm's attention.

The literature on self-preferencing is not all in agreement about its merits, but these conclusions appear to be tentatively justified:

1. Current antitrust law, which largely limits control of self-preferencing to recognized instances of unlawful tying, exclusive dealing, and quasi-exclusive dealing, may be too narrow. The monopolist's duty to deal with rivals reaches conduct more broadly but is also very narrow.
2. Current U.S. law recognizes a firm's right to select its suppliers and trading partners, and that right operates as a strong inducement to competition among sellers. Under current law, the exceptions must be either the product of a naked conspiracy or else an unreasonable exercise of proven market power.
3. The American Innovation Choice Online Act would broaden these duties considerably, but its coverage would be limited to a small group of large online platforms identified as "gatekeepers." That limitation

singles out for adverse treatment one of the most productive areas of the economy.

4. The "Gatekeeper" approach of AICOA is misguided because of its focus on the overall size of a covered firm rather than on market power in a particular product. A stronger case can be made if the statute were limited to products for which consumers have *no reasonable alternatives*. However, "self-preferencing" implies that there are options, so the bite of such a limitation would occur if the self-preferencing made those options unavailable, thus creating a monopoly.
5. Under existing law, even when market power is present, competitive harm must be shown.
6. A broad rule condemning self-preferencing in the absence of market power could place firms under that rule at a significant competitive disadvantage. It will very likely incentivize some firms to stop dealing in the products of third parties altogether. Indeed, antitrust history frequently exhibits situations in which firms vertically integrated into an area because the legal system made dealing in a rival's goods too costly. ■

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[1] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[2] *E.g.*, Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2003).

[3] *Colgate*, 250 U.S. at 307.

[4] Wilson v. Simpson, 50 U.S. 109 (1850). *See* Herbert Hovenkamp, *Antitrust and the Design of Production*, 102 Corn. L. Rev. 1155 (2018).

[5] *E.g.*, Impression Prods., Inc. v. Lexmark Int'l, Inc., 581 U.S. 360 (2017) (printer patentee could not use patent law to prohibit firm from making generic toner cartridges).

[6] Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961).

[7] Bloomer v. Millinger, 68 U.S. 340, 352 (1863).

[8] Auto. Body Parts Ass'n v. Ford Glob. Tech., LLC, 930 F.3d 1314 (Fed. Cir. 2019).

[9] Henry v. A.B. Dick Co., 224 U.S. 1 (1912) (unlicensed third party who sold ink for use in patentee's mimeograph machine liable for contributory infringement).

[10] 15 U.S.C. § 14 (2018).

[11] *Id*.

[12] *Id*.

[13] Int'l Bus. Machs. Corp. v. United States, 298 U.S. 131 (1936).

[14] Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949).

[15] Motion Picture Pats. Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

[16] Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971).

[17] Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451 (1992).

[18] Patent Misuse Reform Act, 35 U.S.C. §271(d)(5) (requiring proof of market power in patent tying cases).

[19] E.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 468-69 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021) (cable providers interconnection services and its advertising marketing were separate products); Epic Games, Inc. v. Apple, Inc., 493 F. Supp. 3d 817 (N.D. Cal. 2020) (plaintiff unlikely to succeed on its claim that tying of the defendant's digital payment processing system to its software distribution system involved separate products).

[20] 15 U.S.C. §14 (2018) (preventing a seller from offering a "discount from, or rebate upon," a good conditioned on the purchaser's not using the goods of a competitor, and where the competitive harm requirements are met.

[21] E.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012), cert. denied, 569 U.S. 958 (2013) (Sherman Act).

[22] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003). For a full discussion of the practices and cases, *see* 11 Herbert Hovenkamp, Antitrust Law ¶1807 (4th ed. 2018).

[23] *See* Coalition for a Level Playing Field, LLC v. AutoZone, Inc., 737 F. Supp. 2d 194 (S.D.N.Y. 2010) (dismissing but granting leave to amend claim that payments for preferred slotting violated Robinson-Patman Act).

[24] E.g., It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 685 (4th Cir. 2016) (concert promoter did not tie its venue to its promotion services where artists were not forced, but were merely encouraged, to use the venue). *See also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (describing ties as "forcing"); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953) (describing ties as "coerc[ion]").

[25] *See* 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1759 (4th ed. 2023 Supp.). *See* Rumble, Inc. v. Google, LLC, 2022 WL 3018062 (N.D. Cal. July 29, 2022) (refusing to dismiss Sherman Section 2 claim including charge of unlawful default).

[26] *See* 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1756b (4th ed. 2018).

[27] The figure is cited in Google, LLC v. Oracle America, Inc., 141 S.Ct. 1183, 1218 n.9 (2021) (Thomas, J., dissenting). *See also* Erik N. Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale L.J. 1483, 1547 (2022) (noting high value of default rules).

[28] United States v. Google, LLC, 2023 WL 4999901, *20 (D.D.C. Aug. 4, 2023).

[29] Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023). See Cal. Bus. & Prof. Code § 17200 et seq. (2018).

[30] Epic Games, Inc. v. Apple, Inc., 73 F.4th 785 (9th Cir. 2023).

[31] *Epic Games*, 67 F.4th at 1003.

[32] *See, e.g.*, FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) (finding liability for supplier who discriminated in the granting of price discount coupon books).

[33] *See* 14 Herbert Hovenkamp, Antitrust Law ¶¶22311, 22363 (4th ed. 2019) (statute requires differential treatment between two different customers).

[34] Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745 (1st Cir. 1994).

[35] See Karin Bradley & Ola Persson, *Community Repair in the Circular Economy—Fixing More than Stuff*, 27 Int'l J. Justice & Sustainability 1321 (2022); Taina Pihlajarinne, *European Steps to the Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials?,* SSRN (Oct. 13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708221.

[36] C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998).

[37] *See In re* Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 2023 WL 4928184 (S.D.N.Y. Aug. 1, 2023) (appointing master to oversee distribution of settlement funds).

[38] Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023).

[39] European Commission JRC Technical Report, Margot Moslinger, et al., *Toward an Effective Right to Repair for Electronics* (2022). ". . . the ever-increasing complexity of electronic devices—ever more light-weight, compact and requiring less material—often translates into increasing repairing and recycling difficulties"), JRC129957_01.pdf.

[40] *See* Aaron Perzanowski, *Consumer Perceptions of the Right to Repair*, 96 Ind. L.J. 361 (2021).

[41] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[42] *See* Hovenkamp, *supra* note 26, 131 Yale L.J. at 1546.

[43] Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949).

[44] *Id*. at 320 (Douglas, J., dissenting).

[45] https://www.thomasnet.com/products/cutting-boards-5902002-1.html (last visited Sept. 6, 2023, showing 121 general manufacturers and 66 custom manufacturers).

[46] American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021-2022) (hereinafter AICOA). It has been reintroduced in the 118th Congress.

See Press Release, Sen. Amy Klobuchar, *Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation to Boost Competition and Rein in Big Tech* (June 15, 2023), https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=CDEAE124-CA63-446E-AC24-BB2EF170B542.

[47] Jessica R. Nicholson, *New Digital Economy Estimates*, Bureau of Economic Statistics (2020), https://www.bea.gov/system/files/2020-08/New-Digital-Economy-Estimates-August-2020.pdf (estimating annual digital economy growth as 6.8%, against 1.7% for overall economy).

[48] U.S. Utility Patents Issued in 2022, Harrity, https://harrityllp.com/patent300/.

[49] Massimiliano Nuccio & Marco Guerzoni, *Big Data: Hell or Heaven? Digital Platforms and Market Power in the Data Driven Economy*, 23 Competition and Change 312 (2019) (finding few barriers into most digital markets).

[50] *See* Aneesa Mazumdar, *Algorithmic Collusion: Reviving /Section 5 of the FTC Act*, 122 Colum L. Rev. 449 (2022).

[51] *E.g.*, Craig Hale, Amazon is putting up $100m to battle Microsoft and Google for the Next Generation of AI, Techrader (June 23, 2023), https://www.techradar.com/pro/amazon-is-putting-up-dollar100m-to-battle-microsoft-and-google-for-the-next-generation-of-ai; Kate Birch, *Generative AI Battle Hots Up Between Microsoft, Google, Meta*, Business Chief (Mar. 15, 2023), https://businesschief.com/technology-and-ai/generativeai-battle-hots-up-between-microsoft-google-meta.

[52] Mike Isaac, Meta's "Twitter Killer" App is Coming, N.Y. Times, July 3, 2023 (https://www.nytimes.com/2023/07/03/technology/meta-app-twitter.html).

[53] *Search Engine Market Share Worldwide—Aug. 2023*, Statcounter, Globalstats, https://gs.statcounter.com/search-engine-market-share (Aug. 2023, Google Search's market share = 91.85%).

[54] Danny McLoughlin, *Amazon Kindle, E-book, and Kindle Unlimited Statistics*, Wordsrated (Nov. 10, 2022), https://wordsrated.com/amazon-kindle-e-book-and-kindle-unlimited-statistics/ (late 2022).

[55] *See* Danny Sheridan, *August 16: Grocery Market Share, Q1 2022*, Fact of the Day 1 (Aug. 16, 2022), https://www.factoftheday1.com/p/august-16-grocery-market-share-q1 (showing Walmart's market share as 21.3%).

[56] Danny Sheridan, *March 21: Top US Grocers By Share of Total Dollars Spent*, Fact of the Day 1 (Mar. 21, 2023), https://www.factoftheday1.com/p/march-21-top-us-grocers-by-share (showing Amazon with 1.3% of groceries and Whole Foods with 1.1%, for a total of 2.4%).

[57] See *Small Appliance Market Infographic*, Traqline (Mar. 4, 2022), https://www.traqline.com/newsroom/blog/small-appliance-market-infographic/.

[58] Brian Ratchford, et al., *Online and Offline Retailing: What we Know and Directions for Future Research*, 98 J. Retailing 152 (2022) (lower search and distribution costs give online sellers and advantage over traditional sellers).

[59] See Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 Am. Econ. Rev. 700 (1989) (equilibrium prices lower as search costs are lower, approaching marginal cost when they are very low).

[60] See 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Ch. 17C (4th ed. 2018).

[61] Search Engine Market Share, supra note 50.

[62] *Browser Market Share Worldwide—Aug. 2023*, Statcounter, Globalstats (Aug. 2023), https://gs.statcounter.com/browser-market-share (last visited Sept. 7, 2023).

[63] For the full listing and details, see the European Commission Press Release, (Sep. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328.

[64] On selection details, see *How to Win the Amazon Buy Box With FBA or FBM: 6 Factors Your Selling Guide* (Feb. 1, 2023), https://yoursellingguide.com/2023/02/01/win-amazon-buy-box/.

[65] *See* Jagoda Adamik-Borowska*, How to Win the Amazon Buy Box and Boost Sales in 2023,* DataFeedWatch, https://www.datafeedwatch.com/blog/amazon-buy-box#:~:text=There%20is%20a%20lot%20of,be%20closer%20to%2090%20percent (82 percent of desktop customers select the buy box choice, and an even higher number for mobile sales).

[66] *See* Frame-Wilson v. Amazon.com, Inc., 591 F. Supp. 3d 975 (W.D. Wash. 2022) (partially dismissing a claim that included most-favored nation pricing as well as claims of buy box manipulation); De Coster v. Amazon.com, Inc., 2022 WL 168405 (W.D. Wash. Jan. 19, 2022) (refusing to certify class action claim of tying buy box access to agreement to most-favored nation clause). There have also been claims that Amazon has tied buy box listings to Amazon's own fulfillment services. *E.g.*, Hogan v. Amazon.com, Inc., 2023 WL 3018866 (W.D. Wash. Apr. 20, 2023) (dismissing complaint).

[67] LY Berditchev, Corp. v. Truss Cosmetics Corp., 2023 WL 334539 (D.N.J. Jan. 20, 2023) (sustaining mainly non-antitrust complaint that defendant vendor used false information and other improper practices to win buy box); BookXchange FL, LLC v. Book Runners, LLC, 2019 WL 1863656 (N.D. Ill. Apr. 25, 2019) (dismissing complaint of one book vendor against another one that defendant manipulated its pricing data in order to win the Amazon buy box).

[68] *See* Hovenkamp, , *supra* note 26, 131 Yale L.J. at 1547-1548.

[69] AICOA, H.R. 3816, 117th Cong. (2021-2022), § 2, https://www.congress.gov/bill/117th-congress/house-bill/3816/text.

[70] *Id.*

[71] See https://www.amazon.com/Amazon-Basics-Multipurpose-Titanium-Stainless/dp/B01BRGU8R0/ref=zg_bs_g_private-brands_sccl_29/144-6044360-9039269?psc=1.

[72] https://www.thomasnet.com/nsearch.html?cov=NA&what=household+scissors&heading=71290605&searchterm=household+scissors&searchsource=https%3A%2F%2Fwww.thomasnet.com%2Fsearch.html

[73] AICOA, supra note 65, at § 2(c).

The ABA Antitrust Law Section will be gathering for another Global Seminar Series (GSS) in Sydney on **August 21st**, where a group of distinguished faculty members will be brought together to discuss competition, consumer protection, and data privacy.n.

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Competition or Competitors? The Case of Self-Preferencing

JONATHAN JACOBSON AND ADA WANG

EVER SINCE *BRUNSWICK* WAS DECIDED almost 50 years ago,[1] competition law in the United States has been thought to protect the interests of the competitive process over the interests of competitors.[2] That paradigm is being challenged today, however, with attacks on the consumer welfare approach, often articulating "self-preferencing" by dominant firms as a basis for legal challenge.[3] But promoting one's own products over those of rivals is the essence of competition, and putting that procompetitive activity at legal risk can only harm competition and the economy as a whole—at least without careful legal rules that distinguish the harmful from the benign. The necessary analysis for distinguishing the two has often been lacking. What is clear, however, is that requiring firms to pull their competitive punches just to benefit rivals makes no sense. The purpose of this paper is to suggest an approach that allows condemnation of truly anticompetitive "self-preferencing" while recognizing that simply promoting one's own wares over those of rivals should be encouraged, even for dominant firms.

Self-preferencing, loosely defined, has been seen by some antitrust authorities as inherently anticompetitive, particularly in digital markets.[4] But because much self-preferencing is supported by common-sense procompetitive justifications, including competition "on the merits," self-preferencing alone cannot sensibly be viewed as a standalone monopolization offense. Doing so would sacrifice these benefits for no sound competitive purpose. Self-preferencing has been targeted by regulators most often when the conduct is seen to be associated with activities such as refusals to deal, tying, bundling, or consumer deception. These aspects of unilateral conduct, however, are already recognized as potential offenses under existing antitrust or consumer protection laws and should therefore be conceptually distinguished from simple self-preferencing—elevating one's own products over those of rivals. The recent attacks on simple self-preferencing are largely inconsistent with the longstanding judicial treatment of the same category of conduct—albeit prior to the emergence of the large Internet platforms—without any policy basis for ignoring what has been considered settled law. Regulators are seeking to protect rivals by developing new rules for platform business models without regard for the likely impact on consumers.

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Self-preferencing in U.S. and European case law

In many countries and jurisdictions, the self-preferencing buzzword is at the center of legislative and regulatory scrutiny of the market behavior of dominant firms.[5] The term generates far less enthusiasm in U.S. court rulings. The U.S. courts did not even mention the term "self-preferencing" until 2021: a Lexis search for U.S. cases for the term "self-preferenc! and antitrust" resulted in only six cases and among them only three cases discussed self-preferencing under the antitrust laws—*Dreamstime*,[6] *Rumble,*[7] and *Epic Games.*[8] But even in these cases, the discussion of the lawfulness of self-preferencing was largely lacking.[9]

This relative absence of allusions to "self-preferencing" in U.S. antitrust case law appears, however, to be more a matter of nomenclature than an actual blind spot. Viewing self-preferencing as simply preferential treatment granted by a platform to its own products and services, it becomes easier to find echoes in prior U.S. antitrust jurisprudence—a small set of cases that by and large treats what is now often labeled as self-preferencing behavior as competition on the merits.

In *Bayou Bottling, Inc. v. Dr Pepper Co.*,[10] a local Pepsi bottler complained that the local Coke bottler (an alleged 75%-80% share monopolist) would not allow Pepsi into vending machines or coolers that the Coke bottler supplied or serviced. In choosing to use these machines only to facilitate the sale of Coca-Cola products, the defendant's behavior could clearly be described as self-preferencing in modern parlance. In its ruling, the circuit court opined: "Without anything more, these practices are not barred by

the antitrust laws. They are competitive acts. It ought to be apparent that 'a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business.'"[11]

Similarly, in *Christy Sports, LLC v. Deer Valley Resort Co.*,[12] the plaintiff had long operated the ski shop at Deer Valley Resort, but the defendant resort (DVRC) elected to evict the plaintiff and operate the ski shop itself. The court assumed monopoly power but ultimately rejected the plaintiff's claim, saying: "The Sherman Act does not force DVRC to assist a competitor in eating away its own customer base, especially when that competitor is offering DVRC nothing in return."[13]

Perhaps the most significant U.S. government position regarding "self-preferencing" was the Federal Trade Commission's 2013 Statement explaining its unanimous decision to close its Google investigation.[14] There, in a 5-0 ruling, the Commission found no violation from Google's placement of Google Shopping results over third-party comparison-shopping engines on google.com, as well as other claims of what is now called self-preferencing. The Commission acknowledged that the conduct at issue had lowered the rankings of competitor websites, but nevertheless concluded:

> Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers. Reasonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google's product design decisions in this case would require the Commission—or a court—to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence. Based on this evidence, we do not find Google's business practices with respect to the claimed search bias to be, on balance, demonstrably anticompetitive, and do not at this time have reason to believe that these practices violate Section 5.[15]

More recently, although the "self-preferencing" label was not used, the court in *United States v. Google LLC* granted summary judgment in favor of Google on the claim that Google was unlawfully favoring its own specialized "vertical" websites (such as shopping or hotels) over those of rivals.[16] The court concluded that the state attorneys general, led by Colorado, had failed to prove that any such "favoring" had anticompetitive effects in the relevant markets alleged, and that the states' speculation was insufficient to carry their burden of proof.[17]

The landmark antitrust case of the digital age, *United States v. Microsoft Corp.*, also involved elements of what some may now term self-preferencing; but the opinion in fact condemned only those actions designed to exclude rivals—where the exclusion made no economic sense for Microsoft *but for the exclusion of rivals*.[18] In the lawsuit, some of the alleged anticompetitive conduct was based on Microsoft's contracts with original equipment manufacturers, which made Internet Explorer the exclusive browser to be pre-installed (thus prohibiting the pre-installation of Netscape), prevented OEMs from removing any "desktop icons, folders, and Start menu entries," and had the effect of thwarting the distribution of rival browsers that many users preferred. The court also found unlawful Microsoft's agreements with Internet access providers or online services (such as AOL) that largely prevented their use of any browser other than Internet Explorer and agreements Internet service vendors requiring them to use only IE in any software development.[19] All this took place in an era where the preclusion of pre-installation was close to exclusive dealing; downloading Netscape on a 14.4 kbs modem could take an hour.

The agreements between Microsoft and computer manufacturers (and similar agreements with Internet service vendors and online services) did little to improve Microsoft's own product and were designed principally to exclude rival browsers, mainly Netscape.[20] It was not a manner of simply "preferring" IE; it was a (successful) strategy to prevent access to Netscape and thus inhibit competition in ways that did not involve any enhancement to Windows or the quality of IE. No part of *Microsoft* really departed from *Bayou Bottling* from decades earlier or was inconsistent with *Christy Sports*, which came afterwards. The case said nothing about simply promoting one's own wares over rivals.

The UK *Streetmap* decision is largely consistent.[21] There, the British court was asked to restrain Google's ability to preferentially treat its own maps product, Google Maps.[22] A competitor to Google Maps, Streetmap, complained that

> by the visual display at or near the very top of its SERP [search engine results page] of a clickable image from Google Maps, and no other map, in response to certain geographic queries, and the consequent position in the market for online search and online search advertising, Google was abusing its dominant position in the market for online search and online search advertising.[23]

The British court found, however, that Google's preferential treatment of its online map product was unlikely to give rise to an anticompetitive foreclosure.[24] Among other reasons, the court noted that "although Google Maps is the only online map to benefit from a visible thumbnail, the Google SERP . . . include[d] clickable links to other relevant online maps; and there is no particular difficulty for a user to click on those blue links."[25] The court's finding in *Streetmap* that Google users would have experienced little inconvenience in switching from Google Maps to competing products distinguishes *Streetmap* from *Microsoft* and makes it more consistent with *Bayou Bottling* and *Christy Sports.* But in rejecting the claim based on the availability of alternatives, the court did not reject the idea that simply favoring one's own product could be a violation.

By contrast, Google's promotion of Google Shopping in its general search engine faced a stiffer challenge and opposite

result in continental Europe.[26] The European Commission argued that Google abused its market dominance as a search engine by giving an advantage to its own shopping results and demoting competitors' comparison shopping services in its search results.[27] The European Commission found the conduct anticompetitive on the grounds that it had the potential to foreclose competing comparison shopping services and was likely to reduce the ability of consumers to access the most relevant comparison shopping services.[28] On appeal to the General Court, the Commission's decision was upheld in part.[29] The mere "special display and positioning" of the platform's own products and services was not in and by itself deemed abusive.[30] What was ruled as illegal was Google's demotion of results from competing comparison services by means of adjusted algorithms.[31]

As noted, however, on the same facts, the U.S. Federal Trade Commission found that Google's promotion of its own shopping site and its concurrent demotion of comparison-shopping sites benefited users.[32] It concluded that "Google likely benefited consumers by prominently displaying its vertical content on its search results page," that "Google would typically test, monitor, and carefully consider the effect of introducing its vertical content on the quality of its general search results, and would demote its own content to a less prominent location when a higher ranking adversely affected the user experience," and that "data showing how consumers reacted to the proprietary content displayed by Google also suggest that users benefited from these changes to Google's search results."[33] The EC's contrary ruling unambiguously favored the interests of Google's comparison-shopping competitors over those of consumers.

If any common ground exists between the General Court's *Google Shopping* decision, *Streetmap*, and the U.S. cases, it is found in the courts' tolerance of a firm's right to promote and preference its own products regardless of the firm's monopolistic or dominant status. The disagreement is regarding the impact on competitors. The uplifting of one's own products and services in many cases, however, necessarily means the demotion of rivals. To treat these impacts differently makes little practical sense without a good test to distinguish the anticompetitive from the benign.

The recent EC proceedings against Amazon demonstrate this difficulty. On September 20, 2022, the EC preliminarily found that, as a dominant online marketplace for third-party sellers, Amazon abused its dominant position in breach of Article 102 of the Treaty by: (1) relying on non-public sales data of sellers active in its marketplace to adjust its own retail offerings; and (2)

> artificially fav[o]ring its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (the so-called 'Fulfilment by Amazon' or 'FBA' services), to the detriment of other marketplace sellers and consumers, when (i) selecting the single prominently displayed offer on Amazon's product detail page (the winner of the 'Buy Box'); and (ii) enabling sellers to offer products to users of Amazon's loyalty program[] (the 'Prime program[]') under the Prime label.[34]

Here again, the EC seems to have equated promoting and "preferencing" one's own product with harming marketplace sellers, while just presuming harm to the consumers. Although the use of rival's data arguably makes this case different from pure self-preferencing, it is hard to see why using a seller's data from transactions on one's own platform would be problematic, at least when the collection and use of the merchant's data is stipulated in agreements between the merchants and the platform or online marketplace.

The EC resolved the two proceedings after extracting commitments from Amazon to not use data it collects from sellers on its platform to compete against the sellers and to not discriminate against sellers that do not use Amazon's logistics and delivery services. In a sense, the two proceedings ended in a cliffhanger because Amazon's commitments are set to expire in a few years and because the EC may challenge similar practices by other firms that end up in European courts. However, the recent case filed by the FTC against Amazon, which advances similar claims, seeks similar relief with no expiration date.[35]

Competition authorities in some member states have already moved aggressively in targeting self-preferential conduct. Following competition concerns by the UK authorities, for example, Amazon offered commitments not to use the data generated through transactions on its websites to give an edge to its own retail business that compete against third-party sellers that use Amazon.[36] The Polish Competition Authority, as another example, recently imposed a huge fine on Allegro, Poland's dominant online shopping platform, for using its own algorithm and consumer data to boost the sale of its own wares and to position them more prominently on its website compared to the merchandise of third-party sellers who use Allegro's platform.[37]

The current U.S. DOJ and FTC appear now to be taking the EC approach. In the July 2023 draft update of their *Merger Guidelines*, the U.S. agencies say:

> The Agencies protect competition on a platform in any markets that interact with the platform. When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against other competitors participating on the platform, harming competition in the product market for that product or service. This problem is exacerbated when discrimination in favor of a product or service would reduce access to distribution for rivals in the participants' market and deprive rivals of network effects in the platform market, both extending and entrenching a dominant position.[38]

By labeling a platform operator's participation in its own platform a "conflict of interest," the U.S. competition

agencies would effectively prevent (or at least inhibit) platform operators from competing with platform participants. As discussed more in detail below, this trend of preferring competitors to the process of competition has nothing to commend it.

Self-preferencing: innovation, efficiency, and exclusion

The history of monopolization jurisprudence's conduct requirement is a history of finding the delicate balance between the anticompetitive and procompetitive effects of the monopolist's conduct. As the recent regulatory and legal scrutiny of self-preferencing has largely focused on digital markets, legal analysis often pivots on how to properly measure the degree of anticompetitiveness of the monopolist's conduct in these markets and how to credit the potentially offsetting procompetitive effects of the same conduct.

Digital markets pose a challenge to the legal analysis. In two-sided or multi-sided markets, users and consumers on one side often pay little to nothing (apart from the cost associated with user attention) for their use of digital products. On the other side, platforms may be compensated directly by advertisers and third-party merchants; the question for them is whether the platform provides a positive return on investment. Because of these factors, the degree of competition in a given digital market cannot be easily gauged by standard metrics such as price. The alternative measures include output effects, continuing innovation, and sustained level of investment. In multi-sided markets, output tends to be the best measure. But output must be measured properly, which can be difficult.[39]

The argument for condemning digital self-preferencing stems from the idea that some Internet firms are so central that their services may be deemed essential facilities, basically public utilities. In other words, the drive to outlaw self-preferencing among these firms really stems from the drive to turn digital platforms into common carriers that are subject to utilities-style regulation.[40] In turn, some commentators have cautioned that this threatens to reduce digital platforms' incentive to invest in consumer welfare-improving innovations.[41]

U.S. antitrust law went through a phase of utilities-style regulation from the 1880s through the early 1970s,[42] some of which of course remains in effect today. Prior to the deregulation movement in the late 1970s, several important industries, mainly utilities, were considered prone to market failures. In these industries, administrative agencies were created to "oversee economic functioning, particularly prices, costs, and entry."[43] This type of regulation was later widely criticized for "distort[ing] firms' incentives and reward[ing] inefficiency rather than reduced costs and innovation."[44] "Significant criticisms of the costs and market distortions that accompanied regulation prompted serious review of regulatory regimes . . . and persuade[d] policymakers to move toward deregulation in almost all regulated markets."[45] Many industries, such as transportation and communications, were significantly deregulated as a result.

Later, in 2004, the *Trinko* decision essentially rejected the utilities-style approach to antitrust enforcement. The Court there made clear that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[46]

Condemning a leading firm's promotion of its products in an adjacent market has aspects of the same utilities-style regulation *Trinko* rejected. To the extent that the firm needs to and continues to make investment in innovation in the second market, the imperative to protect the investment and to encourage future investment is both an economic rationale for policymakers and regulators not to punish self-preferential conduct in adjacent markets, and a basis for a legal defense against any suggestion that the firm's conduct is not conducive to competition in these markets. In the *Streetmap* case, for example, the UK court took note that Google's "presentation of a thumbnail map on the SERP in response to a geographic query was a technical 'efficiency'" and noted that Google can legitimately improve its search product.[47]

The FTC's 2013 approach and the *Microsoft* decision provide a useful current guide to the analysis going forward. The Commission focused on whether the self-preferential conduct improved the quality of a product and user experience and balanced that against the potential for anticompetitive foreclosure. In reviewing some vertical websites' allegations that Google "prominently displayed Google vertical search results in response to certain types of queries, including shopping and local," the FTC decided that the key issue "was to determine whether Google changed its search results primarily to exclude actual or potential competitors and inhibit the competitive process, or on the other hand, to improve the quality of its search product and the overall user experience."[48] The FTC found that, "in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose" and that "these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of 'competition on the merits' and the competitive process that the law encourages."[49] *Microsoft* is entirely consistent. The decision condemned exclusionary agreements, not self-preferencing, and made clear that conduct on one's own platform should not be condemned absent proof that the conduct made no economic sense but for the exclusion or marginalization of rivals.

One might reasonably ask whether even the 2013 FTC and *Microsoft* balancing approaches go too far. What if a company legitimately tries to create a new and better product or feature that also has the effect of making it harder for rivals

to compete effectively but fails because the new product is not better at all? Regulatory second-guessing of the company's behavior might provide a short-run benefit in the specific matter at hand, but would also be a signal to the rest of the world that, if the new product is not in fact "better," it could be condemned as an antitrust violation. That could have a significant chilling effect on new investment incentives. Courts should continue to be wary of assuming the job of speculating about the degree efficiency gains and benefits of new products. If balancing is to be done at all, it might be best to do it with overweight on the side of innovation.

This notion that it is not unlawful to promote one's product in an adjacent market in order to improve the actual or perceived quality of a dominant product in the primary market is important. Absent evidence that the conduct is designed solely or primarily to disadvantage rivals, product improvements typically evidence continued investment and innovation, a strong procompetitive effect of the "self-preferential" conduct.[50] This is especially true of product design decisions. Courts properly have been reluctant to interfere with such decisions absent clear evidence of anticompetitive effects.[51]

The European Commission, unfortunately in our view, habitually rejects any efficiency or consumer benefit justifications for this same variety of self-preferencing. For example, the EC rejected in the *Google Android* case the efficiency justifications for prohibiting phone OEMs from "forking" Android, i.e., from selling a phone as an Android phone without complying with Google's technical requirements.[52] Google argued that these anti-forking measures prevent "software fragmentation and the potential diffusion of incompatible versions of the software,"[53] factors that could ruin the product in the eyes of consumers. The European General Court responded that "[i]t is not necessary to settle the dispute between the parties as to the harmfulness or benefits which fragmentation might have represented for Google and for the entire sector."[54] Instead, it concluded that "the extremely rapid growth of the 'Android ecosystem' from the early 2010s onwards makes Google's claims regarding the hypothetical risk that the threat which it describes to the very survival of that 'ecosystem' could have continued throughout the infringement period implausible."[55] The Commission's antagonism towards Google's anti-forking/efficiency argument could well be not so much about restraining self-preferencing, as about allowing rivals to free-ride on Google's Android investments. This again sounds quite a bit like preferring competitors to the process of competition.

Safeguarding competition and efficiency

What sets *Microsoft* apart from *Bayou Bottling* and *Christy Sports*, as we noted earlier, is that *Microsoft* involved other types of activities that are otherwise actionable. The U.S. cases, as well as some aspects of the European General Court's reasoning in *Google Shopping,* illustrate the need to distinguish self-preferential conduct from other actions that can rightly be prosecuted. Refusals to deal, tying, and consumer fraud or data privacy violations are commonly implicated in antitrust enforcement actions that involve activity that might be characterized as self-preferencing. But these types of conduct are already treated under existing laws. Adding in a "self-preferencing" count in these contexts adds little or nothing.

Refusals to deal. There generally is no duty to deal with competitors. Refusals to deal violate Section 2 when the refusal makes no economic sense apart from the exclusionary impact on rivals.[56] There are, therefore, some limited instances where a monopolist's refusal to deal with a competitor can violate Section 2 of the Sherman Act. Some of those might involve what could be called self-preferencing.

What we have called "pure" self-preferencing should stay clear of refusal to deal liability except where the refusal violates the no economic sense test.[57] In *Streetmap*, for example, there was no allegation that Google would have profited more from promoting the Streetmap product over Google Maps either in the long run or in the near term. In *Google Shopping*, the European General Court narrowed the European Commission's finding and held that if Google's conduct consists "solely in the special display and positioning" of the platform's own products and services, it is not necessarily abusive.[58]

Although *Trinko* poured a large bucket of cold water on the doctrine, some U.S. authorities have recognized an "essential facilities" exception to the general rule that a monopolist has no duty to deal with competitors.[59] The doctrine is frequently evoked in European antitrust litigation. In the EU,

> a refusal to deal many trigger an antitrust violation when: (i) access to the product or service is indispensable to a firm's ability to do business in a market; (ii) the refusal is unjustified; (iii) the refusal excludes competition on a secondary market; and (iv), if intellectual property rights are involved, it prevents the emergence of a new product for which there is potential consumer demand.[60]

As *Trinko* recognized, this essential facilities argument can be applied far too broadly.[61] The lessons learned from the utilities-style enforcement of antitrust statutes in 1970s should discourage any regulatory attempt to declare a digital product an essential facility just because of its popularity. Europe has moved in the opposite direction. The new laws on self-preferencing in Europe deviate drastically from U.S. jurisprudence in numerous respects, prominently including the Europeans' readiness to subject nearly all the big-name (U.S.) tech firms to the essential facilities doctrine. The European Union Digital Markets Act (DMA), for instance, terms many large online platforms as "gatekeepers," and in turn the new law provides, among many other things, that these "gatekeeper" firms would be enjoined from treating their own products more favorably than rivals.[62] The DMA's requirement of treating rivals the same as the "gatekeeper" firm appears not to consider or care about the negative effect on large firms' incentives to develop new and better products. Why undertake such costly investments if there is no benefit to be gained?

As the *Trinko* court warned, these kinds of broad regulatory attempts cut against the very purpose of antitrust laws

of encouraging the invention of socially and economically beneficial tools and facilities. Many of the "gatekeepers" were non-existent two decades or even ten years ago, and their success can be viewed as entrepreneurship and the genius of innovation. The "gatekeeper" laws against self-preferencing impose a heavy price on their success and may ironically snuff out the next generation of "gatekeepers" still in the cradle.

Tying arrangements. "Pure" self-preferencing can also be distinguished from tying because preferential promotion of one's own product or service does not necessarily entail coercing customers to use it. Moreover, to the extent tying is used to achieve a self-preferential outcome, the U.S. antitrust policy towards tying has transformed over a long period and pivoted from the hostile approach of the early *per se* rule. In *Jefferson Parish*, the earlier hostility was turned to a modified *per se* rule that permitted the consideration of possible tying efficiency gains (with four judges in favor of a rule of reason).[63] And the Supreme Court's 2006 decision in *Illinois Tool Works* acknowledged that tying arrangements often have procompetitive effects, a proposition fundamentally inconsistent with any per se rule.[64] Tying arrangements can have severe anticompetitive consequences,[65] but adding "self-preferencing" to the analysis adds nothing.

The Italian Competition Authority's separate investigation into Amazon, and the subsequent imposition of billion-plus euro fine, focused not on Amazon's use of the data collected on Amazon's sites in competition against the third-party sellers on these sites, but rather on Amazon's requirement that these sellers must use Amazon's delivery services to be eligible for the Prime program.[66] The Italian authorities deemed this to be an act of tying and improperly leveraging the dominance of Prime to force Amazon's logistic service on the third-party sellers.[67] Similarly, the Dutch Competition Authority imposed a penalty on Apple for requiring dating-app providers that appear in Apple's App Store to use Apple's payment services. In essence, Apple was deemed to have used its dominance of the App Store to restrict the app developers' freedom of choice in picking their own payment processors. Although one might well question these results, what is clear is that the true transgression in the Dutch case, as in the Italian case, was tying.[68]

Exclusive Dealing. Exclusive dealing arrangements have long been examined under the rule of reason, and "foreclosure" has for decades been the critical issue in evaluating any exclusive dealing claim.[69] While the foreclosure concept was developed as a useful proxy for analyzing harm to competition, as the sophistication of the antitrust analysis has increased, foreclosure as a proxy for analyzing harm to competition has been found inadequate even in cases where foreclosures has properly been defined. The relevant question is instead "whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole."[70] Self-preferencing generally falls outside this arena, but where the effect of the conduct is to make a large portion of the relevant market unavailable to rivals, there will be a violation absent very substantial countervailing efficiencies. The number of instances where pure or simple self-preferencing (i.e., just favoring your own product) might truly foreclose rivals in this manner would seem few and far between. But the *Microsoft* case again provides a useful basis for comparison. There, Microsoft did not simply promote its own browser over Netscape; it entered into agreements with computer OEMs, Internet service vendors, and others that were effectively exclusive arrangements properly analyzed under an exclusive dealing framework.[71] Engaging in a separate "self-preferencing" analysis would have added nothing.

Consumer fraud and deception. Self-preferencing using deception, similarly, can be and is addressed under consumer protection statutes. The issue arises most often in the context of digital platforms' collection and use of consumers' personal data for their commercial benefits. For example, a business might mislead consumers about the collection and use of personal location data.[72] To the extent that this deceit eventually affords the business a significant and unfair advantage over its competitors in designing and developing related products, the deceitful conduct can be prosecuted under existing antitrust and consumer protection statutes.

There are frequent news reports about businesses that mislead consumers about their commitment to the privacy of users' personal data in order, for example, to promote a mobile application where the expanded collection of personal information is then often combined with consumers' Internet activity to give businesses greater insight to users' habits and behavior; this can give businesses a competitive edge.[73] In the digital economy, profits and commercial advantage are to be sought in the businesses' aggressive race to collect more data and more granular data about their users. But if some businesses gain the edge through fraud and deceit, then they can be prosecuted for that fraud and deceit. Further, if they use that edge either to foreclose competition in the native market or to harm competition in an adjacent market, then there may be a viable antitrust case to be made.[74] Legal analysis for antitrust violations by businesses that fraudulently obtain consumer data would hardly dwell on self-preferencing. Rather, the pivotal issue here is whether the deceit gave the defendant an unfair advantage in competition and whether the unfair advantage eventually stifled competition.

Conclusion and Recommendations

Self-preferencing can often be a significant feature of leading tech firms' commercial and research strategy when these firms straddle multiple digital markets. The adjacent areas are typically where they focus major parts of their research and investment; and this is where many exciting new products are born. It is time regulators and courts set clear and consistent legal standards for treating the subject. In our view, any recommended treatment of self-preferencing should stay closely aligned with the existing U.S. case law, which in the past several decades has created a stable and predictable legal framework conducive to huge investment, huge reward, and relentless innovation and progress in the

tech sector. There is no principled basis for preferring competitors over consumers in competition cases. To use Steve Salop's example, doing so would mean that a merger that raised prices to consumers would be just fine if rival profits increased by an equivalent amount. Logically extended, a large portion of existing antitrust law would have to be revisited. Has the economy suffered since *Brunswick* called for the opposite result? Hardly. We have seen the greatest technological progress, with associated societal benefits, in world history. That should be celebrated, not reversed.

Pure self-preferencing should be presumptively legal. The U.S. case law from *Bayou Bottling* to *Christy Sports* is unambiguous in this aspect. New nomenclature does not alter the fundamental legal perspective on promoting one's own product over those of rivals. Where self-preferencing is effectuated by actual exclusionary conduct, the exclusionary conduct itself provides a sound basis for condemnation. The case has not been made for a new species of violation. ■

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[1] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[2] *See, e.g.,* Jonathan Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat,* 66 Antitrust L.J. 273 (1998).

[3] *See, e.g.,* Tim Wu, The curse of bigness: how corporate giants came to rule the world (2018); Lina Khan, Amazon's antitrust paradox (2017); U.S. Dep't Of Justice & Federal Trade Comm'n, Draft Merger Guidelines 25 (2023), at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[4] *See, e.g.,* Jonathan Kanter, Assistant Atty. Gen., Antitrust Div., U.S. Dep't of Justice, Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights, (Sept. 20, 2022), at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary; Lina Khan, Amazon's Antitrust Paradox, *supra* note 3.

[5] For example, the European Union's Digital Markets Act (DMA) prohibits gatekeepers from "engag[ing] in any form of differentiated or preferential treatment in ranking on the core platform service, and related indexing and crawling, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls." *See* Regulation (EU) on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Preamble ¶ 52, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925; the Germany Digitalization Act likewise prohibits platforms from giving preferential treatment to their own offers over competitors' offers. *See* GWB Digitalization Act (Jan. 18, 2021), § 19a, at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf. The proposed American Innovation and Choice Online Act (AICOA) would declare it unlawful to engage in conduct that would "unfairly preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform." S.2992 - American Innovation and Choice Online Act, 117th Cong. 2d Sess. (2022) § 3(a)(1), at https://www.congress.gov/117/bills/s2992/BILLS-117s2992rs.pdf.

[6] *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130 (9th Cir. 2022).

[7] *Rumble, Inc. v. Google LLC*, No. 21-cv-00229-HSG, 2022 U.S. Dist. LEXIS 136468 (N.D. Cal. July 29, 2022), *later opinion at* No. 21-cv-00229-HSG (LJC), 2023 U.S. Dist. LEXIS 95164 (N.D. Cal. May 31, 2023).

[8] *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff'd in part, rev'd in part*, 67 F.4th 946 (9th Cir. 2023).

[9] In *Rumble*, neither Google's motion to dismiss nor the Court's decision addressed the merits of the self-preferencing claim. 2022 U.S. Dist. LEXIS 136468, at *8-9. *Dreamstime* rejected the claim without extensive discussion. 54 F.3d at 1141. The lower court in *Epic* found the evidence lacking, without any substantive discussion, 559 F. Supp. 3d at 1001, and the court of appeals did not address the issue.

[10] 543 F. Supp. 1255, 1260 (W.D. La. 1982), *aff'd*, 725 F.2d 300 (5th Cir. 1984). Mr. Jacobson was defense counsel in the case.

[11] Bayou Bottling, Inc. v. Dr Pepper Co.¸725 F.2d 300, 304 (5th Cir. 1984) (citing *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 93 (2d Cir.1981)).

[12] 555 F.3d 1188 (10th Cir. 2009).

[13] *Id*. at 1192.

[14] Google Inc., FTC File No. 111-0163 (Jan. 3, 2013). Mr. Jacobson was one of Google's counsel in this case.

[15] Statement of the FTC Regarding Google's Search Practices, Google Inc., FTC File 111-0163, at 1-3 (Jan. 3, 2013), at https://bit.ly/2PsKsIn.

[16] United States v. Google LLC, 1:20-cv-03010-APM, 2023 WL 4999901 (D.D.C., Aug. 4, 2023). The authors were among Google's counsel in the case. As of this writing, the remainder of the case remains pending.

[17] *Id.* at *20-*25. The states had alleged that these "verticals" were each in separate markets, but asserted harms in a market for *general* search; the theory was that Google's "favoring" impaired the ability of these vertical search providers to "partner" with Bing or other general search providers, thus weakening Bing and others. The court found this argument unduly speculative.

[18] 253 F.3d 34, 58-63 (D.C. Cir. 2001).

[19] *Id.* at 61.

[20] *Id.* at 62.

[21] Streetmap.EU Ltd. v Google Inc. & Others, [2016] UK High Court of Justice, EWHC 253(Ch) (12 Feb. 2016), at https://www.casemine.com/judgement/uk/5a8ff75360d03e7f57eab4dc.

[22] *Id.* ¶ 4.

[23] *Id.* ¶ 35.

[24] *Id.* ¶ 139.

[25] *Id.* ¶ 53.

[26] Case AT.39740, Google Search (Shopping), European Commission (Jun. 27, 2017), at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

[27] *Id.* ¶ 341. To find dominance in this area, The Commission defined the market to exclude Amazon and other retail shopping sites.

[28] *Id.* ¶¶ 593-600.

[29] Case T-612/17, Google LLC and Alphabet Inc. v. European Commission, EUROPEAN GENERAL COURT (Nov. 10, 2021), EU:T:2021:763. ¶¶ 458, 527.

[30] *Id.* ¶ 187.

[31] *Id.* ¶¶ 572-74. It is worth noting that, in demoting other comparison sites (typically leaving two on the first page), Google made the judgment call that limiting the number of shopping comparison sites would improve the user experience because users search for products largely to buy them while comparison shopping sites require several further steps to make a purchase. *See generally* Statement of the FTC Regarding Google's Search Practices, *supra* note 15, at 2.

[32] *Id.*

[33] *Id.*

[34] Cases AT.40462—Amazon Marketplace and AT.40703—Amazon Buy Box, Summary of Commission Decision (Dec. 20, 2022), ¶¶ 15-17, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.087.01.0007.01.ENG&toc=OJ%3AC%3A2023%3A087%3ATOC. As a result of the investigation, the EC imposed commitments on Amazon to essentially cease the self-preferencing conduct described. *See* Commitments to the European Commission, Case COMP/AT.40462 and Case COMP/AT.40703—Amazon, https://ec.europa.eu/competition/antitrust/cases1/202252/AT_40703_8825092_1476_4.pdf.

[35] Complaint, FTC v. Amazon.com Inc., No. 2:23-cv-01495 (W.D. Wash, filed September 26, 2023), at https://www.ftc.gov/system/files/ftc_gov/pdf/1910129AmazoneCommerceComplaintPublic.pdf.

[36] Case 51184, *Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace*, July 26, 2023, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

[37] *See* Press Release, *President of UOKiK issued two decisions concerning Allegro's practices*, Office of Competition and Consumer Protection (December 29, 2022), at https://uokik.gov.pl/ogloszenia.php?news_id=19185&&&&&&&&.

[38] U.S. Dep't Of Justice & Federal Trade Comm'n, Draft Merger Guidelines 25 (2023), at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[39] *See* Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust,* Antitrust Source (Aug. 2015).

[40] *See* State ex rel. Yost v. Google LLC, No. 21-CV-H-06-0274, 2022 Ohio Misc. LEXIS 200 at *17 (Ct. Com. Pl. May 24, 2022) (denying the State of Ohio's claim that Google Search is a common-law public utility under Ohio law).

[41] *E.g.*, Aurelien Portuese, *"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing*, Information Technology & Innovation Foundation 5-6 (Oct. 25, 2021), available at https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing/.

[42] Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. Bus. L. REV. 335, 342 (2004).

[43] Antitrust Modernization Commission, Report and Recommendations, at 357 (Apr. 2, 2007), at https://govinfo.library.unt.edu/amc/report _recommendation/amc_final_report.pdf.

[44] *Id.*

[45] *Id.* at 333.

[46] Verizon Commc'ns. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004).

[47] Streetmap. EU Ltd. v. Google and Others, [2016] EWHC 253 (ch) ¶ 147.

[48] Statement of the FTC Regarding Google's Search Practices, *supra* note 15, at 1.

[49] *Id.* at 2.

[50] *See* Aurelien Portuese, *"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing*, Information Technology & Innovation Foundation (Oct. 25, 2021), available at https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing/.

[51] *See, e.g.,* Allied Orthopedic Appliances v. Tyco Health Care, 592 F.3d 991 (9th Cir. 2010).

[52] Case AT.40099, Google Android, European Commission ¶ 233 (Jul. 18, 2018), confirmed by Case T- 604/18, *Google v. Commission*, European General Court (Sept. 14, 2022) EU:T:2022:541.

[53] Giuseppe Colangelo, *Antitrust Unchained: The EU's Case Against Self-Preferencing*, ICLE White Paper, at 8-9 (Oct. 7, 2022) (citing Case AT.40099, Google Android, European Commission (Jul. 18, 2018), confirmed by Case T- 604/18, *Google v. Commission*, European General Court (Sept. 14, 2022) EU:T:2022:541), available at https://ssrn.com/abstract=4227839.

[54] Case T- 604/18, Google v. Commission, European General Court (Sept. 14, 2022) EU:T:2022:541, ¶ 880.

[55] *Id*. Of course, the risk can be described as "hypothetical" only because the anti-fragmentation provisions largely eliminated that risk.

[56] *See Trinko*, 540 U.S. at 409.

[57] *See generally* Gregory J. Werden, *Identifying Exclusionary Conduct under Section 2: The No Economic Sense Test*, 73 Antitrust L.J. 413 (2005).

[58] Case AT.39740, Google Search (Shopping), European Commission ¶ 187 (Jun. 27, 2017), available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

[59] *See* ABA Antitrust Section, Antitrust Law Developments 275-81 (9th ed. 2022).

[60] Colangelo, *supra* note 53, at 9 (citing Joined Cases C-241/91 P and 242/91 P, RTE and ITP v. Commission, Court of Justice of the European Union (Apr. 6, 1995), EU:C:1995:98).

[61] *Trinko*, 540 U.S. at 411-12.

[62] Digital Markets Act, art. 6(1)(d), at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en ("[A] gatekeeper shall . . . refrain from treating more favo[]rably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and nondiscriminatory conditions to such ranking[.]").

[63] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 43-44 (1984), *abrogated in part by* Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

[64] Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 36 (2006).

[65] *See, e.g.,* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (the Edison patent on motion picture projectors led to monopolization of the entire motion picture industry).

[66] Case A528, Amazon, Italian Competition Authority (December 9, 2021), English press release available at https://en.agcm.it/en/media/press-releases/2021/12/A528#:~:text=A528%20%2D%20Italian%20Competition%20Authority%3A%20Amazon,for%20abusing%20its%20dominant%20position&text=The%20Authority%20found%20that%20Amazon,review%20by%20a%20monitoring%20trustee.

[67] *Id.* The FTC's recent complaint against Amazon makes the same claim. Complaint ¶ 361 *et seq.*, FTC v. Amazon.com Inc., No. 2:23-cv-01495 (W.D. Wash, filed September 26, 2023), at https://www.ftc.gov/system/files/ftc_gov/pdf/1910129AmazoneCommerceComplaintPublic.pdf.

[68] Case ACM/19/035630, Apple, Competition and Markets Authority (August 24, 2021), English press release available at https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf

[69] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[70] Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 362 (2002).

[71] *Microsoft*, 253 F.3d at 58-64.

[72] *$20m penalty for Meta companies for conduct liable to mislead consumers about use of their data*, Australian Competition & Consumer Commission (Jul. 26, 2023), at https://www.accc.gov.au/media-release/20m-penalty-for-meta-companies-for-conduct-liable-to-mislead-consumers-about-use-of-their-data.

[73] *See* Press Release, *Amazon Agrees to Injunctive Relief and $25 Million Civil Penalty for Alleged Violations of Children's Privacy Law Relating to Alexa*, Office of Public Affairs U.S. Department of Justice (July 19, 2023), available at https://www.justice.gov/opa/pr/amazon-agrees-injunctive-relief-and-25-million-civil-penalty-alleged-violations-childrens#:~:text=The%20stipulated%20order%20entered%20today,requests%20that%20they%20be%20retained; Press Release, *FTC Charges Twitter with Deceptively Using Account Security Data to Sell Targeted Ads*, Federal Trade Commission (May 25, 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads; Jennifer Korn, *Google Agrees to $392 Million Settlement With 40 States Over Location Tracking Practices*, CNN Business (Nov. 14, 2022), available at https://www.cnn.com/2022/11/14/tech/google-location-tracking-settlement/index.html; Kari Paul, *US Regulators May Ban Facebook From Monetizing Data From Children*, The Guardian (May 3, 2023), available at https://www.theguardian.com/technology/2023/may/03/ftc-facebook-meta-messenger-kids-data-privacy#:~:text=The%20first%20time%20was%20in,order%20was%20finalized%20in%202020; *Microsoft Flags Over $400 mln Charge for Irish Privacy Violation Fine on LinkedIn*, Reuters (June 1, 2023), available at https://www.reuters.com/technology/microsoft-flags-over-400-mln-charge-irish-privacy-violation-fine-linkedin-2023-06-01/; Natasha Singer, *Flo Settles F.T.C. Charges of Misleading Users on Privacy*, The New York Times (Jan. 13, 2021), available at https://www.nytimes.com/2021/01/13/business/flo-privacy.html; Thomas Germain, Apple Fined $8.5 Million for Illegally Collecting iPhone Owners' Data for Ads, Gizmodo (Jan. 4, 2023), available at https://gizmodo.com/apple-iphone-france-ads-fine-illegal-data-1849950163; *Correction: ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data*, Australian Competition & Consumer Commission (July 27, 2020), available at https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data.

[74] *E.g.,* Conwood Co. v. US Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

Best Practices for Trying a Section 2 Case*

Wednesday, August 16, 2023

MODERATOR

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PANELISTS

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Scholar in Residence, Stanford Law School, Stanford, CA

Bonny Sweeney
Senior Litigation Counsel, U.S. Department of Justice Antitrust Division, Washington, DC

Christopher Yoo
John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation, and Competition, University of Pennsylvania Carey Law School, Philadelphia, PA

John Roberti
Partner, Cohen & Gresser, Washington, D.C.

IAN SIMMONS: Hello, everyone. My name is Ian Simmons and I'm a Co-Chair of the O'Melveny & Myers' Antitrust Group. We are pleased to present to the readership of ANTITRUST, a panel discussion that originally took place on March 30th of 2023, at the ABA Antitrust Law Section Annual Spring Meeting. The panel was entitled "Trying a Sherman Act Section 2 Case: Best Practices." The panel was well received and the ABA *Antitrust Magazine* asked the panelists if they could replicate the discussion.

It is my distinct privilege to introduce the panelists here today. I will start with Bonny Sweeney. Bonny should be well-known to the readership. She is Senior Litigation Counsel at the U.S. Department of Justice's Antitrust Division. Bonny joined the Justice Department's antitrust trial team just over a year ago, in July of 2022. She was previously a Partner in the San Francisco office of Hausfeld. Bonny is a truly accomplished antitrust trial lawyer. She has represented clients in some of the most significant antitrust cases in the United States over the past twenty years. She served as a co-lead counsel on behalf of a class of merchants in *In re Payment Card Interchange Fee and Merchant Antitrust Litigation*, Eastern District of New York, a sprawling litigation against the world's largest credit card companies. Bonny is currently a member of the trial team for the Department of Justice in a very significant case in the District of Massachusetts where the government challenged the alliance between JetBlue and American Airlines. The court in that case rules for the government, and the matter is currently on appeal.

It is also my distinct privilege to introduce our second panelist, Doug Melamed. Doug, it is I think no overstatement to say, is a legend in antitrust law. He served at Stanford Law School as Professor of the Practice of Law from 2014 until 2022 and has been Scholar in Residence at Stanford since then. From 2009–2014, Doug served as Senior Vice President and General Counsel at Intel Corporation where he was responsible for overseeing Intel's Legal and Government Affairs and Corporate Affairs departments. Prior to joining Intel in 2009, Doug was for many years a Partner in the D.C. Office of Wilmer Hale, a global law firm that we are all familiar with. He made his mark on antitrust cases, such as *In re Rambus* and several others. Significantly, from 1996–2001, Doug served in the U.S. Department of Justice's Antitrust Division as Acting Assistant Attorney General, and before that, as Principal Deputy Assistant Attorney General. Doug had a significant imprint and influence in

* Edited for publication.

the last significant DOJ monopolization case to be tried, *United States v. Microsoft*.

Our third panelist is Christopher Yoo. Christopher is the John H. Chestnut Professor of Law, Communication, and Computer & Information Science, and is the Founding Director of the Center for Technology, Innovation, and Competition at the University of Pennsylvania Carey Law School. Christopher has emerged as one of the world's leading authorities on law and technology, and he is one of the most widely cited scholars on administrative and regulatory law as well as Intellectual Property law. He has authored five books and over 100 scholarly works. His major research projects include investigating innovative ways to connect more people to the internet, engaging in a comparative law analysis of antitrust law/competition law in China, Europe, and the United States, and analyzing the technical determinants of optimal interoperability in high-technology industries. Before entering academia, Christopher served as law clerk to Justice Anthony Kennedy in the United States Supreme Court and prior to that, to Judge A. Raymond Randolph in the U.S. Court of Appeals for the D.C. Circuit. So, welcome, Christopher.

Our fourth and final panelist is John Roberti. John is a Partner at Cohen & Gresser here in Washington, D.C. He has been practicing twenty-nine years in antitrust litigation advising clients on a wide variety of antitrust issues, monopolization issues, cartel issues, and he is an alumnus of the Federal Trade Commission where he tried monopolization cases. John is regularly recognized as a leading antitrust lawyer by Chambers, The Legal 500, Who's Who in Competition, Benchmark Litigation, and as a rising litigation star. The "rising," I'll say just in jest, I assume was from several years ago. John is also very, very active in the ABA Section of Antitrust Law, and he is currently the Technology Officer for the Section.

Welcome, Bonny, Doug, Christopher, and John.

Before I put the first question, which will start with Doug, I just want to make a couple of preliminary observations.

The Assistant Attorney General at the Antitrust Division has said that "We are in a one-in-a-century inflection point in terms of the reach of corporate power," and he has admitted that the Antitrust Division is "claiming a mandate to update and adapt our antitrust enforcement to address new market realities."

FTC Chairwoman Lina Khan, likewise told reporters that her agency would no longer invest in drawn-out settlement negotiations with parties seeking merger clearances or resolving dominance cases, but would instead focus resources on litigating those cases.

Former Deputy Assistant Attorney General Richard Powers made waves when he announced that the Antitrust Division would not shy away from bringing criminal monopolization cases in the right circumstances.

These policymakers are not limiting their ambitions to just filing more cases. Instead, today's antitrust enforcers aim to expand the ambit of antitrust concern beyond the criteria that dominated jurisprudence over the last half century—price, output, and quality. The new guard contends that a myopic focus on those criteria and the consumer welfare standard they embody is not only inconsistent with statutory and case law origins, but that it also gave rise to decades of underenforcement, an inordinate concern with 'false positives,' a legal and economic quagmire in the case law, and a systemic neglect of competitive dimensions that resist measurement or quantification. Antitrust law enforcement has to adapt, the enforcers say, to remedy the sins of the past and to ward off the insidious competitive problems of the future.

Let me start, if I could, with Professor Melamed. It is hard to look at the news these days without seeing stories about monopolization cases. We have three cases relating to Google that will be tried within the next several months; we have cases against Meta; there are cases against Tesla, private cases. Doug, why are we seeing this renewed interest in monopolization antitrust litigation?

DOUGLAS MELAMED: I think it is really a confluence of a number of factors. There is a broad populist sentiment in general in the society on both the right and the left which distrusts concentration of power of almost any type. There is increasing awareness of and dissatisfaction with unequal distribution of wealth and economic power. There is an increasingly widespread view supported by some academic research that antitrust enforcement has been too lax over the past twenty or forty years, depending on how you look at it. And there is a particular unease, I think, about the large digital platforms, which are consumer-facing and increasingly important to almost everyone's lives and are seen as mysterious black boxes that implicate privacy and, on the right, concerns about censorship; and those concerns have been exacerbated by the recent concerns about artificial intelligence.

There are a number of features of the platforms that I think are important and not talked about a lot. The digital platforms are now the dominant sources of communications and media. U.S. antitrust law, going back to the 1930s, has I think been especially aggressive in applying antitrust laws to the then-dominant communications and media platforms, whether they were the motion picture theaters, the broadcast television networks, cable television, or now the internet. I think all those factors, and perhaps others as well, come together to create a moment when attention is focused on big institutions and perceived economic power.

IAN SIMMONS: Bonny, would you like to speak to this question of why we are seeing this proliferation of monopolization cases and an apparent confluence of concern for dominance both on the right, such as from Senators Hawley and Cruz, and on the left, such as from Senators Warren and Klobuchar? Would you like to address that and pick up on anything Doug said?

BONNY SWEENEY: Yes, thank you.

I would just like to start by saying that the views I express do not purport to reflect those of the U.S. Department of Justice and do not indicate what the Department would do in any particular situation.

I would agree with Doug that a whole confluence of factors has led to this increased interest in the enforcement of the antitrust laws at the private level, at the state level, and at the federal level. I think it is in response, in part, to underenforcement of the antitrust laws over the past thirty years; and certainly, as Doug pointed out, there is a concern about the power of very large digital platform firms. But, it is not just the large digital platform firms that are subject to increasing antitrust scrutiny. We see increased antitrust enforcement all over the economy, and it is a welcome development.

IAN SIMMONS: Christopher, Jon Baker's book, *The Antitrust Paradigm*—just picking up on something Bonny mentioned—talks about the ubiquity and prevalence of market power in many sectors of the American economy. Do you agree with that observation; and does that, just picking up on the idea of why monopolization litigation is now de rigueur, explain why are we seeing so much of it? Do you think there is indeed a market power problem that may be at the root of this?

CHRISTOPHER YOO: There are many ways to frame why antitrust is receiving much more attention right now.

One way is to frame it in terms of market power. Another way is to frame it in terms of innovation. Increasingly, instead of focusing exclusively on static efficiency issues—such as output, quantity, price, and quality—which reallocate existing resources to reach the production possibility frontier, antitrust law is being asked to promote dynamic efficiency by promoting the development to push that frontier out. To date, however, the tools we have developed have been better suited to evaluate static efficiency than to evaluate dynamic efficiency.

A lot of this can be tied, for example, to the debates that happened in the 1950s, 1960s, and 1970s, where we moved away from the structure-conduct-performance paradigm, under which we viewed size as inherently suspicious, in favor of an effects analysis. At that time, we confronted numerous proposals to return to the structuralist paradigm, as evidenced by the Neal Commission, the Areeda and Hovenkamp no-fault monopolization proposals, Philip Hart's proposed Industrial Reorganization Acts, and President Carter's National Commission for the Review of Antitrust Law and Procedures. All of these efforts proposed reevaluating whether we should make persistent monopoly power or persistent market size a basis for liability even absent some form of exclusionary conduct.

Congress and the courts have never took that step, primarily because when you take innovation into account, pure size is ambiguous. Size can be the result of anticompetitive acts. It can also be the result of successful competition on the merits.

One of the reasons Congress never enacted the legislative changes that were proposed in the 1970s was because of the concern that it would reduce firms incentive to innovate by penalizing firms that innovated too well.

And so, we end up in a familiar place in antitrust law, which is that when confronted with ambiguous conduct, we look for filters that separate out the conduct that is anticompetitive and deserving of antitrust sanction from the kind of procompetitive conduct that antitrust is looking to encourage.

My hope is that we will keep working on more sophisticated understandings, evidentiary requirements, and questions of proof that will successfully separate the wheat from the chaff in ways that allow us to curb the problems without sacrificing the benefits of innovation.

IAN SIMMONS: Very interesting, Christopher. If I could just quickly follow up—I want to bring John into the conversation slightly shifting gears to private litigation—Christopher, an interesting and intriguing notion about the antitrust community being besotted perhaps with market shares or size.

The D.C. Circuit in the *Microsoft* case—and it's incredible that now it's twenty-two years ago we had the last significant Department of Justice published opinion in a monopolization trial on the merits—the D.C. Circuit there said: "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the field,'" and it cites Harold Demsetz [*Why Regulate Utilities*?, 11 J.L. & Econ. 55, 57 & n.7 (1968)].

Do you believe the ubiquity of the "winner take all" phenomenon is at the root of the Section 2 enforcement agenda and why we are seeing perhaps a coalescence of the left and the right. Is this something that is empirical or is this just fodder for conferences?

CHRISTOPHER YOO: I think that concerns about winner-take-all markets are often overstated. Many things that look extremely threatening in the here and now in retrospect end up not being perhaps as concerning as we thought.

For example, I started teaching law around the time of the *AOL/Time Warner* merger, which at the time was widely regarded as the end of history, when it was really just the end of $240 billion in Time Warner shareholder value. AOL looked like this behemoth that was unstoppable, and they were just basically sold for a song. In considerably less than a generation, they were a shadow of their former self.

When you think about even Facebook, if we were talking about them even just a few short years ago, we would perhaps be expressing stronger concerns about their market position than we do now, as we would also with, say, Twitter.

We can also cite other examples pointing in the other direction. Courts once assumed that MySpace was a monopoly. When Susan Crawford wrote her book, *Captive Audience*, in 2013, she speculated whether Netflix would still exist by the time the reader was reading her book. Such pessimism seems strange now that Netflix has turned out to be such an obvious success, but at the time Netflix was transitioning from mail to online distribution, nothing was certain. And even now, it is facing much stronger competition from other streaming platforms.

In short, I think it can be a mistake to be too focused on the here and now. Instead, we should make sure to take the long view with the understanding that things can change rather rapidly.

But, at the same time, I think there is a wonderful question about whether the nature of competition has changed. People often talk about network effects as if they inevitably lead to "winner take all" markets. We often forget that when multihoming is possible, you are not choosing only one network; you can actually participate in multiple ones. It is thus a mistake to equate network effects with 'winner-take-all' markets," and we learn that features like multihoming and gateways between networks can actually cause those things not to happen. Indeed, there is a variety of other proprietary solutions and aspects of private ordering that can dissipate a lot of those problems.

At the same time, ever since Joseph Schumpeter talked about the "gales of creative destruction," economists have considered whether certain industries, particularly high-tech industries, will not see multiple actors competing within a market for customers but, rather, a succession of monopolists that will dominate a market of time because of scale economies or some other market feature.

I have always been inspired by a chapter that Tim Bresnahan wrote before he became Deputy Assistant Attorney General and chief economist during the *Microsoft* case, in which he said that network effects made it inevitable that there would be a large operating system monopolist, whether its name was Microsoft or not. When that is the case, you will see two forms of competition: one is the different dominant players of the time trying to take over each other's territory by rearranging the vertical chain or production, the other is the kind of competition you mention, Ian, the Schumpeterian idea of the next big dominant invention that allows another player to displace one of those levels.

If so, antitrust law can either increase the level of incremental innovation or accelerate the arrival of the next big change. His reaction was that market seemed to be doing just fine in promoting incremental innovation, and he was skeptical of the government's ability to predict what the next big thing would be in order to bring it about faster before it was already settled, at which point the government would simply be jumping on a bandwagon that was already moving.

So, it is an interesting question to me that someone as empirically based and enforcement-friendly as Tim Bresnahan, having served as the government's expert, took very seriously the idea that this type of competition may emerge in the new economy.

More fundamentally, your question raises a great point: just because something could happen, doesn't say much about the likelihood that it is happening or will happen. As a result, antitrust must make sure to employ terms of proof and evaluation that make sure that the alleged anticompetitive outcome is actually happening, the type of competition we are in, and how should we incorporate that into antitrust law. I would say that we have a lot more questions than answers at this point in that area.

IAN SIMMONS: Having more questions than answers seems to be an occupational hazard with antitrust.

A fascinating point you make about multihoming is not synonymous necessarily with lock-in, but perhaps we can return to that.

Let me bring John into the conversation, and then I would invite Doug and Bonny to weigh in on anything that has been said to date. John, how if at all, has the government's renewed interest in antitrust affected private actions either in quantity or quality?

JOHN ROBERTI: It's a really good question. I take issue slightly with how we are characterizing the government's interest in monopolization. We talked about forty years of underenforcement, and that has been a mantra. We hit the low point with the decision in the *Trinko* case, which is actually a narrow holding that is being interpreted as a sweeping rule because of its extensive dicta that muses on when a refusal to deal with a competitor is actionable.

The true bottom point for enforcement came with the issuance of the DOJ's Section 2 Report in 2008, which was rapidly withdrawn when the Obama Administration took office. This signaled a policy change and a willingness to view Section 2 more broadly. The government was interested in monopolization cases during the Obama Administration and the Trump Administration for that matter; it's just—going back to the title of the panel—trying those cases became very, very difficult. So the renewed interest of the government isn't really a renewed interest in monopolization; it's a renewed interest in trying the cases. That's why you bring in people like Bonny Sweeney here to try cases, right?

Having the government show the courage to try a monopolization case encourages the private bar to do it as well, and in many ways the private bar has been out ahead of the government in bringing monopolization cases and thinking about these issues.

So I'm not sure there is necessarily a cause and effect between the government's recent cases and the cases being brought by the private bar. I think there has been a recognition among enforcers for years that the monopolization standards have been too narrow. I think to the extent that this is a new government revelation it has to do with the

fact that this is a new set of enforcers who just, for whatever reason, aren't nearly as timid about losing cases.

IAN SIMMONS: Fascinating.

Before I slightly shift gears a little bit to go to a doctrinal question, Doug or Bonny, do you want to react to any of the comments thus far?

DOUGLAS MELAMED: I completely agree with John and with the agencies, and even going back to some of the folks in the Trump Administration—that litigation of government cases is better than settlements with conduct remedies and even in many cases structural remedies, for lots of reasons.

The most important one—I certainly felt this way during the *Microsoft* case—is that the government can deal with only the tip of the iceberg. The antitrust laws apply to almost all commercial conduct that affects interstate commerce, so the real contribution of the Justice Department is not to get an injunction against Firm *X* or Firm *Y*; it is to establish good legal principles that, armed with the private bar and treble damages, can be effective deterrents going forward.

Ian, I would like to comment briefly on Christopher's comments about innovation and network effects.

First of all, yes, when you focus on innovation rather than the static welfare effects of avoiding deadweight loss, you are getting into more complicated economics. It's almost certainly true that the prospect of monopoly power *ex post* can be an *ex-ante* incentive to investments in innovation, but I don't think one can conclude from the economic literature that possession of monopoly power promotes innovation. There is some support in Schumpeter and more recent work that size promotes innovation, both because it gives the potential innovator scale and because it increases the ability of the innovator to appropriate the fruits of its innovation if intellectual property and other protections are not sufficient for that purpose; but that is different from market power.

More broadly, Christopher was talking about network effects and dynamic welfare as opposed to static welfare. In effect, as I understand it, he was talking about a broader and somewhat different notion of economic welfare. I would like to make two comments about that.

First, I think the current debate is not really about economic welfare. I think the current debate is about whether economic welfare or something else, some more Jeffersonian vision, should be driving antitrust.

My second comment concerns the question whether antitrust should promote competition for the market or in the market. Antitrust law is not industrial planning. It rests on the contrary premise that competition and the market should determine the direction of the economy. So antitrust law is limited to prohibiting bad conduct that harms competition, and the question is, "What is bad conduct?" It seems to me that bad conduct is conduct that without some justification interferes with market forces that would, among other things, let the market decide when and where competition for the market is a superior investment rather than competition in the market.

IAN SIMMONS: Good thoughts Doug, thank you. Christopher, you have your hand up. Please proceed.

CHRISTOPHER YOO: There is a theoretical literature suggesting that firms with market dominance may be more innovative, exemplified by Gilbert and Newbery's work on rent dissipation incentives.

There is also a very large empirical literature on the subject. You mentioned market size—that's really the Arrow versus Schumpeter debate where Arrow says smaller firms are more innovative and Schumpeter says larger ones are more innovative.

But there is actually empirical literature that measures that not only in size but in terms of market share. The relationship between market concentration and innovation has been called the second most heavily studied question in industrial organization, and I think every survey that I have read has really said, "This literature is inconclusive"—not inconclusive because you don't get results, but rather inconclusive because you get too many results. The relationship is not a simple one between both size and innovation and concentration and innovation, and there are disputes over how you measure innovativeness; but there are usually some other factors brought in, and we haven't really settled out what they are.

But the one thing that I think you are hinting at, Doug, which I think is important too, is even when you take innovation seriously, we have to think of it as a tradeoff. Bill Baumol has said that the fact the long-run benefits from dynamic efficiency amortize over time makes them inherently more important.

I think a more balanced approach would really treat innovation as a tradeoff that tolerates short-run static efficiency losses in order to obtain long-run dynamic efficiency gains, as is often talked about in patent law. This tradeoff must be calibrated properly to make sure consumers benefit. It is not always going to go on the side of static efficiency, and it is not always going to go to the side of dynamic efficiency. We have to figure out a framework to bring both sides together.

Doug's comment about there being no benefit right now from market power is reminiscent of the debate over the no-fault monopolization proposal that Areeda and Turner advanced in the 1970s. The problem is that firms decide whether to invest in innovation long before they know what the outcomes are. So, the real question from an innovation standpoint is: What would penalizing a firm simply for holding monopoly power do to the incentives to innovate *ex ante* when people are undertaking the investments and are forecasting their expected returns. If firms can be penalized simply for being large, even innocent firms will necessarily have to adjust their prediction by what possible antitrust

liability they might face if they are too successful at competing on the merits. This penalty on innovation is one of the reasons antitrust law has never adopted no-fault monopolization and why monopolization has always included an exclusionary conduct element to make sure that liability attaches only when a firm does something to obtain or to maintain a monopoly beyond what would normally be determined competition on the merits to serve as a filter to separate procompetitive from anticompetitive outcomes.

IAN SIMMONS: I want to come back to all of this—innovation, how do we measure it; injury; and exclusionary conduct, how do we define it—and we'll be coming to that in just a minute.

But before we progress, I want to ask Bonny: Doug alluded to the debate about the objectives of antitrust and he mentioned the consumer welfare standard. Tell us what is the consumer welfare standard and is it the appropriate standard?

BONNY SWEENEY: We have been talking about underenforcement of the antitrust laws over the past thirty to forty years, and part of that has to be attributed to the rise of the consumer welfare standard as it was popularized by Judge Bork in *The Antitrust Paradox* in 1978.

Remember that the consumer welfare standard has never been adopted by the U.S. Supreme Court—it has been mentioned by it—but, the Court has never embraced it. Nevertheless, this standard has been used by lower courts to justify a narrow view of antitrust enforcement that is focused on short-term price and output effects. I think that has helped lead to underenforcement.

This focus on short-term price effects on consumers ignores other benefits of competition—such as innovation, quality, and variety—and it also tends to leave out certain groups, like the groups who purchase inputs for their products—workers, farmers, and small suppliers, for example.

There is a recent example of this in the Ninth Circuit. In a case called *PLS.com,* the district court dismissed a lawsuit by one competitor against another competitor on the ground that the plaintiff had not adequately alleged antitrust injury because it had not alleged direct harm to the "ultimate consumers." Although the competitor alleged that it was injured by the anticompetitive conduct (in addition to alleging harm to competition), the court held that was not enough."

The Ninth Circuit reversed. The Department of Justice submitted an amicus brief in that case. The Ninth Circuit held that a business that uses a product as an input to create another product is a consumer of that input for antitrust purposes.

This decision illustrates how the consumer welfare standard has been, perhaps, misunderstood, and certainly construed in a way that is very limiting in antitrust enforcement.

Widespread recognition of the shortcomings of the consumer welfare standard is one of the reasons why we are seeing greater enforcement across the board in antitrust.

IAN SIMMONS: John, do you agree with Bonny that is perhaps at the root of what I think you identified as chronic underenforcement over the past several decades of Section 2? Do you think the consumer welfare standard has been one way or another at the root of that?

JOHN ROBERTI: Yes. I take Bonny's last point to be really important, which is it's not just the consumer welfare standard; it's the very, very narrow view of what is consumer welfare.

Imagine a vertically integrated healthcare company that drives its downstream competitors, say community pharmacies, out of business by under-reimbursing them. In a way, that is good for consumers because consumers are paying lower prices, but the consumers also lose the quality that might come with being able to go to somebody who is going to spend time with them and talk to them about their medication as opposed to getting their medication in the mail.

I think the narrow view of the consumer welfare standard is that a lot of defendants would suggest is "Tough luck if we lose the community pharmacies, that's okay, because we'll have lower prices."

I think that view is incorrect as a matter of law. As a practical matter, however, if you want to see additional antitrust enforcement, you cannot be slavish to short-term price and output effects.

IAN SIMMONS: Let me try to merge my first line of questions to the panelists, and whoever wants to go first can go first on this. With the increased interest in monopolization cases and consumer welfare—we want low prices, lots of products, and good quality—we see the antitrust cases against the high-technology firms, and many of their products are free to use—Meta's products; or Google search, I don't pay Google to type on that search bar. What is the competition problem, monopolization problem, with industries with free products?

DOUGLAS MELAMED: The *Microsoft* case was about efforts taken by Microsoft to undermine the competing Netscape browser. Both that browser and Microsoft's browser were free—at least free in the sense that that term is normally used, meaning distributed to consumers with a zero or nominal dollar price.

Of course nothing is free. Google is not free—I give them time, attention, and data. So in one sense it is misleading to talk about free goods.

But the larger reason that "free" is not a safe harbor is the idea that, if there is not a price effect, it is not an antitrust problem rests on a fundamental misunderstanding of antitrust law. It's a misunderstanding that informs much of the criticism of the consumer welfare standard.

Bork brilliantly named it the consumer welfare standard, but it was never a consumer welfare standard. What the consumer welfare standard means in antitrust law is economic welfare. It means that antitrust law is about prohibiting

conduct that impairs competition and thereby impairs economic welfare.

I think that's a good standard and that we should not depart it. The attack on it—based on the idea that it's all about price, and all about the short term—is nonsense.

Antitrust law is—and should be—concerned about anticompetitive conduct that increases or maintains market power, because it is market power that by definition means harm to the competitive process and that enables firms to take actions that are inconsistent with economic welfare. And we are concerned about free products, just as we are concerned about costly products, because, as *Microsoft* teaches, anticompetitive conduct aimed at free products can lead to an increase in market power.

JOHN ROBERTI: I just want to underscore what Doug said about the consumer welfare standard. That is 100 percent right. If you are trying a monopolization case, the last thing you want to do is come in and say, "I want to blow up the standard. I want to do something entirely different."

For the most part, what plaintiffs and what the government are really trying to do is to get back to the true meaning of the consumer welfare standard, which I think Doug articulated very well: it's overall economic welfare; it's not just short-term price effects and output effects.

CHRISTOPHER YOO: I agree with Bonny and John that the consumer welfare standard should be about economic welfare broadly conceived.

As Doug mentioned, there is a broader discussion that wants to move beyond economic criteria to take into account a broad range of nonecomonic factors.

I find it telling that many people who want to see more vigorous antitrust enforcement still support the consumer welfare standard and reject bringing in noneconomic considerations.What I find fascinating is that we can broaden antitrust enforcement within the economic paradigm by looking at more than just whether prices are too high. John, your example of the pharmacies is an excellent one. You also see in labor monopsony cases, in which employers use their market power to underpay labor. This creates economic inefficiency along the vertical chain of production even though it leads to lower end prices for consumers. I would say that even orthodox antitrust law is well positioned to find harms that cannot always be measured in terms of lower prices.

Antitrust law can look to other indicators. Consider, for example, the Third Circuit's *Uber* case, which upheld the dismissal of taxi companies' attempted monopolization claim. Rather than looking at prices, the court based its decision in part on whether the total number of vehicles offering rides went up or down.

So, the fact that taxi drivers found themselves squeezed was simply the result of a different business model that increased the level of competition and created net economic benefits that we can measure.

IAN SIMMONS: All right.

CHRISTOPHER YOO: A quick thought to go back to what you were saying, Ian, is that a lot of people seem to regard markets with zero prices as an unprecedented problem that antitrust does not know how to address.

My very first article was written about broadcast television, which, like much of the modern Internet was entirely an advertising-supported business. The fact that consumers paid zero prices did not stop enforcement officials from bringing antitrust cases based on monopsony power against advertisers and monopsony power against program suppliers. These cases show conventional antitrust techniques are well equipped to handle zero-price markets. We just need to recover the literature and precedents on these issues.

IAN SIMMONS: Fascinating. Of course, to the consumer turning on the television broadcast, it was free, at least in precable days, over-the-air.

Our panel is called "Litigating Best Practices for Trying a Section 2 Case," so I want to move a little bit from the stratosphere. As the readership knows, there are few areas of antitrust law more conceptual than Sherman Act Section 2—that's why I love it, it's highly conceptual—and yet the concepts have to persuade someone wearing black robes or a jury of six or twelve.

I want to move to really a core issue, a vortex, in trying Sherman Act Section 2 cases, which is the issue of exclusionary conduct, a fascinating body of law, and a fascinating area to discuss.

But there are few areas of Sherman Act Section 2 law that I find more vexing. How do you distinguish lawful exclusion which results from competition on the merits from conduct that you are going to label "exclusionary?"

I want to start with Doug on that. What is exclusionary conduct and what is the guidance? How do I know where that line is drawn?

DOUGLAS MELAMED: I think everyone has a different way of putting it. Mine is an inference that I have drawn from what I see in the cases, the statute, the legislative history, and so forth. It's this: all antitrust violations—and this is certainly true of Section 2—have at their core two elements:

The creation or increase of market power compared to the but-for world. That means that, in order to be exclusionary conduct, conduct has to do something to weaken the discipline of rivals. In an exclusionary conduct case, we are not talking about agreeing with the rivals; we are talking about, in effect, imposing on them circumstances that undermine their ability to be a discipline on the defendant and therefore enables the defendant to have more market power than it otherwise would have. That is the first element.

The second element is that the conduct must be anticompetitive, not just exclusionary. When Apple built the iPhone, it drove Motorola and Nokia out of the mobile

phone business. That was exclusionary conduct, I suppose, but it certainly wasn't anticompetitive conduct.

I don't know what anticompetitive means, but I think I know what procompetitive means, or at least can infer that from what cases teach us and what economics teaches us. Procompetitive conduct is conduct that improves or is likely to improve product quality or reduces or is likely to reduce costs or above-cost prices. And by the way, the first two of those benefits could be by reason of innovation or something else, like investing more money in quality control at the plant. So, if you have conduct that excludes someone and doesn't have the prospect of providing any of those three benefits, it is anticompetitive conduct.

IAN SIMMONS: So anticompetitive in your mind is what is left behind once you go through those three filters; is that a fair statement?

DOUGLAS MELAMED: Yes.

IAN SIMMONS: Let me ask if there are any comments on Doug's definition of exclusionary from the panelists.

CHRISTOPHER YOO: I really like Doug's proposal because it requires both an increase in market power and no prospect of improving quality, production, and cost. I think that is an extremely useful way of thinking about exclusionary conduct.

It reminds me that the late Clayton Christensen of the Harvard Business School pointed out that modern innovation is often business model innovation rather than a new invention or new scientific development.

What Doug's definition underscores is that changes are often just a better way of doing business, and we are seeing that more and more in the tech platforms. I take Doug's test to allow that if someone does an improvement in quality or cost—and I think the iPhone example is an excellent one—that is not going to be a sufficient claim even if it has the effect of weakening their rivals and even if it allows the innovating firm to charge extremely high margins and achieve an extremely strong market position. Any harm to rivals achieved by a revolutionary improvement in quality wouldn't satisfy Doug's test.

The concern I have about some of the cases, particularly the ones I see in Europe, is an inordinate focus on evidence of harm to rivals without undertaking the kind of inquiry that Doug is putting in.

IAN SIMMONS: But let me press on that a bit. Maybe Doug, Bonny, or John want to react to this. On the cost element, whose cost structure are we talking about? Are we living in a world with "winner take all" or are we competing for the field but we are not competing for a slice of the field, and the big firm has a lower cost structure and the new entrant has a higher cost structure, and the big firm does something vis-à-vis the lower new entrant firm with a higher cost structure, whose cost structure—I know the "equally efficient competitor" logic, but how does that map on to how we think about cost structure? Whose cost structure is relevant here? The new entrant by definition does not have the scale of the big one, and so if it is being predated, so to speak, in a way that forces it to exit, is that a problem?

DOUGLAS MELAMED: Let me take a stab. I think the one complication to what I said is that some kinds of conduct—and inventing the iPhone is probably this—hurt rivals only by shifting demand.

But other kinds of conduct can hurt rivals by raising the rivals' costs. Suppose Apple in order to build the iPhone goes out and buys up a bunch of raw materials—not predatorily; it needs them to build a better product or to reduce its costs and thus it prices and uses all of the raw material—and in so doing it increases the price that its rivals face when they buy needed raw materials. Or suppose Apple enters into exclusive dealing arrangements, or something like that, that both provide those benefits and increase its rivals' costs. And suppose further that the conduct in question can be shown to really be necessary to achieve the benefits I assumed.

Then you have the question: What do you do when you are not shifting demand but you are both increasing your rivals' costs and creating a real benefit? What does the antitrust law do?

The courts tend to punt on this. Often courts say things like "balance" harms and benefits, but no one knows what that means. One way that courts have tried to resolve that question is by saying: "Well, if the conduct would not disadvantage someone equally efficient, we are not going to worry about it. So if you engage in some complicated pricing scheme or loyalty discount or whatever pricing strategy, we are not going to worry about that unless it would exclude an equally efficient rival."

I understand why courts say that because it enables the economists to draw little graphs and come to easy answers, and that might be a good enough reason. But I am not sure that, as a theoretical matter, that is a very sound place to draw the line precisely because of the reason you suggested in your question, Ian. What if the little guy has really built a better product and with time could grow to be more efficient than the incumbent, but it is nipped in the bud before it has an opportunity to achieve that because it does not have enough scale to stay in business in the face of conduct that would exclude rivals that are less efficient than the defendant. I don't think we should be indifferent to the plight of that little guy.

But that question really doesn't change the basic framing of what we are thinking about here when we ask, "What is procompetitive conduct and what is anticompetitive conduct?"

IAN SIMMONS: Well said, Doug.

CHRISTOPHER YOO: What I find fascinating is that the possibility that a less efficient rival may provide competitive benefits even if it is less efficient. This is an underappreciated corollary to Oliver Williamson's famous efficiency defense, in which he said that reductions in costs may create welfare benefits sufficient to offset any welfare losses created by the potential rise in price from the lessening of rivalry.

There is a limited amount of writing pointing out that the flip side must also be true, that is the welfare benefits from the additional rivalry more than offset the welfare losses resulting from the fact that the competitor may be less efficient. In this manner, an effects analysis would take the less-efficient rivals as they are while taking into account the net benefits of price competition and netting out the countervailing effects. If we are going to take seriously this notion of efficiency, it should work both ways. It can't be a one-way ratchet.

And we also have to bear in mind that the whole literature on product differentiation tells us how smaller rivals could survive even when they face cost disadvantages by pursuing what I think of as the boutique solution, in which small providers who have lower volumes and worse cost structures can survive by selling a narrow range of goods tailored to the preferences of a small group of consumers, and then charge them more for giving them exactly what they want. This allows firms to tap into a source of welfare that is often underappreciated in the price/quantity space, which is the benefits of providing consumers with products that are a better fit with what they want.

IAN SIMMONS: Let me shift gears, and maybe I could start with Christopher on this one, and I want to keep us on target. Christopher, on this whole idea of exclusionary conduct we are seeing a debate play out in some of the various cases that are pending now—and we have seen it in cases that have been submitted, and courts come out different ways on this—involving the so-called "monopoly broth" theory. In other words, a plaintiff is alleging there are five pieces of conduct that the monopolist did that are exclusionary; and defendants like to say, "Antitrust is a tort and the plaintiff is not showing a causal flow from each individual act; it is aggregating them all, it is doing monopoly broth, and the plaintiff is being very imprecise on the causal flow from any subset of the five elements of conduct." What's your view on this monopoly broth debate?

CHRISTOPHER YOO: I think that the monopoly broth theory can be implemented in a manner consistent with the idea of an effects analysis where you look at the overall impact on the conduct. The two watch-outs are: (1) some conduct is per se legal; for example, innovating in your product and unilateral refusals to deal. If so, adding them into a broth should not add anything.

But what bothers me more is when the broth consists of conduct that is completely ambiguous, any case must be based on a coherent theory about how the combination of harms actually hurts competition. Otherwise, parties can hand wave at a lot of conduct that does not sound very good to a jury. We all know that business involves a lot of conduct that is not very attractive in the cold light of day, but is consistent with competition on the merits.

To avoid this type of guilt by association, plaintiffs should be required to put forward a coherent theory and evidence of how the different types of conduct combine to harm consumers and to propose remedies that address those problems if we are going to prevent the monopoly broth approach from just being an excuse for sweeping in a bunch of bad monopolization cases that couldn't live up to their burden of proof.

IAN SIMMONS: That may be begging the question, bad monopolization cases, but let me bring in Bonny. Christopher mentioned a jury. I want to move a little bit now in our discussion of exclusionary conduct to where the rubber hits the road.

Bonny, talk to us about—and you can refer to the broth issue—how you attempt to develop your trial narrative on exclusionary conduct. You know Max Blecher famously said, "The whole point of being an advocate is to prejudice the trier of fact against your opponent." He didn't see anything unsavory about the idea of trying to prejudice a trier of fact against your opponent; that's what advocates do.

Bonny, how do you think about using facts to prejudice the trier of fact against a firm allegedly engaged in exclusionary conduct? How do you go about telling the story? What role does intent play? What role does the broth play?

BONNY SWEENEY: I'll start with the so-called monopoly broth", which is a subject of contention in some monopolization cases. The courts have different formulations, but one common element—and this has been mentioned—is that the courts, including the Supreme Court, recognize that you have to look at the market realities in which this allegedly anticompetitive conduct is taking place.

Sometimes that requires looking at different categories of conduct together. For example, if the monopolist has entered into a series of exclusive contracts, the finder-of-fact must look at the conduct as a whole to determine the extent of foreclosure. That's an easy case. At the other extreme, if the plaintiff seeks to aggregate conduct that is subject to specific legal tests-like predatory pricing or refusals to deal, courts have said, "No, we can't lump those kinds of conduct together and decide that this is as a whole anticompetitive if individually these acts would not be anticompetitive."

In the middle are cases like the Third Circuit's *LePages* decision, in which the court considered the anticompetitive effects of 3M's bundled rebates and exclusive contracts together, and the Sixth Circuit's decision in *Conwood v. U.S. Tobacco*, which upheld a plaintiff's verdict based on a whole host of conduct, including exclusive agreements, destruction of the plaintiff's point-of-sale advertising, and disparagement of the quality of its snuff.

It is a very fact-dependent inquiry because there are clearly certain kinds of conduct that in order to become anticompetitive interact with other kinds of conduct that render that conduct anticompetitive, so it would be incorrect in those cases not to look at the conduct as a whole.

In terms of what I look for as an advocate in trying or litigating an antitrust case, unfortunately, as we talked about, so much of this is very theoretical, it is very abstract, and it is very hard to make your case understandable and compelling. So how do you do that in a monopolization case?

Just like in any case, the role of the advocate, the litigant, especially on the plaintiff side, is to be a good storyteller and be able to make your case understandable. You need to fit it into a narrative arc. It helps make it more understandable and it makes it more interesting. If you are in front of a jury, this is particularly important.

Intent can play a role for sure. Of course, you don't have to prove intent in an antitrust case except in an attempted monopolization case. However, the courts have recognized, and the Supreme Court has said, that intent often helps illuminate the facts; it helps you interpret the evidence and predict the consequences of the acts that you are asking the trier of fact to evaluate.

If you have evidence that shows bad intent and there is a way to get that into evidence, I think that is a very important strategy.

Showing harm is critical. In public enforcement cases, the government does not have to show harm to business or property, but if there is harm to consumers, if there is harm to competitors, that is easier to understand than the abstract harm to competition.

In addition, going back to the monopoly broth question, if you are going to have different categories of anticompetitive conduct—and I think Doug mentioned this—if you can show that you have a coherent theory as to how those acts fit together and how they harmed competitors, consumers, the competitive process, that is very critical.

IAN SIMMONS: And as Bonny well said, both on the intent point—it was Justice Brandeis in *Chicago Board of Trade* who said, "Knowledge of intent may help the finder of fact interpret fact and predict consequences;" and the D.C. Circuit in *Microsoft* 1994 famously said, "Intent may be probative as to effects." Those points about intent always resonated with me, and the intent idea is something that a trier of fact could gravitate to because judgments are being made on whether to be prejudiced or not against the defendant.

On your point about theory, in a case that doesn't get the publicity I think it deserves, the first case that the government brought against Microsoft in 1994, the per-processor case, where Microsoft was alleged to engage in de facto exclusive dealing by requiring OEMs to pay a royalty to Microsoft whether or not each processor had Microsoft's operating system loaded on it, the government characterized that as a tax: "Why would I load a non-Microsoft operating system if I have to pay Microsoft anyway?" To me that is a really pristine example of theory and narrative: "Why am I paying you if I'm not loading your product?" There was an inherently unjust theme going on there that I thought was effective.

John, let me ask you. You are representing a plaintiff in a monopolization case and you have to convince the finder of fact that the defendant's actions are beyond the pale. What kind of themes are you going to emphasize? Do you want fact witnesses? Are you going to put all the burden on your experts? Talk to us about how you would go about prejudicing a trier of fact against a purported monopolist.

JOHN ROBERTI: I would try to get the trier of fact to really see the truth, Ian. Look, the answer to your question is yes, each of the people you identified has a particular role. If you are representing a private plaintiff, or if you are representing the government even, if you do not have regular people who can tell a story about how they are being harmed, it is going to be a rather unconvincing story.

Likewise, if you don't have villains from the other side who you can cross-examine and demonstrate that they are the villains, you are going to have a rather unconvincing story. If you have an expert who tells a story that is so complicated that it is not accessible to regular folks, you are not going to be convincing either.

The key thing to do is to make the story understandable. We have talked a lot about theoretical concepts that are critical to understand, but once you start telling your story you've got to speak in words that people are going to understand.

IAN SIMMONS: So making a story resonate. A story can't resonate with the trier of fact unless it is understood.

Let me start with Doug on this one. We know how important experts are in antitrust cases—industry experts, economists. Doug, how important are they and how do you make these brilliant economists understood by a trier of fact and resonate with the trier of fact? Talk to us about how we use experts in antitrust and we don't leave them in the stratosphere, we get them down to talk to mere mortals and resonate with those mortals.

DOUGLAS MELAMED: The first thing you do is you hire an economist who can make himself understood by people who aren't economists. A courtroom is obviously not a workshop for cutting-edge economics. It's a different enterprise.

I think Bonny and John are completely right. It's the story. Both parties are trying to tell a story. I think that story revolves around the two issues I discussed earlier: harm to competitors or the creation of market power—which are two sides of the same coin—and was the conduct good or bad. And you want that story to be told by the best storyteller.

Experts have had maybe an oversized role in antitrust for lots of reasons. Experts are needed to explain things that are not self-evident from documents or percipient witnesses. By

the way, experts are also sometimes very useful synthesizers of the story, and some have a gift for that.

Explaining things that are not self-evident is frequently going to be important in antitrust because antitrust cases often involve issues about abstractions—market definition, competition, even improving a product if it is not a tangible product with observable features, incremental costs, and so forth. Also, the legal rules, and if it's a jury the jury instructions, are going to at least implicitly embody economic concepts. So you are probably going to need an economist.

You want someone who, as you say, can translate the economic insights and understanding into a language that is both rooted in the facts of the case and intelligible to people who are not experts. That's just a forensic skill, I think, and presumably good lawyers are going to pick economists who are good at that, and hopefully they are also good economists and not charlatans.

IAN SIMMONS: Well said, Doug.

CHRISTOPHER YOO: Ian, before I went to law school I went to business school and then worked for Procter & Gamble, where I underwent sales training. The trainers repeatedly emphasized, "Stories sell. Don't give me all this theory. What you really need is a story." That's what brings it together.

I think what John, Bonny, and Doug were all talking about is the power of stories because talking about numbers and abstractions is only going to get you so far. Every basic person who has been involved in the business of persuasion understands all too well the value of that motivating example that brings it all together.

IAN SIMMONS: Well said, Christopher. As with you, Doug, John, and Bonny, it's not just stories, I assume, but it's also teaching. It's also an expert who is speaking to the trier of fact as if they were a student they are teaching.

Let me go to this and you can come back to the expert issue, the fact issue, the broth issue. So many of the cases we are seeing in the courtroom now relate to theories of foreclosure or doing something to a rival to hurt innovation. Doug and Christopher mentioned innovation very early on and I want to come back to it a little bit because I think it's a good topic that implicates both the stratosphere concept but also how you are going to prejudice that trier of fact against your opponent—defendant vis-à-vis plaintiff, plaintiff vis-à-vis defendant.

What I'm getting at is this: We're seeing all these high-tech cases. Well, if I'm a layperson I think: What's a more dynamic industry than high tech, they're constantly innovating; and this plaintiff is claiming that the dominant firm did something to a rival which hurt innovation; and because it hurt innovation, that's bad conduct, it's exclusionary, and somebody was injured as a result?

I want to start with the advocates on this; maybe we could start with John or Bonny, whoever wants to go first, and then we'll go to Doug and Christopher. How do we make concrete and tangible to a trier of fact something as ephemeral as innovation—a better mousetrap would have been invented or proliferated faster? How do you make that tangible evidence in a court to prejudice a trier of fact when we are talking about the laboratory of the mind and a world that did not happen? Who wants to start, John or Bonny?

JOHN ROBERTI: I'll go first. The way you do it, Ian, is you make it simple and tangible, as you said. But, when talking about conceptual innovation, you've got to bring it back to the practical so the trier of fact understands how the fact that innovation didn't happen is actually going to matter. The real challenge is in most cases a monopolist will play the innovation card, even in places where that innovation is really highly questionable. It's a good card to play.

IAN SIMMONS: The monopolist, in other words, is saying, "I'm innovating so much because I hear the footsteps on the pavement. This person is coming to dislodge me, so I am going to keep innovating."

JOHN ROBERTI: Exactly right, Ian.

IAN SIMMONS: What's your rejoinder to that, John? You do plaintiffs' work.

JOHN ROBERTI: And the answer to that is, "No, it isn't." It is often that claims of innovation are much less than meets the eye or the harm from the exclusion outpaces the innovation.

IAN SIMMONS: Bonny, would you like to speak to this, and then we'll go to Doug and Christopher? I think it's an important issue where so much comes together, theory and advocacy.

BONNY SWEENEY: Yes. What John said was very well said. It has to be practical. We as antitrust lawyers, experts and professors talk a lot about innovation, and we assume that everyone understands what it is we are talking about. But, it absolutely has to be concrete and presented through witnesses who are compelling.

I wanted to go back to trials. One important statistic is that so few monopolization cases actually go to trial and result in a verdict or a decision by the court. I did a little digging, and since the Microsoft case, there have been approximately thirty monopolization cases tried to a verdict in federal court. That is not very many, so there is not a lot of data to work with in terms of figuring out what kinds of messages work for the jury or for the judge as trier of fact.

IAN SIMMONS: Interesting.

Doug and Christopher, you can take a pass if you'd like, but do you have any thoughts on how a plaintiff goes about making concrete theories of injury to innovation when the

idea may be very ephemeral and yet you are in a court of law where tangible evidence has to be tendered?

DOUGLAS MELAMED: I really have nothing to add to what John and Bonny said about how you put on the show for the fact finder. But I do have one brief thought.

Take a pharmaceutical case where Company A excludes Company B. If you have a good story to tell, you might well want to say: "You know what happened when you weakened Company B and it had to shut down its research operation in Delaware? We had to stop our research on drug so-and-so. Do you know how many people have died a painful death?" You can tell that story. You can imagine that story motivating the fact-finder.

But the plaintiff does not have to prove innovation effects, or price increases or output restrictions, because they are not elements of the antitrust offense. The antitrust offense is creating market power. If you prove market power, you can presume an increase in price or a decrease in output because market power is by definition the ability profitably to cause that; if there is profit from doing it, you can presume the company is going to do it. Harm to innovation is a more complicated story. Evidence of the likelihood of any of those bad outcomes, or the absence of the likelihood of bad outcomes if the conduct under investigation has been going on for a long period of time, can shed light on the plausibility of the market power story. But it is not an element of the offense.

So my one caution would be—although I would defer to John and Bonny because of their expertise as trial lawyers—do not put a witness on to try to show innovation effects if you do not really have a good story to tell because you do not have to do that to win the case.

CHRISTOPHER YOO: I want to emphasize something that Doug said, that is really important: The story gives the framework, but you then have to establish the likelihood that something is going to happen through evidence. Being able to tell a story of how something could happen doesn't prove it did happen or will happen. That is the interesting complication we always run across.

One way to show harm to innovation, is to offer a prediction of what benefits would have arisen if the firm had not taken the action that it did.

It also seems important to predict potential harms that might have arisen had the firm acted differently. We had mentioned earlier the debates about acquisitions of nascent competitors. This is something that to me is a classic problem where we need the filters to understand what the future is going to be.

My favorite example when I teach is that at the time Google acquired Android they had about ten employees and no revenue. Fans of blocking acquisitions of nascent competitors presume that we could have looked into our crystal balls and seen what Android was going to become. At the same time, it is equally plausible that the reason Android was so successful is its acquisition allowed Google to combine it with its other resources.

Moreover, when you look at nascent acquisitions from the standpoint of the startup, the target of the acquisition, they would usually say, "I have two exit strategies: Maybe we can do an IPO and make out really, really well; but, failing that, we would like to be acquired by one of the larger companies."

We all know that in the last twenty-thirty years the IPO route has become much less. But even if they were both on the table, they could ask: "How does taking one of my exit options off the table enhance my ability to innovate?"

IAN SIMMONS: Interesting.

We have just about twenty minutes left. Let me shift gears slightly to a logistical question and start with Bonny and John on this.

You know there is this baggage associated with monopolization cases that they take forever to get ready for trial and they take forever in trial. United States v. IBM lasted from 1969 to 1982 and United States v. AT&T was 1974 to 1982. By the way, they were resolved on the same day. I have hanging in my office a facsimile of The New York Times' front page with a picture of Assistant Attorney General William Baxter with the Chairman of AT&T. He dismissed without merit the IBM case, but he settled and broke up AT&T.

Why do these cases take so long, or do they have to? United States v. Microsoft was a seventy-six-day bench trial. I tried a case last March in April in the Southern District of New York, US Airways v. Sabre, which was the first jury trial in a two-sided market case under American Express, and each side had 36.5 hours to put on its case, and we won a plaintiff verdict in the first jury trial in a two-sided market case.

Where are we headed with the length of these cases? Are the agencies coming up with a way of making these things palatable or are they making this like Bleak House? Where do you see this going both in the public bar and the private bar on the plaintiffs' side?

BONNY SWEENEY: I can start. I think the direction is coming from the judiciary. Judges are not going to tolerate four-year trials anymore.

We see this all the time. You said you had thirty-six-and-a-half hours to put on your case. I think we are seeing that in virtually every complex federal trial, certainly the ones that I am familiar with. In the last couple of years, all of the antitrust trials that I have seen have been in the range of four-to-five weeks for Section 1 and Section 2 cases. So judges are making those decisions for us, and I think it is for the better.

Especially if you are in front of a jury, prolonging the trial is not going to make your case any better. A time limit forces the parties to be clearer and more concise in their presentation of evidence. I think it is a great improvement over the IBM and AT&T framework.

JOHN ROBERTI: I couldn't agree more. My experience is the same as yours. I had a case where a trial was set last year. The parties asked for forty hours each, and the judge said, "It's twenty-eight hours each." And guess what? We were ready to do it in twenty-eight hours each.

In the same trial, the parties came in with 1,000 exhibits. By the time they had talked to the judge for an hour, each side had reduced the number of exhibits down to a couple hundred. The judiciary is going to exercise more control to try to keep their dockets moving.

The feedback we hear from the judges who work with the Antitrust Section is that they love antitrust cases because typically, they are well-lawyered on both the plaintiff and defense side, they typically involve experienced good advocates, they are interesting, and often they are a nice show. But, they don't love them to the exclusion of everything else they have going on. I think that is going to be the discipline that ultimately forces us to tell good stories.

IAN SIMMONS: The judiciary is forcing the parties, in other words, to remember Federal Rules of Civil Procedure 1, which is designed to secure the just, speedy, and inexpensive resolution of the litigation.

Before I move to our final topic today, I just wanted to note that on the colloquy we had on innovation and which is the winning side on prejudicing the trier of fact. I think it is interesting to recall the language in United States v. Microsoft where the D.C. Circuit said: Any kind of ambiguity on how the world would have played out but for the conduct that's alleged to be exclusionary, that burden really rests on the defendant. It is an interesting passage.

Let me move to something that I have called before the elephant in the room. We are seeing this in many of these platform cases. We started off our very first line of conversation with: "What's in the water? Why are we seeing so much monopolization litigations with many of them involving platforms?"

Is there an elephant in the room in these platform cases? Could it be said that the government is really challenging through these cases the rule in Trinko? John mentioned Trinko. That case said it is not illegal to be a monopolist and (absent an Aspen Highlands exception), a monopolist does not have a duty to deal with a rival or with anyone else; a monopolist can decide who it wants to deal with and under what terms.

But, it could be said—in fact, it is being said—that many of the cases challenging platform practices are really glorified challenges to Trinko because somebody is saying, "I don't like the terms under which the platform is dealing with me or with somebody else."

So is Trinko an elephant in the room in these cases? Are we going to see it kind of be a Grim Reaper for the prospects of the plaintiffs in these cases?

Doug, why don't we start with you on this one.

DOUGLAS MELAMED: I think defendants are certainly going to argue something along the lines of: "I have a right not to deal with this guy, so if I dealt with him and self-preferenced myself"—to take some of the kinds of cases that are pending now—"that's less harm than if I hadn't dealt with him at all. So what's the problem?"

I actually hope the government takes it on. If I were the government, bringing carefully constructed cases to try to narrow Trinko would be maybe my top priority.

We are all familiar with the old saw about hard cases make bad law. I think Trinko stands for the proposition that easy cases can make bad law. Trinko was an incredibly easy case. The issue in the case was whether the plaintiff could show that the defendant engaged in anticompetitive conduct by showing that it violated a non-antitrust rule, an FCC rule. The answer is obvious: "No, of course not. That is not an antitrust violation. You've got to show that the conduct is anticompetitive under the antitrust laws."

The problem is that Justice Scalia went on and included in his opinion a lot of broad dicta that lower courts have treated like holdings of the case and have applied broadly to create a perceived broad safe harbor for all kinds of conduct that might by analogy or more directly be called a refusal to deal.

Extending Trinko to a self-preferencing case has a couple of problems. One is that it ignores a critical distinction: Trinko was about refusing to deal with someone who wanted to compete with the defendant in the defendant's monopoly market; so there were all sorts of legitimate reasons why the defendant might say, "I don't want him to be a free rider" and why the courts might be concerned about collaboration among competitors. In these self-preferencing cases, we are talking about someone in an adjacent market in which the self-preferencer usually has much less or often no market power.

Correctly read, I think Trinko does not preclude a refusal to deal-type claim if the plaintiff can both show an intelligible answer to the question "What are the terms of trade under which the defendant should have dealt with her?", and prove some kind of profit sacrifice. Trinko made clear that it was not overruling Aspen Skiing.

IAN SIMMONS: Interesting.

Christopher?

CHRISTOPHER YOO: Ian, I think that a lot of people do think that Trinko is the elephant in the room, but to some extent I think that concern may be overstated.

If you look at the Cicilline Report issued by the House Subcommittee on Antitrust, it actually called for legislative abrogation of the Trinko decision. The authors of that report very clearly thought that Trinko is a big deal.

I am not a big fan of the argumentation of that report, which said: "Here's a series of anecdotes that identify potential harms by four actors, from which we infer a problem with online platforms generally, from which we further infer the need to change the rules governing not only online platforms but every actor out there." It is not a well-constructed

argument in terms of how it is built, but they clearly bought into the idea that one of the issues was Trinko.

Taking what Doug said, what is fascinating to me is that the people who think that Trinko is this huge obstacle are only reading half of the opinion. My point is that the first part of the opinion on substantive antitrust law says, "There is long tradition of a right to charge monopoly prices." If that is all there was to it, the opinion should have just stopped there, period, and just said, "Here is the outcome."

But, the opinion didn't stop there. It actually went on to offer a nuanced analysis about institutional competence that is one of the hallmarks of the New Harvard School. Antitrust liability creates the potential for inconsistent remedies resulting from the fact that a state regulatory body was also imposing remedies in this space. The plaintiff asked for them to be revised, received some of those revisions but not all they wanted, and then they turned around and went to federal court to ask for antitrust relief on top of that.

Another way to interpret this is: (1) we only want one good adjudication, not multiple ones with the potential of judicial waste and the potential for inconsistent judgments, and we do not want people looking for that second bite of the apple running around; but (2) there is also an element of just understanding which is the actor better suited to oversee this type of behavior. Those considerations are not necessary if you take the very simplistic reading of Trinko.

So, I think that by looking much more holistically at the entire opinion you end up with a much more complicated analysis, which I think is influential in certain ways that we are talking about, but we have to take seriously the fact that the Court did include as a separate part of the analysis this question about the potential for a different kind of institutional actor providing relief for the defendant in addition to the Court's recognition that investing in infrastructure represents a classic form of competition on the merits.

IAN SIMMONS: John or Bonny, any comments on Trinko?

JOHN ROBERTI: I said early on that I thought Trinko was not quite the low point but the biggest blow that led to the low point in terms of the enforcement of Section 2.

I agree with you that, read properly, Trinko really is a pretty narrow decision. But, that narrow reading is not what has happened in the courts. The courts have taken the dicta and ran with it. They have created a bucket for cases involving the refusal to deal with a rival and have basically given immunity to these cases to a very, very large degree. There are still some exceptions; they talk about Aspen Skiing, for example; but courts view that as really, really limited.

In the bones of Trinko is a major hostility to Section 2. I don't know if Trinko would be decided differently in today's Supreme Court, but it is the law that we have.

It goes back to my point about why this interest in Section 2 cases. It is not necessarily that there are more chinks in the armor of Section 2 today as compared to ten or fifteen years ago. It is that the current enforcers are just willing to take chances and bring cases that are more difficult than perhaps prior enforcers were.

Trinko is absolutely the elephant in the room—not necessarily just in the platform cases, but in a whole swathe of other cases.

IAN SIMMONS: Bonny, please give us your thoughts.

BONNY SWEENEY: Without speaking to government enforcement or any current cases, I agree with everything that Chrisopher said. Trinko does not say those things that advocates on the defense side say that it says.

That decision was rendered in a regulatory environment. The Telecommunications Act of 1996 was intended to deter and remedy anticompetitive harm. The Supreme Court recognized that regulatory framework and concluded that allowing the case to go forward would not significantly improve the competitive outcome.

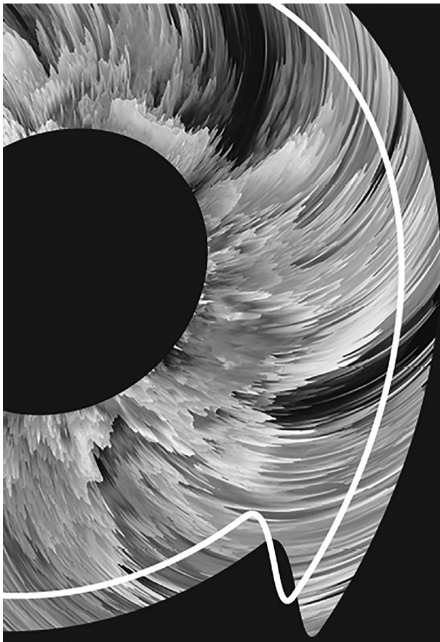
So it is definitely overused and overread and, unfortunately, the dicta in the case is what stands out in the lower courts.

IAN SIMMONS: Well, panelists, it's time for me to blow the final whistle. The only comment I would offer on Trinko is query whether we see the plaintiffs changing the subject, saying: "Trinko doesn't apply because the defendant is engaged in restraints of trade vis-à-vis third parties, so input foreclosure or downstream foreclosure is at the heart of the matter. So it's not so much that I want to deal with the platform; it's that they are foreclosing things that I need downstream or that I need upstream." So there's that question.

Finally, one of the beauties of antitrust is that it is common law. Microsoft did not know it was violating antitrust laws until Judge Jackson told it it was. It is within the province of the agencies to build on the common law if they choose, or seek to have it evolve in one direction or another.

There's so much we didn't touch on—how to demonstrate a but-for world, examination techniques, and graphics—but we are at our time. We are just simply scratching the surface both of the concepts and how to have the rubber hit the road.

I want to thank today's panelists—Bonny Sweeney, Doug Melamed, Christopher Yoo, and John Roberti—for their time and their thoughtful comments. I would also like to thank my colleagues Colleen Powers, Tyler Helms and Jack Derewicz for all their help leading to today. ■



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A Rising Tide for Competition Enforcement: The Federal Maritime Commission Revitalizes its 'Anti-Monopoly Tradition'

WYATT FORE

"Such a practice runs counter to the anti-monopoly tradition of the United States . . . and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs."

California Stevedore & Ballast Co. v. Stockton Port Dist., 7 F.M.C. 75, 78 (FMC 1962).

AMERICAN COMPETITION LAW DOES not only arise out of the Sherman and Clayton Acts. As President Biden recognized in his landmark Executive Order, many federal statutes contain analogous provisions.[1] One of those, the Shipping Act, has an "alternative competition regime put in place by Congress" to prevent abuses of market power.[2] Although oceanic transportation has an exemption from the antitrust laws, the Shipping Act's competition mandate is strong. And drawing on its rich tradition, the Federal Maritime Commission (FMC) has in recent years sought to revitalize its role as competition enforcer under the Shipping Act.

Since the FMC and antitrust agencies (Department of Justice and Federal Trade Commission) have similar mandates, they could learn a lot from each other's experience and history. The goal of this article is to compare the two competition regimes, and offer suggestions for how the Shipping Act and antitrust agency administration, procedure, and doctrine could draw from one another's experiences to improve competition enforcement.

The Shipping Act's Competition Provisions

Both the Shipping Act[3] and the antitrust laws govern competition in oceanic transportation. Where one ends, the other begins. For example, while mergers and acquisitions remain subject to the antitrust laws, conduct is generally covered by the Shipping Act.[4] The FMC also oversees filed agreements among rivals that are allowed because of an antitrust exemption under the Shipping Act.

Where the Shipping Act's competition provisions apply, they have important differences from the Sherman and Clayton Acts. Unlike the antitrust laws' distrust of horizontal coordination, the Shipping Act permits certain entities (like ocean carriers) to enter into agreements with their competitors provided those agreements are filed with the FMC and otherwise comply with statutory requirements. At the same time, the Shipping Act imposes common carrier obligations that the antitrust laws do not place on ordinary companies. As a result, the Shipping Act looks similar to a regulatory regime where dominance for certain entities (like ocean carriers) is presumed. For instance, under the Sherman Act, even a monopolist only rarely must deal with others.[5] But the Shipping Act explicitly differs on this point; common carriers may *never* unreasonably refuse to deal or negotiate in certain situations.[6] Similarly, the Shipping Act has unilateral conduct requirements that are much more demanding than the antitrust laws.[7]

These conduct provisions generally require "reasonableness." This standard has been interpreted (particularly in the "just and reasonable" practices context) to require conduct that is "fit and appropriate to the end in view," and/or "tailored to meet its intended purpose[.]"[8] For this, FMC precedent applies a burden-shifting framework similar to the rule of reason. First the complainant (i.e., plaintiff) must show detrimental effects from the challenged practices. The complainant can meet this burden directly by showing substantial harm to the complainant, or indirectly by identifying a suspect arrangement[9] or defining a market and showing excessive harms within the market.[10] If the complainant makes this prima facie showing, the burden then shifts to the respondent (i.e., defendant) to proffer a "worthy objective" or legitimate "end in view."[11] This objective must be more than a firm's profit-maximization, and must be nonpretextual.[12] If the

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Respondent makes this showing, then the burden shifts back to the complainant to show whether the practice is ultimately unreasonable, such as whether the worthy objective can be satisfied through "less intrusive" alternatives.[13] If less intrusive methods exist, then the conduct is "excessive" and "unreasonable," violating the Shipping Act.[14]

As antitrust lawyers know, not all restraints are evaluated under the full rule of reason. Similarly, the FMC uses an abbreviated reasonableness analysis for certain conduct. For example, the FMC has considered, without deciding, that certain practices may violate the Shipping Act per se, just as how some restraints are per se violations of the antitrust laws.[15] In other situations, the FMC has determined that some practices are by their nature inherently harmful, and so detrimental effects can be presumed at the prima facie stage. Thus, the only question for the Commission is whether those detrimental effects are justifiable for some legitimate reason, like operation of the supply chain.[16] In legal terms, this means that the burden immediately shifts to the respondent to proffer a worthy objective.[17] Under the antitrust laws, this sort of abbreviated reasonableness analysis that presumes that the prima facie case has been met might be called a "quick look" or a practice "inherently suspect."[18]

As a result, there is significant overlap between the legal analysis of the antitrust laws and the Shipping Act. But there are important differences, too. Notably, while antitrust law ordinarily imposes a significant market power screen for violations, the Shipping Act does not. This policy choice by Congress reflects the significant gatekeeper role that regulated entities, like ocean carriers and marine terminal operators, have with their shipper customers. Without access to an ocean carrier or port, a shipper simply cannot reach a market. Thus, those regulated entities can be presumed to have power that ordinary firms lack. And as a result, Congress has imposed ex ante common carriage obligations on them.

Another important difference is venue. Violations of the Shipping Act's conduct provisions, including claims brought by private parties for damages, can be brought *only* in administrative court at the Federal Maritime Commission. This means that the FMC plays an outsized role in enforcement of the Act's competition provisions.

But perhaps the most glaring difference is that, unlike the antitrust laws, the Shipping Act contemplates and permits horizontal rivals to enter into agreements with one another. However, the parties must file those agreements with the FMC and they must otherwise comply with statutory requirements. Once an agreement has been filed, the Commission may perform a competitive analysis. If the FMC determines that the agreement is likely to harm competition resulting in lower output or higher price, it may seek to enjoin it in district court.[19] Yet, as now-Chair Maffei has recognized, this provision has been sorely underutilized.[20]

Lessons Learned from the FMC for the Antitrust Agencies

Because of its mixed role as sectoral regulator and competition enforcer, the FMC can offer interesting case studies for the antitrust agencies. Below are a few lessons learned from the FMC's experiences which may be useful for antitrust enforcement.

An Accelerated Timeline. Shipping Act matters are ordinarily resolved much more quickly than antitrust cases. In one recent case with 13 defendants, the ALJ shepherded motions to dismiss, complex fact and economic discovery, and then resolved summary decision motions in just 2.5 years.[21] This quick resolution is largely a product of procedural rules that impose a rapid pace and force the parties to focus on core issues. One example is that discovery ordinarily must be completed within 150 days of the filing of an answer, unless good cause is shown. But the timeline is also a result of a culture of efficient case management. In that recent case, the ALJ led by example by swiftly resolving discovery disputes that inevitably delay proceedings, and reminding the parties to continue discovery pending resolution of the motions.[22]

This lightning speed at the FMC recognizes that justice delayed is justice denied. Too often, antitrust litigation spins out of control. One reason is that the rents gained from anticompetitive conduct may far exceed the marginal litigation costs needed to protect them, even for a little while longer. Everyone is busy, including the court itself, and so there is almost always some plausible reason to continue the schedule. This dynamic is combined with a trend by some courts to impose a high degree of precision and certitude before finding an antitrust violation. As a result, in modern antitrust litigation, parties must scrape for every last document and piece of data, including from nonparties. The pragmatic effect is a dramatic increase in the volume and burdens of antitrust discovery, leading to more demands on the tribunal to mediate negotiations and resolve disputes, slowing down ultimate resolution of the case.

As a result, antitrust tribunals could look to the FMC as a guide when considering tactics, such as accelerated timelines, of managing the resolution of complex competition cases.

A More Powerful ALJ. Whereas both the FMC and Federal Trade Commission have administrative courts, there are significant procedural differences. These variations mean that an FMC ALJ has more power to resolve a case. To the extent the FTC considers reforming its Part 3 proceedings, the FMC may offer a useful example of how changes might work in practice.

One major contrast is that at the FTC dispositive motions (except the Initial Decision) are decided by default by the Commission, rather than the ALJ.[23] Many believe that this robs the ALJ of his most important role—to adjudicate whether the allegations or facts comply with law. Because

important decisions can be kicked 'upstairs,' the FTC ALJ loses much of his inherent power to manage his docket. In contrast, the FMC ALJ is more analogous to a district court judge, who not only shepherds discovery but also makes important legal determinations in the first instance, including at the dismissal, summary decision, and initial decision stages.[24] The parties in FMC administrative court know that the FMC ALJ will make dispositive decisions, allowing the ALJ to maintain her implicit power to keep the parties focused and on track.

Another procedural difference is that FTC administrative adjudication can be initiated only by the Commission, whereas FMC administrative adjudication allows private parties to bring cases. Because FTC Commissioners must first authorize the litigation, respondents are often placed in the awkward position of asking the same Commission to find a complaint deficient that they just authorized. Respondents have raised constitutional challenges to this combined role of prosecutor and neutral tribunal, which is not the subject of this article. However, the pragmatic effect is that administrative adjudication at the FTC serves more explicitly as an affirmative conduit for shifting policy priorities. In contrast, the FMC plays less of a role at the litigation initiation stage, because private parties bring most suits in administrative court. Again, the result (as in district court) is that FMC administrative adjudication is more reactive rather than proactive.

Market Definition. The Shipping Act does not have antitrust law's tradition of extensive market definition analyses using complex econometric tools. Although there are doctrinal reasons for this difference, antitrust law could perhaps learn from the Shipping Act's experience in avoiding overly complicated, high-stakes market definition disputes when they may not ultimately be helpful for a tribunal.

In the few FMC precedents that use market definition (generally with respect to exclusionary conduct), the exercise is a helpful (but not required) tool to calculate how widespread the harm to competition is.[25] For example, if an exclusionary practice occurs at just one marine terminal, instead of throughout a major Port, then the harm is not significant enough to justify intervention. This market definition exercise is also relatively simple compared to antitrust litigation, and there is little tradition of using complex economic tools, like a SSNIP test.

In contrast, market definition in antitrust cases is often high-stakes, burdensome, and dispositive. Legal precedents instruct that market definition is an imperfect and indirect way of evaluating the defendant's market power, which in turn informs the challenged restraint's competitive effects.[26] In practice, antitrust courts often require intense market definition exercises—even sometimes at the pleading stage. And courts and juries too often get lost in the complexity of econometric modeling. For example, in the hospital context, courts previously relied on economic tools that looked to indirect purchasers (patients) rather than direct purchasers (health plans) in defining markets.[27] This intuitive—but wrong—approach to market definition allowed anticompetitive practices to flourish *for decades* in the health care sector.

By effectively requiring the parties to engage in expensive market definition exercises, even at an early stage, and then turning market definition into a central dispositive issue (instead of a helpful tool to assess market power), antitrust tribunals effectively prevent enforcers from challenging anticompetitive conduct in many cases. As a result, antitrust tribunals could learn from the Shipping Act's experience, i.e., that market definition is a useful if imperfect tool, but by no means a magic wand that resolves every issue.

Abuse of Dominance? Congress and antitrust reformers have proposed heightened duties for digital firms, and/or a new abuse of dominance violation of the Sherman Act.[28] The Shipping Act offers a model of how those reforms might play in practice.

The Shipping Act imposes significant prohibitions on what antitrust lawyers would call unilateral conduct and vertical restraints. The goal of these provisions is to prevent an abuse of the dominant position of certain entities, like ocean carriers, flowing from their gatekeeper power. Antitrust reformers might look to the structure of the Shipping Act (including the merits of a violation, whether and how to structure a new regulator, a private right of action, and the venue of administrative adjudication) as an exemplar of how those reforms might work in practice.

Lessons Learned from Antitrust for the FMC

The FMC can also draw important lessons from antitrust enforcement. These include experiences with doctrine and administrative tactics.

Convenor Authority. It is no secret that government agencies are resource-constrained. As a result, the FMC and the antitrust agencies lean heavily on market participants to educate them about what is happening in the economy. However, industry investigations and empirical analyses are time-consuming and resource-intensive for government agencies. As a result, both the Antitrust Division and the FTC regularly conduct public workshops to consider various issues.[29] Unlike an FMC fact finding report, or a merger retrospective, or an FTC Section 6(b) study, the costs of hosting a public workshop are relatively low. For example, they do not require agency staff to conduct an economic analysis or publish a report. The cleverness of these initiatives is that they rely on the expertise and insights of the public, rather than the overtaxed staff, to educate the agencies.

Like the antitrust agencies, the FMC could consider convening (for example) a one-day workshop to gather scholars, lawyers, and economists about discrete issues. As discussed below, one possible workshop topic could be the Commission's standards for evaluating filed agreements. This workshop could include discussions of whether existing concentration metrics, such as the Herfindahl-Hirschman Index

(HHI), are appropriate and whether there are more suitable alternatives. The antitrust agencies are in frequent conversation with academic scholars in the industrial organization field of economics, and the FMC could likewise benefit from ongoing discussions with those researchers as well.

Published Guidelines. The antitrust agencies frequently publish statements on enforcement policy, most famously the merger guidelines.[30] These merger guidelines endeavor to digest the latest economic and legal research and apply it to merger policy. The process of updating and publishing the merger guidelines is hotly contested but the final result usually allows the agencies to persuasively explain their thinking to the public and to courts.

Although mergers and acquisitions remain subject to antitrust enforcement, the FMC retains authority to review filed agreements. These agreements, often between horizontal rivals, raise serious competition concerns analogous to mergers. As a result, Congress has authorized the FMC to evaluate whether these agreements may diminish competition, and to seek an injunction in district court against anticompetitive agreements.[31] But the FMC provides little information to the public on how it evaluates these filed agreements. There is no analog to the merger guidelines.

This lack of transparency is concerning because some public statements indicate that the FMC relies on HHI, a tool that is frequently used by antitrust enforcers. However, emerging economic research suggests HHI might be inappropriate in the oceanic transportation context.[32] This is because HHI makes a baseline assumption that firms in a market are entirely separate entities with limited ability to influence the competitive decisions of one another. In the antitrust context, this assumption generally works because antitrust law strongly discourages horizontal coordination. As a result, in practice, ordinary firms have limited ability to influence the competitive decisions of their rivals. In contrast, this assumption does not equally apply in the oceanic transportation context, because ocean carriers are allowed to coordinate with their direct competitors through filed agreements. As a result, using HHI for the ocean carrier industry likely drastically underestimates concentration, and thus the likely competitive effects, of filed agreements.

HHI's failure to fully capture likely anticompetitive effects from filed agreements is particularly troubling because there is a serious concentration problem in oceanic transportation. Globally, there are 10-13 major ocean carriers. Using HHI, competition enforcers may consider this to be unobjectionable. However, HHI may not measure the fact that ocean carriers have organized into three global alliances. These three alliances control approximately 90% of all inbound and outbound trade in the United States.[33] Worse, those ocean carriers are connected by a web of hundreds of consortia agreements, including across the alliances. As a result, ocean carriers can directly and indirectly influence their rivals through the web of filed agreements to a degree that could only be dreamt of by ordinary firms.

The FMC could explore whether other tools, such as a Modified HHI (MHHI) may be more appropriate in evaluating filed agreements. Emerging economic research suggests that MHHI and other concentration metrics may more accurately quantify the likely competitive effects where the lines between firms are less distinct.[34] Going through the process of developing, receiving feedback, and publishing guidelines for filed agreements would allow the FMC a venue to consider this emerging economic evidence and implement enforcement policies accordingly.

Presumptions. One way that antitrust doctrine has successfully incorporated economic learning is through the use of presumptions. Presumptions are an effective tool for enforcement because they rely on relatively easy to ascertain metrics (like concentration) to determine likely harms. As a result, presumptions allow antitrust enforcers to deter illegal conduct, and also to move quickly when an anticompetitive transaction has been detected. The FMC could consider adopting analogous presumptions under the Shipping Act.

One important antitrust presumption is the so-called "structural presumption" in merger enforcement. There, a plaintiff may "establish a presumption of anticompetitive effect" through market structure, including showing "undue concentration."[35] Importantly, the presumption does not mean that a transaction is automatically illegal, but rather only establishes that the plaintiff's prima facie case can be met.[36] The 2010 Horizontal Merger Guidelines and 2023 Draft Merger Guidelines from the antitrust agencies use HHI to calculate concentration for their structural presumptions. And courts have generally followed merger guidelines because of the robust economic evidence supporting them.

The structural presumption is critical to U.S. merger enforcement.[37] Because the exercise is almost always prospective, antitrust enforcers, courts, and other parties must inevitably make predictions about the future likely effects of a transaction. The presumption recognizes that although market structure alone does not make a merger illegal, decades of economic research support the common-sense intuition that competition is diminished in highly concentrated markets, leading to higher prices and lower output. Further, proving actual harms (such as higher prices) is enormously resource-intensive for both enforcers and courts. Waiting until actual detrimental effects can be proven with certainty leads to significant underdeterrence, allowing anticompetitive transactions to proliferate.

Learning from this experience, the FMC could consider adopting an analogous structural presumption, based on concentration metrics appropriate to the industry, when evaluating filed agreements. Like the 2010 Horizontal Merger Guidelines and 2023 Draft Merger Guidelines, the FMC could incorporate this structural presumption into those published guidelines based on economic research, which would then provide a persuasive basis for a court to enjoin an anticompetitive agreement in court.[38] Or the

FMC could incorporate a structural presumption within the context of administrative adjudication, if the agreement were challenged retrospectively in conduct litigation.[39]

Outside the merger context, antitrust applies what might be called presumptions in other contexts too. These include, for example, the per se rule and a quick look analysis. Like the antitrust laws, the Shipping Act also abbreviates the full reasonableness analysis for certain inherently harmful practices. [40] The FMC should continue to consider, and adopt when appropriate, presumptions that certain practices are inherently suspect or per se illegal. Otherwise, the FMC may inadvertently incentivize harmful activity to flourish from underdeterrence.

The Class Device. The FMC has not resolved the question of whether its administrative adjudication rules permit class actions. However, the experience from antitrust litigation shows that the class device has been central to the success of competition enforcement. This experience could easily be applied to the Shipping Act. Further, the costs and burdens of individualized litigation is a serious impediment to enforcement, particularly because shippers, especially smaller ones, have fewer resources and less power than regulated entities. And litigation puts shippers in the awkward position of suing the very entities they need in order to survive. The FMC has already recognized these hurdles to enforcement, which is why it takes a more permissive position with representative actions.[41] For Respondents and the FMC itself, the class device assists with adjudicatory efficiency by allowing all parties to deal with challenged conduct only once, instead of with repetitive litigation. As a result, the class device is consistent with sound administrative practice and the FMC should consider aligning its Rules of Practice and Procedure with the Federal Rules of Civil Procedure, including Rule 23.

Reasonable Estimation of Damages. The FMC could also learn from the experience with antitrust litigation to not require too-strict proof of competitive injury, such as with specific receipts or financial invoices, but to allow reasonable estimates of damages, including with the assistance of economic modeling. In one recent case the tribunal noted that an actual damages award "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained."[42] Under this standard, the tribunal determined that "the most reasonable estimate, backed by solid evidence and reasonable certainty," was that only a handful of the containers would have been shipped but-for the respondents' unreasonable refusal to deal and retaliation.[43] In contrast, antitrust tribunals have long recognized that too-strict damages standards simply allow a violator to benefit from covering up its own violations. As a result, antitrust courts frequently emphasize that it "does not come with very good grace for the wrongdoer to insist on specific and specific proof of the injury which it has itself inflicted."[44]

* * * *

Competitive, open markets are not just important for our economy. They are also central to our American way of life. The Biden administration's "whole of government" approach to competition policy is a breath of fresh air, reawakening the many tools the federal government has to open markets. As the guardian of one of these non-antitrust competition regimes, the Federal Maritime Commission has an opportunity to restore competition to a critical sector of the U.S. economy: oceanic transportation. ■

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[1] Exec. Order No. 14036, 86 C.F.R. Section 36987 (2021).

[2] Fed. Mar. Comm'n, Fact Finding Investigation 29 Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. Section 41102(c) (2022) (hereinafter "Fact Finding 29 Report").

[3] One normally refers to the "Shipping Act," but there are several relevant statutes. For example, the Shipping Act of 1916 was significantly revised and supplemented by the Shipping Act of 1984 (the '84 Act, The Shipping Act) which in turn has been amended various times including by the Ocean Shipping Reform Act of 1998 (Public Law 105-258), the Frank LoBiondo Coast Guard Authorization Act (Public Law 115-282), and the Ocean Shipping Reform Act of 2022 (Public Law 117-146).

[4] 46 U.S.C. Section 40301(c) (2018); *see also* Org. for Economic Co-operation and Development, Working Party No. 2 on Competition and Regulation, Submission of the United States, *Competition Issues in Liner Shipping* (2015).

[5] *Compare* Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (absent "purpose to create or maintain a monopoly," a firm generally is "free to exercise his own independent discretion as to parties with whom he will deal" (citation omitted)) *with* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985) (a "refusal to cooperate with rivals can constitute anticompetitive conduct," if it is exclusionary).

[6] *See* 46 U.S.C. Sections 41104(a)(10), 41105(1), 41105(4), 41105(5), 41105(6) (2018).

[7] *E.g.*, 46 U.S.C. Section 41102(c) (2018) (a "common carrier, marine terminal operator, or ocean transportation intermediary" many not fail "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.").

[8] Distrib. Servs., Ltd. v. Transpacific Freight Conf. of Japan, 24 S.R.R. 714, 722, 1988 WL 340659, at *7 (FMC 1988) (quoting Investigation of Free Time Practices—Port of San Diego, 9 F.M.C. 525, 547 (1966)); 85 Fed. Reg. 29,638, 29,651 (May 18, 2020) (rulemaking pursuant to ocean common carrier obligations).

[9] California Stevedore & Ballast Co. v. Stockton Port Dist., 7 F.M.C. 75, 78 (FMC 1962).

[10] *See* River Parishes v. Ormet Primary Aluminum Co., 1999 WL 125991, at *24 (FMC 1999) ("before requiring [a Respondent] to justify its business decision, there must be a showing of something more than an effect on a 'relatively tiny portion of the relevant market . . . and the minimal impact on the complaining [person] resulting from its exclusion.'" (citation omitted)).

[11] Distrib. Servs., Ltd., 1988 WL 340659, at *7.

[12] *Id.*; *see also* 46 C.F.R. Section 545.5(c)(1) (2023) ("In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity."). *Cf.* United States v. Microsoft, 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (holding procompetitive justification must be "nonpretextual").

[13] Distrib. Servs., Ltd., 1988 WL 340659, at *7.

[14] *Id.*

[15] River Parishes, 1999 WL 125991, at *31; *see also* PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1510a (4th & 5th eds., 2023 cum. supp.) (per se rule means, inter alia, "that the court will condemn a price-fixing cartel without determining whether the resulting price level is high, low, or reasonable in any sense" and also "that certain claims of justification will not be considered.").

[16] California Stevedore & Ballast Co. v. Stockton Port Dist., 7 F.M.C. 75, 83 n.5 (FMC 1962) ("It is not significant that these evils [of 'monopolistic' arrangements] have not been proved to actually exist yet at Stockton. Healthy competition for business . . . has been destroyed.").

[17] *Id.*

[18] *See* California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) ("quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained." (citations omitted)); 1-800 Contacts v. FTC, 1 F.4th 102, 115 (2021) (questioning whether practice can be evaluated under FTC's "inherently suspect" framework).

[19] 46 U.S.C. Section 41307(b)(1) (2018). One proposed legislative reform would allow the FMC to issue an order directly enjoining an anticompetitive agreement, instead of going first to district court. *See* H.R. Res. 2710, Ocean Shipping Competition Enforcement Act, 118th Cong. (2023) (introduced).

[20] *See* Press Release, Daniel Maffei, Commissioner, Federal Maritime Commission, Statement from Commissioner Maffei on Puerto Nuevo Terminals LLC Cooperative Working Agreement (Aug. 29, 2019) ("If the answer is that the Commission never will [file a challenge], at least on the onset of an agreement, then why did we establish a timeline for an agreement to take effect and why does the Commission have a process of assessing an agreement before it takes effect?").

[21] Initial Decision, Doc. No. 133, IMCC v. OCEMA et al. (ALJ 2023) (Dkt. No. 20-14).

[22] *E.g.*, Order on Complainant's Motion to Compel, Doc. No. 51, IMCC v. OCEMA et al. (ALJ 2021) (Dkt. No. 20-14) (issuing order a little over a week of completion of briefing calendar); Third Amended Scheduling Order, Doc. No. 73, IMCC v. OCEMA et al. (ALJ 2021) (Dkt. No. 20-14).

[23] 16 C.F.R. Section 3.22(a) (2023).

[24] 46 C.F.R. Section 502.221 (2023).

[25] *See* All Marine Moorings, Inc. v ITO Corp., 27 S.R.R. 539, 546 (FMC 1996); River Parishes Co., 1999 FMC LEXIS at *71.

[26] *E.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986) (defining market is "but a surrogate for detrimental effects"); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) ("Defining the market is not the aim of antitrust law; it merely aids the search for competitive injury."). *See also* PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶500 (5th ed., 2022 cum. supp. 2015-2021).

[27] *See* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 339–41 (3d Cir. 2016) (articulating history of courts' prior incorrect reliance on Elzinga-Hogarty test).

[28] *E.g.*, S. Res. 2992, American Innovation and Choice Online Act, 117th Cong. (2021) (introduced); Herbert Hovenkamp, *Monopolizing Digital Commerce*, 64 WM. & MARY L. REV. 1677 (2023).

[29] U.S. Dep't of Justice, Public Workshop on Promoting Competition in Labor Markets (Dec. 6, 2021); U.S. Dep't of Justice, Public Workshop on Venture Capital and Antitrust (Feb. 12, 2020); Press Release, Fed. Trade Comm'n, FTC and Justice Department to Hold Two-Day Virtual Public Workshop Examining Antitrust Enforcement in the Pharmaceutical Industry (May 31, 2022).

[30] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010); U.S. Dep't of Justice, Vertical Merger Guidelines (2020).

[31] 46 U.S.C. Section 41307(b)(1) (2018).

[32] *See* FMC v. City of L.A., Cal., 607 F. Supp. 2d 192, 200–01 (D.D.C. 2009) (FMC economic expert using HHI, although for drayage market where HHI may be more appropriate); Fact Finding Report 29, at 44 (referencing HHI to assess competitive conditions in liner transportation). *See also* FEDERAL MARITIME COMMISSION, BUREAU OF TRADE ANALYSIS, STUDY OF THE 2008 REPEAL OF THE LINER CONFERENCE EXEMPTION FROM EUROPEAN UNION COMPETITION LAW (2012) (analyzing trade routes using HHI).

[33] FED. MAR. COMM'N, 60TH ANNUAL REPORT FOR FISCAL YEAR 2021 (2022).

[34] *See, e.g.*, Olaf Merk & Antonella Teodoro, *Alternative Approaches to Measuring Concentration in Liner Shipping*, 24 MARITIME ECONOMICS AND LOGISTICS 723–46 (2022).

[35] United States v. Anthem, 855 F.3d 345, 349 (D.C. Cir. 2017).

[36] Anthem, 855 F.3d at 349 (citing United States v. Baker Hughes, 908 F.2d 981, 982 (D.C. Cir. 1982)); *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), https://www.ftc.gov/legal-library/browse/horizontal-merger-guidelines-united-states-department-justice-federal-trade-commission; *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines (2023), https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

[37] *E.g.*, Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure and Burdens of Proof*, 127 YALE L.J. 1996, 1997–98 (2018); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276–78 (2015).

[38] *See* 46 U.S.C. Section 40304 (2018). *Cf.* City of Los Angeles, Cal., 607 F. Supp. 2d at 200–01 (evaluating FMC economic evidence of concentration).

[39] *E.g.*, In re Vehicle Carrier Services, 1 F.M.C. 2d 45 (ALJ 2018), aff'd in part 1 F.M.C. 2d 175 (FMC 2019).

[40] California Stevedore & Ballast Co., 7 F.M.C. at 83 n.5 ("It is not significant that these evils [of 'monopolistic' arrangements] have not been proved to actually exist yet at Stockton. Healthy competition for business . . . has been destroyed."). *See also* River Parishes, 1999 WL 125991, at *31 (observing without deciding that some practices may be illegal per se under the Shipping Act).

[41] *See* Statement of the Commission on Representative Complaints at 1-2, Dkt. No. 21-13 (FMC Dec. 28, 2021) ("any person may file a complaint alleging a violation, including . . . trade associations").

[42] Initial Decision at 43, OJ Commerce, LLC v. Hamburg Suedamerikanische Dampfschifffahrts-Gesellschaft A/S & Co. KG and Hamburg Sud North America, Inc. (ALJ 2023) (Dkt. 21-11) (quoting MAVL Capital Inc. v. Marine Transport Logistics, Inc., Dkt. No. 16–16, 2022 WL 2209421, at *3 (FJC June 10, 2022)).

[43] *Id.* at 54.

[44] J. Truette Payne Co. Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566–67 (1981) (citations omitted).

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Antitrust and Economic Analysis of Key Sectors under the New Anti-Monopoly Law

JANET HUI, WEI HUANG AND VANESSA YANHUA ZHANG

FOR MORE THAN A DECADE, CHINA HAS witnessed rapid economic and social development in the face of changing global economic dynamics. In order to adapt to these circumstances, China has revised its anti-monopoly law and issued a number of anti-monopoly guidelines in key areas, including the platform economy, the pharmaceutical industry, and the semiconductor industry. The new legislation also refines legal procedures regarding merger review, antitrust investigation, and private litigations to assist law enforcement by the antitrust authorities. Antitrust agencies are increasingly capable of handling complex cases as they progress to adopt more economic analysis tools, and are increasingly issuing guidelines to aid practitioners, including for specific industry sectors.

This article addresses three aspects of the amendments to the Anti-monopoly Law (AML Amendments): merger reviews, antitrust investigations, and antitrust litigation. Milestone cases will be analyzed in detail with the intention of probing into the changes and implications brought by new antitrust laws and regulations. Finally, we review economic analyses applied in both new antitrust cases and recent merger reviews.

Mergers: Legislative Progress

Recent years have witnessed significant improvements in China's merger control regime. The AML Amendments came into effect on August 1, 2022, marking the first substantial revision since August 2008. The AML Amendments include, inter alia, the "stop the clock mechanism," a new local review system, the State Administration for Market Regulation's (SAMR's) power to intervene in concentrations where the notification thresholds are not met, and the improvement of the classification and grading review system for concentrations of undertakings. Subsequently, on March 24, 2023, the SAMR issued, among others, the Provisions on the Review of Concentration of Undertakings (effective since April 15, 2023), which further clarify and complement the procedural rules of the merger control regime in China.

Inclusion of the Stop the Clock Mechanism and the Local Pilot Review System. The AML Amendments for the first time introduced the stop the clock mechanism in Article 32[1] and formulated the local pilot review system. The stop the clock mechanism is envisaged to address issues where the SAMR does not have sufficient time to finalize the review of complex cases with competition concerns. Currently, the SAMR normally would require the parties to pull and re-file the transactions in these circumstances. Yet, based on our survey, the authority has been very cautious in applying the new mechanism in practice. As of this paper, based on publicly available sources, the stop the clock mechanism has only been used in a few high-profile cases, e.g., *Asiana Airlines/Korean Air Lines*, *Tower Semiconductor/Intel*, and *MaxLinear/Silicon Motion*. As for the local pilot review system, from its inception (August 1, 2022) to the end of 2022, the SAMR had delegated 135 cases to local Administrations for Market Regulation (local AMRs), accounting for 32.7 percent of all the filings for the same period. After nearly a year of implementation, the review period of local AMRs is largely in pace with that of the SAMR, i.e., the average review period of local AMRs is almost the same as that of the SAMR.

Further Clarification of the Rules for the SAMR's Intervention into Transactions Below the Filing Thresholds. Legislation has now empowered the SAMR to initiate investigations on transactions below the turnover thresholds. According to Article 26 of the AML Amendments, for transactions under the filing thresholds, but with facts and evidence showing the transaction has or may have the

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effect of eliminating or restricting competition with anti-competitive effects, the SAMR can initially require the undertakings concerned to proactively notify the transactions; if the undertakings fail to do so, the SAMR shall then launch an investigation.

The Guidelines of the Anti-monopoly Commission of the State Council for Anti-monopoly in the Field of Platform Economy (Platform Economy Guidelines), effective in 2021, also expressed concern regarding the killer acquisition in the platform economy, i.e., where the emerging target's turnover may be low in consideration of its free or low-margin business model, but the relevant market may be highly concentrated with limited incumbents.

Merger Review Practice: Pattern and Trend

The enforcement of merger review is under ongoing improvement and strengthening during recent years, especially since 2021.

- The number of merger filings received and completed annually shows a significant growth since 2021. Specifically, in 2019 and 2020 respectively, the SAMR received 503 and 520 cases and completed 465 and 473 cases;[2] in 2021, the SAMR received 824 cases (with a growth rate of 58.5 percent) and completed 727 cases (with a growth rate of 53.7 percent);[3] in 2022, antitrust agencies in China (including both the SAMR and local AMRs) received 867 cases and completed the review of 794 cases–which is the highest number of transactions reviewed ever since 2008.[4]
- Complex cases (i.e., conditionally approved cases) continue to be subject to strict scrutiny. The average review periods for 2019, 2020, and 2021 were about 400 (approx. 393) days, 300 (approx. 291) days, and 350 (approx. 352) days, respectively. While in 2022, the average review period was more than 400 (approx. 434) days, the longest in recent years.

Overview of Key Conditionally Approved Cases, Particularly in the Semiconductor Sector. In recent years, the semiconductor industry has been navigating serious supply shortages, increased costs of components, and the pandemic's disruption of supply chains. Supply shortages have led to cuts in automobile production and higher prices for consumer and healthcare electronics.[5] However, even in the period of economic downturn, China, as the largest semiconductor market, has seen no lowering of antitrust scrutiny for mergers in this sector.

In 2022, the SAMR cleared five transactions with remedies, including three that were related to the semiconductor industry.[6] For example, both parties of the *Advanced Micro Devices (AMD)/Xilinx* transaction, i.e., AMD and Xilinx, are US companies. There was neither a horizontal overlap nor a vertical relationship between the parties. Rather, there is an adjacent market relationship between the programmable gate arrays (FPGA) of Xilinx and the central processing units (CPUs) and graphics processing units (GPUs) of AMD. In the review decision, the SAMR expressed their concern that the parties might use Xilinx's strong market power in FPGA (market shares of 50-55 percent) to reduce the interoperability between its FPGAs and competitors' CPUs and GPU accelerators by refusing to supply, so that to eliminate or restrict market competition. The SAMR decided to impose several behavioral remedies to address these concerns. Another example is the *II-VI/Coherent* transaction, where the SAMR concluded that the merged entity had the capability to implement input foreclosure, discriminatory treatment, and refusal to supply in the vertical markets. The SAMR approved the transaction with conditions such as the continuation of existing supply and purchase contracts post-merger and the supply of products under the FRAND principles.[7]

These cases reflect China's continuously cautious, fairly creative and aggressive enforcement attitude towards semiconductor deals. Separate and apart from this, we must also keep in mind that the United States-China trade war since July 2018 may further increase the uncertainty of merger review of high-profile cases involving U.S. companies.

The SAMR's Intervention in Transactions Below the Filing Thresholds, Particularly in Platform Economy and Active Pharmaceutical Ingredients. Although the SAMR has been bestowed the power to investigate transactions below the filing thresholds since 2008, there has been little information about how this power has been exercised in practice. According to the limited information, it seems that the SAMR has been paying most attention to such transactions involving active pharmaceutical ingredients (APIs) and the platform economy.

In terms of the API industry, for example, the SAMR launched an investigation against the *Hunan Erkang Pharmaceutical/Henan Jiushi Pharmaceutical transaction*. Despite not meeting the filing thresholds, the deal was eventually abandoned by the parties amid antitrust authorities' concerns that the deal might eliminate or restrict competition. It was reported that Henan Jiushi Pharmaceutical had market dominance in the market for API of chlorpheniramine in China, whilst Hunan Erkang Pharmaceutical served as the sales distributor of paracetamol for an Indian company, Supriya Lifescience Ltd. The theory was that the parties could have obtained the most share of the production and imports of the API of chlorpheniramine in China should the merger be completed.[8]

Insights

One should assume that there will be continued close scrutiny on sectors of strategic significance, especially the semiconductor industry and the platform economy. As evidenced above, most of the conditionally approved cases have involved the semiconductor industry. China is the largest semiconductor market across the globe, and thus it is of vital importance from both antitrust and industrial perspectives to ensure the security supply of components for the

development of China's semiconductor industry. In addition, the Platform Economy Guidelines explicitly state that the platform economy should not be exempted from merger review and confirm antitrust agencies' power to investigate so-called killer acquisitions. Therefore, it would be reasonable to expect that the SAMR will keep a close eye on any platform transactions involving nascent competition threats.

More broadly, for high-profile transactions generally, it should be remembered that geopolitical reach and international tension may also have a negative impact on the merger review to some extent. For example, against the background of the United States-China trade war, the supply chain disruption risk (especially in the semiconductor industry) can be intensified, resulting in greater uncertainty and unpredictability of the merger review timeline for complex and/or high-profile semiconductor transactions. Competition authorities in China may also have different appetites for high-profile transactions and not always negative. Taking the *Microsoft/Activision* deal as an example, announced in January 2022, this deal faced great difficulties in obtaining approval in several major jurisdictions. Specifically, the U.S. FTC initiated a lawsuit attempting to block the transaction in December 2022[9] and asked for a preliminary injunction of the deal in June 2023,[10] and the UK CMA blocked the deal in April 2023.[11] While also expressing concern, the European Commission conditionally approved the case.[12] On the contrary, this deal was unconditionally approved by the SAMR in China in May 2023. Yet, the SAMR found that the merger would have little impact on the domestic market, given that Activision does not have a distributor in China and the market share of Microsoft's Xbox consoles in China is negligible. This signifies that the antitrust agency in China has its own review perspective, rather than merely following the approach in other major jurisdictions. Hence, for cross-border transactions, it is advisable for transaction parties to assess the competition risks in the major jurisdictions separately.

Lastly, transaction parties need to consider these antitrust complexities at the outset of deal planning, especially for complex and/or high-profile transactions. For example, it may be more unpredictable to estimate the review timeline for complex and/or high-profile transactions with strategic significance (e.g., semiconductors), due to the more uncertainty caused by geopolitical tension between the United States and China and the application of the stop the clock mechanism. Therefore, parties need to carefully envisage the transaction timetable to avoid any economic loss incurred due to the delay caused by the merger review.

Antitrust Investigations: Recent Developments in the Legislation for Antitrust Investigations

To date, the SAMR has released five AML implementing rules since the law came into effect,[13] among which are the latest Provisions on Prohibiting the Abuses of Intellectual Property Rights to Exclude or Restrict Competition (Provisions on Abuses of IPR) effective from August 1, 2023. The Provisions on Abuses of IPR introduce a new article to regulate excessive pricing practices in the intellectual property rights (IPR) sector and retain the focus on the abuse of injunctive relief in the latest draft. This demonstrates the SAMR's efforts to strike a balance between ensuring reasonable returns for IPR holders and preventing exploitative IPR practices. This also heightens antitrust risks for Standard-Essential Patent (SEP) holders, particularly when seeking protection against infringement through either authorities or courts.

In addition to implementing AML regulations, antitrust guidelines also play a vital role in guiding the agencies' enforcement approaches and emphasizing enforcement priorities. Currently, the Anti-Monopoly Commission under the State Council has issued four industry-specific guidelines, successively. These guidelines provide guidance for enforcement activities in the auto sector, the platform economy, the API sector, and the IPR field.[14] These guidelines offer detailed explanations of the typical forms of monopolistic conduct in those industries, as well as potential justifications or efficiencies based on industry characteristics. Additionally, the SAMR published its draft Antitrust Guidelines for the Standard Essential Patents (Draft SEP Guidelines), for which public comments closed in July 2023.[15] The Draft SEP Guidelines extensively address SEP-related antitrust issues, particularly abusive practices such as excessive pricing, tying, imposing unreasonable trading conditions, and abuse of injunction actions.

Antitrust Investigation Cases

From 2020 to 2022, the SAMR launched 20, 30, and 18 investigations on monopolistic agreements, respectively. Among them, the number of concluded cases was 16, 11, and 16, and the total penalties and confiscation amounted to RMB 104 million, 1,673 million, and 569 million for the three years. Medicines and construction materials attracted the most enforcement attention in the past three years.

As for investigations on abuse of market dominance, the SAMR concluded 13 cases in 2022, imposing penalties and confiscation of RMB 166 million. In 2021, the SAMR concluded 11 cases of abusing market dominance with penalties and confiscation totaling RMB 21,847 million. In 2020, the SAMR concluded ten cases of abusing market dominance with penalties and confiscation totaling RMB 341 million. Public sectors (e.g., water/gas supply), medicines, and Internet platform industries faced the most stringency from the SAMR in these three years. In this section, we review some of the key cases.

The SAMR's Investigation on Alibaba's Abuse of Dominance. On April 10, 2021, the SAMR imposed an administrative penalty on Alibaba, an Internet hyper-scaler of China, for its abuse of dominance in China's online retail platform service market through implementing the "either-or" provision. The SAMR ordered Alibaba to cease its illegal behavior and imposed a fine of RMB 18,228 million (four percent of

its China sales in 2019), which so far remains the highest fine in China's antitrust enforcement arena.

According to the penalty decision released, the SAMR investigated Alibaba's behavior in the market for online retail platform services in China. The relevant market was defined through analysis of both demand-side substitutability and supply-side substitutability. It is worth mentioning that the SAMR considered the online retail platform service market as a two-sided market serving two groups, i.e., online retail merchants and consumers. The market is characterized by an indirect network effect where demands for the service by merchants and consumers are closely related. Therefore, the SAMR conducted a demand-side substitutability analysis from the perspectives of both retail merchants and consumers.

Another highlight of the Alibaba case is that the SAMR for the first time found the either-or conduct to constitute the exclusive dealing as prohibited by the AML. The challenged conduct included a) prohibiting merchants on the platform from starting a business on Alibaba's rival platforms; b) prohibiting merchants on the platform from participating in promotional activities on Alibaba's rival platforms; and c) adopting various rewarding and punitive measures to ensure the implementation of the exclusivity requirement.

The SAMR's Investigation on Yangtze River Pharma's Retail Price Maintenance. On April 15, 2021, the SAMR imposed on Yangtze River Pharma, a pharmaceutical company in China, a fine of RMB 764 million (three percent of its sales in 2018) for engaging in resale price maintenance (RPM) when distributing medicines within China.

The SAMR found that Yangtze River Pharma reached and implemented monopoly agreements on fixing and restricting resale prices with its counterparties (including its first- and second-tier distributors, chain pharmacies, and other retail pharmacies). Specifically, Yangtze River Pharma reached the agreements by entering into agreements containing RPM clauses with its counterparties, as well as issuing written and verbal notifications requiring its counterparties to adjust resale prices accordingly. Yangtze River Pharma had further implemented these RPM agreements by establishing a price control system, a monitoring system, and a penalty system for counterparties who failed to comply with the pricing policy.

According to the penalty decision, Yangtze River Pharma argued that its RPM practices should be exempted from the AML for two reasons. First, Yangtze River Pharma contended that its purpose was to facilitate the successful launch of new medicines and give consumers more choices. Having such a purpose, the conduct at issue should be regarded as an improvement of technology and development of new products, and thus be exempted from the AML. Second, Yangtze River Pharma argued that the purpose of its conduct was to prevent distributors and pharmacies from competing at low prices, thereby encouraging distributors and retail pharmacies to strengthen investments in the distribution chain and ensure the quality of drug products, rendering the conduct at issue eligible for exemption from the AML. However, both contentions were rejected by the SAMR on factual grounds (i.e., the RPM was irrelevant to the new product) and that ensuring product quality and safety is a basic regulatory requirement of the pharmaceutical sector regardless of commercial considerations.

The SAMR's Investigation on CNKI's Abuse of Market Dominance. On December 26, 2022, the SAMR imposed an administrative penalty of RMB 87.6 million, which constitutes five percent of the faulty player's 2021 domestic sales revenue on CNKI, an academic database platform in China. CNKI allegedly abused its dominance in the market of Chinese academic literature network database service in China through implementing a) unfairly excessive pricing, and b) exclusive dealing since 2014. Aside from the five percent fine, the SAMR also ordered CNKI to cease its exclusive contracting.

Regarding the relevant market definition, similar to the previous Alibaba case introduced above, the SAMR again took into consideration the multi-sided nature of the platform. The SAMR considered CNKI as competing in a multi-sided market comprised of database users (on one side) and academic resource providers (such as Chinese academic journal publishing institutions, colleges and universities, research institutes, public libraries, and individual users on the other).

Regarding CNKI's behavior of imposing unfairly excessive pricing, the SAMR took the "historical price-cost comparison" test (i.e., to examine whether the price has been increased beyond the normal range when the costs are essentially stable) and the "competitor-price comparison" test (i.e., whether the price has been increased significantly more than that of competitors in the same industry), concluding that CNKI had continued to drive up the price of database service through unfair means. While regarding exclusive dealing, CNKI was recognized to have inhibited both publishers and universities from authorizing the use of relevant data to other competitive platforms. It also employed punishment measures including discriminatory royalty fees to ensure the implementation of such arrangements.

Insights

The above recent updates in antitrust enforcement rules, coupled with increased stringency in investigations on sectors closely connected to people's livelihood and social well-being, indicate a continued enhancement of antitrust regulation in China. Industries such as pharmaceuticals, digital platforms, and APIs are expected to remain enforcement priorities.

Looking ahead, we anticipate a more dynamic landscape in the investigation of monopoly agreements in China. One reason for this is the AML Amendments, which now grant companies under RPM investigation the opportunity to defend their practices by proving the absence of anticompetitive effects. This shift will result in future RPM investigations placing greater emphasis on competition effect

analysis, facilitating the development of a more comprehensive analytical approach for assessing RPM conducts. Further, the new AML introduces an article specifically targeting hub-and-spoke agreements in order to close all of the regulatory gaps between vertical and horizontal monopoly agreements. Meanwhile, it also raises pertinent questions regarding the definition of the role of hubs in such agreements and how to evaluate their involvement, which await further clarification through future enforcement actions.

In terms of abuse of market dominance, there has been a growing number of antitrust investigations in recent years, especially in public sectors and the platform economy. We expect enforcement priorities to continue focusing on sectors such as APIs and others with significant public impact. In addition, the SAMR will likely continue to investigate cases that garner wide attention, as indicated by the *Alibaba* case, the *CNKI* case, and a few APIs that caused supply shortages of critical drugs.

Considering some unique features of the AML in China—specifically, its regulation on excessive pricing conducts—Chinese antitrust agencies are poised to play an increasingly important role in shaping the landscape of SEP licensing. This is evident through the recent release of the Provisions on Abuses of IPRs and the Draft SEP Guidelines. SEP holders and other IPR holders must remain informed on the latest developments, anticipate how their practices will be evaluated under the AML, and proactively devise effective plans to address potential claims.

Litigations:

Private antitrust litigation in China plays a crucial role in enforcing the AML and is widely acknowledged as a crucial aspect of the "double-track" enforcement system for the AML. In recent years, the Supreme People's Court (SPC) and other lower courts in China have made extensive efforts to shape antitrust litigation in the country. They have clarified numerous high-profile and contentious issues through draft updates on judicial interpretations and landmark antitrust judgments. These developments are expected to have substantial impacts on future antitrust practices in China.

Recent Developments on the Draft Antitrust Judicial Interpretation in China

In parallel with the SAMR, the SPC has also been engaging in efforts to reflect the recent AML Amendments and to respond to new circumstances in the evolving and complex antitrust landscape in China. (We note here that for most practitioners in other countries, it is unusual for a court to issue rules and guidance absent a litigated decision.)

For instance, in November 2022, the SPC released a draft of Provisions of the Supreme People's Court of the People's Republic of China on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases (the Draft). Compared to its predecessor, this Draft is much more comprehensive and detailed, with the number of articles increasing almost threefold from 16 to 52. Among others, the SPC makes several bold attempts to introduce new concepts such as "competing undertakings," "single economic units" and "as-efficient competitors," specifies new forms of monopolistic conduct such as the "pay-for-delay" agreement, and offers more detailed explanations and guidance on the analytic approaches in assessing the alleged monopolistic practices, especially on excessive pricing and abusive practices in industries with special features (e.g. platform economy and IPR field). All of the above, if implemented, are expected to have profound implications for the antitrust judicial practices in China.

Recent Developments in Antitrust Litigation Cases in China

An Overview of the Recent Developments in the Antitrust Litigation Landscape in China. With the growing awareness of antitrust law, Chinese courts have witnessed a surge in antitrust cases. For instance, the SPC alone accepted 79 antitrust civil appeal cases and 26 antitrust administrative appeal cases from 2019 to 2022.

Meanwhile, with a strong emphasis on antitrust regulations and the steady accumulation of comprehensive expertise, Chinese courts have demonstrated their adeptness in handling complex antitrust cases and issuing rulings that have significant impacts nationally and globally. For instance, the SPC has developed a comprehensive analytical framework for addressing excessive pricing issues of patented drugs, under which the SPC fully considers the unique characteristics of innovative products and seeks to strike the right balance between preserving incentives for innovation and the necessity for antitrust intervention.[16] Additionally, the SPC has successfully resolved a variety of other antitrust lawsuits related to intellectual property rights, involving issues such as exclusive licensing of copyrights owned by sports unions,[17] patent settlement agreements between competitors,[18] and pay-for-delay agreements.[19]

Moreover, the SPC has improved its alignment and coordination with the antitrust enforcement agencies. For instance, the SPC established that the plaintiffs in a follow-on antitrust damage claim are not required to prove the illegality of alleged monopolistic conduct if such conduct has been fined in a valid antitrust decision.[20] And the SPC affirmed that it is reasonable for antitrust regulators to calculate antitrust fines based on the total sales of the company concerned, instead of the sales of the products in question.[21]

A Closer Look at Three Recent Landmark Antitrust Litigation Cases. While the SPC issued many noteworthy antitrust judgments in recent years, we chose the following three landmark cases as they exemplify the intricate intersections between patent rights and abuses of dominant position, pay-for-delay agreements, and abuses of dominance in the platform economy. These cases are anticipated to have substantial implications for sectors such as high tech, pharmaceuticals, and the platform economy.

Yangtze River Pharma v. HIPI Pharma. On May 25, 2023, the SPC finally delivered its long-awaited judgment in the *Yangtze River Pharma v. HIPI Pharma* case. In this extensive 175-page ruling, the SPC reversed the lower court's decision which required HIPI Pharma (HIPI) to pay Yangtze River Pharma civil damages totaling around RMB 70 million and rejected all claims put forth by Yangtze River Pharma.

Among the various findings, we find the following standing out as particularly noteworthy.

First, the SPC carefully recognized and analyzed the special features of input products in its analysis for market definition and market dominance. Specifically, the SPC acknowledged that the demand for inputs is derived from the demand for the final product. Therefore, input suppliers not only face direct competition from other competing input suppliers but also face indirect competition from the downstream market competition of the final product. Whether these indirect competition constraints should be considered in the relevant market definition, or the determination of market dominance depends on the specific circumstances of each case. If the indirect competitive constraint from the downstream markets is significant enough, then it should be considered in the definition of the relevant market. Otherwise, it can be considered in the determination of market dominance.

Second, the SPC set clear boundaries for antitrust intervention on prices and highlighted the high risk of misjudgment when intervening in prices from the antitrust perspective. The SPC explicitly held that "if the practice of high pricing does not have a clear effect of excluding or restricting competition, neither does it clearly harm consumer welfare, then it is not appropriate to simply identify it as an abuse of dominant market position," and "the determination and regulation of unfairly high pricing conduct shall be especially prudent."

To mitigate the risk of misjudgment, the SPC has established a "three-step" analytical approach for excessive pricing issues:

- In the first step, the SPC examines the competitive landscape and innovation risk in the relevant market. The SPC emphasizes that the more competitive the market is and the higher the level of innovation risk is, the more caution shall be exercised in regulating high prices.
- In the second step, the SPC suggests utilizing various economic tools to analyze whether the price is excessive or not. In this step, after a holistic assessment of different economic tools proposed by the parties, the SPC held the internal rate of return (IRR) is a proper economic tool for assessing the price in this case and further concluded the price charged by the defendant is not excessive as compared to reasonable IRR range for similar products. (Please see "Economic Analysis Applied in Mergers, Investigations, and Litigations" for a detailed introduction and analysis of how the SPC applied economic methods in this case.)
- In the final step, the SPC assesses the impact on market competition and consumer welfare to verify the initial conclusion reached in step 2. The SPC highlights the potential "price-squeezing" effects on the as-efficient competitor when the dominant player is vertically integrated. After reviewing all the evidence, the SPC concludes that there is insufficient evidence to suggest anti-competitive effects or harm to consumer welfare in this case.

Last, but certainly, not least, the SPC also provided much-needed clarifications on rules regarding tying and the imposition of unreasonable trading conditions. For example, when examining the alleged tying practices, the SPC supported the IPR defense raised by the defendant and held that if tying is a natural outcome of exercising lawful IPRs, it should not be condemned under antitrust laws. Additionally, the SPC outlined that both the presence of "mandatory" conditions and the occurrence of "undue harm to trading counterparties or the receipt of undue benefits by dominant players" are crucial elements in determining whether the imposition of unreasonable trading conditions has taken place in China.

As the first case of its kind involving patented drugs, this case fully demonstrated the SPC's approach of meticulously striking a balance between the protection of IPR and the promotion of market competition, which offered clear guidance for antitrust disputes that involve IPRs or innovation risks. This would undoubtedly be welcomed by high-tech companies and IPR holders.

AstraZeneca AB v. Aosaikang Pharma.[22] This was initially a patent infringement case rather than an antitrust case. However, when reviewing the request to withdraw the appeal, the SPC observed that the patent settlement agreement involved in this case appeared to be a pay-for-delay agreement and that there was no need to challenge the disputed patent's validity. Considering the public interests involved in antitrust issues, the SPC decided to conduct a preliminary antitrust review of the settlement agreement to assess whether it excluded or restricted competition.

In its review, the SPC emphasized that the effects of such agreements on competition can be evaluated by comparing the actual situation, where the agreement is signed and performed, with the hypothetical situation in which no such agreement exists. And, in this case, the SPC deemed that the key factor to consider in this process was the likelihood of the party succeeding in its invalidation challenge against the disputed patent, as this would impact the assessment of whether the agreement unduly prolonged the exclusivity of the patent rights and significantly delayed or hindered the entry of generic drug applicants into the market.

While pay-for-delay agreements have been a hot topic in the United States for many years, they did not receive much attention from Chinese courts or agencies until the end of 2021, when this case came into the spotlight. As a first of its kind, the case underlined the potential antitrust

risks associated with reaching settlement agreements on patent matters in China, and no doubt further highlighted the importance for companies to seek antitrust counsels' assistance when reviewing such agreements.

HUANG Wende v. Didi.[23] This case is the most recent antitrust judgment from the SPC regarding the abuse claims in the platform economy. Didi is a prominent ride-hailing service provider in China, and in 2019, it was sued by a passenger for the alleged abuses of its dominant position in the mainland China ride-hailing market.

The most noteworthy aspect of the case is the SPC's definition of the relevant product market for ride-hailing services. While the passenger argued for a separate market for ride-hailing services, Didi advocated a market that includes both traditional taxis and ride-hailing services. After a careful review of the evidence, the SPC agreed with Didi and defined the relevant product market as the taxi transportation service market and declared the following findings:

- Traditional taxis and ride-hailing services are closely substitutable in terms of their functions and intended uses, as they both cater to the personalized "point to point" transportation needs of passengers and operate based on the passengers' willingness.
- Although traditional taxis used to be mainly hailed on the street while ride-hailing services are primarily hailed online, this distinction is becoming less important as online hailing of traditional taxi services is becoming more prevalent.
- There were no significant differences in terms of quality or pricing between traditional taxis and ride-hailing services.
- Furthermore, there were no substantial differences in the difficulties passengers faced in obtaining these two types of services.

The SPC further found the relevant geographical market to the local city, i.e., Zhengzhou (a Chinese city), and defined the relevant market as the taxi transportation service market in Zhengzhou city. In such a relevant market, the SPC concluded that Didi faced strong competitive constraints and there was insufficient evidence to establish its dominance. Consequently, all claims made by the passenger were dismissed by the SPC.

Insights from the Recent Developments on Antitrust Litigations in China

From recent developments in antitrust judicial interpretations and practices, we can see that the SPC and other specialized courts in China have a growing influence in shaping antitrust enforcement in China. These courts now generally prefer an effects-based approach when assessing alleged monopolistic conduct. Importantly, however, they also provide defendants with ample opportunities to present and substantiate the rationale and efficiency behind their business practices. This, in turn, also underscores the value of involving economic experts in antitrust litigation cases in China.

We also observed that the SPC engaged in serious efforts to alleviate the burden of proof on plaintiffs and address the current low success rate for antitrust plaintiffs. And, in relieving plaintiffs of the need to prove alleged monopolistic conduct in follow-on damage claims and anti-competitive effects in RPM cases, we see this as a signal of the SPC's willingness perhaps to do this in other areas. Consequently, we anticipate that plaintiffs may be even more motivated to bring antitrust cases before the courts, leading to a potential increase in the number of antitrust lawsuits in China.

By contrast, we also observed that the SPC and other courts in China tend to be more cautious when it comes to IPR-related abusive conduct and seem to put great emphasis on the importance of preserving innovation incentives and avoiding chilling effects. This approach is generally well received by high-tech companies and those holding significant IPRs. As a result, it is likely to encourage IPR holders and other innovators to vigorously defend their antitrust cases in China, considering not only the competitive effects but also the potential impacts on innovation.

Economic Analysis Applied in Mergers, Investigations, and Litigations:

China's antitrust authorities and courts have adopted multiple economic analysis tools in mergers, investigations, and litigations. In this section, we will look into the economic analysis in some specific cases, discuss the tools that the agencies and courts have used, and try to display the tendency of economic analysis in antitrust cases in China.

Economic Analysis in Merger Reviews. The Herfindahl-Hirschman Index (HHI), diversion ratio, and the Gross Upward Pricing Pressure Index (GUPPI) are all widely used in merger filings of horizontal cases. The HHI can serve as an indicator to analyze the relevant market concentration changes before and after the transaction. The diversion ratio may be utilized to measure the degree of close competition between the parties, and the GUPPI is used to measure the possibility of price increases by the post-transaction entity.

In the merger review of the acquisition . . . in 2021 of MTS Systems Corporation's (MTS's) Test & Simulation business by Illinois Tool Works Co., Ltd. (ITW), for example, the SAMR applied the quantitative economic indicators above when assessing the anticompetitive effects of the transaction. The SAMR first used the increasing HHI to indicate the significant increase of market concentration due to the transaction, then analyzed the diversion ratio from MTS to ITW to show the close competition relationship between the parties. Besides, the SAMR calculated a GUPPI of 21.7 percent, which was much higher than the ten percent threshold and showed that there was a great possibility that the parties would increase the price unilaterally after the merger.[24]

In the merger review of the acquisition of WABCO Holdings Inc. (WABCO) by ZF Friedrichshafen AG (ZF) in 2020, the SAMR hired independent third-party consulting agencies to conduct the economic analysis of the

competition issues. The economic analysis showed that in the short term, even if the post-merger entity loses all the profit in the upstream market due to the implementation of input foreclosure, it can still make up for it by capturing enough profits from the downstream market. The SAMR concluded that the post-merger entity would have both the incentive and the ability to implement input foreclosure. The SAMR conducted a quantitative analysis to prove the conclusion, which showed that the post-merger entity could make profits through input foreclosure if it cuts its supply to the downstream customers by more than 15-20 percent in the Chinese market. However, this cutoff point rose to 25-30 percent for the global market.[25]

Economic Analysis in the Platform Economy

Economic Analysis in the SAMR's Investigation on CKNI's Abuse of Market Dominance (2022). In the investigation of CKNI's abuse of market dominance, the SAMR made full use of economic analysis tools. The SAMR analyzed the HHI and found that the relevant market was highly concentrated. In its analysis of the excessive pricing behavior of CNKI, the SAMR found that users' demand for CNKI's database service was inelastic. This means that even if CNKI increased the price of the database with stable costs, users would still have to accept the price increase and purchase the database service. Since 2014, CNKI has raised its service fee by a large amount, with a CAGR of 10.06 percent, much higher than the four percent CAGR adopted by its competitors. Coupled with the fact that users had weak bargaining power, CNKI was able to earn unfairly large profits through its abusive excessive pricing conduct. CNKI was fined five percent of its annual in 2021 (RMB 87.6 million) by the SAMR.[26]

Critical Loss Analysis in Shanghai AMR's Investigation on Sherpa's Either-Or Abusive Conduct (2020). Sherpa's is an online food delivery platform, which mainly provides English food delivery service information and delivery services. In June 2019, Shanghai AMR initiated an antitrust investigation on its either-or abusive conduct and issued a penalty decision in December 2020.

In Sherpa's case, the online food delivery platform is a typical two-sided platform. The platform makes profits by brokering transactions between consumers on one side and restaurant merchants on the other side and charging service fees. There is an indirect network effect between consumers and restaurant merchants. The demand from consumers and restaurant merchants is negatively affected not only by the fees charged to themselves but also by the fees that the platform charges on the other side. If the online food delivery platform increases the fees charged to consumers (i.e., the delivery fees), it will reduce the number of orders and in turn reduce the willingness of restaurant merchants to join the platform. The same applies to the other side.

With respect to the relevant market, Shanghai AMR used a hypothetical monopolist profit model and conducted the critical loss analysis with market transaction data. Shanghai AMR assumed that the hypothetical monopolist controlled all the target products in the market and increased the price by a small amount (generally five percent to ten percent) over a period of time. By comparing the critical loss rate and the actual loss rate when the price of the target product increases, we can determine whether the price increase of the hypothetical monopolist is profitable. If the actual loss rate exceeds the critical loss rate, the price increase is unprofitable, and the target product cannot constitute the relevant market alone. On the contrary, if the actual loss rate is less than the critical loss rate, the price increase is profitable, and the target product can constitute a relevant market.

Shanghai AMR examined two scenarios for the robust critical loss analysis. In the first scenario, the agency only assumed changing delivery fees. It showed that the higher the delivery fee, the lower the order volume. However, consumer demand was less sensitive to the delivery fee compared with the meal charge. Therefore, if the monopolist was willing and capable, a slight increase in the delivery fee was still profitable. Under the second scenario, Shanghai AMR assumed both changing delivery fees and changing commission rates. If the monopolist was capable of raising both the delivery fee and the commission rate by a slight amount, it could earn more gross profit without losing orders.

Based on the above quantitative analysis as well as the qualitative substitution analysis, the SAMR concluded that the market for online food delivery platform services that provide services in English constituted a separate relevant product market.[27]

Economic Analysis in the Pharmaceutical Sector

Economic Analysis in the SAMR's Investigation of Yangtze River Pharmaceutical Group (2021). In its investigation of Yangtze River Pharma's alleged RPM behaviors in 2019, the SAMR used economic simulation to assess the anticompetitive effects. SAMR simulated the competitive resale prices of some drugs of Yangtze River Pharma in 2018 and 2019 in Shanghai. The SAMR then compared the simulated results with the actual resale prices and hospital purchase prices during the same period. The SAMR concluded that Yangtze River Pharma's RPM behavior caused a significant increase in the prices of drugs, which further led to a significant increase in social expenditure costs, such as increased burdens on patients and damages to the legitimate interests of consumers and the public.

More specifically, the SAMR conducted an economic analysis to show that by locking in prices in the retail channel (i.e., in markets with high price sensitivity), Yangtze River Pharma could maintain or even increase the selling price in the hospital channel. From the perspective of the market environment, the general trend was that more and more people held hospital prescriptions but purchased drugs from retail pharmacies. However, the demand for retail pharmacy drugs was more price sensitive than the demand for hospital-sold drugs. Therefore, by locking in prices in the retail channel, Yangtze River Pharma could indirectly push

consumers into the hospital channel. Meanwhile, prices in the retail channel were Yangtze River Pharma's invoice price and thus could be manipulated by Yangtze River Pharma, as opposed to prices in the hospital channel, which were constrained by the winning bid price. Therefore, Yangtze River Pharma was both willing and capable of maintaining or increasing the prices in the retail channel, which in turn inflated the benchmark price in the hospital channel, ultimately achieving the goal of maintaining or increasing the prices in the hospital channel. Yangtze River Pharma was fined three percent of its 2018 income from sales (RMB 0.76 billion).[28]

Economic Analysis in Yangtze River Pharma v. HIPI Pharma (2023). In the May 2023 judgment of the case *Yangtze River Pharma v. HIPI Pharma*, the SPC largely adopted the economic analysis of HIPI's experts and determined that HIPI's allegedly abusive conduct was justified as legitimate business conduct.

When assessing the market dominance of HIPI in the Desloratadine Citrate Disodium (DCD) API market, the SPC found that HIPI's market power was constrained by indirect competitive restraints from downstream competition. The stronger the correlation between the demand for intermediate goods and the demand for finished goods, the greater the indirect competitive restraints from the market of finished goods. In this case, the DCD API had no close substitutes and was used in only one finished good. The market demand for the DCD API was derived from the market demand of the downstream drug "Beixue." Moreover, there was no substantial barrier or cost for Yangtze River Pharma to switch to the production of other competing drugs. Therefore, HIPI's market dominance was substantially weakened by the downstream indirect constraints.

When analyzing whether HIPI's selling price of DCD API at RMB 48,000/kg constituted excessive pricing, the SPC largely adopted the IRR calculations of HIPI's experts. In addition, the SPC indicated that IRR was a more robust choice than the profit analysis, as the comparison of IRR could reflect the return on inputs and profitability. IRR also avoided the problem of inaccuracy when approximating the economic rate of return with the accounting rate of return, because the calculation of IRR was simply finding the proper discounting rate that would discount the total future cash flows to a net present value of zero. As to the detailed calculation of IRR, the SPC also supported HIPI's proposal to adjust the research and development (R&D) cost by the development success rate, to cover the costs of failed projects with the profitability of successful drugs. HIPI also allocated the R&D cost based on the supply ratio of API between the two downstream drugs "Beixue" and "Puruikang." After the adjustment, HIPI's IRR amounted to 24.4 percent. Such a rate was quite common among Chinese innovative drug companies, as the IRR of the latter is generally above 20 percent and may even exceed 40-50 percent.

Besides, considering the significant economic value that the API in question conveys to the finished drug, the DCD API accounted for only four percent of the price of Beixue, much lower than the proportions of APIs in other pharmaceutical preparations. The SPC concluded that the DCD API was not overpriced.[29]

Insights

Not only the antitrust authorities in China such as the SAMR and the local market regulatory agencies, but also the courts, are increasingly applying rigorous economic analysis in merger filings, antitrust investigations, and litigations.

- In the economic analysis of the platform economy, antitrust agencies are taking more consideration of the features of platform enterprises, such as the utilization of indirect network effects when defining the relevant market and determining the abuse of market dominance.
- Economic tools provide strong support and innovative perspectives for the Chinese judiciary in the pharmaceutical sector. For example, the IRR of a patented drug that considers not only the production cost but also the R&D cost and the success probability of a new drug is deemed as a much more reasonable index to assess the excessive pricing allegation. And the necessity of exclusivity could be justified by patent protection of innovative drugs. It shows the protection of innovation by China's judicial authorities, affirming that the lawful exercise of intellectual property should be protected and not prohibited by antitrust laws.
- For merger reviews, the SAMR employs various economic analysis tools and focuses on the assessment of potential input foreclosures and unfairly high pricing which can result in changes in the profits of the merging parties before and after the merger.
- Looking ahead, with the development of new economic forms such as the digital economy, there will be more complexity in the antitrust analysis. With data supporting theories, and quantitative analysis supporting qualitative analysis, a closer combination of the two will make a stronger statement. This is especially helpful in assisting the agencies and the courts to make more informed decisions. We expect that economic analysis will play an increasingly important role in China's antitrust system.

Conclusion: Antitrust in China is Dynamic

In China, the methods to tackle merger reviews, antitrust investigations, and antitrust litigations are varied. With the assistance of economic analysis, many innovative interpretations of laws and regulations were made by antitrust agencies and courts. Progress also stems from updated legislation, such as the AML Amendments, and guidelines in the platform economy, API and IPR, etc. We can expect that strong regulation and antitrust enforcement in these key sectors

will persist in the foreseeable future. In addition, landmark cases in antitrust litigation can serve as practical guidance and as interpretations of legislation in real business applications. Lastly, the cases also demonstrate the importance of economic tools that are widely and well adopted by antitrust agencies and courts, in order to reach conclusions based on more robust evidence and logic. ■

[1] Article 32 of the AML stipulates as below. Under any of the following circumstances, the Anti-monopoly Law Enforcement Agency of the State Council may decide to suspend calculation of the time limit for the review of a concentration of undertakings, and notify the undertakings concerned in writing: (1) where the undertakings concerned fail to submit documents and materials in accordance with the relevant provisions, thereby making the review impossible; (2) new circumstances or facts occur that have a material impact on the review of the concentration of undertakings and will result in the failure to carry out the review without verification; and (3) where it is necessary to further assess the restrictive conditions attached to the concentration of undertakings and the undertakings make a request for a suspension. Calculation of the review period shall continue from the date on which the cause of suspension of calculation is eliminated. The Anti-monopoly Law Enforcement Agency of the State Council shall notify the undertakings concerned in writing.

[2] SAMR, Annual Report on Antitrust Enforcement in China (2020), (Sep 3, 2021), https://www.samr.gov.cn/xw/zj/art/2023/art_c339a6851fa6479a8fa9ed7756d17a83.html.

[3] SAMR, Annual Report on Antitrust Enforcement in China (2021), (Jun 8, 2022), https://www.samr.gov.cn/xw/zj/art/2023/art_bfac0acc333e4bd0be85adf099272047.html.

[4] SAMR, Annual Report on Antitrust Enforcement in China (2022), (Jun 9, 2023), https://www.samr.gov.cn/xw/zj/art/2023/art_38056964cf5449daa346237200e24da0.html.

[5] Wall Street Journal, *Chip Shortages Are Starting to Hit Consumers. Higher Prices Are Likely*, https://www.wsj.com/articles/chip-shortages-are-starting-to-hit-consumers-higher-prices-are-likely-11624276801.

[6] Namely, GlobalWafers/Siltronic, AMD/Xilinx, and II-VI/Coherent.

[7] SAMR, Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on the Approval of II-IV's Acquisition of Coherent with Additional Restrictive Conditions, (Jun 28, 2022), https://www.samr.gov.cn/jzxts/tzgg/ftjpz/art/2023/art_1ecbf7a1e3e94bc1bf1480b1fbed36fb.html.

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GLOBAL SEMINAR SERIES Tokyo

NOVEMBER 29, 2023
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Antitrust Law Section

Please join us on November 29, as the Antitrust Law Section will bring together a group of distinguished speakers in Tokyo for this year's Global Seminar Series (GSS). Registration is complimentary and required prior to November 22 (or when capacity has been reached). Online registration is open at ambar.org/atgsstokyo

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9:00 – 9:45 **Welcome & Keynote: Kazuyuki Furuya, Chair, Japan Fair Trade Commission, Tokyo**

9:45 – 10:40 **Session I: ESG/Sustainability**

Corporations are increasingly focused on environmental, social and governance (ESI) principles, including participating in industry collaborations and engaging with government agencies to advance ESI goals. While the spirit of these efforts may be positive, they can implicate the antitrust laws and present risk for participants. Our panel will discuss how ESI efforts may create competition issues, and how enforcers are balancing the benefits of ESI efforts with the potential impact on competition.

10:40 – 11:00 **Enforcer Highlight**

11:15 – 12:10 **Session II: Merger Developments**

Several jurisdictions now have merger control regimes with potential reporting requirements, thus making the merger filing process more burdensome and creating greater cost and risk for transacting parties. In the U.S. and elsewhere, we are seeing meaningful changes in merger enforcement policy and practice. Our panel will review these developments and discuss what practitioners can do to navigate the increasingly complex merger filing process.

12:10 – 12:30 **Enforcer Highlight**

12:30 – 13:30 **Lunch**

13:30 – 14:25 **Session III: Digital Economy**

Antitrust has been dominated in recent years by news of enforcers' focus on large tech platforms. We are also seeing regulators and lawmakers grapple with the antitrust and other implications of artificial intelligence and how it will shape competition enforcement in the years to come. These developments have implications not just for large tech companies, but for antitrust policy and enforcement generally. Our panel will review the state of play and developments in the U.S. and Asia and provide insights into what may be coming.

14:25 – 14:45 **Enforcer Highlight**

14:45 – 15:40 **Session IV: Hot Topics**

The panelists will review several key issues and developments in the world of competition law, including cartel enforcement, the intersection of antitrust and labor markets, and more.

16:00 – 17:00 **Session V: Enforcers Panel**

17:00 – 17:10 **Closing**

Roundtable on the DOJ Leniency Program*

American Bar Association Antitrust Law Section
Tuesday, August 22, 2023

MODERATOR

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SPEAKERS

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Anna Pletcher
Partner, O'Melveny & Myers, San Francisco, CA

Richard Powers
Partner, Fried Frank, New York, NY

Anne Riley
Independent Competition Consultant, Ellesmere, England

KELLIE LERNER: Good afternoon and welcome. I have the pleasure of introducing today's esteemed panel who will be discussing the history and status of the Antitrust Division's Leniency Program. We have Anna Pletcher, who is a Partner in the Antitrust and White-collar practice of O'Melveny & Myers. Before joining O'Melveny, Anna was a trial attorney with the Department of Justice Antitrust Division for ten years and served as Assistant Chief of the San Francisco office.

We also have Jane Norberg, who is a Partner in the Securities and Enforcement Litigation practice at Arnold & Porter. She is the former Chief of the Office of the Whistleblower at the Securities & Exchange Commission, and during her tenure at the SEC Jane helped develop and lead the SEC's whistleblower program since near its inception.

We also have Anne Riley, who served as head of Royal Dutch Shell's global antitrust group from 1992 until 2019 and was a member of Shell's Group Ethics and Compliance Office Leadership Team until her retirement. She has been awarded several legal and compliance awards and is the co-editor of the recently published *Concurrences* book, *Perspectives on Antitrust Compliance*.

Today we also have Richard Powers. Richard is a Partner at Fried Frank. He previously served as the Acting Assistant Attorney General for the DOJ's Antitrust Division during the first year of the Biden Administration and was the Deputy Assistant Attorney General for Criminal Enforcement from 2018 to 2022.

I would also like to thank the Editorial Board members who assisted with planning this Roundtable, including Lisa Wood, Ian Simmons, Sonia Pfaffenroth, Robin Moore, and last but not least, our Executive Editor Kim Van Winkle.

I thank all of our panelists for their participation today in what I expect is going to be a really interesting and lively discussion of the DOJ's corporate leniency program and what we may be able to learn from similar programs under the Dodd-Frank Act.

I thought I would start with Anna just to give us a high-level overview of what the DOJ's corporate leniency program is, and I would ask that with the caveat that we are going to start with the modern incarnation of that program starting in 1993. The floor is yours, Anna.

ANNA PLETCHER: Thank you for inviting me to participate. It is great to be here today.

The DOJ leniency program goes back to 1993. It started off as a way to incentivize companies to self-report. One of the challenges with prosecuting antitrust cases is that it is important to have witnesses who can explain what happened and testify at trial. The most effective way to do that is through the use of cooperators. The leniency program is a brilliant way to incentivize that cooperation and was incredibly successful.

The basic bedrock components of the leniency program are that a company will come to the DOJ and self-report. That means they will admit that they participated in an illegal

*Edited for publication. Antitrust magazine inadvertently published an earlier version of this roundtable discussion that omitted certain edits. This version supersedes the earlier digital version and the print version. We regret the error.

conspiracy. Then the company will provide full cooperation to the government so that they can develop a case against other conspirators. In exchange, the company that is applying for leniency would receive a "free pass": It will not be prosecuted and none of its employees will be prosecuted. Of course, there are a lot of nuances here. There has been an evolution over time in terms of what cooperation entails and what the benefits are, but that is the core concept behind the program.

KELLIE LERNER: We are also going to be talking today about the whistleblower program under Dodd-Frank, so let us hear from Jane just to give us a similar high-level overview of that whistleblower program, and we will dive deeper into it later on in our discussion.

JANE NORBERG: Thanks, Kellie, and thanks for inviting me to be here today.

The Dodd-Frank Act put in place a whistleblower program under the SEC as well as its sister agency the Commodity Futures Trading Commission (CFTC), which has a mirror program. Under the SEC's program there are three core tenets of the program: confidentiality protection, anti-retaliation protection, and monetary awards for individuals who come in and report to the SEC possible securities law violations. If at the end of the day there is an enforcement action that is brought by the SEC based on that whistleblower's original information, then that person may be eligible to receive a monetary award if the enforcement action is over $1 million ordered against the company or the individual. The intent is to incentivize individuals with information regarding possible securities law violations to report them to the SEC to help with the SEC's enforcement goals.

KELLIE LERNER: Thank you, Jane. Moving back to the DOJ corporate leniency program, it has been described as the "lifeblood of cartel enforcement" by DOJ officials and the "most important tool" for detecting cartels or for developing the evidence necessary for cartels, but as Anna said it has evolved.

Richard, could you walk us through some of the main changes to the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) over the years?

RICHARD POWERS: Thanks, Kellie. It is good to be here with everyone on the panel today, and I appreciate the invitation.

As Anna said, the modern version of the leniency policy only goes back to 1993, but in 2004 Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act, which provided additional protections for leniency applicants. In sum, what ACPERA does is allows successful leniency applicants of a DOJ investigation to turn to any private litigation and have its damages detrebled and joint and several liability with its coconspirators removed.

In passing ACPERA, Congress did two things. First, it removed a disincentive for applicants to come in for leniency, because when you apply for leniency, you have to admit to the violation, and that can create liability in private litigation, so it addressed the issue of the additional liability that was being created for leniency applicants. At the same time, it also creates an incentive. It reduces it down to single damages for the applicant and removes joint and several liability with their co-conspirators.

The other ACPERA did was that it further enabled a recovery for victims. To qualify under ACPERA applicants—in addition to being a successful leniency applicant—have to provide timely and satisfactory cooperation to the private plaintiffs. So ACPERA was a big step forward for the leniency policy in 2004 in further reducing disincentives to applying while also adding additional benefits for applicants.

KELLIE LERNER: So one of the main changes is this requirement for timely satisfactory cooperation. Can you or Anna walk us through who cooperation is owed to and how you satisfy it?

RICHARD POWERS: The cooperation has to be provided to the claimants in the private litigation in your typical case. There is probably going to be a separate conversation about who exactly qualifies as a victim in the private litigation, and I would be interested to hear Anna's take on that. In the course of the ordinary antitrust investigation as soon as there is some indication of a government investigation, you tend to see private actions being filed on behalf of the different groups of plaintiffs.

The statute itself defines who the claimants are, and it is pretty broad in the sense that it is anybody who was a victim of the antitrust crime. I would also note that ACPERA also has been interpreted to cover not just the antitrust violation itself, but also any sort of related violations of law that are part of, and in furtherance of the antitrust violation. So that is generally who the leniency applicant has to work with. It is the subject of a lot of back and forth as to who exactly that means because, as you all know—and I think our audience knows—there are all of these different groups of plaintiffs in antitrust cases.

ANNA PLETCHER: Who the cooperation is owed to is a difficult question because there are the plaintiffs, the class, the individual class members, and the opt-outs. There are a lot of different stakeholders involved in these cases, and you can see how plaintiffs might take a broad view of who cooperation is owed to and defendants would take a more narrow view, so it is definitely a subject of controversy.

Just to take a step back on the bigger picture ACPERA was an important development because, as Richard said, it took away a major disincentive to report. As I mentioned

earlier, the core of the leniency program, which was originally called the amnesty program, is that the criminal liability is taken off the table, but the civil liability remains. For a defendant, that is an incredibly important consideration because civil liability can subject companies to millions of dollars of exposure. It can also take a long time to resolve and create a significant distraction for the company and its employees. Sometimes these cases last longer than a decade. So ACPERA was important in the sense that it relieved some of the burden of civil liability, but there are still a lot of difficult and unresolved issues that we have seen, over the last almost twenty years, that raise questions about how effective it is.

KELLIE LERNER: I want to address one other area that has led to some confusion, which is, what is "prompt or timely" cooperation? I guess I will go to you first this time, Anna, and then Richard can follow up with any additional thoughts.

ANNA PLETCHER: ACPERA requires timely cooperation, and what that means is an important question. Does that mean you are cooperating as soon as it becomes known that there is a leniency applicant and an investigation going on? There are some who take that view. Then there are others typically defendants—who might want to delay that cooperation until the case unfolds more. Some plaintiffs may want to settle early and maybe get better deals, but then there is less information out there. So it is a complicated question.

The few times we have seen courts weigh in on ACPERA has tended to be on the issue of timeliness. There is no hard and fast case law about what it means to be timely, and it tends to be a case-by-case decision. In my view, it turns on the reasonableness of the timing of the cooperation, and again that varies case by case.

KELLIE LERNER: Thanks, Anna. Richard, do you have anything to add to that?

RICHARD POWERS: Anna has covered it well; it is very fact-intensive. One thing that can affect the timeliness of the cooperation and the timing of when that cooperation begins is the status of the DOJ's investigation . DOJ has said that there will be times when it will ask the leniency applicant not to provide cooperation because doing so may compromise an ongoing criminal investigation . There may be certain investigative techniques they are trying to take advantage of or maybe other things going on with the investigation that DOJ wants to accomplish before the cooperation with private litigants begins.

One of the things I think we will come back to a little bit later in greater detail is what DOJ did in 2022 with the leniency policy updates, including updating the frequently asked questions (FAQs). In the revised FAQs, DOJ added about five pages of discussion about ACPERA and—again I don't want to jump ahead here—that was intentional and is probably the bulk of the additional material in the revised FAQs. On this question about cooperation, what DOJ said was, "If we ask an applicant not to cooperate, not to provide information to the plaintiffs, we will come in later and tell the court what we did and why we did it." That assurance is there for prospective applicants who might be worried about untimely cooperation under ACPERA. So with that guidance, DOJ is trying to provide transparency and predictability about what it will do down the road to support the applicant.

The other thing, in terms of timeliness, is that the statute itself does contemplate DOJ intervening and getting a stay of discovery. If there is a stay of discovery, the applicant does not have to cooperate for what is covered by the stay. That said, a stay can lead to issues if, for example, the leniency company takes an overly broad view of what that means in terms of limiting its cooperation when there is a limited stay of discovery. But, I think it all goes to the issue of timeliness and what is considered timely, which can depend on the facts and what DOJ is doing in terms of its own investigation and/or seeking stays discovery in the private litigation.

KELLIE LERNER: When is the cooperation satisfied? Is this another requirement where there is room for differences of opinion?

RICHARD POWERS: This is a bit of a moving target. I think courts have been pushed to make this decision before trial. I think some courts have waited until after. There have been different decisions on this. I think DOJ and the FAQs, if I remember correctly, push the parties to get to a resolution on this with the court as soon as possible, again for purposes of predictability. I keep saying "predictability" because that is one of the three cornerstones of leniency policy. Predictability and transparency for the perspective applicants is a key part of the program so that they can anticipate the outcome when deciding whether or not to come in for leniency.

In terms of when is it complete, I think as a technical matter the cooperation has to continue through the litigation because the expectation is that if the applicant needs to provide witnesses at trial that is part of the cooperation. In terms of when does the court make a determination about whether the applicants have provided satisfactory cooperation, that can happen before the trial or after, and it depends on the facts.

KELLIE LERNER: You said there are three pillars. There is predictability and transparency. What is the third?

RICHARD POWERS: Yes, there are three: the threat of severe and significant sanctions, transparency and predictability, and the credible threat of detection, so any leniency policy has to have all three aspects working together.

I said them a little bit out of order for what I might usually say on this topic, but predictability and transparency

in the application of the policy is essential for leniency policies—so that when companies are making this significant bet-the-company-type decision to come in, self-disclose, and admit to the violation, they want to be as assured as they can about the outcome, both in terms of the financial penalties that we are talking about with respect to civil litigation and ACPERA but also of course with the criminal sanctions that Anna mentioned earlier, coverage for culpable executives and the company itself.

The credible threat of detection is if you are sitting there trying to make the decision "Do I self-report or not?", how likely is it that one of my coconspirators is going to beat me to the DOJ's door. I think that is where you see a lot of public messaging from DOJ about this. Threat of detection also comes from DOJ's own, *ex officio*-type, investigative activities.

Severe and significant sanctions are everything we have talked about in terms of penalties. If you are not the leniency applicant, the DOJ commits to aggressively prosecuting everyone else, which means jail time for culpable executives, high criminal fines, treble damages plus joint and several liability in a private litigation, etc. So it is creating that other side of the leniency coin where, if you are not the leniency applicant, these are all the bad outcomes that could happen as a result of the investigation.

JANE NORBERG: May I ask a question for my own understanding? Is it "first in the door," meaning if you are an individual and you are seeking leniency if you come in first and let's say you have a coconspirator and they come in second, are they denied the leniency?

RICHARD POWERS: Generally speaking, yes. There is only one leniency recipient per conspiracy. The only reason I am hesitating a little bit is we always talk about it in the context of companies, but there actually is an individual leniency policy, but it is only what is called a "type A," meaning it only applies for individuals as the leniency applicant if there is no DOJ investigation. But, yes, one leniency per conspiracy, and then for everyone else it is a race to get a better position in terms of discounts on fines, etc.

KELLIE LERNER: Thank you, Richard. That is a very helpful framework to guide us as we think about these issues. Anna, would you like to add anything to what Richard said?

ANNA PLETCHER: To your original question, which was, how do you know when cooperation is complete and satisfied and it is time to grant those ACPERA benefits? From the defense side you want to get as much certainty as you can that your client is going to get those benefits, but it is in tension with the requirement for cooperation, which can extend for a long time.

So you have on one hand the desire to get certainty that you have ACPERA benefits and to know exactly what your damages and restitution are going to look like. On the other hand, you do not know that until you have gone through this process of cooperation and the litigation has played out. One of the challenges of ACPERA in general is that this tension puts the leniency applicant in a difficult situation. There are great benefits to be had; you just do no not know when or whether they might come in. A leniency applicant has to decide whether the benefits of engaging in ACPERA are a net positive. Often it is, but maybe there are situations where it is not.

KELLIE LERNER: That segues perfectly to my questions to Anne. Could you share your perspective both from an in-house perspective and a compliance perspective as to how some of these ambiguities may shape decision making to come forward in a potential antitrust cartel case?

ANNE RILEY: First of all, I would like to put it into context. Everyone will be aware, of course, that under ACPERA one of the improvements was that each applicant must now use its best efforts to improve its compliance program to mitigate the risk of engaging in future illegal activities. That links ACPERA very much to the DOJ's 2019 Antitrust Compliance Guidelines.

I want to talk a little bit about how those relate together and maybe later or directly afterward—your choice—I can come back to some practical tips that I have thought of for businesses in how to manage some of the ACPERA challenges. There are too many to manage, but I will address some of them, and also what to do about the new compliance program requirement, which for me is a particularly important thing.

Obviously, the DOJ assesses compliance programs now using its 2019 evaluation of corporate compliance programs in criminal antitrust investigations, and I am sure you are all very familiar with those.

Just one or two words on compliance, and I will not go into it in much detail, but there is no one size fits all. The compliance program must be appropriately tailored to the size of the business and the company. One interesting thing that I think has come out of the interrelationship between the 2019 DOJ Guidelines and the changes to ACPERA in April 2022 is that the DOJ now expects that the leniency applicant will conduct a thorough analysis of the causes of the underlying conduct, including implementation measures to reduce the risk to reputation; implementation measures to identify future risks; and implementation measures to discipline noncooperating and culpable personnel.

My take on it is that these new compliance measures linking ACPERA to the 2019 Antitrust Compliance Guidelines means that to get leniency it is not enough just to end the violation. What the applicant has to do is to do a deep dive to analyze the compliance program to see why the underlying conduct was caused and what needs to be done to rectify that going forward. I think as a leniency applicant,

given that my understanding—and please correct me if I am wrong on this—is that you may not actually get final leniency until you can prove that you have put these measures in place.

I think it puts a huge timing issue on leniency applicants because they have to be looking at all the leniency issues and the very complicated decision as to whether to go for leniency, and it is not always that easy, but they also have to be looking at their compliance program almost at the same time and putting a lot of resources and a lot of effort into showing the DOJ what they are doing to improve their program.

My reading is that this goes wider than just looking at the antitrust compliance program and could include things such as the oversight and approval of business expenses. I have been aware of cases in the past, of course not involving my former employer, where the issue of business expenses and the approval of business expenses was an issue in the violation not getting detected. It could relate to looking at the oversight and approval of business expenses; your hiring and firing policies; your promotion, pay, and bonus policies; and so forth. I think the narrow link between the DOJ's Antitrust Compliance Guidelines and ACPERA extend the boundary for the extent of work that an applicant has to do.

I would like to come back to practical tips later, but perhaps others might like to comment on that and correct me if I am wrong.

KELLIE LERNER: Does anyone have any reactions to what Anne said?

RICHARD POWERS: As somebody who was part of the DOJ team putting together these Compliance Guidelines, it is good to hear that they had some of the intended effect. I think you hit the right point, which is that there is an evolution in the Antitrust Division's approach to compliance that you started to see probably ten years ago. The high-water mark in terms of a major step forward was the 2019 policy change that the Antitrust Division would, like the rest of the Department of Justice, consider compliance programs in making charging decisions and then they also made public the guidance for how DOJ would evaluate those programs. The bookend to that was the April 2022 leniency policy updates adding the additional requirements that there would have to be improvements to the compliance policy for an applicant as well as remediation to receive conditional leniency. I think it all works together.

A couple of quick thoughts on it. First, I think the emphasis on compliance ties into the broader approach you are seeing across the Department of Justice in terms of white-collar enforcement. You can see how these changes overlap with the policies that came out last year from the Deputy Attorney General's Office and Criminal Division. The Antitrust Division has talked about those overlaps and understanding that companies have broader compliance programs, which include these different risk areas, beyond Antitrust.

I think the other thing is just in terms of the timing of the decision to self-report. One other change to the policy that is worth mentioning is it used to be that prompt and effective termination of the misconduct was a requirement. Now, the policy requires prompt self-disclosure and prompt reporting to the DOJ. So the clock has shifted such that if you detect a possible violation, you have to come in promptly for a marker. After that, according to the FAQs, during the leniency application process a company can do the internal assessment of the compliance program, figure out what needs to be fixed if there was a violation, as well as work with DOJ on any restitution and remediation that will be necessary. So, yes, I think you are right, Anne, that all works together and was part of those changes that came out in 2022.

ANNA PLETCHER: I understand how requiring improvements to compliance policies makes sense from the enforcement side. From the defense implementing improvements to compliance programs can be challenging, especially if the program has to be built from the ground up. It takes time to change a corporate culture. You have to get the buy-in from the top and change the tone from the top. There is a lot involved in creating a good compliance program. That could take time.

As you mentioned, Anne, this is something that a leniency applicant would have to be doing along with providing the required cooperation. It is a lot to put onto a company that is trying to cooperate and ultimately it could extend the timeframe for getting a final decision on leniency. That adds to the uncertainty for leniency applicants. From a practical perspective that is just the reality of the effect that these requirements for leniency have.

ANNE RILEY: If I may just add to that, as well as increasing the length, complexity, and cost to business, I think it also creates uncertainty and it makes the decision as to whether to go into leniency much more difficult than it used to be. It might disincentivize some companies who think, *Oh, my God, this is all too much*.

I do not know if you would like me to carry on with my practical points or whether you want to come back to those, Kellie. There are just a few challenges.

KELLIE LERNER: Why don't we let you finish that thought, and then I would like to go to the FAQs and start talking about the whistleblower program.

ANNE RILEY: After this I have very little to say, so you can choose where you put it in the article as well.

Some practical points have occurred to me, particularly with my compliance background and my background as a member of a leadership team that included internal investigations as part of our remit. A company needs to think

about the length and thoroughness of its internal investigation when it is actually looking into the violation to balance the seeming contradiction between prompt reporting and having sufficient information to satisfy the obligation of full and ongoing cooperation. That seems to me a very practical challenge that I do not know the answer to, but hopefully someone is going to tell me.

Just some of the practical things. In undertaking the internal investigation, it is going to be important for companies to keep a very clear record showing what they have done and when, so they need to keep a timeline of when the conduct came to light, who was informed of it and when, when the internal investigation was started, the steps that were taken during the internal investigation, obviously the outcome of the internal investigation, and in parallel what they have done in relation to the compliance process improvement. My practical thought on that is that in looking at the improvements to the compliance program, companies need to have an internal record of the root causes of the conduct including the steps in the investigation as I have just mentioned. They need to record very carefully the status of the compliance program when the violation occurred, what they have identified as necessary to rectify that, and the measures that they are taking to achieve a reduction for the future.

I think also it is going to be important to make a clear record of measures taken to discipline culpable noncooperating employees. A company needs to rethink how it does its internal investigations and the sorts of records it is taking of how it does those. Most big companies keep those records, but some companies may not be so familiar with that.

One tip I would say for now, right at this moment, before you even know you have a violation, is have a look at whether your antitrust compliance program facilitates your ability as a potential applicant promptly to detect and report a potential violation. So have a look at whether your compliance program now is sufficiently good to protect against potential or perhaps even violations that may be going on that you do not know about. I think that is going to be a very important thing to do right now.

I see loads of challenges, but one challenge I want to flag is the potential tension between the promptness requirements and the improvement of the compliance program requirement. I think the promptness is coming forward, so you can come forward promptly, but you will not necessarily have finished your internal investigation and you certainly will not have reviewed all of your compliance program and all the related processes and policies that you may need to change. Human resources processes may need to change as a result of your investigation because your compliance program may be deficient in those processes.

That is all I wanted to say, and now I am going to be quiet.

KELLIE LERNER: Thank you so much for that helpful framing of some of the practical challenges that applicants face.

RICHARD POWERS: I want to jump in on one quick point on the change to prompt self-reporting now being requirement of the policy. The reality is that that has always been the structure of the program. If you go back thirty years to 1993 what you always heard DOJ officials say, and it was in the FAQs, was: "The moment there is a whiff of a problem, come in, get a marker, and you will be given the latitude to do your internal investigation and work toward perfecting your leniency, which may take some time." That urgency has not changed over the years, nor have some of the other requirements of the policy—let's go back thirty years: Restitution has been a requirement in the policy for thirty years. You did not have to make the decision about restitution at the same time you made the decision to come in for a marker.

Same thing with providing all the cooperation that you have to provide to get to conditional leniency, to get to that "intermediate finish line," let's call it, that first major point that triggers the ACPERA protections. That is all part of the ongoing requirements, so compliance and remediation fit into that timeline like restitution. It is not something that you have to do immediately upon promptly self-reporting; it is part of the leniency application process and is that same process that has existed for thirty years.

Just to clarify this again, I don't think you have to make that decision right away. The FAQs say: "Come in, get the marker right away, and even if you hesitate a little bit before coming in, DOJ will allow a reasonable amount of time before you come in and promptly self-report to seek the marker."

ANNE RILEY: I do understand that, but what I am saying is, and I think maybe I did not make it explicit enough, is that many companies are actually wary of going in for the marker despite all the benefits of leniency and being the first in the door before they actually know the facts. I think it is difficult. The Guidelines say, "Come in the minute you know, get the marker, and that is fine," but a company does not work like that. The business people want to know what the facts were. They are not going to want you to run to the government just because somebody says something to a compliance officer, who may be a junior person. If it is mentioned to them, are you going to run in for leniency at that point? No, of course not. Your management and your group audit committee are going to need to be properly briefed. The idea of running in the minute you get the is a nice idea, but it is not how businesses work in practice.

RICHARD POWERS: Just to be clear, I am not disagreeing with you on that. All I am saying is that dilemma you are describing has existed for thirty years. That is not something new under the new policy. The challenge of the business decision to go in for leniency has always been there.

ANNE RILEY: I agree. I think things are just being made a little bit more complicated because a businessperson will see all of these requires and go, "Now I have got to do all this."

JANE NORBERG: This is why I love these Roundtables because you get so many different perspectives—former government, on the defense side, and then Anne, who was in-house for many years. It is interesting because then throw in whistleblowers, so you are thinking about the company, you are thinking about the DOJ, but then throw in individual whistleblowers and you have blown that leniency right out of the water if somebody else reports it to the DOJ. I think that is the other piece of that that everybody needs to consider, because the SEC's program is very impactful in getting individuals to report possible violations of law to the SEC at least. A lot of times they overlap with DOJ violations, and so the information is flowing to both, even though the monetary work comes from the SEC. I thought I would throw out that thought as well.

KELLIE LERNER: Thank you, Jane. It is a perfect segue to the most recent FAQs.

Richard, could you walk us through what was added to the FAQs?

RICHARD POWERS: When the Division released the updated leniency policy, they also released updated frequently asked questions.

As I said earlier, the new FAQ document has a number of updates, including five additional pages about ACPERA and explanations of the new compliance and remediation requirements.

The FAQs are meant to be what the name says: frequently asked questions. So the recent changes were a moment for DOJ to step back and say: "Okay, it has been a many years since the last real updates, so let's take a look and make sure that what we are saying publicly actually reflects the issues are that are coming up in the investigations."

I think one of the issues that DOJ had seen over the years—and that I heard during my time as head of cartels—is the negative impact of private litigation on leniency applications and how that has changed the cost calculus for self reporting. What DOJ did with the revised FAQs was to take questions they had received from leniency applicants about ACPERA in recent years and put the answers in writing in what equates to a policy document. For example, the FAQs say "[t]his is what DOJ's position would be if you (the leniency applicant) are asked not to cooperate with the plaintiffs. We—DOJ—will go into the court and explain that request."

As another example, the new FAQs say "As a matter of policy, it undermines the intent behind ACPERA if ACPERA benefits are denied because of unreasonable requests by plaintiffs."

There are times when DOJ would want to say these things in court filings, but the practical reality is that the issues often do not end up getting litigated. So the parties might come in, ask DOJ to weigh in, and then they resolve it before there is an opportunity to litigate it. Or, alternatively, the facts just don't make it the right moment for DOJ to weigh in.

Ultimately, what DOJ did with these FAQs was to go out in a public way and put on paper as much as possible its views of ACPERA and the positions you can expect them to take. They did this both to provide additional transparency to the parties but also to a court, which will look to the DOJ's interpretation of ACPERA as a persuasive authority.

KELLIE LERNER: Richard, can you please walk us through how the Antitrust Division handles whistleblowers who report antitrust violations?

RICHARD POWERS: With antitrust it is not the same whistleblower program with a bounty. In late 2020, Congress passed a Whistleblower Protection Act that protects whistleblowers of criminal antitrust violations from retaliation by their employers. In that situation the employee, if she faces an adverse employment action (e.g. being fired) for raising a criminal antitrust issue, either internally or externally, can bring a claim to get her job back, recover lost wages plus interest, as well as attorney's fees and the costs of litigation. Information about this is covered in the FAQs now, too.

KELLIE LERNER: Some reports suggest that, in the years leading up to these FAQ updates, there has been a significant drop in leniency applications. Are the FAQ updates designed to incentivize a resurgence of applicants, and do you think they are enough to get people to come back to the leniency program in higher numbers?

RICHARD POWERS: I will take a step back on this because this is a question I got a lot in my last job. Here is what I would say (and have said before publicly in other settings): The number of leniency applications the DOJ received held pretty steady from about 2010 through to when I left in 2022, with two exceptions: first, there was a spike around 2013 or 2014 related to two very large investigations that I am not going to name, and second, there was a dip in 2020, which we attributed to the pandemic.

However—and I want to put a big "however" on this—I think what is true is that if you look at the number of international cartel investigations and the fines and the number of cases brought from about 2016, 2017 forward, those numbers are down, especially when you look at the peak period from probably 2010/2011 through 2016 with the auto parts, the foreign exchange and *London Interbank Offered Rate (LIBOR),* air cargo, and these sorts of investigations.

I think the question is, and your question, Kellie, gets at is, what is the cause of that? What is going on? It is something my predecessor dealt with and I dealt with, and I think they are dealing with it now on some level. When I was the Deputy for Cartels and I would talk to the bar or the business community about it, what I would hear was two things: first was the rise of uncertainty around private

litigation. You just cannot predict the outcome in private litigation. Even if you are a successful leniency applicant, it takes longer to negotiate out in private litigation, and that uncertainty creates a higher barrier to seeking leniency; the other is the proliferation of leniency programs around the world and the costs associated with that and the challenges of trying to get markers in dozens of jurisdictions.

Those two kinds of costs going up have created a lot of challenges, so I think from DOJ's perspective it is, okay, how do you deal with it? In 2019, for example, there was an ACPERA roundtable to talk about what improvements could be made to ACPERA, which could potentially help with private litigation. The only consensus I would say that came out of that from all aspects of the bar—defense side, plaintiff side, in-house—was that ACPERA should be there and it does not need a sunset. It was mixed views beyond those two points. Some people said no changes, some people said changes, and for the people who said changes there was no consensus around what the changes should be. That is why in 2020 DOJ supported a straight-up reauthorization removing the sunset but nothing else.

With the leniency policy updates and FAQs, I think what the Antitrust Division was trying to do—and some of it is what I was talking about before—was just to make sure the leniency policy reflected not only current practice but also broader Department of Justice practice. And I think that latter point is something that does not get talked about as much as it probably needs to by the Antitrust Division.

More broadly, there was a shift in DOJ practice in the last 10 years that influenced Antitrust Division practice, and you see that more fully now. So some of the recent policy changes harmonize the Antitrust Division's approach with the broader DOJ approach. In making those changes, the Division took opportunity with the FAQs to address things like ACPERA, which relates to one of the primary drivers DOJ heard about why the drop in the number of big cartel cases in recent years. There, as I said, DOJ tried to provide more transparency by providing its views to help address the uncertainty.

I know that is a long answer, but I'm trying to answer the complicated question of why is there a decrease in the number of large international cartels, what has DOJ tried to do, and what can it do within the broader DOJ white-collar enforcement framework. And DOJ decided to make a number of changes all at once to fundamentally address the issues they were hearing and seeing.

KELLIE LERNER: I would like to get Anna and Anne's perspectives on the recent drop in global cartel detection.

Anna, what do you think is the reason for that? Could you talk us through your thoughts on the current climate and any root causes?

ANNA PLETCHER: I agree with Richard's analysis that the rise of civil lawsuits and the potential exposure for leniency applicants is so significant that it has been and probably will continue to be a drag on companies running in to self-report. ACPERA does help address that.

I also agree with the rise of international enforcement and other jurisdictions. That also contributes to the challenging decision about whether to come in and report in one jurisdiction because that may trigger the need to report in other jurisdictions. The calculus about whether to seek leniency in the United States also has to involve a consideration of the cost of going into other jurisdictions around the world. And companies have to consider how quickly can that be done because there is a timing issue there, too, if you want to be the first in the door in the leniency programs in other jurisdictions. Those are important considerations for companies that will slow down their decision making.

The additional requirements that have come into the leniency program over the years also make this a difficult decision. For example, are all of a company's executives going to be covered? Maybe not, depending on what their roles were in the alleged conspiracy. As Anne pointed out, you may not even know who did what at the time the decision to go in for leniency has to be made. Are former employees going to be covered? That's another important question. There are a lot of important practical details that will give companies pause when they think about reporting.

I also think compliance has gotten better, and there is much better awareness of antitrust compliance. Companies have been investing in it. They are ramping up their programs. They know it is important. To that extent I think DOJ's program of the last twenty to thirty years has been quite effective. There is quite a bit of awareness in the corporate world about the seriousness of antitrust violations and a willingness to invest in compliance. That is good. It is a very difficult and complicated decision about whether to go in for leniency, and I think you are seeing that reflected in the numbers.

KELLIE LERNER: I have two strong reactions to those comments. To build upon Richard's thought earlier about some of the challenges that Anne was raising, the threat of private civil litigation has existed since the beginning of the leniency program. As a plaintiff's lawyer, I would argue it was even more significant back then than it is now because class certification standards were far more lenient, and for some period, pre-*Twombly*, so bringing private civil actions was in many respects an easier endeavor than it is today under current case law.

I think there are many successes we could herald for the Department's leniency program, but is it realistic to think that the drop in enforcement today from the record fines of over $3 billion in 2015 is because companies are finally getting it right and really are just complying with the law? I am sure that is to some extent true, but I do not think it could possibly tell the whole story. Do you?

ANNA PLETCHER: I agree with you – it does not tell the whole story. I did not intend to mean to suggest that it did. It is just another piece of the puzzle.

It is true that civil litigation has been around for a long time and has always been part of the leniency equation, but the scope and extent of it is significant. You are talking about many, many years of litigation, and the benefits of coming in for leniency and being the first one in the door are not so clear in terms of who is actually going to be covered and what the benefits are to the company compared to, say, coming in second or third, -- because there is uncertainty in terms of benefits that are given to second and third. This is all part of the calculus that people are thinking about. The decision is complicated.

KELLIE LERNER: I agree. I would love to talk about what tools are available to improve the program.

I am sorry, Anne. I reneged on my promise to come back to you.

ANNE RILEY: I almost do not need to intervene because Anna said everything I wanted to. I agree with you, Richard, but the point I am trying to make very strongly is that maybe a drop in leniency is because things have just gotten so much more difficult. You are quite naturally looking at this from just a U.S. perspective, but a global company has to think globally, and the proliferation of antitrust laws, the proliferation of leniency regimes, and the differences between leniency regimes impact that calculus. I do not think it is litigation alone.

Also, remember, if you are an international company, you have got potential litigation in many parts of the world. Europe has had a litigation explosion, so it is not just litigation in the United States, which has been around forever. I think it is the proliferation of the international ramifications, and it makes leniency a hard decision.

KELLIE LERNER: Thank you, Anne. I will give everyone a chance to wave a magic wand and offer one proposed change to the program , but before we get there, I would like to explore whether there is something we can learn from the SEC Dodd-Frank whistleblower program, so I am going to turn it next to Jane to walk through that program and how it is used to detect other types of financial crimes.

JANE NORBERG: As I mentioned at the top, the SEC's whistleblower program was put in place pursuant to the Dodd-Frank Act with the sole purpose being to encourage individuals who have information about possible securities law violations to report them to the SEC, and in return individuals—and let me stress that it has to be an individual and not a company—receive in return anti-retaliation protections if they are an employee of the company that they are reporting on, confidentiality protections, meaning that the SEC cannot disclose their identity outside of the Commission with some very limited exceptions, and the promise of a potential monetary award if their information is used to bring a successful enforcement action where over $1 million in monetary sanctions are ordered.

In the rules, they have to have original information, it has to be voluntary, there has to be a successful enforcement action, and all of these things are terms of art that I will not get into for the purposes of this discussion. But let me just put a fine point on how successful that program has been for the SEC. They opened their doors in late 2011 and started taking tips under the program, and since that time, I think as of the end of the last fiscal year for the SEC, they had received over 52,000 tips worldwide. So to be clear, this is not just a U.S.-based program. Tips come in from every single state in the United States, and I think at the last count 130 countries worldwide. So not only are they receiving information from U.S.-based employees or individuals, they are also receiving them from individuals based overseas. The SEC has definitely paid awards to individuals overseas as well and has reported that publicly.

They have paid over $1.2 billion in awards in that time, which is an incredible number, as someone who was there at the beginning of the program. You worry about the success of a program; this program exploded very quickly. As of today, I think it is over $1.2 billion. If you think about it from a corporate impact side, companies and individuals have been fined over $6 billion based on information received from whistleblowers, and that is information that the SEC has reported out.

In thinking about the awards that have been paid, I just want to highlight two things. There have been large awards in the last couple of months. In May of 2023, the SEC paid its largest award to date, which was a $279 million award to one individual, which is just astronomical when you think about it. I think about two weeks ago it paid $104 million to seven whistleblowers. There was apparently a large number of whistleblowers in that matter. I think ten individuals applied and seven of them got awarded, and they split this $104 million pot of money. When you think about it from the extent of how is it incentivizing individuals to come forward, when you think about those numbers for people, that is certainly the incentive.

In thinking about it from what challenges come with a program like this, I would say the challenges are that you receive a lot of tips that are not actionable tips necessarily, so you have to have a dedicated office in place that can intake the number of tips that a program will get with this type of a bounty provision tied to it. There is a lot of culling through the wheat and the chaff. The Office of the Whistleblower at the SEC does not take tips, but the main triage point is the Office of Market Intelligence at the SEC. That office is staffed, and the only thing they do is literally view every piece of intelligence that comes into the Commission

and make links between the information and determine if it is specific, timely, and credible enough to send out to enforcement staff, exam staff, or whoever it may be to take a further look.

I would say based on my time at the SEC it is definitely an impactful program. Whistleblowers were submitting a lot of good information to the Commission that definitely pushed forward enforcement actions much quicker than it had prior to that program being put in place.

KELLIE LERNER: Before this program was implemented, what was the main mechanism to identify SEC violations?

JANE NORBERG: It is an interesting question. You probably do not know this, but there actually was a whistleblower program that predated the Dodd-Frank whistleblower program at the SEC. You probably do not even know it existed, because I don't think anybody used it. The issue was that there was not a dedicated staff dealing just with that program, so people did not know it existed. I think maybe two or three people got paid under that program at one time, and it was somebody who had that job in addition to all the other duties they had at the SEC, so it was something that was not advertised and publicized.

The only way to make a program like this successful is to be out there talking about it and making sure people are aware of it and truly getting the trust of individuals to report in. I would say that me and my predecessor, Sean McKessy, who was the first Chief of the Office, we made that a big goal, which was to make people feel comfortable, that they could trust us, that after they gave us the information, we were going to truly protect the confidentiality and push forward retaliation cases, and that you might get paid at the end of the day if your information was used in an action. So, I would say having dedicated staff for something like this is something that has to happen.

The second thing I would say that I have seen other programs flounder for lack of it is having a dedicated pot of money. When Congress put this program in place, they set up a separate pot of money called the Investor Protection Fund. It is funded from money from wrongdoers, but it is not necessarily a dollar-for-dollar, somebody reports on company *X*, company *X* pays a fine, and then that money goes to the whistleblower.

That is not how it works. There is a pot of money. I think if it falls below $300 million it has to be replenished, but it is a constant replenishment of this fund, so there is always a promise of money being there at the end of the day to pay whistleblowers, and the money is not being taken from investors, which is I think another big key thing because no one wants to see money taken from somebody who lost their life savings.

I think those are a couple of things that I have seen that have messed up other whistleblower programs. They did not have this dedicated pot of money, and they did not have the dedicated staff they needed to make the program successful.

KELLIE LERNER: Your reference to trust really struck a chord with me as I think about these issues and compare your remarks to what we just heard about the challenges facing companies who want to come forward and report violations to the Antitrust Division. What I heard is that many companies are deterred from coming forward because they don't have enough trust in the process to be confident that they will eventually receive the benefits of leniency, at least vis-à-vis global enforcement.

Looking at and hearing about the SEC whistleblower program I am curious, Anna and Richard, what your views are on whether a similar program for the Antitrust Division could be used to complement the corporate leniency program, or whether you see it as being something that would create friction or work at odds with it.

ANNA PLETCHER: I think there are some challenges to implementing a similar program. I don't know how well-known it is, but the Antitrust Division has always had a hotline. Providing protections for people who call in to it and have a complaint to express could help incentivize more people to call in with legitimate issues.

However, the money piece seems important. If you do not have a significant financial incentive, it will be hard to bring people out of the woodwork to raise serious issues. But trying to create a financial incentive where criminal sanctions are involved is particularly challenging, because there is something unseemly about rewarding a whistleblower with a cash award for the success of a criminal prosecution where defendants may be subjected to a long prison sentence. It's challenging to create a bounty program in a way that seems ethical and upholds the integrity of the justice system when you are dealing with criminal penalties.

KELLIE LERNER: That point is well taken, but, Jane, through Dodd-Frank and the SEC whistleblower program isn't it possible that the information could lead to other criminal cases against executives who commit fraud and lead to SEC violations?

JANE NORBERG: Yes. The SEC does share information with its regulatory law enforcement partners, including the DOJ, so it is possible that whistleblower information that gets submitted to the SEC also could be shared with the DOJ under cover of the confidentiality protections that a whistleblower must receive. But a lot of times whistleblowers are also working hand in hand with the SEC and the DOJ, not only reporting to one but sometimes reporting to both, especially if there are whistleblower attorneys involved who understand the system well. They end up reporting to both if they think there are possible violations on both sides. Think

about the FCPA. The SEC has jurisdiction there, and the DOJ has jurisdiction there. A lot of times you will see information shared across both agencies in an FCPA violation.

If the SEC brings a case and the DOJ brings a case based on that same information brought by a whistleblower, the SEC will actually pay that whistleblower based not only on the monetary sanctions collected by the SEC but will pay it based on the monetary sanctions collected by the DOJ out of that pot of money that I talked about before. The DOJ is not giving money to the SEC and putting it in that pot, but the SEC is required under Dodd-Frank to still pay out that money, and as we all know from FCPA violations those can be incredibly costly in fines for companies. So when you are hearing about some of these large awards, your mind immediately goes to FCPA violations or something that the DOJ or many other agencies may have been involved in because that is how the numbers get so high. It is very rare that the SEC alone will bring something that would result in a $279 million award to someone because the fines do not get that high without having a partner in the regulatory or law enforcement space to also have brought a case where they received monetary sanctions based on that same information from that same whistleblower.

ANNA PLETCHER: DOJ prosecutions that would come from a whistleblower might not necessarily involve a company. One of the priorities of the Division is to hold individuals accountable, so the prosecution could target a series of individuals. So when you have a whistleblower making accusations against other individuals, there could be some element of personal animosity there. I know it would be on the government agency to sift through all of that. That is one of the things you would triage as you are going through all the complaints. Of course, the government would not bring a case that was just based on a whistleblower complaint, but I can see that being part of it if we have a focus on individual prosecutions and a whistleblower program that is tied to that.

RICHARD POWERS: My recollection is that historically the Antitrust Division has resisted the idea of a whistleblower like the one we are talking about here for the reasons Anna has laid out, which is that there are credibility risks with a case based on some sort of whistleblower disclosure. It was not a live issue during my time as the deputy, and we were focusing more on ACPERA.

I will say that, when I was at DOJ, I talked to some of my colleagues in leadership at the Criminal Division who had experience in this area, and they were pretty supportive of the whistleblower programs that fed into their enforcement areas. They viewed litigation risks that Anna has identified, which are legitimate risks in terms of credibility of witnesses and those sorts of things, as standard litigation risks. Can you corroborate the witness or not? If somebody comes in and says this is what is going on, you have to test what they are saying based on what you can see in the documents.

I think from just a very practical standpoint one of the challenges of trying to put forward this type of program at DOJ Antitrust would be the logistics. Where is the money going to come from, how are you going to staff it, and how are you going to run it? It costs money at a time when it is hard to get a basic level of funding. Everybody can see the fighting over the DOJ's budget, and this is one more thing.

Another question is how it would fit into a leniency regime. If there is one more avenue of a risk of disclosure, going back to the pillars we talked about before, that creates some incentive to self-report and get ahead of that sort of whistleblower. So I could see a whistleblower program being complimentary in that way, where you want to self-report as a company for leniency before one of your employees does it or before somebody at another company does it, that sort of thing.

JANE NORBERG: I think it already exists a little bit when we think about an information share across the SEC to the DOJ. They think whistleblowers are everywhere. I think every company has to take that into account, that any one of their employees could absolutely turn to the government, whatever agency it is, and at least from the SEC's perspective the company cannot stop them. They have rules that prohibit impeding someone from reporting to the Commission, including confidentiality provisions or things like that within the company, and they sought to enforce that and have. I think there are eighteen or nineteen cases to date based on potential impeding reporting to the SEC.

When you are thinking about it from the point of view of the whistleblower and the corporation, I think that is probably the pressure that would be applied. I think the pressure is already there. Maybe companies just do not realize it yet or maybe they only think about it in the SEC context, but I think there is a real risk that you could have an internal whistleblower who reports information to the SEC, the information makes its way to the DOJ, and you have lost your opportunity for leniency.

Being on the defense side I recognize very clearly the risk of private litigation and putting your name out there and having litigation come your way that you do not want or going in too early. There is always a calculus, but I think whistleblowers need to give real thought for companies about whether somebody is potentially going to report this out to the government and are they going to find out before you have an opportunity to go in and seek that leniency?

RICHARD POWERS: If you look back at some of the cases behind the stats we were talking about earlier for antitrust criminal enforcement, DOJ has been in the financial services sector for years, starting with the muni bonds investigation. Then, about ten years ago, the Antitrust worked jointly with the Criminal Division in the *LIBOR* investigations followed by the foreign exchange investigations and prosecutions. So, in terms of the SEC and financial services, there is a history

of criminal antitrust enforcement in that sector with a significant amount of success from the Division's perspective.

ANNA PLETCHER: There is also the False Claims Act model, which already provides a vehicle for a whistleblower in an antitrust context. If the government is the victim and there is a successful False Claims Act *qui tam* action, the relator could get a significant award. I think the South Korea oil refinery case in 2020 came about that way, so there is precedent for that.

KELLIE LERNER: It does seem like there are opportunities for the two regimes to complement each other, and there is some precedent for it, but in many respects the Antitrust whistleblower program resembles the pre-Dodd-Frank whistleblower program at the SEC in that it is not well-advertised, the anti-retaliation provision just got announced, and it does not have the teeth that a bounty provision has under Dodd-Frank, so it could potentially bolster cartel detection.

In 2011, the U.S. General Accounting Office issued a report on the impact of ACPERA and concluded that there wasn't a strong consensus to add a whistleblower bounty to the program given its success at the time. My question is, with the current state of the program, is it time to revisit this issue? My personal view is that I suspect global price-fixing still happens more than we know and such a provision could bolster cartel detection.

We are coming to the end of our time. As promised, my final question to each of you is, if there is one thing that you could do to add to the current corporate leniency program, what would it be? Is it to clarify something? Is it to change something? The floor is yours. I will start with Anne.

ANNE RILEY: I am not sure I would change anything. I would just say from a former business perspective that where confusion or uncertainty arises it is in the DOJ's interest to clarify that as soon as possible because companies are more likely to go in for leniency if it is very clear. As I repeated, probably far too many times, the decision to go for leniency is not easy.

The one wish list I have, which does not relate to ACPERA at all, but is a general request in relation to leniency, is that far more work needs to be done through the ICN to get some harmonization or soft harmonization in this area because the differences between leniency regimes around the world are another disincentive.

KELLIE LERNER: That is a great point. Richard?

RICHARD POWERS: This is a loaded question for me because I did have the wand for awhile.

Time will tell how the changes to the leniency policy in 2022 will play out. The reality is that antitrust years are like Olympic cycles, so I think it will take a number of years to see whether the changes work as intended and/or whether they need to be clarified, modified, adjusted, and as Anne pointed out, based on feedback.

I agree actually with the point that continuing to work together in the international space is going to be important. We tried to do that through the ICN with some work product, but I do think that will continue to be an important piece for DOJ to continue with those efforts to harmonize as much as possible.

KELLIE LERNER: Thank you. Anna?

ANNA PLETCHER: I think Anne is right on that the success of a leniency program can be furthered with greater clarity. The FAQs and additional transparency are really good, but there are some things we just do not have the answers to, partly because they are relatively new, that we need to know in order for companies to make these important decisions.

We talked about some of the uncertain issues with ACPERA, the questions about who is actually covered when it comes down to the nuts and bolts, even questions about restitution, what does that mean and how do you actually get paid. Those are big looming questions. The more clarity we have, the more seamless the program will be, and the more incentive there will be for people to come in. Some of these things just need to work out with time.

KELLIE LERNER: Of those ambiguities, is there one that you hear the most about from your clients that weighs most heavily in the decision-making process? Is it the restitution question? Is it the timeliness question? Is there one that stands out more than any other?

ANNA PLETCHER: There are two big issues. One is, if we go in, will we actually get the leniency we asked for? Because the process is so long, because there are so many different points where DOJ has to judge whether you have done enough or not done enough, there is a lot of uncertainty in that process.

The other is the civil litigation component, which I know has been part of the leniency program for a long time, but it is a significant cost and the public relations associated with the continued ongoing litigation for years and years. It impacts the company's well-being for a long time, their bond ratings, their ability to access capital, their customers—all of those things. The length of time the litigation takes to resolve is something I wish I could wave away. It is difficult because once you get in court, case management takes a long time, the justice system does not have enough judges, the judges need to get educated on complex cases. So there are many factors that contribute to the slow pace. It is not all in the control of the government.

KELLIE LERNER: I think civil litigation is something that obviously is important to those who were directly harmed by a price-fixing conspiracy so that they are able to obtain

monetary damages. That being said, I am sympathetic to a company that came forward, wants to resolve this, wants to pay their single damages, but they have no idea if it is going to be a year or fifteen years, which is actually in the realm of reasonableness based on current court statistics. In an ideal world they would come forward, they would settle the civil case, they would give their cooperation to prosecute their co-conspirators, and they would move on.

What do you think creates that friction in an environment where the goals of civil plaintiffs who are seeking a speedy resolution of litigation should otherwise align with leniency applicants who are trying to put this behind them as fast as possible?

ANNA PLETCHER: Part of it is just the nature of antitrust litigation. It is complex and the cases are big. Multiple experts are often involved and millions of documents There is only so much you can do to move that along quickly. Discovery lasts a long time and is heavily litigated.

That is not to say that cases cannot be moved a little bit more quickly. Maybe there are ways to think outside the box for how to do that, perhaps even involving the judiciary and having a more specialized bench that could fast-track some of these cases.

KELLIE LERNER: Yes. Specialized antitrust courts should be our next Roundtable.

Jane, I will give it to you for any final thoughts about the corporate leniency program on the antitrust side and your experience under Dodd-Frank's whistleblower program. Do you see them being complementary? Do you have any other ideas?

JANE NORBERG: It is difficult to say because I think they do not necessarily go hand in hand. You have individuals reporting possible violations of law, and on the other side it is the corporation that is seeking leniency. They do not necessarily go hand in hand. I guess at the end of the day the way the government would think about it is they would want to get the information, whether via the corporate leniency program or via the whistleblower program. If I put my government hat back on, that is the way I would think about it.

I would throw out one other thing. This is a little bit different, but to the extent that the SEC overlaps at all with the DOJ in some of these violations, when you are talking about lack of clarity on the DOJ side on the leniency program, I would say it is so much clearer than the SEC's cooperation program. If I could wave a magic wand, I would say that the SEC needs to be a whole lot clearer about incentivizing corporations to come in and seek cooperation credit because right now it is a black box, and I was there for many, many years. If you are worried about incentivizing companies on the DOJ side to go in, it is even harder on the SEC side to see the light at the end of the tunnel in going in and talking about self-reporting.

KELLIE LERNER: This is the point of this Roundtable. Maybe there is something that the SEC corporate leniency program can learn from DOJ's Antitrust program and vice versa, which may lead to greater detection and enforcement overall.

This has been truly a pleasure. I have enjoyed hearing from all of you, your incredible wisdom and wealth of information will be much appreciated by our readers. It was by me. I hope you enjoy the rest of your summer. ■

The EC's New Merger Referral Policy and the Transatlantic Reverberations of Illumina/GRAIL on the FTC's Administrative Process

BY HUGH M. HOLLMAN, CHARLES POMMIÈS, AND NICHOLAS P. PUTZ

THE REGULATION OF MERGERS AND acquisitions is a central function of competition authorities around the world. They face the challenge of finding the right balance between the trade-offs and uncertainties in each case. On the one hand, competition authorities need to detect and then remedy or prevent transactions that would create or enhance market power that may result in substantial anticompetitive harms often evidenced by higher prices, lower quality, and the stifling of innovation. On the other hand, competition authorities need to be careful and proportionate in avoiding both over and under-enforcement that would deter or distort efficient and beneficial transactions, impose excessive costs or delays, or undermine legal certainty or predictability. They also need to adapt and update their analytical tools, methods, and criteria to reflect the changing dynamics and complexities of markets, industries, and technologies while remaining in step with evolving objectives and values of society.

As competition authorities' thinking continues to evolve there must be appropriate checks and balances to protect the legitimacy of administrative processes and to prevent potential administrative overreach. Competition authorities reviewing transactions may operate in administrative environments without oversight of their day-to-day actions and decisions. While the opposite end of the spectrum—intense scrutiny of every action—is undoubtedly impractical, parties that find themselves in front of competition authorities should be afforded the opportunity to seek timely external review at critical junctures of an administrative process. Relatedly, as parties are increasingly finding themselves in front of more active competition authorities around the world, often simultaneously, appropriate external domestic oversight will also ensure that competition authorities cannot take advantage of each other's administrative systems to avoid appropriate domestic checks and balances.

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A perfect checks and balances storm illustrating these various tensions in global administrative processes was created in March 2021 when the European Commission issued updated guidance on the application of Article 22 of the EU Merger Regulation (EUMR) that altered its longstanding practice of discouraging the recourse to Article 22 and, in parallel, announced that it would review Illumina's acquisition of GRAIL under the EUMR. The updated Article 22 guidance encourages EC review of transactions not meeting EU or national jurisdiction thresholds. With this policy update, the EU joins the ranks of other jurisdictions, including the U.S., which can challenge a transaction even where merger notification thresholds are not met.

While the EC changed its policy for scrutinizing transactions that did not meet its own reporting thresholds, the U.S. Federal Trade Commission was moving to block the transaction via its own administrative process without simultaneously pursuing a court-ordered injunction. The FTC was able to rely on intervention by the EC under its recent revision to its Article 22 policy to suspend the transaction, mooting a request for a preliminary injunction and allowing the FTC to challenge the transaction only via its much lengthier administrative process.[1] As the Illumina/GRAIL parties faced these merger review complications in front of the FTC in light of the EC's simultaneous administrative processes, the FTC's own internal administrative process was separately facing a strong domestic challenge in *Axon Enterprise, Inc. v. FTC*, with serious constitutional questions, some directly relevant to considerations in Illumina/GRAIL, being leveled at the FTC.[2]

Updated Article 22 Guidance

The new EUMR Article 22 guidance amounted to a much needed update in the EC's methods for identifying reviewable transactions because it addressed some of the gaps and challenges that were previously faced by the Commission in capturing and assessing the competitive effects of certain types of transactions, especially those involving nascent or potential competitors and innovation markets.[3]

Article 22 of the EUMR allows the EC to review transactions that do not meet the EU or national jurisdictional thresholds, but may affect trade between Member States and threaten to significantly impede effective competition, upon

the request of one or more Member States. However, the EC's previous practice discouraged such requests unless the transaction affected the requesting Member State(s) and had a clear impact on the EU's internal market. This meant that some transactions that could have significant cross-border or EU-wide implications, but did not generate sufficient turnover in the EU or in any Member State, could escape the EC's scrutiny, even if they raised serious competition concerns.

The EC's update to Article 22, announced in March 2021, aimed to address this gap by clarifying that the EC will accept and encourage Article 22 referrals from Member States regardless of whether they have jurisdiction over the transaction, and regardless of whether the transaction has already been completed. The EC also indicated that it will adopt a more proactive approach in identifying and inviting referrals of transactions that may have a significant impact on the internal market, particularly in sectors where the turnover of the parties may not reflect their actual or future competitive potential, such as digital or innovation markets.

Article 22's Original Rationale and the EC's Evolving Policy

Article 22 was originally introduced on a Dutch initiative (hence it being occasionally referred to as the "Dutch clause") to enable countries that had not yet established their own system of merger control; to scrutinize mergers that would nonetheless have an impact on competition. When the original merger regulation was enacted in 1989, only three Member States (France, Germany and the UK) had a domestic merger control regime.

However, having regard to the importance of legal certainty, the referral system was meant to remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds. As national legislation developed (Luxembourg, the only Member State that nowadays does not have a merger control regime, is in the process of adopting one), the EC exercised the discretion granted to it by the EUMR and developed a practice of discouraging referral requests under Article 22 from Member States that did not have original jurisdiction over a transaction. This practice was notably based on the experience that such transactions were not generally likely to have a significant impact.

It was only in recent years that the Article 22 referral mechanism regained traction, particularly in the context of so-called "killer acquisitions" in the digital and pharmaceutical sectors. Market developments resulted in an increasing number of cases in which start-ups generating little or no turnover in the moment, but with significant potential for playing an increased competitive role on the market, were acquired by larger companies.

The EC noted in that respect that while the EU turnover thresholds have generally been effective in capturing transactions with a significant impact on competition, a number of cross-border transactions which could potentially also have such an impact have escaped review by both the EC and the Member States. The EC eventually concluded that its approach of discouraging Article 22 referrals where a transaction falls outside national merger control jurisdiction limits the effectiveness of these referrals as a corrective mechanism to the EU turnover-based thresholds. The Article 22 Guidance is intended to close that perceived regulatory enforcement gap. Accepting (and even encouraging) the referral of relevant transactions would give Member States and the EC the flexibility to target transactions which merit review at EU level, without imposing on parties the mandatory notification of transactions that do not.

The EC will focus on transactions where one of the parties' turnover does not reflect its actual or future competitive potential. The Article 22 Guidance is intended to be a targeted tool focusing on specific categories of cases but not limited to any specific economic sector, although the EC does particularly call out digital, pharmaceuticals and biotechnologies.

Scenarios in which a transaction would be considered an appropriate candidate for an Article 22 referral include where a party:

- is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues;
- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); or
- provides products or services that are key inputs or components for other industries.

Significantly, deal value will also play a role. The EC may take into account whether the value of the consideration is particularly high compared to the current turnover of the target, as it could be an indication that the turnover of the target does not reflect its actual or future competitive potential.

Legal Requirements For an Article 22 Referral

A Member State seeking to refer to the EC a transaction that does not meet the EUMR turnover thresholds must demonstrate that two legal requirements are fulfilled.

First, the transaction must affect trade between Member States. A transaction which has an impact within the confines of one Member State only cannot be referred to the EC. The EC considers that "some discernible influence on the pattern of trade between Member States" (including direct or indirect and actual or potential influence) is sufficient to fulfil the requirement. The Article 22 Guidance lists as relevant factors the location of customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of R&D projects whose results may be

commercialised in more than one Member State. That said, the condition of affectation of trade is arguably not onerous. In what was seemingly a purely domestic transaction involving the merger of two supermarket chains in Finland, referred to the EC by the Finnish competition authority in 1996, the EU's Court of First Instance (now General Court) accepted the EC's argument that the transaction would create foreclosure effects for new entrants, including potential entrants from other Member States, coupled with the fact that 30 percent of the products sold by the undertakings concerned originated outside Finland. Additionally, the General Court and the EC took into account recent expansions by the undertakings concerned to Sweden and the parties' membership of several international purchasing organisations.

Second, a referring Member State must demonstrate that there is a "real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny."[4] This essentially requires the referring Member State to conduct a prima facie merger assessment along the parameters included in the EC's Horizontal and Non-Horizontal Merger Guidelines.[5] Accordingly, relevant considerations include the creation or strengthening of a dominant position, the elimination of an important competitive force, the reduction of competitors' ability or incentive to compete, or the ability or incentive to leverage a strong market position from one market to another. The EC clarifies that the prima facie assessment made by the referring Member State is without prejudice to the outcome of a full investigation—but it also emphasizes that the prospective nature of the merger control assessment ought to be taken into account when deciding on a referral request.

The Role of Member States

The choice to make a referral request belongs to the Member States. The EC, however, is not precluded from playing an active role. Under Article 22(5), the EC may inform one or several Member States that it considers that a transaction fulfils the criteria for a referral and accordingly invite Member States to request a referral—as it did in the Illumina/GRAIL case.

By referring a transaction to the EC, a Member State declines to exercise its competencies in relation to that transaction. More than that, pursuant to Article 22(3), third subparagraph, the referring Member State undertakes to no longer apply its national legislation on competition to the transaction. It should also be noted here that the lodging of a referral request by some Member States does not preclude other Member States, who have not chosen to join in the referral, from conducting their merger assessment. For example, a number of Member States made a referral request for the EC to review the acquisition of Kustomer by Facebook. The German Federal Cartel Office, however, did not join in this request, arguing that its general practice is that a referral requires a transaction to be subject to notification based on national competition law.[6] The German Federal Cartel Office later determined that the transaction was reviewable under German law and eventually cleared it, having regard to the findings of the EC's conditional clearance decision.

Illumina/GRAIL Under Transatlantic Review—Effect of the Article 22 Policy Update on the FTC's Illumina/GRAIL Administrative Process

The EC's revision of the Article 22 policy became directly relevant to Illumina's plans to buy GRAIL, both U.S. companies that operate in the field of genomics and cancer detection. Illumina is a leading provider of next generation sequencing (NGS) systems, which are used to analyse genetic and genomic data. GRAIL, a spin-off from Illumina in 2016, develops tests that rely on NGS systems to detect multiple types of cancer at an early stage. In September 2020, Illumina agreed to buy GRAIL for $8 billion in cash and stock, plus future royalties based on revenues.

The Illumina/GRAIL merger first appeared on the FTC's radar in late 2020—the parties had signed an agreement in September and shortly thereafter filed the necessary premerger notification to the agency under the Hart-Scott-Rodino Act. In November 2020, the FTC issued a "second request," seeking more information and time to determine whether the merger would have anticompetitive effects.

The deal was not notified in Europe as GRAIL did not have European turnover and did not trigger the EUMR thresholds or any national filing requirements. However, in December 2020, the EC received a complaint against the deal and discussed it with the German, Austrian, Slovenian, and Swedish competition authorities, who could potentially review the deal under their national laws. In line with its evolving policy, the EC decided that the deal would be an appropriate candidate for referral under the newly updated Article 22 guidance. On February 19, 2021, the European Commission invited Member States to refer the merger for review under Article 22.

On March 30, 2021, the FTC sued to block the merger, alleging a violation of Section 7 of the Clayton Act on a vertical innovation theory of harm, even though GRAIL and its competitors had yet to commercialize the relevant product.[7] According to the FTC's complaint, Illumina is the dominant provider of NGS platforms that multi-cancer early detection (MCED) test developers like GRAIL need to commercialize MCED tests.[8] The FTC alleged that post-acquisition, Illumina could use its control over NGS platforms to harm GRAIL's competitors by raising prices, denying technical assistance, or refusing or delaying license agreements required to sell in vitro diagnostic (IVD) versions of MCED tests.[9]

In regular fashion, in addition to the administrative complaint, the FTC also sought a preliminary injunction to prevent the parties from merging until the merits of the case could be decided—a fairly quick remedy.[10] All of this was, to a degree, business as usual for the FTC. The Illumina/

GRAIL merger only becomes unusual when viewed in parallel with actions across the Atlantic.

On April 19, three weeks after the FTC sued to block the merger, the European Commission accepted the Article 22 referral, a decision that was ultimately upheld by the EU's General Court and is currently pending before the EU Court of Justice.[11]

A few weeks later still, on May 21, the FTC withdrew its request for a preliminary injunction, which was now moot in light of the EC's investigation and proceeded in its own administrative court, explaining that "[n]ow that the European Commission is investigating, Illumina and GRAIL cannot implement the transaction without obtaining clearance from the European Commission."[12] The FTC proceeded only with suit in its administrative court. There is no evidence that the FTC asked the EC to intervene with an investigation, though the Wall Street Journal's Editorial Board speculated at the time—"[w]hy do that?" and then commented, "[p]erhaps the FTC worried it would lose. Instead the FTC appears to have asked the Europeans to stop the acquisition while the FTC tried the case in its administrative tribunal where it almost always wins."[13]

Proceeding only in administrative court would not have been an option if the U.S. Department of Justice's Antitrust Division was reviewing the transaction, as the DOJ can only challenge transactions in federal court. The FTC and DOJ share merger review jurisdiction and decide the reviewing agency "on a case-by-case basis depending on which agency has more expertise with the industry involved."[14] This leads to some merging parties arbitrarily facing a more daunting administrative process, whereas other merging parties face a more familiar process in the federal judiciary, purely on the basis of the relevant industry and the agencies' black-box decision-making process.

Why did the FTC choose this path? The FTC had sued in federal court three weeks before the Article 22 referral had been accepted, and, moreover, receiving preliminary injunctions in federal court is a fairly quick remedy. A decision could have been reached in federal court well in advance of a U.S. administrative court or in the EU. Though the FTC's request for a preliminary injunction was mooted by the EC's investigation, there are two other potential factors working behind the scenes of this decision. The first is that the FTC enjoys a unique confluence of power that bestows upon it the roles of investigator, prosecutor, and judge. In fact, the agency has at least a 90 percent win rate over the past twenty-five years in its own administrative court.[15] A quicker, uncertain decision in federal court is perhaps undesirable when compared to a longer, statistically probable victory that could grind down opposing parties. The second factor is that the EC's review of Illumina-GRAIL had the potential to bolster the FTC's own case.

A decision was first reached in the U.S., seventeen months after the FTC had first filed its administrative complaint, with the FTC's own in-house administrative law judge dismissing the FTC's complaint on September 1, 2022.[16] The judge found that Illumina's position as the only viable supplier of NGS platforms already existed and was not a consequence of the transaction and that Illumina had no incentive to harm GRAIL's rivals post-transaction.[17] Furthermore, the judge reiterated that absent proof of harm in the reasonably near future, harm to "existing innovation and future commercial competition" runs afoul of Section 7's requirement that any substantial lessening of competition be probable and imminent.[18]

The Commission was not far behind, though it diverged from the FTC process. On September 6, the EC blocked the merger, and Illumina/GRAIL found itself with a win and loss simultaneously. According to the EC, Illumina would have "clear incentives" to foreclose GRAIL's rivals via sales of NGS platforms.[19] Although the EC acknowledged that Illumina's sale of NGS platforms to GRAIL rivals represented a small proportion of its sales, the market was expected to grow significantly by 2035. Additionally, the EC rejected the uniqueness of any first-mover advantage associated with GRAIL's Galleri test, which at the time was the only MCED test commercially available for purchase, and maintained that other cancer detection tests were poised to "closely compete with Galleri in the near future" absent the transaction.[20]

The authorities realigned when in early April 2023 the FTC overruled its administrative law judge, issuing an opinion finding that the acquisition may substantially lessen competition in the U.S. for the research, development, and commercialization of MCED tests and ordering Illumina to divest GRAIL.[21] Contrary to the administrative law judge, the FTC found that the acquisition of GRAIL would increase Illumina's incentive to foreclose competition in the MCED market, ignoring that Illumina's ability to foreclose competition in the MCED market, such as by price discrimination, already existed given its position as a critical supplier of NGS platforms.[22] The FTC reasoned that Illumina's incentives to foreclose competition would increase because it stood to profit substantially by owning 100 percent of GRAIL in an MCED market that is expected to grow significantly. The FTC also pointed to Illumina's prior revocation of special pricing terms for GRAIL when it previously reduced its ownership in 2016.[23] Accordingly, the FTC concluded that because Illumina's acquisition of GRAIL would impair its incentive to support other MCED developers in innovation efforts and increase its foreclosure incentives, the transaction is likely to cause harm to competition.[24] Illumina is, as expected, appealing, and an expedited decision is expected in late 2023 or early 2024.

Interestingly, just one week after the FTC overruled its own administrative law judge's dismissal of the FTC staff's merger challenge, the Supreme Court, in *Axon Enterprise, Inc. v. FTC,* greenlit constitutional challenges to the FTC's administrative proceedings where the FTC acts as both

prosecutor and adjudicator. The FTC Commissioners' overruling of the FTC administrative judge in Illumina/GRAIL goes right to the heart of the legitimacy of the FTC's in-house administrative process in which, as Supreme Court Justice Gorsuch stated in his *Axon Enterprise, Inc.* concurrence, the "FTC combine[s] the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence –rules they make for themselves."[25]

Furthermore, the Wall Street Journal's accusation that a U.S. regulator may be pursuing its enforcement agenda abroad and in its own administrative court to avoid the federal judiciary is a serious accusation that raises important legitimacy and accountability questions.

Illumina/GRAIL Raises Questions about FTC's Administrative Process That Are Currently Being Challenged

It is worth speculating whether the FTC would have overruled its own administrative law judge if the EC had not also blocked the Illumina/GRAIL merger. The two agencies, at least based on timelines, initiated long administrative actions in multiple jurisdictions. Illumina did not succumb and completed its acquisition anyways, and, as seen recently, it paid the price—a record €432 million gun-jumping fine imposed by the EC that Illumina is challenging in court.[26]

While Illumina's appeal of the FTC's order is still ongoing, its fate raises serious concerns about the administrative state of the U.S.—some of which were recently addressed in the Supreme Court's decision in *Axon Enterprise, Inc.* and may soon be taken up again in *Securities and Exchange Commission v. Jarkesy*.[27] Faced only with the question of where constitutional challenges to administrative processes should be heard, the Supreme Court in *Axon Enterprise, Inc.* held that litigants can bring structural constitutional challenges in federal district court against the FTC without first fully exhausting administrative proceedings.

However, the Supreme Court appeared receptive to substantive claims of unconstitutionality that the FTC improperly acts as prosecutor, judge, and jury in determining liability and remedies for violations of the FTC Act, some of which are currently being raised by Illumina/GRAIL in the Fifth Circuit. For example, in his concurring opinion, Justice Thomas expressed "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end."[28] And, Justice Gorsuch observed that "the bulk of agency cases settle," often with settlement terms that could not be lawfully obtained in every other way, because the administrative agencies are aware "that few can outlast or outspend the federal government" in dragged out administrative proceedings.[29]

To see how parties embroiled in the FTC's administrative process can be negatively affected by these constitutional claims one need not look any further than Illumina/GRAIL. In Illumina/GRAIL, because of the ongoing EC proceedings, the FTC did not need to obtain a preliminary injunction to prevent the parties from closing and was able to opt for home-court advantage by keeping its merger challenge in-house, where some claim that the FTC has not lost a proceeding in 25 years.[30] The FTC's overturning of one of its administrative law judges on a novel vertical innovation theory of harm did nothing to quell claims that the FTC's administrative process is tilted to favor the FTC to the detriment of merging parties. In fact, the same four FTC Commissioners who voted to issue the Illumina/GRAIL complaint then overruled an administrative law judge's dismissal of that very complaint. To make matters worse, if the EC had not used Article 22 to review the transaction or if the DOJ had reviewed the transaction instead of the FTC, the parties would have found themselves in front of a federal judge at the outset. Although the FTC can continue pursuing an in-house challenge to a transaction even after being denied a request for a preliminary injunction, the FTC generally abandons its administrative challenge if it loses its appeal.

In light of *Illumina v. FTC* and possibly *Jarkesy*, a substantive constitutional challenge to the FTC's administrative process at the Supreme Court could be on the horizon. If so, parties finding themselves in the same position as Illumina and GRAIL in the future may be afforded a more level playing field when their transactions are challenged domestically and abroad. ■

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[1] *But see* Complaint, *Fed. Trade Comm'n v. Intercontinental Exchange, Inc. et al.,* No. 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023) (requesting preliminary injunction where transaction was imminently scheduled for closing); Complaint, *Fed Trade Comm'n v. Microsoft et al*., No. 3:23-cv-02880 (N.D. Cal. June 12, 2023) (requesting preliminary injunction where transaction was imminently scheduled for closing).

[2] 452 F. Supp. 3d 882 (D. Ariz. 2020) (holding FTC Act barred district court jurisdiction over actions against agency insofar as Act provided for administrative proceedings subject to appellate court review), *rev'd and remanded*, Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023).

[3] Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases, 2021 O.J. (C 113).

[4] Commission Notice on Case Referral in Respect of Concentrations, 2005 O.J. (C 56) 2, 44.

[5] Eur. Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5; Eur. Comm'n, Guidelines on the Assessment of Non-horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6.

[6] Press Release, German Federal Cartel Office, Bundeskartellamt Examines Whether Facebook / Kustomer Merger is Subject to Notification (July 23, 2021).

[7] Complaint, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Mar. 30, 2021), https://www.ftc.gov/system/files/do=cuments/cases/redacted_administrative_part_3_complaint_redacted.pdf.

[8] *Id.* at ¶ 49.

[9] *Id.* at ¶ 49.

[10] Complaint, FTC v. Illumina, Inc., et al., No. 1:21-cv-00873 (D.D.C. Mar. 31, 2021).

[11] *See* Case C-625/22—GRAIL LLC v Commission, 2022 O.J. (2022 C451/13).

[12] Press Release, Fed. Trade Comm'n, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case (May 20, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth-petrizzi-bureaus-motion-dismiss-request; *see also* Plaintiffs Ex Parte Application to Dismiss the Complaint without Prejudice, FTC v. Illumina, Inc., et al., No. 1:21-cv-00800 (S.D. Cal. Mar. 31, 2021).

[13] Wall Street Journal Editorial Board, *The FTC's Antitrust Collusion*, Wall St. J. (Feb. 23, 2023), https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-Grail-acquisition-a78e03d0.

[14] Fed. Trade Comm'n, *How Mergers Are Reviewed*, Fed. Trade Comm'n, https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review.

[15] Axon Enter., Inc. v. FTC, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring).

[16] Initial Decision, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Sept. 9, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

[17] *Id.* at 171–72, 178.

[18] *Id.* at 193.

[19] Press Release, Eur. Comm'n, Mergers: Commission Prohibits Acquisition of GRAIL by Illumina (Sept. 6, 2022) (IP/22/5364).

[20] *Id.*

[21] Opinion of the Commission, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Apr. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[22] *Id.* at 49.

[23] *Id.* at 49–50, 52–53.

[24] *Id.* at 60.

[25] Axon Enter., Inc., 598 U.S. at 215 (Gorsuch, J., concurring).

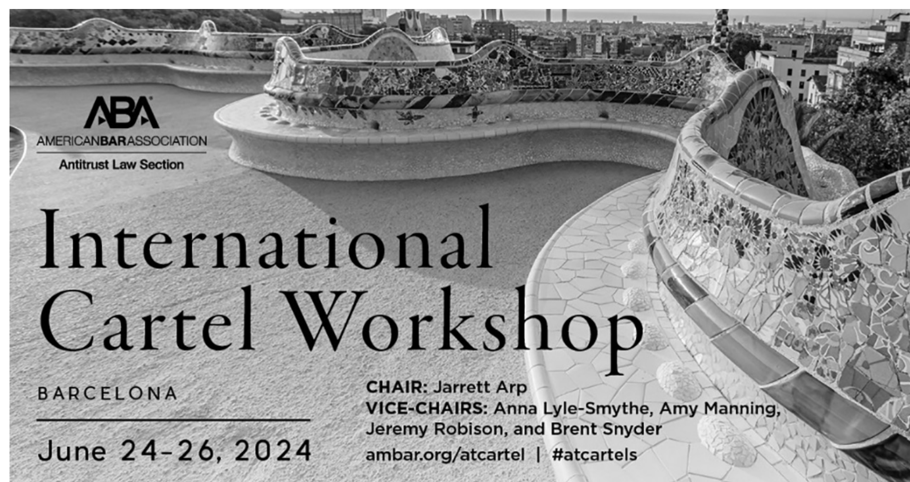
[26] Press Release, Eur. Comm'n, Mergers: Commission Fines Illumina and GRAIL for Implementing Their Acquisition Without Prior Merger Control Approval (July 12, 2023) (IP/23/3773).

[27] 34 F. 4th 446 (5th Cir. 2022) (finding SEC administrative enforcement process violated Articles I and II of Constitution), *cert. granted*, Securities and Exchange Commission v. Jarkesy, 143 S. Ct. 2688 (2023).

[28] Axon Enter., Inc., 598 U.S. at 196 (Thomas, J., concurring).

[29] *Id.* at 216 (Gorsuch, J., concurring).

[30] *Id.*



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The Future of Merger Control in Technological Markets as Revealed in Recent Merger Cases

MICHAL HALPERIN

MERGER CONTROL IS BECOMING increasingly global as commercial entities expand their reach worldwide, blurring the boundaries of business activities across national borders. In the 1990s, competition review of mergers underwent the first stage of globalization when numerous countries adopted antitrust enforcement regimes, requiring international entities to file mergers that met a given country's thresholds for review.[1] Global companies had to adapt to filing transactions for review with multiple antitrust agencies and manage multi-jurisdictional approval of their transactions. [2]

However, this progress has not kept up with demand for globalization and global standardization, and today we are facing a new era in which the traditional country-by-country merger control approach has become outdated and fails to address basic principles of merger control.[3] This is particularly true in the technology sector where boundaries of activity are less clear, the activity of technological companies in one territory have effect on the commercial activity in other territories and participants tend to have the same status and business model across countries.

In the beginning of 2022, Microsoft announced its intention to acquire Activision Blizzard. This transaction crystalizes the faults of the current international merger control system. The merger was filed for review with more than a dozen different antitrust agencies representing approximately 40 different jurisdictions. Some of the agencies cleared the transaction, some of them cleared the transaction subject to remedies and some blocked or would have liked to block the merger. However, Microsoft was successful in securing approval from the EU. It then prevented the blocking of the merger in the U.S. and ultimately was able to satisfy the UK that an amended transaction will sufficiently address the previous competition concerns that the UK raised.[4] At the time of writing, the deal is still being discussed and has until October 18 to be consummated—a three-month extension agreed by the parties after the court's decision not to grant a preliminary injunction in the U.S. and Microsoft's suggestion to the UK's CMA to review an amended transaction. Although the size of the Microsoft-Activision Blizzard deal is exceptional, the merger control journey it is going through is by no means exceptional. In fact, multi-jurisdictional review of mergers with contradicting results in different jurisdictions has become quite common in recent years.

This is illustrated by two additional recent merger control cases: the Sabre Corporation and Farelogix Inc. merger, and the Illumina Inc. and Grail LLC merger. These two cases cover very different industries—air travel bookings and medical diagnosis respectively. One was horizontal (or at least potentially horizontal) and the other was vertical. The business models of the merging companies were different, and the competitive concerns were different. Both are different from the gaming industry merger of Microsoft and Activision Blizzard which has both horizontal and vertical aspects.

And yet, these three cases share great similarities. They together demonstrate where merger control is headed. All three mergers were challenged by U.S. antitrust agencies, but the courts ultimately allowed them to proceed. In the cases of Sabre-Farelogix and Illumina-Grail, days later, non-U.S. antitrust agencies, the UK CMA in the Sabre-Farelogix case and the EU Competition Commission in the Illumina-Grail case, blocked the merger. In Microsoft-Activision Blizzard the U.S. court allowed merger notwithstanding the decision of the CMA to block the merger following the European Commission decision to allow the merger subject to behavioral remedies.

To understand the significance of these three cases, I will briefly describe each. From there, I will analyze lessons learned from these cases, and finally, conclude by identifying how coordination among competition authorities can lead to more desirable outcomes to help prevent these inefficiencies.

The Sabre-Farelogix Merger Case

Sabre is a leading global distribution system (GDS) for airline travel booking services. It collects information from airlines and provides travel agencies with a platform to compare prices, schedules, and more. Along with Amadeus and Travelport, Sabre is one of three major GDS providers in the world. Farelogix, on the other hand, is a disruptor in the traditional GDS market. It offers a novel business model that allows airlines to sell customized offers directly to travel agents, bypassing GDS services. This new approach threatens the GDS business model.[5]

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In 2019, Sabre announced it intended to acquire Farelogix for $360 million. The proposed merger raised competition concerns regarding potential competition and attracted antitrust scrutiny from both the U.S. Department of Justice (DOJ) and the UK Competition and Markets Authority (CMA). The DOJ decided to challenge the merger, stating that:

> For many years, Sabre has operated outdated technology and resisted innovation. Farelogix is an innovative technology company that has stepped in to address the needs of airlines and their customers.
>
> . . .
>
> Farelogix has injected much-needed competition and innovation into stagnant booking services markets. Airlines have successfully leveraged their ability to turn to Farelogix to negotiate lower fees with Sabre and the other GDSs, and to reduce their reliance on GDSs for booking services. Farelogix has also pioneered the development of new technology that empowers airlines to make a wider array of offers to travelers who book tickets through travel agencies.[6]

However, the U.S. DOJ failed to convince the Federal Court that the merger raises competitive concerns and Judge Stark, relying on the U.S. Supreme Court's ruling in *American Express*[7] decided that "[a]s a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[8]

In contrast, only two days after the U.S. court decision the CMA decided to block the merger, stating that:

> Farelogix has developed technology that allows airlines to offer more choice to passengers who purchase tickets from travel agents by way of customising their flight experience through, for example, booking specific meals or seats with extra leg room. Sabre does not currently offer this new technology but is investing in developing it. If Sabre were to buy Farelogix it will be unlikely to develop the technology itself. Airlines, and ultimately their passengers, will lose out from both this lack of innovation and the insufficient competition between the remaining companies in the market.
>
> . . .
>
> The CMA considers that Farelogix's continued independence will likely help motivate Sabre to innovate further, giving airlines more choices in connecting to travel agents that will allow tickets and extra products to be sold through travel agents in more innovative ways.[9]

Following the CMA's decision, the parties decided to abandon the transaction. Sabre appealed the CMA's decision on jurisdictional grounds, but the appeal was dismissed.[10]

The Illumina-Grail Merger Case

In September 2020, Illumina announced the acquisition of Grail for $8 billion. Illumina is a leading supplier of DNA sequencing technology used for genetic and genomic analysis, while Grail is a developer of a multi-cancer early detection test that has the potential to revolutionize cancer detection and treatment.[11] Illumina formed Grail in 2016 and then spun it off shortly afterwards, while maintaining a minority stake. Illumina aimed to reacquire Grail. The merger, which was not between competitors, was reviewed by the U.S. Federal Trade Commission (FTC) as a vertical merger. The FTC expressed concerns about foreclosure, as Illumina is a monopoly in next-generation DNA sequencing (NGS) and a critical input for Grail's development and future product. Grail is racing against others to be the first to produce early detection of multi-cancer (MCED).[12]

The FTC decided unanimously on March 2021 to challenge the merger, stating that:

> . . . If this acquisition is consummated, it would likely reduce innovation in this critical area of healthcare, diminish the quality of MCED tests, and make them more expensive.
>
> As the only viable supplier of a critical input, Illumina can raise prices charged to Grail competitors for NGS instruments and consumables; impede Grail competitors' research and development efforts; or refuse or delay executing license agreements that all MCED test developers need to distribute their tests to third-party laboratories. For the specific application at issue in this matter—MCED tests—developers have no choice but to use Illumina NGS instruments and consumables.[13]

The European Commission started its review of the merger in April 2021, applying a new guiding document of the EU Merger Regulation that encouraged referrals of mergers to the EU, even if neither the European Commission nor any of its Member States have jurisdiction over the merger.[14] Hence, the European review of the merger took place while in the U.S. it was already under court review.

Despite the European Commission's ongoing investigation, the deal was consummated in August 2021 after the FTC decided to withdraw from requesting a preliminary injunction. On September 9, 2022, an American Administrative Law Judge (ALJ) allowed the merger, despite the FTC's arguments, mainly because Illumina already had a monopoly in the DNA sequencing market and had an economic interest in Grail. In addition, the lack of close substitutes for Grail's test would make foreclosure unprofitable, without plausible opportunities to divert sales from other customers to Grail. [15]

Just six days after the ALJ's decision the European Commission gave its decision to block the merger stating that Illumina has both the ability and incentive to foreclose access to Grail's rivals who rely on Illumina's NGS to develop their cancer-detection tests.[16]

The FTC and Illumina appealed the decisions of the ALJ in the U.S. and the European Commission respectively. In the U.S., the FTC Commissioners reversed the ALJ decision returning back to the decision to block the merger and the FTC ordered Illumina to divest Grail. In July 2023, the EU fined Illumina €432 million for closing the deal without EU

approval.[17] As this paper is being written both the decision of the European Commission and the decision of the Commissioners of the FTC are under judicial review in the U.S. and Europe.

The Microsoft-Activision Blizzard Merger Case

In January 2022, Microsoft Corporation announced a merger with video game developer Activision Blizzard, Incorporated, for USD$68.7 billion cash.[18] Pundits noted this would be the largest video game-related acquisition in history and is projected to make Microsoft the third largest video game publisher worldwide, surpassing Nintendo Inc.[19]

Microsoft is the fourth largest video game publisher by revenue. It owns and maintains the popular Xbox series of gaming consoles.[20] Activision Blizzard was ranked as the sixth largest video game publisher worldwide in the same year. It develops multiple major video game IPs—most notably, the *Call of Duty* franchise, the world's highest grossing video game franchise.[21] As Microsoft is both a major producer and distributor of video games and their platforms, the proposed merger is therefore both horizontal and vertical.

The merger raised concern among multiple antitrust and competition agencies worldwide. Notable concerns raised included the impact of Microsoft being able to limit the distribution of Activision Blizzard's games to Xbox only (including *Call of Duty*), and the impact the merger would have on the emerging cloud gaming industry. Despite this, a vast number of competition authorities approved the merger—including those in China,[22] Japan,[23] Brazil,[24] South Korea[25] and New Zealand[26]

Three major agencies opposed the merger—the U.S. Federal Trade Commission, the European Commission and the UK Competition and Markets Authority. Each voiced opposition to the merger in February 2023—with the CMA rejecting it in April and the FTC securing an injunction in June. However, on all three fronts the decision would eventually be reversed or softened.

The EC's concern of blocking the *Call of Duty* franchise from competing platforms was met by a concession from Microsoft to secure a 10 year contract to allow Nintendo to distribute *Call of Duty* on their own platforms. The EC allowed the merger on May 15, dismissing fears of console exclusivity.[27]

Next, the FTC would succeed in June 2023 in securing a short-lived temporary injunction by again citing the dangers of console exclusivity of *Call of Duty* as well as the impact on cloud gaming. However, the injunction was overturned less than a month later by the courts, dismissing fears of console exclusivity. Judge Corley noted:

> Microsoft's acquisition of Activision has been described as the largest in tech history. It deserves scrutiny. That scrutiny has paid off: Microsoft has committed in writing, in public, and in court to keep Call of Duty on PlayStation for 10 years on parity with Xbox. It made an agreement with Nintendo to bring Call of Duty to Switch. And it entered several agreements to for the first time bring Activision's content to several cloud gaming services. This Court's responsibility in this case is narrow. It is to decide if, notwithstanding these current circumstances, the merger should be halted—perhaps even terminated—pending resolution of the FTC administrative action. For the reasons explained, the Court finds the FTC has not shown a likelihood it will prevail on its claim this particular vertical merger in this specific industry may substantially lessen competition. To the contrary, the record evidence points to more consumer access to Call of Duty and other Activision content. The motion for a preliminary injunction is therefore DENIED.[28]

The FTC appealed the ruling, which was rejected by the Ninth Circuit and an injunction request to the U.S. Supreme Court was declined[29] and the FTC withdrew its challenge to the case.[30]

The UK CMA formally blocked the merger in late April due to dangers posed to the cloud gaming market. However, on July 11 (the same day as the rejection of the U.S. injunction), the CMA requested the Competition Appeal Tribunal to stay the appeal litigation. After discussion with Microsoft, the CMA announced that the August 2023 amended transaction resolved its major concerns.[31]

With talks remaining ongoing and the Australian authority still considering the case,[32] the Microsoft-Activision Blizzard merger remains uncertain.

The Similarities Between the Three Cases

Despite dealing with three separate and unrelated markets, and differing concerns about competition, there are notable similarities in how the three merger cases were approached. In all cases, antitrust agencies presented unconventional theories of harm in their efforts to block the mergers. In the Sabre-Farelogix case, the theory was a "killer acquisition" of a potential competitor, while in the Illumina-Grail case and the Microsoft-Activision Blizzard case, it was the theory of vertical foreclosure of competitors to the acquired entity.[33]

In the first two cases, the antitrust agencies agreed on the competition concerns and believed the mergers should be blocked. The arguments for challenging the mergers were nearly identical on both sides of the Atlantic. However, in the end, the mergers were approved by the court in the U.S. but blocked in the UK and Europe respectively. In the Microsoft-Activision Blizzard Case the U.S., EU and UK agencies agreed on the relevant competitive concerns and differed only on whether the remedies offered will resolve the concern.

Finally, all cases involved technological markets with a heavy emphasis on innovation, research, and development. As a result, all cases are addressing markets with a significant level of uncertainty, including questions about the evolution of the markets, the success of products, and reasonable business models, which have no clear answers.

The Lessons on the Direction of Merger Review Cases in Technological Markets

Based on the three recent cases, some conclusions can be drawn:

The first is that the American courts are reluctant to broaden the causes or grounds for blocking mergers. They are also reluctant to reduce the high burden that is required today from the antitrust agencies in order to succeed in their challenge of a merger.[34] This is a continuing tendency. For the last four decades courts in the U.S. have been willing to block only horizontal mergers and in most cases this was done in markets with very few participants to begin with. The Illumina-Grail case was the second attempt of American antitrust agencies in the last few years to block a vertical merger. The previous attempt took place in 2016-2018 when the DOJ challenged the merger of AT&T and Time Warner. However, that attempt also ended up in the DOJ losing the case and the merger being approved.[35] The Microsoft-Activision Blizzard was a third attempt to block a vertical merger, which also did not succeed.

The Sabre-Farelogix case was an attempt to block a merger of potential competitors. This is also the second attempt in the last few years to block a merger due to concern about potential competition. The previous attempt was done by the FTC in the merger of Steris Corporation with Synergy Health plc in 2015. In that case the FTC attempted to block a merger in the sterilization of products services market. The FTC viewed Synergy as a competitor that can potentially bring a new method for sterilization of products that will compete with the local incumbents. However, the attempt to block the merger was not successful and the merger was allowed by the ALJ. [36]

All three cases that were described above demonstrate the tendency of the U.S. courts to adopt a conservative approach to antitrust. Although the three recent cases are not enough to draw definite conclusions on the attitude of the courts, it seems that the courts in the U.S. are not prepared quite yet to block a vertical merger nor a merger between potential competitors. The view that courts in the U.S. in the last few decades tend to adopt a conservative approach and are reluctant to intervene in the markets is well supported.[37]

To the benefit of the conservative approach, it is worth emphasizing that in technological markets in which research and developments are key elements, the ability to foresee clearly where the market is heading is limited and therefore one can understand a more cautious approach to regulatory market intervention.

Although the objection of the DOJ and the FTC to the mergers was not based on the traditional horizontal theory of harm, in both cases the theory of harm that was brought before the court was not novel and was not unestablished in the theory of antitrust. The existence of "killer acquisition" phenomena is today well established both in theory and in practice.[38] The notion that a company can foreclose its competitors by merging vertically with its supplier or its client has existed for many decades.[39] And yet the U.S. courts are still willing to block only horizontal mergers in markets where the competitors are few.

The second lesson is that the European Commission, the UK's CMA and the U.S. antitrust agencies appear prepared and willing to try to block mergers in technological markets even if it requires adopting a less conventional approach and taking more risks. The European and UK analysis of the mergers at hand are well aligned with the approach of the American antitrust agencies. They both identified the need to be less lenient towards mergers and are willing to take more risks and challenge mergers that were not challenged before. [40]

The Sabre-Farelogix merger and the Illumina-Grail mergers were analyzed in a similar manner and with a similar outcome on both sides of the Atlantic Ocean. One may wonder if the change in leadership of the American agencies following the 2020 elections is the cause of the shift in American antitrust agencies' approach. However, it seems that the change in approach is not just a change in the direction of the political wind but a deeper change in approach towards mergers as a whole, and specifically towards mergers in technological markets. The Sabre—Farelogix investigation and the DOJ's decision to challenge the merger took place under the DOJ's previous leadership. The FTC's decision to challenge the merger of Illumina and Grail was decided unanimously by all commissioners of the FTC including the more conservative ones. These two facts demonstrate that the change in the approach towards mergers is common to the European/ UK competition agencies and to the U.S. antitrust agencies.

It is therefore fair to conclude that the difference in approach doesn't rest between the two sides of the Atlantic Ocean but between the American judicial system and its own antitrust and competition agencies.

The third lesson relates to jurisdiction and nexus. Mega-mergers that occurred in recent decades brought many antitrust agencies to the conclusion that merger filing thresholds, as they are currently designed, do not capture the most crucial mergers in the technological sector and therefore they are unable to block mergers that may raise competition concerns.[41] A few steps were taken by different legislators and agencies in order to expand their ability to review mergers that do not meet the revenue thresholds.[42] This enhanced the blurring of boundaries of jurisdiction and nexus issues. In both the Sabre-Farelogix case and the Illumina-Grail case the parties to the merger raised legal doubts regarding the authority of the CMA and the European Commission respectively to review the mergers at hand and decide them. In the Illumina-Grail case it was not disputed that the European Commission took a step to expand its authority over mergers of entities that don't necessarily have present activity in Europe. The courts in both cases were unwilling to intervene in the decision of the competition agencies regarding their authority to review the

merger and backed the decision of the agency. The ability and incentive of the competition agencies to expand their reach to mergers in the technological sectors that don't have traditional nexus to their jurisdiction, makes the boundaries of merger review murkier than ever before and contributes to the duplication of merger reviews.

The fourth insight is that procedure does matter. In the U.S., the antitrust agencies have no authority to block a merger. In some cases, their willingness to challenge the merger in court makes the parties withdraw, but it is only the courts that may block a merger. Hence, the court is the one that determines the content of the antitrust laws in the U.S. and accordingly holds the ability to navigate the direction in which antitrust in the U.S. is heading.

In Europe and the UK, like most other regimes there is a professional agency within the administration that analyzes and decides cases. Judicial review is an essential component, and many major antitrust cases get to court. But there is a significant difference between a judicial review of an administrative decision and an administrative decision that is taken by the court. When a court needs to take the administrative decision of whether to block a merger or not it will apply its own discretion (as it should). When the duty of the courts is limited to reviewing the administrative decision, the discretion of the court is more limited.

There is also the issue of who holds the burden of proof in court. In the U.S. the burden lies with the antitrust agencies. They need to convince the court to intervene in the market and block the merger. The parties to the merger need only shed the doubts or demonstrate the loopholes in the antitrust agencies' case.[43] In Europe and the UK, the appealing side is the parties to the merger. In many of the regimes these administrative decisions enjoy a preliminary presumption of propriety, and although such presumption may be refuted, this changes the balance of the discussion.

This change in procedure has a tremendous effect on the outcome and on the ability to adopt a flexible and less conservative approach.

The fifth and last insight from these three cases is that the merger control system doesn't function well when it comes to global mergers. The mere fact that different jurisdictions have reached different outcomes on mergers that are global in their essence and have essentially the same competition and economic effects in all major economies is by itself an undesired outcome.[44]

This is not to say that all antitrust agencies should agree on all merger cases all the time. There are cases where the markets look substantially different in different countries. That by itself may draw different conclusions. And yes—from time to time we can even accept and expect a different outcome over the same merger in different jurisdictions due to differences in ideology and approach. But this shouldn't happen too frequently.

Antitrust rules should be transparent, clear and predictable, and the outcome should be based on professional analysis, economic theory and legal rules that are commonly accepted. We demonstrated the problem on three specific mergers that were reviewed each by several different antitrust agencies. In many global mergers the situation is complex. Contradicting decisions among antitrust agencies is a heavy weight on the ability to predict the outcome of the merger review process. This adds a substantial amount of uncertainty to the parties to the merger, to the business community and to the public. Although this paper concentrates on three merger cases, these three cases are by no means the only cases in the last few years in which different merger reviews by different jurisdictions brought different outcomes. [45]

The Microsoft-Activision Blizzard case is a notable inversion of the above—where we see that discoordination between agencies allowed for Microsoft to have greater success in appealing decisions by citing approvals from other jurisdictions. While it cannot be proven that the UK softened and began negotiations because of in part the U.S.' decision being reversed, it is notable it happened immediately after and on the heels of the EC's reversal, which was cited as a criticism of its own ruling three weeks previous.

In this circumstance, the loser can be said to be the agencies—which have their decision-making authority eroded. Appeals become more and more powerful and approvals by some jurisdictions can be cited as grounds for approval in other jurisdictions,[46] while the market which each agency control an ever shrinking proportion of the financial considerations of the merging entities in deciding to go through with the merger. In all of these situations, we see that this discoordination is costly and undesirable for agencies, and parties alike.

How can we start repairing this situation? This is the topic of the next section.

How Can We Improve the Multinational Merger Control System?

As discussed, the antitrust agencies appear to be reasonably aligned in their analysis of mergers in technological markets, allowing for deeper cooperation in achieving joint outcomes. In most of the cases of mergers in the technological markets the analysis is quite similar across antitrust agencies.

There is already substantial cooperation between agencies on mergers under their jurisdiction, with discussions between agencies on mergers filed for review in multiple jurisdictions being a common practice. The sharing of information and evidence collected by agencies is encouraged by the International Competition Network and the Competition Commission in the OECD and has become increasingly frequent.[47] Further, the FTC in 2011 released a best practices statement outlining the benefits and procedures for cooperation between the U.S. and EU in merger investigations, arguing such cooperation is beneficial for both the agencies and parties under review[48]

Throughout the years agencies have been able to enhance their cooperation through different practices and procedures.

They agreed on recommended practices for merger notification and review procedures[49] back at the beginning of the millennium. As an outcome of the intensive cooperation among competition agencies new and valuable procedures were created.

One prominent outcome of the ongoing cooperation was the creation of a waiver procedure in multi-jurisdictional mergers according to which parties to a merger are requested voluntarily to waive confidentiality protections vis-à-vis the agency that originally received the merging party's confidential information and to allow agencies to share information regarding the merger. This allows for a more efficient and expedited review and therefore parties usually grant such waivers. The sharing of information is a cornerstone in the cooperation of agencies in merger review cases and has become standard practice in multi-jurisdictional mergers and a very effective one.[50] Sharing confidential information pursuant to a waiver is the most frequent method of sharing confidential information between competition agencies. The main advantage of waivers is that it is voluntary. Parties are willing to waive their confidentiality because they recognize the advantages of having a more expedited and coordinated review for them. For agencies the granting of waivers may help to avoid the need to use official channels in formal cooperation procedures, and the consequent delays this can entail.[51]

Yet the sharing of information between agencies is only one aspect in which cooperation can be beneficial. There are many other aspects in which competition agencies can enhance their cooperation to the benefit of all, such as cooperation to align timetables for merger review; cooperation in remedy design and sharing implementation analysis; discussing theories of harms; and support in court review proceedings.[52]

It is time to take the current form of cooperation one step further. As agencies are facing the challenges of reviewing mergers in the technological areas and as they struggle to develop new theories of harm and to understand the complexity of new business models, this is a critical period offering substantial advantage to do so as a joint team.

Multi-jurisdictional mergers in technological markets should be reviewed jointly by one team working on behalf of and composed of members of each agency involved. According to the same principle that created the practice of waivers that allowed sharing of confidential information, agencies can create a broader joint review of multi-jurisdictional mergers. This would go beyond current coordination and information sharing practices that exist today. The joint team will collect the required data on behalf of all involved agencies and will create one analysis of the merger considering different possible approaches. At the end of the review the team will publish one joint decision on behalf of all agencies that are involved in the merger review.

The voluntary approach towards the parties to the merger that was adopted by the agencies in connection with sharing of information in merger review processes can be adopted in the creation of global review teams too. The parties to the merger will be requested to give their voluntary consent to the review by the global review team, as per the precedent set in the OECD/ICN waiver process outlined earlier.

For the agencies specifically involved in such a joint review team there will also be a voluntary dimension. The voluntary dimension can be achieved either by allowing agencies to voluntarily join the global review team or by allowing an involved agency to break away from the joint global decision if the decision doesn't consider specific circumstances of that jurisdiction such as substantially different market shares of the parties, different consumer habits, etc. Otherwise, agencies will be expected to follow the joint team's decision and to promote this decision in accordance with the relevant procedure in their own jurisdiction.

The suggested model is, therefore, a "soft" model based on the willingness of competition agencies to cooperate and on the voluntary consent of the parties. Both competition agencies and merging parties may learn that such a voluntary path saves them resources, confusion, uncertainty and creates better informed and better analyzed decisions. The proof of such a model will need to be in the pudding. If agencies will too frequently decide to break away from the decision of the joint merger review team, it will show that the new model has no advantage. However, if the general custom is that agencies respect the joint merger review decision and are willing to defend it in their courts, it will strengthen the model and its reputation.

The main advantage of having a "soft" voluntary model is that it requires no legislation, and it avoids sovereignty and international law questions.

This suggested change in the way multi-jurisdictional mergers will be reviewed comes with a few difficulties that need to be addressed. The two major obstacles in creating a global merger review regime are firstly, the difference in procedure among different jurisdictions and secondly, the need to create a high level of trust among agencies.

As to procedure, antitrust agencies made a substantial step in standardizing the procedural aspects of their work by agreeing on the International Competition Network Framework on Competition Agency Procedures (ICN-CAP 2019).[53] This framework, which was announced and presented in the spring of 2019, was joined by more than 70 competition and antitrust agencies around the globe. The framework sets due process standards that became the global benchmark for appropriate competition law enforcement.[54] Hence, the ICN-CAP can create the baseline for mutual and joint work in reviewing mergers in technological markets.

In addition, the parties to the merger will be requested to give their voluntary consent to the review by the global review team, as per the precedent set in the OECD/ICN waiver process outlined earlier. This joint global team will work under transparent procedural rules and the consent of the parties will include consent to the procedural rules that they abide by.

This model presents significant benefits in terms of efficiency, greatly reducing procedural burden and costs for both sides. Parties to multi-jurisdictional mergers will have an incentive to voluntarily agree to the joint review because it will further expedite the review process and will save effort in interacting with multiple agencies, and most importantly, will reduce the risk of contradicting decisions in different jurisdictions.

In the current situation every jurisdiction that is involved in reviewing a merger holds a veto right over the merger. It needs only one blocking jurisdiction to create a hurdle for the merger. The recent Microsoft—Activision Blizzard merger case demonstrates this clearly. Parties can get the consent of all agencies but one and they will still be unable to consummate their deal. This is naturally undesirable for the firm but also for each of the other regulators involved, who have the authority of their own decision-making powers eroded by other jurisdictions. To avoid such an outcome, the parties have a high incentive to commit their merger to review by a joint team of all agencies.

Trust is more difficult to achieve, as it is built gradually through cases of successful cooperation. Agencies should trust the joint global team to do a professional and comprehensive review that will allow the agencies to litigate their decision in court taking into account that some courts require a high threshold of evidence from the relevant agencies.

Alongside these two obstacles there are clear advantages for creating a review by a joint multi-jurisdictional team in mergers in the technological sector. First and most important, it will reduce the number of cases with conflicting decisions from different agencies. In addition, it allows the agencies to join forces in a burdensome and challenging merger review. Further, it promotes the creation of one consistent approach and case law towards mergers in the technological sector, which is especially pertinent as legal theory outlining technological economic regulation is still growing. Finally, it creates a more resilient decision which will make the decision less vulnerable to judicial intervention and overruling. The pros of such a system will outweigh the cons.

Conclusion

As I have shown, discoordination among competition and merger control authorities across national boundaries carries with it significant disadvantages for both regulators and the regulated. The cases that were discussed above illustrate that conflicting decisions for mergers with interests across national boundaries can significantly harm businesses and can create substantial difficulties for agencies. The current state of things gives each country's agency veto power on the one hand but on the other hand a result in other jurisdictions can be used to sway and force a reversal of decisions elsewhere.[55]

As technological markets continue to grow and continue to blur national boundaries, competition and merger control agencies will be increasingly tested and their authority eroded in the absence of large-scale cooperation. In the face of significant ideological and procedural consensus on the importance of benefits to cooperation and information sharing in merger review, the natural next step is to move towards full joint review of multi-jurisdictional merger cases. The sheer procedural and cost benefits for such cooperation is immense, for all parties involved. ■

[1] Today there are more than 140 countries that have merger control rules, most of which require pre closing notification of the merger. In 1989 when the European Union adopted the EU Merger Regulation there were only a handful of countries with effective merger control regime.

[2] OECD, Recommendation of the OECD Council on Merger Review (2005), https://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf; Jenny Frederic, *Substantive Convergence in Merger Control: An Assessment*, 1 Revue des Droits de la Concurrence at 21-41 (2015), https://ssrn.com/abstract=2869098.

[3] Nicholas Levy, Alexander Waksman, and Lanto Sheridan, *Global merger control—where to now?* 8 Journal of Antitrust Enforcement at 319–334. https://doi.org/10.1093/jaenfo/jnz026.

[4] At the time of this paper the CMA is still conducting a consultation regarding the amended Microsoft - Activision Blizzard transaction and no final approval of the CMA has been secured. Nevertheless the CMA expressed the view that the amended transaction that was filed to it in August 2023 resolves the major concerns it previously had. See: UK Competition and Market Authority, *New Microsoft/Activision Deal Addresses Previous CMA Concerns in Cloud Gaming* (2023), https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming

[5] United States v. Sabre Corporation, 1:99-mc-09999, https://www.justice.gov/opa/press-release/file/1196816/download.

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[33] To be clear, the ability to foreclose competitors through vertical integration is well established in the literature of antitrust and examples of such incidents are well known. So is the theory of potential competition and the motivation of incumbents to reduce the threat of potential competition by acquiring the new entrant. But in the last four decades no vertical integration was blocked in the U.S. and no merger was stopped because of "killer acquisition" concerns.

[34] See Kostis Hatzitaskos, Brad Howells and Aviv Nevo, *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK,* 12 Journal of European Competition Law & Practice (2021), at 698–704.

[35] The Federal Court of Appeal approved the first instance's decision.

[36] Press Release, Federal Trade Comm'n, FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers (May 29, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services-manufacturers, and FTC Dismisses Complaint Against Steris and Synergy (Oct. 30, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/10/ftc-dismisses-complaint-against-steris-synergy.

[37] See AMG Capital Management v. Federal Trade Commission and Ohio v. American Express Co., 585 U.S. ___ (2018). See also Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*,33 Journal of Economic Perspectives (2019) at 79-82; Jonathan B. Baker, *Taking the Error out of Error Cost Analysis: What's Wrong with Antitrust's Right,* 80 Antitrust Law Journal (2015) at 1-38 ; Gregory J. Werden and Luke M. Froeb, *Antitrust and Tech: Europe and the United States Differ, and it Matters,* Competition Policy International Antitrust Chronicle (2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/10/CPI-Werden-Froeb.pdf.

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[39] See the U.S. Department of Justice and the Federal Trade Commission's joint Vertical Merger Guidelines of June 30, 2020. In September 2021 the FTC withdrew from these joint merger guidelines. But this withdrawal is not related to the mutual recognition that foreclosure is a major theory of harm in vertical integration.

[40] See for example, Andrea Coscelli, A New Route Forward for Regulating Digital Markets,BeesleyLecture(2021)https://www.gov.uk/government/speeches/beesley-lecture-a-new-route-forward-for-regulating-digital-markets.

[41] A summary of the discussion of these concerns appear in OECD, Start-ups, Killer Acquisitions and Merger Control (2020), https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf, and Summary of Discussion of the Roundtable on Start-ups, Killer Acquisitions and Merger Control (2020), https://one.oecd.org/document/DAF/COMP/M(2020)1/ANN3/FINAL/en/pdf.

[42] See for example Germany in OECD, Start-ups, Killer Acquisitions and Merger Control—Note by Germany (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf; Korea in OECD, Start-ups, Killer Acquisitions and Merger Control (2020)—Note by Korea https://one.oecd.org/document/DAF/COMP/WD(2020)19/en/pdf; and EU in the amended Article 22 of the EU Merger Regulation (EUMR) that was implied in the Illumina - Grail merger discussed above.

[43] The burden of proof element had a major part in the decision of the U.S. court in the Sabre-Farelogix case. See Kostis Hatzitaskos, Brad Howells, Aviv Nevo, *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK*. 12 Journal of European Competition Law and Practice, at 698–704.

[44] Edoardo Leozappa, *Illumina's Acquisition of GRAIL: A Comparison of the Outcomes,* Fordham Journal of Corporate and Financial Law (2022) https://news.law.fordham.edu/jcfl/2022/11/18/illuminas-acquisition-of-grail-a-comparison-of-the-outcomes.

[45] See for example the merger of Google and Fitbit that was reviewed differently by the European Competition Commission, the South African Competition Commission and the Australian ACCC while allowed to be consummated by the DOJ in the U.S. without any remedies.

[46] See for example the attempt of Sabre's attorneys to use the U.S. court decision in order to influence the judicial decision in the UK: Sabre

Corporation, *Sabre statement on the U.S. District Court decision in the Farelogix acquisition case* (2020), https://www.sabre.com/insights/releases/sabre-statement-on-the-u-s-district-court-decision-in-the-farelogix-acquisition-case/, and Sean O'Neill, *U.S. Judge Rules in Favor of Sabre-Farelogix Acquisition Over Justice Department's Antitrust Objections* (2020), https://finance.yahoo.com/news/u-judge-rules-favor-sabre-123028189.html, and as discussed above the proximity in time between the U.S. court decision on the Microsoft-Activision case and the opening of negotiation between the CMA and Microsoft.

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[52] *Id.*, 120

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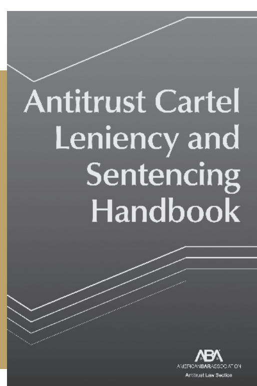

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This first edition of the *Antitrust Cartel Leniency and Sentencing Handbook* provides a guide for criminal antitrust practitioners to help navigate the Antitrust Division's Leniency Program. This handbook equips criminal cartel defense professionals with the in-depth knowledge they need to successfully represent a client—whether corporation or individual—through the leniency application and investigation processes, or through charging, plea agreements, and sentencing if leniency is not available.

Private Equity, the Clayton Act, and the Hurdles of Private Plaintiff Enforcement of Section 8

BY ALEXANDER J. SWEATMAN

FEARS OF CONSOLIDATED CORPORATE power and economic domination by a small number of individuals and corporations were pervasive in the years leading up to the enactment of the Clayton Act. A congressional committee uncovered interlocking directorates among J.P Morgan & Co. and the largest financial institutions and investment banks in the United States, raising concerns of a collusive "money trust" that was entangled and interlaced at all levels of U.S. industry and society.[1] One of the chief ills of the money trust was appointing and abusing interlocking directorates on the boards of directors of competing corporations:

> It is manifestly improper and repugnant to the theory and practice of competition that the same person or members of the same firm shall undertake to act in such inconsistent capacities. […] When we find, as in a number of instances, the same man a director in a half dozen or more banks and trust companies all located in the same section of the same city, doing the same class of business and with a like set of associates similarly situated all belonging to the same group and representing the same class of interests, all further pretense of competition is use-less. For all practical purposes of competition such banks and trust companies may as well be consolidated into a single entity.[2]

Congress responded by passing the Clayton Act of 1914; the current iteration of Section 8 of the Act prohibits a "person" from simultaneously serving as a "director or officer in any two [competing] corporations."[3]

Now, nearly 110 years later, the government is taking aim at interlocking directorates instigated by another financial juggernaut: private equity. Exempt from many of the financial reporting rules required of publicly traded companies, private equity firms are estimated to control more than $6 trillion in assets in the United States alone.[4] Through their portfolio companies, private equity firms KKR, Blackstone, and Carlyle Group indirectly employ such a large number of individuals that, if taken together, those private equity firms would constitute America's third, fourth, and fifth largest employers, beaten out in size only by Walmart and Amazon.[5]

The past few years have borne witness to the Department of Justice's and the Federal Trade Commission's aggressive posture toward private equity. The DOJ issued civil investigative demands to Apollo, Blackstone, and KKR regarding overlapping board seats, committed to "aggressive action" against private equity investments that result in board interlocks among competitors, and promised to "ramp[] up efforts" and to "not hesitate" to break up interlocking directorates.[6] On August 16, 2023, the FTC filed its first Section 8 case in 40 years against private equity firm Quantum Energy Partners.[7] The FTC's demand that Quantum relinquish any rights to a seat on its competitor's board furthered the FTC's promise to "reactivate Section 8 and effectively put market participants back on notice."[8]

However, the government is not the sole enforcer of Section 8; private litigants also may enforce the Clayton Act and "[i]t is well recognized that private enforcement of [antitrust] laws is a necessary supplement to government action."[9] Though sparsely litigated, the Clayton Act permits private plaintiffs to seek monetary damages and injunctive relief for Section 8 violations, which are considered per se illegal.

Private litigants may bring an array of Section 8 suits, ranging from individual shareholder actions to derivative suits. However, private plaintiffs face particularly steep challenges, especially in the private equity context because of the myriad of unsettled and open questions concerning the reach and interpretation of the Clayton Act when applied to private equity fund structure. Whether viewed as corporate raiders or economic saviors,[10] private equity dominates extensive swaths of the U.S. corporate realm and economy; this article seeks to widen the aperture beyond the government enforcement jurisdiction to canvass the landscape of, and analyze the hurdles to, private plaintiff enforcement of Section 8.

What is Private Equity and Why all the Section 8 Scrutiny?

Private equity firms typically raise money from large institutional investors such as pension funds, endowments, sovereign wealth funds, and high net worth individuals. The raised capital is put into a fund, usually a limited partnership, which then uses the pooled fund of institutional investor contributions, and usually a high amount of leverage or debt (hence the term leveraged buyout or "LBO") to acquire a controlling stake in a "portfolio company." The upshot is to make money for the fund and its investors by increasing the

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portfolio company's profitability by a variety of means, such as increasing efficiency, restructuring, improving management, or divesting unprofitable portions of the business.[11] The private equity firm may own the portfolio company for a period of time, hold the corporation as an investment, or eventually sell the portfolio company or conduct an initial public offering.

What is unique to private equity that lends itself to Section 8 scrutiny is that private equity firms often appoint one or more of their own employees to the boards of their portfolio companies and are frequently involved in their management.[12] A private equity fund opens itself up to Section 8 liability if it invests in competing portfolio companies and places the same individuals, or in some cases even different individuals affiliated with the same fund, onto the boards of those competing companies. Such an interlock can lead to the potential for collusion between competitors, including through sharing competitively sensitive information.

Section 8 and Proxy Wars—Defensive Use of Section 8 by a Target Company

Corporations sometimes wield Section 8 in an attempt to ward off the placement of hostile or insurgent candidates tendered by activist investors in takeover battles. The target corporation usually pursues an injunction to block a proposed slate of directors or a board nomination by contending that the nominee serves on a competitor's board and that a successful tender would lead to an illegal interlock. Though private equity firms largely focus on acquiring private corporations, private equity firms sometimes conduct hostile takeovers to acquire public corporations, such as when KKR famously took over RJR Nabisco in 1988.[13] However, defensive use of Section 8 cases are largely unsuccessful because courts hold that a potential interlock *in the future* is too speculative an injury to warrant injunctive relief.[14] Others have held that a potential future interlock fails to constitute an antitrust injury.

For example, in *Charming Shoppes v. Crescendo Partners II, L.P.,* the Eastern District of Pennsylvania denied a corporation's attempt to use Section 8 to prevent a private equity firm from running their slate of nominees for election to the company's board.[15] In that case, one of the private equity firm's proposed nominees sat on the board of a competing corporation.[16] Consequently, the corporation sought to enjoin the board election, alleging that the potential interlock would risk disclosure of its trade secrets to its competitor.[17] The court denied the injunction, holding that Section 8 was "not created as a vehicle for courts to sit in judgment of competitors in a proxy context" and that the company failed to allege or prove antitrust injury stemming from the interlock because the "antitrust laws were enacted for the protection of competition[,] not competitors."[18]

Charming Shoppes is criticized for being at odds with Section 8's prophylactic purpose to prevent interlocks prior to their occurrence and contradicting the Clayton Act's lenient injunctive relief standard that allows parties to seek an injunction for "threatened" loss or damage.[19] However, its conclusion is in line with other district courts that have held that target corporations of hostile takeovers fail to demonstrate antitrust standing because the potential takeover results *only in a threat* of an interlock.[20]

The hostile takeover cases implicate a broader public policy debate that reaches beyond whether the target corporation satisfied the standards to invoke injunctive relief based upon a future Section 8 violation. The cases illustrate the concern held by some courts that target corporations constitute a "poor private attorney general" that lack antitrust standing because they are the beneficiary, rather than the victim, of the antitrust violation.[21] Courts adherent to this reasoning balance the public policies of a "possible anti-trust injury versus the entrenchment of inefficient management and the harm to vindicating shareholder rights" and find an absence of antitrust injury because shareholders ultimately benefit from increased prices or decreased competition stemming from the merger.[22] Private litigants are likely to face hurdles with respect to target corporation antitrust standing when attempting to employ Section 8 as a defense to a private equity backed proxy contest.

However, a private litigant's defensive use of Section 8 to win a proxy war is not entirely off the table. In *Square D Co. v. Schneider S.A.*, the Southern District of New York denied the defendant's motion to dismiss plaintiff's Section 8 claims.[23] In that case, the Square D Company was the target of a hostile takeover attempt. Schneider attempted to obtain control of Square D by installing its own directors to Square D's board so that they would approve a merger between the two companies.[24] Square D employed Section 8 defensively, contending that Schneider's slate of nominees constituted Schneider's agents and, further, that many of the slate sat on the boards of competing corporations or other Schneider affiliated companies that competed with Square D.[25] The court enjoined the board election, and did not explicitly analyze antitrust standing, but rather found that the underlying policies of Section 8 to prevent "coordination of business decisions by competitors and the exchange of commercially sensitive information" supported Square D's Section 8 claim.[26] The court found that the allegations that the slate of nominees were the "agents" of and had a "business relationship" with Schneider were sufficient to state a Section 8 claim and held that "a cause of action under [Section 8] is stated where a company attempts to place on the board of a competitor individuals who are the agents of, and have an employment or business relationship with, such company."[27] Accordingly, *Square D* provides a counterweight to *Charming Shoppes* and has particular import when applied to the private equity realm. *Square D* leaves open the possibility for private litigants to allege sufficient facts demonstrating that a fund appointed nominee acts as the fund's "agent" or has a "business relationship" with the appointing fund to leverage a defensive use of Section 8 in a private equity backed hostile takeover.

Shareholder Derivative Suits

Shareholder suits alleging Section 8 violations must overcome Rule 23.1's pre-suit demand requirement and the business judgment rule, which protects director actions made in good faith. These requirements pose a significant obstacle to Section 8 shareholder litigants because plaintiffs must show at the pleading stage that: (1) the board lacked the ability to impartially handle the plaintiffs' objection to the interlocking directorate; and (2) the defendant knowingly and intentionally violated the antitrust laws.

For example, in *Robert F. Booth Trust v. Crowley*, the Seventh Circuit rejected a shareholder derivative suit alleging a Section 8 violation against Sears Roebuck & Co.[28] The derivative action arose in the wake of Sears' 2005 merger with Kmart. The plaintiffs alleged that the consolidated corporation possessed two directors that interlocked with a number of Sears' key competitors.[29] The shareholders further alleged that pre-suit demand would have been futile because Sears knew of the prohibited interlock when Sears nominated the individuals for re-election to the board.[30] The district court agreed, noting that the "record amply supported the inference" that the individuals who nominated the interlocked directors knew that the nominations would cause Sears to violate Section 8 and that "knowingly [causing] Sears to violate section 8 of the Clayton Act […] is not protected by the business judgment rule." In light of those facts, the court found that pre-suit demand would have been futile.[31]

On appeal, the Seventh Circuit rejected the claim, holding that the shareholders lacked standing to bring a derivative suit because they actually stood to benefit from the interlock. The Seventh Circuit found that the shareholders never suffered antitrust injury, holding that that none of the plaintiffs, nor any investors in Sears, were injured because "cooperation with a competitor [would] benefit the investors" and that the crux of antitrust law is to protect against "detriment [to] consumers." Because "no consumer complained about the other directorships held by members of Sears's board," the Seventh Circuit remanded the case with instructions for the district court to enter judgment in the defendant's favor.[32]

The District of Delaware reached a similar result in *In re eBay, Inc., Derivative Litig*. There, an eBay shareholder alleged that eBay violated Section 8 when it re-nominated an individual to its board that simultaneously served on the board of the N.Y. Times.[33] The shareholder's theory was that eBay and the N.Y. Times were "competitors" because eBay's online classifieds business competed with the N.Y. Times' online-classifieds platforms.[34] The court dismissed the plaintiff's Section 8 claim for failure to satisfy Rule 23.1's demand requirement because the shareholder's complaint failed to state facts supporting the claim that the directors "knowingly and intentionally" violated Section 8."[35] The court further held that the board's action was protected by the business judgment rule because the shareholder was "[w]ithout any factual basis to support the inference that eBay's board of directors knew that eBay and N.Y. Times were competitors that would trigger a violation of [Section 8]."[36] Last, the court held pre-suit demand was required because the shareholder failed to demonstrate that eBay's board lacked the ability to impartially handle his objection to the interlock.[37]

However, at least one court has held that the presence of interlocking management between a defendant parent corporation and its subsidiary coupled with the parent's control of the subsidiary's voting stock was sufficient to excuse demand. Though the shareholders' Section 8 claim in *In re Penn Cent. Sec. Litig*. was rendered moot by the resignation of the interlocked directors, the court held that the shareholders sufficiently alleged demand futility because of their allegations that their board was completely "controlled and dominated" by the defendant parent corporation.[38] There, the court held that the same individual serving as the CEO and president of both the defendant parent and subsidiary corporations at issue "suggested that the board would not be overly sympathetic" with the shareholder's demand.[39] Most critically, the parent's "position as an overwhelmingly dominant shareholder" of the subsidiary's voting stock was sufficient to show a level of control and domination that rendered demand futile.[40] Accordingly, a shareholder of a public company acquired by a private equity fund may be able to sufficiently plead demand futility based on a similar theory that the private equity fund dominates and controls the board of the plaintiff shareholder's corporation in addition to the board of the interlocked competing corporation.

Does Section 8 Apply to Non-Corporate Private Equity Funds and Portfolio Companies?

Section 8 forbids interlocking directorates among competing "corporations." However, the vast majority of private equity funds are formed as limited partnerships or limited liability companies (LLCs). This raises questions as to whether Section 8 applies to private equity funds organized as LLCs or limited partnerships or would reach interlocks between competing portfolio companies organized as non-corporate entities.

To illustrate, suppose a private equity fund acquires a controlling stake in two competing portfolio companies. One is a Delaware LLC, the other, a limited partnership. The fund then places an individual on the board of directors of the Delaware LLC and appoints the same individual as an officer or director of the limited partnership.[41]

A strict reading of Section 8 precludes a private litigant from challenging the interlock because the entities are not corporations. The fact that LLCs did not exist when the Clayton Act was signed into law in 1914 bolsters this argument.[42] However, there is no case law squarely addressing whether Section 8 applies to interlocks between two competing LLCs or an interlock between an LLC competing with some other non-corporate entity, such as a limited

partnership. Nevertheless, the spirit and purpose of Section 8 is to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation for such violations through interlocking directorates."[43] This broad and prophylactic legislative purpose arguably supports application of Section 8 to any type of entity, as the risk of collusion and sharing of competitively sensitive information exists no matter the corporate form.

The DOJ has certainly taken this position. Based on its interpretation of Section 8's legislative history, the DOJ does not believe that "Congress intended to limit the application of Section 8 solely to corporations."[44] The government's recent aggressive posture toward interlocking directorates in the realm of private equity resulted in certain private equity affiliated directors resigning their board positions. But all of those instances involved interlocks between *corporations*.[45] Notably, the FTC's recent action against private equity firm Quantum Energy Partners further underscores the government's interpretation that Section 8 reaches non-corporate entities. There, the FTC prevented an interlock between Quantum, a limited partnership, and EQT, a corporation "put[ting] industry actors on notice that they must follow Section 8 no matter what specific form their business takes."[46] Nevertheless, the absence of any case law on Section 8's application to non-corporate entities foments additional uncertainty for private litigants eyeing potential Section 8 litigation.

Private Equity Fund Liability for Appointing "Deputies" to Portfolio Companies

On June 27, 2023, the FTC, with the DOJ's concurrence, proposed changes to the Hart-Scott-Rodino Act's ("HSR Act") premerger notification regulations to allow the FTC and DOJ to "more effectively and efficiently screen transactions for potential competition issues."[47] One of the "key proposals" in the notice of proposed rulemaking is additional disclosures regarding the "structure of involved entities such as private equity investments."[48] The antitrust regulators are seeking more information about private equity fund structure and ownership, and, for the first time, will now require "identification of the officers, directors, or 'board observers' (or in the case of unincorporated entities, individuals exercising similar functions) . . . to allow the Agencies to know of existing, prior, or potential interlocking directorates […]."[49]

These changes aim to increase Section 8 enforcement against private equity board interlocks by shining a light into the shadows of private equity fund structure at an earlier stage. While the government will obtain a clearer picture of interlocking directorates in the private equity realm, private litigants will continue to struggle to ascertain whether directors of portfolio companies are the "agents" or "deputies" of a private equity fund prior to filing suit.

Private equity's fund structure poses a significant challenge to private plaintiffs. Section 8 clearly prohibits the same *individual or natural person* from serving as an officer or director on competing portfolio companies.[50] However, it is unsettled whether a private equity firm is liable for an illegal interlock when a private equity fund invests in competing portfolio companies and places *different* individuals onto the boards of those portfolio companies to serve as the fund's representatives or agents. In such instances, private litigants may allege that the private equity fund *itself* constitutes a "person" or "director" under Section 8 because the officers or directors appointed by the fund to the boards of the competing portfolio companies are not acting in their "individual capacities," but rather acting as "deputies" of, or as the "puppets or instrumentalities of the [private equity fund's] will."[51]

Though rarely litigated, courts that subscribe to the "deputization theory" view interlocking "deputized" directors as "present[ing] every bit as much of a danger to competition as a single individual serving on both boards."[52] Under this view of Section 8, the risk of collusion, coordination of business plans, and exchanging commercially sensitive information exists irrespective of whether a private equity fund designates the same individual to the board of two competing portfolio companies or appoints two *different* individuals to the portfolio companies to represent its interests and manage the portfolio companies.[53]

To survive a motion to dismiss such a claim, a plaintiff must plead facts that allow a court to infer that the directors or officers of the portfolio companies are acting on behalf of the private equity firm. The facts alleged must show that the private equity firm constitutes the de-facto director or interlocked "person" on the competing portfolio companies. This is a significant hurdle, especially because plaintiffs will not have access to the new HSR disclosures regarding interlocking directorates and fund structure and organization or the recently announced Securities and Exchange Commission's heightened reporting requirements for private equity funds.[54] Though courts retain discretion to permit early discovery, any documents that a private equity fund produced in response to a civil investigative demand concerning interlocking directorates are likely not discoverable until after surviving dismissal, and public information regarding board composition and other aspects of private equity funds may be of little use to private litigants facing funds organized as partnerships or that are otherwise exempt from public reporting requirements.[55]

Reading International v. Oaktree Capital Management is instructive. There, private equity firm Oaktree Capital moved to dismiss the plaintiff's claims of a "deputized" interlock.[56] Oaktree Capital acquired minority interests in two large competing movie theater chains, Regal and Loews, placed its president on Loews' board, and appointed one of its senior executives to Regal's board.[57] The plaintiffs alleged that Oaktree Capital's board designations violated Section 8 and allowed the firm to exercise control over the competitor movie theater chains so that they could orchestrate illegal agreements with film distributors.[58]

The court denied Oaktree Capital's motion to dismiss, holding that the plaintiffs' allegations of a "carefully coordinated" strategy designed by "two of the most senior executives" of Oaktree Capital was "sufficient to suggest deputization."[59] The court further held that "proof of the existence of an agency relationship must await discovery."[60] Oaktree Capital's placement of its high-level executives to the boards of the competing portfolio companies was a significant fact in the case. In their response brief to Oaktree Capital's motion to dismiss, the plaintiffs argued in support of their deputization theory that "[i]t is patently impossible to suggest that the President and a Principal of Oaktree, when sitting on the boards of two companies in which Oaktree holds significant investment interest, are doing anything but protecting those interests."[61]

Other than *Reading International,* very few cases shed light on how to sufficiently plead a Section 8 deputization claim. It is also the only reported private plaintiff deputization case against a private equity defendant. Other cases, such as the Fourth Circuit's opinion in *Pocahontas Supreme Coal Co. v. Bethlehem*, emphasize the importance of the plaintiff being able to go beyond conclusory allegations that "simply track[]the statutory language" of Section 8 and to specifically "identify the directors or boards involved in such a 'deputization' scheme."[62] These cases again highlight the quandary plaintiffs face obtaining such information prior to filing suit to provide factual support for such allegations given that private equity firms and the private portfolio corporations that they manage are largely exempt from much of the financial disclosure requirements.

Securities Exchange Act Rule 16(b) Cases Support Section 8 "Deputization" Theory

The *Reading International* court observed that "no court has attached liability in an interlocking directorate situation [involving deputization], but neither has any court squarely rejected such a theory."[63] Private plaintiffs seeking additional support for a Section 8 deputization theory can point to the Second Circuit's opinion in *Feder v. Martin Marietta Corp*.[64]

Though not a Section 8 case, *Feder* accepted the "deputization" theory in the context of the Securities Exchange Act of 1934's Rule 16(b) short-swing profits provision.[65] The rule prohibits corporate insiders, including officers and directors, from taking advantage of their special access to internal and material corporate information to make short-term profits by trading their own corporation's stock within a 6-month timeframe.[66] In the 16(b) context, courts have held that a *corporation* can be liable for the short-swing profits that it realized by trading the stock of another corporation to which it has placed a deputized director.[67]

The *Feder* court found the Martin Marietta Corporation liable under the deputization theory when it placed its own chief executive officer on the board of directors of Sperry Rand Corporation to "acquire inside information concerning Sperry and [to] utilize such data for Martin Marietta's benefit[.]"[68] Martin Marietta owned substantial stock in Sperry Rand while its CEO served on the Sperry Rand Board. Martin Marietta purchased and sold the stock within six months of purchase, violating 16(b). Shareholders brought a derivative action and alleged that Martin Marietta was liable on the theory that its CEO was Martin Marietta's deputy on the board of Sperry Rand.[69] Much like a private plaintiff would allege in a deputized interlock action against a private equity firm, the plaintiff in *Feder* argued that Martin Marietta's designation of its own CEO to the Sperry board was designed to "protect Martin's investment in Sperry"[70]

One of the key facts supporting the court's holding that Martin Marietta deputized its CEO was that the corporation "formally consented to and approved [the] [dual] directorship."[71] Other facts pertinent to a finding of deputization in the 16(b) realm that can be applied in a Section 8 context include: (1) whether the alleged deputy exercised any power of approval concerning investments; (2) whether the deputy discussed operating details of the corporation's affairs with board members of the corporation that appointed the individual to the deputized position; and (3) whether the alleged deputy made purchases and sales with the advice or concurrence of the corporation that nominated the individual to the deputized position.[72]

In fact, the DOJ cited to Rule 16(b) cases, including *Feder*, in *United States v. Cleveland Trust Co*., to support the proposition that a corporation may be deemed to sit on the board of directors of another corporation through a "deputy."[73] The *Cleveland Trust* court noted that "[n]o view [was] intimated as to what applicability, if any, these section 16(b) decision[s] have to the proper construction of Section 8 of the Clayton Act, a statute with different language, purpose, and history."[74] Yet, the court acknowledged that the 16(b) cases recognize that the "issue of deputization is a question of fact to be settled case by case" and held that analysis and treatment of the issue would occur at trial on a full record.[75] However, the case never reached trial and commentators note that the court's abstention from ruling on Rule 16(b)'s applicability to Section 8 deputization allows for use of 16(b) reasoning to apply to interlocking directorate cases.[76] There is a dearth of case law outlining the evidence needed to prove that a director is working at the behest of a third party to such an extent that the *corporation* sits on the board, rather than the individual. Rule 16(b) cases may provide private plaintiffs with a useful roadmap of key facts for private litigants to allege and develop in Section 8 cases.

Foreign and Offshore Private Equity—Section 8's Extraterritorial Application

Private equity firms frequently organize offshore funds to capitalize on favorable tax laws and liability protections for the fund's investors.[77] For example, the Cayman Islands is the largest foreign domicile for private equity funds and allows for funds to be established as corporations, limited

liability corporations, and limited partnerships.[78] Can a private plaintiff sue an offshore private equity fund for designating interlocked directors (either direct or "deputized") on its competing U.S. portfolio companies?

Few courts have grappled with Section 8's extraterritorial application to foreign corporations or business entities. In *Borg-Warner Corp. v.FTC*, the FTC challenged an interlocking directorate between Bosch, a German corporation, and Borg-Warner, a U.S. automotive parts supplier. There, Bosch placed two of its directors onto Borg-Warner's board.[79] The FTC alleged a Section 8 violation because Bosch directly competed with Borg-Warner's automotive parts business in the United States via a wholly owned subsidiary.[80] The FTC enjoined Borg-Warner and Bosch from having interlocking directorates for ten years; however, the FTC's order was ultimately reversed by the Second Circuit because Borg-Warner sold its automotive parts business, nullifying any "cognizable danger of recurrent violation" of Section 8.[81] Consequently, the court did not address whether Section 8's reach applied to an interlock with a foreign corporation operating a wholly owned subsidiary in the United States.

In 2016, the DOJ raised concerns of an interlocking directorate between two British financial corporations that operated in the United States.[82] Prior to the DOJ's intervention, the transaction would have involved ICAP, a company providing electronic trading platforms, would have acquired a 19.9 percent interest in and the right to nominate a member to the board of Tullett Prebon, a provider of electronic brokerage services.[83] Because the two corporations would continue to compete after the transaction, the DOJ interceded because of its concerns that ICAP's ability to nominate a Tullett Prebon board member would create an interlocking directorate and create a "cozy relationship among competitors."[84]

The enforcement action is significant because Section 8 was applied to two foreign-based corporations with U.S. operations, providing support for the proposition that offshore business entities are within Section 8's reach. Further, the action is notable because it inferentially supports a "deputization" theory against a foreign-based corporation. The DOJ did not explicitly state a concern that the *same individual* would serve on the board of ICAP and Tullett Prebon, but rather that ICAP had the *ability to nominate a director* to a competing entity's board.[85] To that point, the revised deal prohibited ICAP from having *any right* to nominate a Tullett Prebon board member, rather than simply requiring that ICAP avoid a direct interlock when it exercised its board appointment rights.

Further, the Foreign Trade Antitrust Improvement Act of 1982 (the "FTAIA"), which requires that foreign anticompetitive conduct have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce, applies only to Sherman Act claims and does not place any jurisdictional limitations on claims alleging substantive violations of the Clayton Act.[86] In addition, the text of Section 8 contains no limitations on its foreign reach, only requiring that the interlocked "corporations" be "engaged in whole or in part in commerce."[87] Still, as illustrated in the DOJ and FTC enforcement actions, private plaintiffs would have to point to some type of harm occurring in the United States resulting from the interlocking directorate to establish antitrust standing, such as the foreign entity's control over a subsidiary that competes directly with a U.S entity, as in *Borg-Warner*. Even assuming Section 8 applies to foreign *corporations*, the same arguments that Section 8 does not apply to domestic limited partnerships or LLCs could be marshalled against private litigants bringing Section 8 claims against offshore private equity funds organized under foreign limited partnership or limited liability company statutes.

Foreign Private Equity in *In Re Packaged Seafood Antitrust Litigation*

Recent litigation in *In re Packaged Seafood Antitrust Litigation* illustrates the evidence and facts necessary to establish an agency relationship between a foreign private equity firm and its domestic portfolio company.

The plaintiffs in *Packaged Seafood* alleged a conspiracy to fix the prices of packaged seafood against three major tuna producers and their parent corporations.[88] One of the defendants, Bumble Bee Foods LLC, was a portfolio company of Lion Capital LLP, a British private equity firm. After purchasing Bumble Bee, Lion Capital appointed its own partners to Bumble Bee's board, "provided strategic direction to Bumble Bee at the Board Level," and "comprised the majority of the Bumble Bee Board."[89] Lion Capital moved for summary judgment, arguing that it did not participate in the price fixing conspiracy and could not be held vicariously liable for the actions of its portfolio company for engaging in "normal investment activities as a private equity firm."[90]

Nevertheless, on August 18, 2023, the Southern District of California largely dismissed the Lion Capital entities' motion for summary judgment, holding that the plaintiffs submitted sufficient evidence to raise triable issues as to whether Lion Capital entities *directly* participated in the conspiracy, but left unresolved whether Lion Capital and its wholly owned U.S. based registered investment advisor could be held vicariously liable for Bumble Bee's conduct.[91]

Both the court's Order and the parties' summary judgment briefing provide a factual framework for private litigants analyzing whether a portfolio company constitutes an agent of a private equity firm (domestic or foreign) and may also be employed to support a "deputization" argument in the Section 8 context. For instance, the court noted that Lion Capital partners conducted "regular meetings" with Bumble Bee management, participated in "hour long monthly calls" to review financial reports from Bumble Bee's CFO, received daily emails with detailed sales reports, and were "closely involved in Bumble Bee pricing strategy."[92] Plaintiffs further alleged that the terms of the management services agreement between Lion Capital and Bumble Bee

demonstrated an agency relationship and pointed to Lion Capital's domination of Bumble Bee's board as well as Lion Capital's partner statements and general investment strategy that evidenced a close "partnering with management teams."[93]

Conclusion

Private plaintiffs face significant uncertainties in Section 8 cases. In the hostile takeover and proxy war context, private plaintiffs face court decisions that are at odds with each other concerning whether the potential for an interlocking directorate constitutes an antitrust injury or poses a risk imminent enough to warrant injunctive relief. Then, upon creation of an interlock, shareholders must allege, at the pleading stage, that the board knowingly violated the antitrust laws by creating the interlock, satisfy the rigorous strictures of F.R.C.P 23.1's pre-suit demand requirement, and demonstrate an injury to the shareholders stemming from the interlock.

Private equity's fund structure and limited public reporting requirements compounds these challenges, as litigants face an absence of binding precedent concerning Section 8's application to LLCs and limited partnerships as well as precedent illuminating Section 8's extraterritorial reach to foreign corporate and non-corporate entities. Last, the viability of the "deputization theory" under Section 8 remains largely unaddressed, and though the theory found acceptance in the Securities Exchange Act Section 16(b) case law, the dearth of precedent for its application under the Clayton Act generates additional uncertainty for private plaintiffs seeking to enforce Section 8. ■

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[1] Arthur H. Travers, Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 826-29 (1969).

[2] H.R. Rep. No. 62-1593, at 140 (1913).

[3] 15 U.S.C. § 19(a)(1).

[4] What do I Need to Know Before Starting a Private Fund? https://www.sec.gov/education/capitalraising/building-blocks/private-fund; Chris Morran and Daniel Petty, *What Private Equity Firms Are and How they Operate,* ProPublica, Aug. 3, 2022, https://www.propublica.org/article/what-is-private-equity.

[5] Brendan Ballou, Plunder: Private Equity's Plan to Pillage America (1st ed. 2023); *see also* American Investment Council, *Economic Contribution of the US Private Equity Sector in 2022* (noting that, in 2022, the U.S. private equity sector directly employed 12 million workers earning $1 trillion in wages and benefits and that 85% of private equity backed business were small business with fewer than 500 employees).

[6] Private Equity Wire, US DOJ Probes Blackstone, Apollo and KKR & Co on Overlapping board Seats, Oct. 31, 2022, https://www.privateequitywire.co.uk/2022/10/31/318133/us-doj-probes-blackstone-apollo-and-kkr-co-overlapping-board-seats; *see* Deputy Assistant Attorney General Andrew Forman, The Importance of Vigorous Antitrust Enforcement in Health Care, Keynote at the ABA's Antitrust in Healthcare Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust; *see also* Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[7] Press Release, Federal Trade Commission, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Aug. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

[8] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation, File No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf

[9] In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008).

[10] Makan Delrahim, *Antitrust Attacks on Private Equity Hurt Consumers: Regulators ignore research showing their investments promote competition and increase productivity*, The Wall Street Journal, July 31, 2022, https://www.wsj.com/articles/antitrust-attacks-on-private-equity-hurt-consumers-lina-khan-ftc-recession-competition-management-expertise-capital-11659271442.

[11] Chris Morran and Daniel Petty, *What Private Equity Firms Are and How they Operate,* ProPublica, Aug 3, 2022, https://www.propublica.org/article/what-is-private-equity.

[12] Julia Beskin and Samantha Tantko, *Fiduciary Duties of Directors Appointed by Private Equity Firms: Pitfalls and Best Practices,* Financier Worldwide Magazine, Oct 2019, https://www.financierworldwide.com/fiduciary-duties-of-directors-appointed-by-private-equity-firms-pitfalls-and-best-practices; What Do I Need to Know Before Starting a Private Fund?, https://www.sec.gov/education/capitalraising/building-blocks/private-fund.

[13] Janet Key, *$25 Billion Nabisco Sale Largest Takeover*, Chi. Trib., Dec. 1, 1988, https://www.chicagotribune.com/news/ct-xpm-1988-12-01-8802210125-story.html.

[14] General Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971).

[15] Charming Shoppes v. Crescendo Partners II, L.P., 557 F. Supp. 2d 621, 630 (E.D. Pa. 2008).

[16] *Id.* at 629.

[17] *Id.*

[18] *Id.*at 630 (internal quotation and citation omitted).

[19] Joseph Larson and Nathaniel Asker, *Charming Shoppes and the Issue of Standing under Section 8,* Global Competition Policy, Nov. 2008, https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Larson-Nov-08_2_.pdf; 15 U.S.C. § 26.

[20] *See* Barnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988); General Fireproofing v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971) (holding that the plaintiff corporation could not use Section 8 as a basis to enjoin a board member of a competing corporation from placing himself onto the plaintiff corporation's board because the threat of harm was too attenuated to warrant an injunction).

[21] Barnup & Sims, Inc. v. Posner, 688 F. Supp. at 1535; *see also* Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155 (1982).

[22] Barnup & Sims, Inc. v. Posner, 688 F. Supp. at 1534-35.

[23] Square D. Co. v. Schneider S.A., 760 F. Supp. 362, 368 (S.D.N.Y. 1991).

[24] *Id.* at 364.

[25] *Id.* at 366-67.

[26] *Id.* at 366.

[27] *Id.* at 367.

[28] Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).

[29] *Id.* at 316.

[30] *Id*; Robert F. Booth Trust v. Crowley, 09C5314, 2010 WL 748201, at *2 (N.D. Ill. Feb. 26, 2010), rev'd and remanded sub nom. Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).

[31] *Id*. at *10.

[32] Robert F. Booth Trust, 687 F.3d at 317.

[33] In re eBay, Inc., Derivative Litig., CIV. 10-470-LPS, 2011 WL 3880924, at *1 (D. Del. Sept. 2, 2011).

[34] *Id.* at *10.

[35] *Id.* at *7.

[36] *Id.*

[37] *Id*. at *11.

[38] In re Penn Cent. Sec. Litig., 367 F. Supp. 1158, 1164-65 (E.D. Pa. 1973).

[39] *Id.* at 1164.

[40] *Id.* at 1165.

[41] A "direct interlock" occurs when the *same individual* serves simultaneously as an officer or director on the board of two or more competing corporations. An "indirect interlock" or "deputization theory" is when two *different individuals* serve as officers or directors on competing corporations, but both act on behalf of the same third party, such as when a private equity fund places two different individuals on the board of its competing portfolio companies. *See* Michael E. Jacobs, *Combating Anticompetitive Interlocks*: *Section 8 of the Clayton Act as a Template for Small and Emerging Economies*, 37 Fordham Intl. L. J. 643, 649-50 (2014).

[42] Although forms of the limited partnership existed in the early 1900s in the United States, the Commission on Uniform State Laws did not approve the first Uniform Limited Partnership Act (ULPA) until 1916. *See* § 18:1. Nature and sources of Limited Partnership Law, Partnership Law & Practice § 18:1 (2022-2023); the first LLC statute was not enacted until 1977 and most states did not enact LLC statutes until the 1990s. *See also* Sandra Feldman, Understanding LLC Law: Its Past and its Present, Sept. 30, 2021, https://www.wolterskluwer.com/en/expert-insights/understanding-llc-law-its-past-and-its-present#:~:text=Introduction,the%20United%20States%20until%201977.

[43] United States v. Sears, Roebuck & Co, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)

[44] Assistant Attorney General Antitrust Division Makan Delrahim, Don't "Take the Money and Run": Antitrust in the Financial Sector, Keynote at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download; *see* 88 Fed Reg. 42189 (June 29, 2023) at n. 34 (noting that "[a]lthough Section 8 does not technically apply to unincorporated entities, information sharing and coordination can still raise concerns under Section 1 of the Sherman Act.").

[45] Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022) (noting resignations of private equity affiliated directors from Thoma Bravo and Prosus), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially. *See also*, Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023) (noting resignations of additional private equity affiliated directors from Apollo Global Management, Inc. and Thoma Bravo), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

[46] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation, File No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf.

[47] See Press Release, Federal Trade Commission, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27,2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[48] *Id; see also* Stefania Palma, *New US Antitrust Guidance Puts Private Equity and Tech Deals in Focus*, The Financial Times, July 19, 2023, https://www.ft.com/content/8b4907ba-742c-4dfb-9dd0-0a5925f4856c.

[49] 88 Fed Reg. 42189 (June 29, 2023).

[50] 15 U.S.C. § 19 ("no person shall, at the same time, serve as a director or officer in any two [competing] corporations.").

[51] Reading Int'l. v. Oaktree Capital Mgt. LLC, 317 F. Supp. 2d 301, 331 (S.D.N.Y 2003).

[52] *Id*. at 329.

[53] *Id*. at 331.

[54] Press Release, U.S. Securities and Exchange Commission, SEC Adopts Amendments to Enhance Private Fund Reporting (May 3, 2023) ("Private funds today are ever more interconnected with our broader capital markets. They also nearly have tripled in size in the last decade. This makes visibility into these funds ever more important. Today's amendments to Form PF will enhance visibility into private funds and help protect investors and promote financial stability."), https://www.sec.gov/news/press-release/2023-86. The HSR and SEC disclosures are confidential and FOIA exempt.

[55] *See, e.g.,* In re NASDAQ Mkt.-Makers Antitrust Litig., 929 F. Supp. 723, 727 (S.D.N.Y. 1996) (compelling production of the defendants' responses to DOJ's civil investigative demands).

[56] *Reading Int'l v. Oaktree Capital Management*, 317 F. Supp. 2d 301 at 332.

[57] *Id.* at 308-09

[58] *Id*.

[59] *Id.* at 332.

[60] *Id*.

[61] *Id; see also* Pltfs' Mem. Of law in Opp. To Def. Mot. to Dismiss the Compl. at 65, June 20, 2003. Case No. 03-CV-1895 (GEL) (THK), ECF No. 36.

[62] Pocahontas Sup. Coal Co., Inc. v. Bethlehem Steel Corp., 828 F. 2d 2111, 217 (4th Cir. 1987).

[63] *Reading Int'l*, 317 F. Supp. 2d at 328.

[64] Feder, 406 F.2d 260, 262 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 266. *See also* Blau v. Lehman, 368 U.S. 403, 410 (1962).

[68] *Feder v. Martin Marietta Corp*., 406 F.2d at 264.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 265.

[72] *Id*. *See also* § 11:15. Competition—What corporate entities are involved?—"Deputization", Corp. Counsel's Antitrust Deskbook § 11:15 (Oct. 2022); Lear Landa, Gregory S. Rowland, and Michael S. Hong, Advising Private Funds: A Comprehensive Guide to Representing Hedge Funds, Private Equity Funds and their Advisors, § 25:25. Directors by "deputization", Advising Private Funds § 25:25 (Dec. 2022).

[73] United States v. Cleveland Trust Co., 392 F. Supp. 699, 711-712 (N.D. Ohio 1974), *aff'd* 513 F.2d 633 (6th Cir. 1975).

[74] *Id.* at 711.

[75] *Id*. at 712.

[76] Robert Jay Preminger, *Deputization and Parent-Subsidiary Interlocks Under Section 8 of the Clayton Act,* 58 Wash. U L.Q. 943, 963-64 (1981).

[77] Larry Jordan Rowe and Justin T Kliger, Private Equity in United States: Market and Regulatory Overview, Practical Law Country Q&A 1-500-5474 (June 1, 2023), https://1.next.westlaw.com/Document/Id4aecb791cb511e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default).

[78] Atif Azher, Private Equity (Fund Formation) Cayman Islands, at 5–6, https://www.stuartslaw.com/cms/document/2023-private-equity-fund-formation--cayman-islands.pdf.

[79] Borg-Warner Corp v. FTC, 746 F.2d 108, 109-10 (2d Cir. 1984).

[80] *Id.*

[81] Matter of Borg-Warner Corp., 101 F.T.C., 863 1983 WL 486332, at *55; *Borg-Warner Corp v. FTC,* 746 F.2d at 110.

[82] Press Release, U.S. Dep't of Justice, Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (July 14, 2015), https://www.justice.gov/opa/pr/

tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses concerns#:~:text=The%20Department%20of%20Justice%20announced,by%20creating%20an%20interlocking%20directorate.

[83] *Id.*

[84] *Id*.

[85] *Id.*

[86] Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 246-47 (S.D.N.Y. 2008).

[87] 15 U.S.C. § 6(a); 15 U.S.C. § 19(a)(1)(A).

[88] In re Packaged Seafood Products Antitrust Litig., No. 15-MD-2670 DMS (MSB), 2023 WL 5344133, at *1-2 (S.D. Cal. Aug. 18, 2023).

[89] *Id*. at *11; *20 (internal quotation omitted).

[90] *Id.* at *2

[91] *Id*. at *19.

[92] *Id.* at *11.

[93] Pls.' Opp'n to Lion Entities' Mot. For Summ. Judg. at 29-31, May 11, 2023, Case No. 3:15-md-02670-DMS-MSB, ECF No. 3068.

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This fourth edition of the *Antitrust Grand Jury Investigations Handbook* provides a comprehensive guide for the practitioner representing a corporate or individual subject of a criminal antitrust investigation in the United States. Much has changed since the previous edition was published 21 years ago, in 2002. For example, the Antitrust Division has expanded the scope of conduct subject to criminal enforcement to include agreements among competing employers to fix wages and not to poach each other's employees. The Division has also substantially revised its Leniency Program, which confers immunity from prosecution to those companies and individuals who are the first to report a criminal antitrust violation.

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The Inefficient Treatment of the Efficiencies Defense

BY MICHAEL E. HAMBURGER AND DANIEL GROSSBAUM

THE PRIMARY REASON FOR PERMITTING competitors to merge is the potential to generate efficiencies. When two entities combine, they should be able to reduce redundancies in assets or staffing, and exploit each firm's superior internal processes, talent, products, and services. At the same time, the larger combined firm typically enjoys economies of scale that permit it to produce goods more cheaply and may be able to use its greater purchasing volume to obtain lower input costs. If executed properly, the merger should allow the new company to provide the same or a greater quantity of goods and services at lower prices, improved goods and services at no higher than existing prices, or an amalgamation of the two. At a minimum, the company should be able to increase profitability without negatively impacting the price, quantity, or quality of goods and services it sells.

Of course, the combined firm may instead use the loss of a competitor to raise prices unilaterally, or to coordinate with the remaining competitors to raise prices. In order to avoid these potential consequences, Section 7 of the Clayton Act prohibits mergers where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[1] Yet far too many courts—and the competition agencies—focus only on possible harms from a merger, either minimizing real consideration of the efficiencies a merger may create, or imposing an asymmetric and higher evidentiary burden to proof of efficiencies than to proof of potential harms.

This is a serious error that likely has deprived consumers of lower costs and improved products by preventing pro-competitive mergers. Rather than casting a skeptical eye on potential benefits from an acquisition, the language of Section 7 and the burden-shifting framework that governs Section 7 litigation compels the judicial and executive branches to consider benefits and harms on a level playing field. Thus, the type and quantum of proof needed to establish efficiencies should be equivalent to the type and quantum of proof sufficient to establish anticompetitive effects from a merger, with both categories of proof subject to the same degree of scrutiny.

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The Legal Framework for Section 7 Actions

In *United States v. Baker Hughes Inc.* (D.C. Cir. 1990), then-Circuit Judge Clarence Thomas described the burden-shifting approach applied in Section 7 cases and how that approach has evolved. First, "[b]y showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." Second, if the government makes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant."[2] The defendant can carry this burden of production "by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor."[3] Third, "[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[4]

Despite recognizing this framework for Section 7 litigation and the possibility that defendants could rebut a prima facie case, "[i]n the mid-1960s, the Supreme Court construed Section 7 to prohibit virtually any horizontal merger or acquisition."[5] That hostile approach softened in the 1970s, when the Supreme Court began taking a more holistic look at mergers to determine whether they may substantially lessen competition. The following subsections provide examples of the Court's hostile treatment of mergers during this period, as well as the Court's subsequent shift toward greater tolerance of proposed transactions in the 1970s.

The 1960s: The Supreme Court Increasingly Finds that High Market Shares, or Minor Increases in Concentration, Warrant Condemning Mergers. The 1963 decision in *United States v. Philadelphia National Bank* held that it was proper to "simplify the test of illegality" and "dispens[e], in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects" in favor of relying entirely on the merged firm's market share to establish the government's prima facie case. According to the Court, if a merger results in an entity that possesses "an undue percentage share of the relevant market" and significantly increases concentration in that market, it is "inherently likely to lessen competition substantially" and must be enjoined unless the defendant produces "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[6] Although the Court did not establish a minimum threshold beyond which a merger would warrant

this simplified test of illegality, it held that the merged firm's share of at least 30% of the market and an increase in concentration of the top two firms by more than 33% would exceed any minimum threshold.[7]

Subsequent cases appeared to decouple the amount of concentration post-merger from an increase in concentration due to the merger, while simultaneously lowering the bar for the government to establish its prima facie case. In *United States v. Aluminum Co. of America* (1964), for example, the Supreme Court held unlawful the merger of two aluminum conductor producers—Alcoa and Rome—where Alcoa held the largest share of the market (27.8%) and Rome, as the ninth largest producer, had only 1.3% market share. Even though the merger did not appreciably increase concentration, the Court nevertheless ordered divestiture because "Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7." In particular, the Court worried that the aluminum conductor market had seen five acquisitions since 1957, and that permitting another acquisition would further shift the market away from a supposed ideal of many sellers with small market shares.[8]

Thus, *Philadelphia National Bank* and *Aluminum Co.* appeared to interpret Section 7 to prohibit (1) the merger of two of the largest firms in a market, and (2) the acquisition by the largest firm in a market of a far smaller firm, even where many competitors remain. In the 1966 *United States v. Von's Grocery Co.* decision, the Court took *Aluminum Co.* a step further, relying upon its belief that "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency" to order divestiture following the merger of two grocery stores that collectively controlled just 7.5% of the Los Angeles retail grocery market.[9]

Judged by today's merger review standards, *Von's Grocery* would not present any antitrust concern: post-merger, there were still more than 3,800 single-owner grocery stores in Los Angeles, and 150 chain grocers of two or more stores, in comparison to just 61 stores operated by the merged Von's and Shopping Bag chains. While the two chains were third and sixth in total retail sales respectively pre-merger (behind the market leader, which held an 8% share), even post-merger they became just the second largest chain (at 7.5% share).[10] Moreover, pre-merger Von's and Shopping Bag represented 8.9% of total sales (at 4.7% and 4.2%, respectively),[11] indicating that the combined firm actually lost about 1.4% market share post-merger (one presumes due to competition by the remaining firms). Collectively, the top 12 grocery store chains held just 48.8% of the market pre-merger, and only 50% post-merger.[12] Under the widely-used Herfindahl-Hirschman Index ("HHI") measure of concentration,[13] this merger would not have exceeded any of the HHI thresholds first adopted by the U.S. Department of Justice ("DOJ") in its 1982 Merger Guidelines.[14] Indeed, by the late 1980s, Von's (then the second largest California grocer) and Safeway (the third largest) had merged.[15]

When the DOJ first promulgated its merger guidelines in 1968, *Von's Grocery* arguably fell within the class of mergers that the regulators would have challenged.[16] Although not competitors in a "Highly Concentrated" market (which the 1968 Merger Guidelines defined as having a 75% share among the four largest firms), the agencies might have challenged the merger because (1) Von's and Shopping Bag were close to 5% market share each, which was a threshold used in challenging mergers in "Less Highly Concentrated" markets, or (2) the share of the eight largest firms had increased by more than 7% in the preceding 10 years.[17]

Just a few weeks after *Von's Grocery*, the Court adopted an even more extreme position, reversing an order dismissing a challenge to the consummated merger between the nation's tenth largest brewer (Pabst) and its eighteenth largest (Blatz), which combined to hold merely 4.49% market share nationally.[18] Echoing its earlier concerns about arresting increases of concentration, the Court in *United States v. Pabst Brewing Co.* (1966) held that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." Because there was such a "steady trend toward concentration in the beer industry," the Court held that even this meager post-merger market share was sufficient to establish a Section 7 violation.[19]

As these cases demonstrate, Justice Potter Stewart was right when he memorably quipped that the "sole consistency" of decisions from the 1960s was that "the government always wins."[20] In effect, the government and the courts could use a simple numerical shortcut to strike down almost any merger, which Justice Stewart found inappropriate in *Von's Grocery*:

> The Court makes no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area. Instead, through a simple exercise in sums, it finds that the number of individual competitors in the market has decreased over the years, and, apparently on the theory that the degree of competition is invariably proportional to the number of competitors, it holds that this historic reduction in the number of competing units is enough under § 7 to invalidate a merger within the market, with no need to examine the economic concentration of the market, the level of competition in the market, or the potential adverse effects of the merger on that competition. This startling *per se* rule is contrary not only to our previous decisions, but contrary to the language of § 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality.[21]

1974 and Beyond: The Supreme Court Moves Away from Treating High Market Shares or Increases in Concentration as Determinative in Section 7 Cases. In 1974, the Supreme Court changed the trajectory of merger review cases in *General Dynamics*. There, the government presented proof that the coal industry was highly concentrated, with much of this concentration happening in the then-recent

past as the number of market participants dropped from 144 to 39 over a ten-year period. Despite recognizing that this proof permitted the government "to rest its [prima facie] case on a showing of even small increases of market share or market concentration" due to the proposed merger, the Court ultimately accepted the appellees' argument that other factors in the industry and in the businesses of the merging parties warranted finding that there was no likelihood of a substantial lessening of competition.[22]

In a sharp break from prior precedent, the Court reasoned that "statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects." In the coal industry, for example, past production did not speak to a company's future ability to produce because it did not reflect available reserves, and even current production was a poor indicator because much of it was committed for sale to specific companies at set prices under long-term supply contracts. When present and future reserves were considered, they showed that the target company "was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate," which supported the district court's finding that the merger would not substantially lessen competition.[23]

The differences between *General Dynamics* and its predecessors are striking. In *United States v. Phillipsburg National Bank & Trust Co.* (1970), the Supreme Court faulted the district court for considering competition between commercial banks—the relevant product market there—and other institutions such as savings and loan associations, pensions, and mutual funds, in deciding whether the merger of two commercial banks was substantially likely to lessen competition.[24] In dissent, Justice Harlan rejected the majority's approach of simply calculating market share and finding that the merger violated Section 7 on that basis alone as too simplistic, ignoring that market share statistics at most "create a rebuttable presumption of illegality."[25] Moreover, Justice Harlan chastised the majority for "ignor[ing] completely the extent to which competition" from the other financial institutions "affects the market power of the appellee banks."[26] Just four years later in *General Dynamics*, the majority seemed to agree with Justice Harlan's approach and considered evidence that producers in the coal industry—the relevant product market—"had become increasingly less able to compete with other sources of energy in many segments of the energy market," i.e., sources of energy other than coal.[27]

General Dynamics thus began the shift away from wholesale reliance on the structural presumptions that courts used to reject so many mergers in the 1960s. And in the decades since, almost all stakeholders—including the enforcement agencies—have "progressively deemphasized structural factors, moved toward more sophisticated econometric tools, and increasingly emphasized unilateral effects theories of anticompetitive harms."[28]

For example, *Baker Hughes* (D.C. Cir. 1990) held that market shares are simply "a convenient starting point for a broader inquiry into future competitiveness," and argued that the "Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition."[29] And in *FTC v. Sysco Corp.* (D.D.C. 2015), the FTC itself presented a complex merger simulation model in order to estimate that the transaction likely would result in $900 million in increased prices, rather than resting on increased concentration alone.[30]

The shift away from focusing almost exclusively on market share presumptions has led to an expanded range of evidence that defendants may use to rebut a prima facie case. "In the wake of *General Dynamics*, the Supreme Court and lower courts have found Section 7 defendants to have rebutted the government's prima facie case by presenting evidence on a variety of factors," including the weak position of an acquiring company, deteriorating ability to compete by an acquired company, and a strong level of competition in the relevant market post-merger.[31] In addition, it is now regarded as "hornbook law" that many other factors can rebut a prima facie case, such as a low likelihood of express or tacit collusion (in cases presenting coordinated effects theories of harm), weak data underlying the market share calculations, product differentiation, elasticities of demand across industries, and, in some instances, efficiencies.[32]

Unfortunately, some courts have not applied the same standards in considering defendants' "rebuttal" evidence that they applied to plaintiffs' evidence of potential anticompetitive effects. This disparity is most apparent in how differently some courts have treated claimed efficiencies in Section 7 actions, which has led them to invalidate mergers that appeared likely to benefit, rather than harm, consumers.

While Some Courts Credit Proof of Efficiencies, Many Give Efficiencies Evidence Short Shrift

In the 1960s, as the Supreme Court struck down virtually every merger that came before it, the Court also cast doubt on whether firms could use a merger's efficiencies either to rebut the government's prima facie case or to win approval for a merger that the courts would otherwise block. In *Philadelphia National Bank* (1963), for instance, the Court rejected the argument that two large banks in the Philadelphia area should be allowed to merge because the merger would stimulate economic development. According to the Court, "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[33] In *FTC v. Procter & Gamble Co.* (1967), the Court held that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[34] And in *Phillipsburg National Bank*

(1970), the Court held that even if the merger of two banks enhanced their competitive position, stimulated other local banks to be more aggressive, and enabled the merged bank to compete more effectively with larger banks, "such considerations . . . are not persuasive in the context of the Clayton Act."[35]

There was immediate backlash against this seeming rejection of efficiencies as a relevant consideration, with Justice Harlan's concurrence in *Procter & Gamble* forcefully contending that courts must consider efficiencies when evaluating mergers. Justice Harlan lamented the majority's "attempts to brush the question aside by asserting that Congress preferred competition to economies," because in his view "certain economies are inherent in the idea of competition." From this premise, it follows that if "Congress had reasons for favoring competition, then more efficient operation must have been among them." Furthermore, because a firm that realizes greater efficiencies improves its competitive position, any evaluation of a merger should "examine and weigh possible efficiencies arising from the merger in order to determine whether, on balance, competition has been substantially lessened."[36]

But not all efficiencies matter for this evaluation. Instead, courts and the enforcement agencies generally will not consider efficiencies unless they are (1) merger-specific, (2) verifiable, and (3) will be passed through to consumers. According to the 2010 Merger Guidelines, efficiencies are merger-specific only if they are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[37] For efficiencies to be verifiable, they must not be vague, speculative, or incapable of verification "by reasonable means." When efficiencies are verifiable, merger-specific, and not due to anticompetitive reductions in output or services, they are said to be "cognizable" and should be considered in assessing the effects of a given merger.[38]

Since *General Dynamics*, some courts have held that cognizable efficiencies are relevant because they may enhance competition, while others continue to hold that courts should not consider efficiencies in Section 7 cases. And in many instances, even courts that consider efficiencies have imposed asymmetrically high burdens on the merging parties to prove verifiable, merger-specific efficiencies that will lower prices post-merger.

Some Courts Have Accepted that Efficiencies May Rebut a Prima Facie Case. As noted above, for nearly 30 years the D.C. Circuit has regarded it a matter of "hornbook law" that efficiencies may rebut a prima facie case.[39] In *Heinz* (2001), the court agreed with Professors Areeda and Turner that *Procter & Gamble* (1967) did not foreclose the use of the efficiencies defense, but instead rejected "'an economies defense based on mere possibilities'" alone.[40] It also noticed that, despite *Procter & Gamble*, "the trend among lower courts is to recognize the defense."[41]

In addition, shortly after *Baker Hughes* (D.C. Cir. 1990), the Eleventh Circuit recognized the defense in *FTC v. University Health, Inc.* (1991). Although it reversed the lower court's decision not to enjoin the merger, the court reasoned that evidence of "significant efficiencies benefiting consumers is useful in evaluating the ultimate issue–the acquisition's overall effect on competition." It instructed lower courts to compare a merger's predicted anticompetitive costs against efficiencies that would benefit competition and consumers, finding this comparison "necessary . . . to evaluate the acquisition's total competitive effect."[42] Similarly, the Sixth Circuit in *ProMedica Health Systems v. FTC* (2014) recognized that efficiencies benefiting consumers may rebut a prima facie case, but rejected the defense because the merging parties in that case only argued that the merger would benefit them, not consumers.[43]

Nevertheless, even the cases that considered efficiencies have not relied entirely on them to reject challenges to the proposed mergers. Most prominently, in *FTC v. Tenet Health Care Corp.* (1999), the Eighth Circuit held that while the trial court may have properly rejected the parties' efficiencies defense, the district court nevertheless erred in failing to consider evidence that a larger, more efficient merged entity would provide a better quality service (medical care) than if the merging parties remained separate.[44] Because the combined system could provide better services, the court held that the merger may enhance rather than substantially lessen competition.[45]

The district court in *FTC v. Arch Coal, Inc.* (2004), engaged in the same type of analysis of efficiencies evidence and refused to enjoin a merger of two coal companies. The court devoted several pages to assessing the defendants' claimed efficiencies and determined the efficiencies that the parties were likely to realize: about $35-$50 million of the claimed $130-$140 million over the first five years post-merger. While it found that these savings were not large enough to "provide a complete defense to plaintiffs' prima facie case," it recognized that such efficiencies remained relevant to assessing the competitive landscape post-merger. It then held that the likely efficiencies, combined with other evidence, successfully rebutted the FTC's prima facie case.[46]

Similarly, in *New York v. Deutsche Telekom AG* (2020), the district court held that the merger of Sprint and T-Mobile would result in verifiable, merger-specific efficiencies, including: (1) billions of dollars in cost savings from combining their cellular networks and closing redundant retail locations; (2) a faster transition to 5G data transfer capabilities across a broader network with more capacity than could be achieved if the companies built out their networks independently, in part due to carrier aggregation network effects; and (3) resultant cost savings that would flow to consumers given the incentive to use excess network capacity and reduced capital/operational costs to compete against larger wireless providers like AT&T and Verizon.[47] But despite recognizing that billions of dollars in efficiencies likely would

be achieved and passed on to consumers, the court declined to rest its decision on efficiencies evidence alone due to the uncertainty of whether efficiencies are a complete defense.[48] Instead, the court found that the predicted effects of the merger based on market share and upward pricing pressure analyses failed to match the reality that T-Mobile had aggressively competed against Verizon and AT&T in the past and, with a better network and lower costs post-merger, was unlikely to abandon this strategy.[49]

In short, since *General Dynamics*, many courts have credited evidence of cognizable efficiencies in Section 7 cases. As discussed below, others have doubted that efficiencies are relevant when assessing the likely effects of a merger. And still others have imposed such high burdens on proving the certitude and scale of post-merger efficiencies that they have effectively rendered it impossible for efficiencies to rebut a plaintiff's *prima facie* case or show that a merger will benefit consumers.

Many Courts Are Hostile to Efficiencies Evidence or Asymmetrically Require More Proof of Efficiencies than of Potential Anticompetitive Harm. Several courts of appeals have suggested that courts should not consider an efficiencies defense even though they themselves elected to do so. In *St. Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System* (2015), the Ninth Circuit argued that the Supreme Court may not approve of such a defense and asserted that it "remain[s] skeptical about the efficiencies defense in general and about its scope in particular."[50] The Ninth Circuit nevertheless considered evidence of efficiencies, but held that the defendant was obligated to "clearly demonstrate" that the merger enhances competition because of merger-specific and verifiable efficiencies.[51] Because it found that the defendant had not clearly shown that there were sufficient cognizable efficiencies to make the merger procompetitive, the court affirmed the district court's rejection of the merger.[52]

The court made several relevant findings: (1) it accepted that, as defendants claimed, adding primary care physicians through the merger of two health systems likely would improve the quality of patient care; (2) but it believed that the reimbursement rates paid to the combined firm for primary care physician services would likely increase as well; and (3) it doubted the defendants' contention that the merger would necessarily lead to more integrated health care or a new reimbursement model for healthcare services that would replace the old system based on the payment of fees for each medical service. Moreover, the court did not find that the defendant needed to add primary care physicians to transition to integrated care, because independent physicians already were adopting risk-based reimbursement models and using data analytics tools to move toward integrated care. As a result, the court held that the claimed efficiencies were not merger specific. Finally, the court concluded that even though the merger may result in better patient care, the defendant had not shown that this outcome "would have a positive effect on competition."[53]

The following year, the Third Circuit in *FTC v. Penn State Hershey Medical Center* (2016) stated that it was "skeptical that such an efficiencies defense even exists," but did not decide that issue because it believed the defendants "cannot clearly show that their claimed efficiencies will offset any anticompetitive effects of the merger." The court first took issue with the district court crediting savings of $277 million from using the merged firm's existing capacity rather than building more, because it was unclear whether a new building was needed and because deciding not to build the facility constituted a reduction in output (i.e., there would be fewer facilities to provide services post-merger). The court further held that the efficiencies were not "extraordinarily great," which it felt was required given the high HHI numbers post-merger.[54]

Previously, the D.C. Circuit in *Heinz* (2001) suggested that efficiencies needed to be "extraordinary" where market concentration levels were high. In that case, however, the court never questioned whether efficiencies evidence should be considered, because "the trend among lower courts is to recognize the defense." Instead, it rejected the defendants' efficiencies evidence because it found that the purported benefit of the transaction—access to the acquired firm's better recipes, which would allow production of better-tasting baby food in Heinz's more efficient facilities at a lower cost—was not merger-specific, since neither the defendants nor the district court addressed whether Heinz could have improved its own products and thus obtained the benefits of the merger without eliminating a competitor.[55]

Even though two prior D.C. Circuit cases held that efficiencies may be used to rebut a prima facie case (*Baker Hughes* (1990) and *Heinz* (2001)), the D.C. Circuit shifted course in *United States v. Anthem, Inc.* (2017) ("*Anthem II*") and strongly suggested that *Procter & Gamble* banned consideration of efficiencies. After noting that Justice Harlan's concurrence in *Procter & Gamble* had accepted the use of efficiencies to defend a merger, the two-judge majority of the panel deciding *Anthem II* stated that while "Justice Harlan's view may be the more accepted today, the Supreme Court held otherwise." The majority then disclaimed that it was deciding whether efficiencies could be considered in a Section 7 case, because it believed that the district court's rejection of the defendants' efficiencies evidence was not clearly erroneous.[56]

In reaching this conclusion, the *Anthem II* majority went well beyond even the "clear showing" burden that some courts had placed on merging defendants to prove efficiencies in cases like *Penn State Hershey* and *St. Luke's*.[57] There, a health insurer, Anthem, contended that its acquisition of another insurer, Cigna, would allow it to obtain $2.4 billion in medical cost savings through lowering the rates it paid providers for medical services, and its expert calculated that 98% of these savings would be passed through to customers.[58] The majority concluded that in order for these savings to be creditable, Anthem first would need to obtain

lower provider rates, and then renegotiate some customers' contracts in order to pass through lower rates.[59] Rather than assessing whether this was likely, it held that Anthem would need to be "*certain* to take those actions" and face "no impediments to the savings' realization," finding that this "showing is still *necessary* for a court to conclude that the merger's direct effect (upward pricing pressure) is likely to be offset by an indirect effect (potential downward pricing pressure)."[60]

According to the majority, the merged firm's calculated medical cost savings were "speculative" because there *might* be "abrasion" with medical providers if the combined entity used pre-existing contractual terms (called affiliate clauses) to automatically lower provider rates. It also thought that some providers "could push back hard" on efforts to renegotiate lower rates, even though "very few" providers had tried to remove the affiliate clause from their contracts despite knowing that Anthem planned to use it to lower rates.[61] Moreover, the majority doubted that much of the savings would be passed on to customers. While it admitted that "renegotiation will lead to a decrease in [the acquired firm's] rates," it thought the merged firm might try to increase fees to self-insured customers in order to recoup some of these savings and would need to renegotiate contracts with fully-insured customers in order to deliver any savings to them.[62]

Then-Circuit Judge Brett Kavanaugh's dissent critiqued the majority for placing so much weight on 1960s Supreme Court jurisprudence and ignoring the shift away from those cases beginning with *General Dynamics*.[63] Rather than relying on market share alone as conclusive proof of a Section 7 violation, *General Dynamics* requires an analysis that "is 'comprehensive,' and focuses on a 'variety of factors,' including 'efficiencies.'"[64]

In addition, Justice Kavanaugh explained that the majority placed an insurmountable burden on the defendants and inexplicably disregarded the claimed efficiencies. Contrary to the majority's holding, he noted that the "evidence overwhelmingly demonstrates that the merged Anthem-Cigna, with its additional market strength and negotiating power in the upstream market, would be able to negotiate lower provider rates . . . *Indeed, the Government itself agrees that this merger would allow Anthem-Cigna to obtain lower provider rates*."[65] Further, because most customers in the relevant market defined by the district court were ASO (self-insured) customers, annual savings of at least $1.7 billion would be passed through to them "automatically," even ignoring efficiencies that would flow to fully-insured customers.[66] This amount far exceeded the increased fees—without considering any efficiencies—that the government's expert believed would result from the merger ($48 million to $930 million).

In the dissent's view, the majority erred by ignoring that efficiencies "need not be certain. They merely must be probable."[67] In fact, the D.C. Circuit had recognized as far back as *Baker Hughes* that "Section 7 involves *probabilities*, not certainties or possibilities."[68] The majority, however, relied on a "smorgasbord" of "highly speculative" concerns about "lots of bad things [that] *could* happen after the merger. But the courts have to assess what is *likely*." According to Justice Kavanaugh, the majority disregarded the teachings of *Baker Hughes* and instead seemed "to be accepting the worst-case possibility rather than determining what is likely."[69]

Some district courts have rejected efficiencies defenses by relying on the same type of reasoning as the majority in *Anthem II*. In certain of these decisions, the courts refused to consider efficiencies because they did not believe the efficiencies were certain to occur.[70] In other cases, the courts also concluded that the efficiencies would not outweigh the likely harm resulting from the merger, despite never quantifying the amount of cognizable efficiencies or harm that the merger was likely to cause.[71]

The asymmetric treatment of efficiencies evidence provides private plaintiffs and government enforcers a significant advantage in merger cases. As then-FTC Commissioner Christine Wilson recognized in 2021, such asymmetric treatment of efficiencies evidence created a "vicious cycle": since some courts and the competition agencies "systematically discount efficiencies evidence, requiring certainty when none is possible," merging firms have "little incentive" to develop robust proof of efficiencies, and in turn courts and the agencies that encounter such less-than-robust proof become even more suspicious of all efficiencies evidence.[72]

There Is No Sound Basis for Imposing a Higher Burden on Merging Parties to Prove Efficiencies

That many courts have imposed a higher burden to prove efficiencies does not address a central question: is there a sound reason for requiring a higher burden? Professor Hovenkamp argues that courts should "require stricter proof of merger-generated efficiencies than of predicted anticompetitive effects" for two reasons. First, he suggests that proof of harmful effects is largely based on market predictions "supported by widely embraced economic tools and observable by many," in contrast to proof of efficiencies, which depend "on information that is often unobservable to outsiders." Second, he notes that parties to a merger are in the best position to identify what efficiencies they expect to achieve and how they expect to do so.[73] But neither rationale supports imposing a *greater* burden on the merging parties than their opponents bear in proving anticompetitive effects.

The first rationale does not account for the "widely embraced economic tools" available to determine how efficiencies impact a merger's competitive effects. In general, courts and enforcers should judge efficiencies based on whether they enhance consumer welfare (i.e., benefit consumers), rather than general welfare (i.e., create more gains than losses, even if those gains accrue to the merged entity rather than to consumers).[74] Thus, if a merger would likely generate efficiencies, then that merger would likely enhance consumer welfare if enough efficiencies are passed through

to avoid increased prices.[75] And while precise pass-through estimates may be difficult to calculate in some instances,[76] that does not undercut textbook economics theory, which finds that even monopolists pass through 50% of cost changes.[77] If it is fair to build a prima facie case based on economic predictions that increasing concentration is likely to result in supracompetitive prices, it is fair to presume that at least 50% of cost savings are likely to be passed through to customers. In each case, of course, both predictions can be rebutted with evidentiary proof. But in the absence of such rebuttal evidence, any difficulty in calculating more precise pass-through rates of efficiencies does not justify disregarding foundational economic principles and presuming that pass-through is zero.

The second rationale similarly appears to treat a reason for placing the burden of *production* on merging defendants—evidence of likely efficiencies would be in their possession—as a reason for imposing the burden of *persuasion* on them (and a high burden at that). But this rationale ignores that the burden of proving a merger is likely to result in a substantial lessening of competition always remains with the plaintiff.[78]

Although Professor Hovenkamp did not call for placing the burden of persuasion on defendants, other commentators have done so. For example, Professor Daniel Crane contends that merging parties should be forced to prove likely efficiencies by a preponderance of the evidence.[79] But that position conflicts with the well-recognized rule that, in Section 7 cases, plaintiffs always bear the ultimate burden of proving a merger is likely to substantially lessen competition. Consequently, defendants should not be obligated to prove that a merger likely is procompetitive due to its efficiencies.[80] Rather, if the defendants produce evidence that efficiencies outweigh the likely harm established by the government in its prima facie case, then the burden should shift to the government to prove that, on balance, the merger is likely to substantially lessen competition.

Furthermore, the defendants' burden of production cannot be too stringent or else it would turn merger cases on their heads. "A defendant required to produce evidence 'clearly' disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially. . . . [W]e are loath to depart from settled principles and impose such a heavy burden."[81]

Most importantly, imposing a higher burden of production on defendants or shifting the burden of persuasion to them would violate the language of Section 7, which prohibits only mergers that may *substantially* lessen competition. If Congress intended to outlaw all mergers unless they were proven to *enhance* competition, it could have said so—but it did not. Thus, the substance of Section 7 does not support requiring defendants to prove with certainty that there will be no harm. The statute contemplates symmetrical treatment of harms and benefits and requires the plaintiff to prove that the likely harms outweigh the likely benefits substantially enough to violate Section 7.

The next issue concerns how to apply symmetrical treatment to potential harms and efficiencies. Some commentators disfavor direct numerical comparisons. In Professor Crane's view, for example, data and methodological limitations make direct balancing of likely efficiencies against likely harms impossible (or at least impracticable) in most cases. He therefore proposes "symmetrical treatment as a policy mnemonic device, much as we already use mathematically indeterminate concepts like probable cause."[82]

But there is no reason to impose such evidentiary limitations, at least where the efficiencies claimed are directed at lowering costs or prices of goods and services.[83] In such instances, the only way to determine if competition may be substantially lessened is to compare directly the likely efficiencies and harms. Further, adopting such limitations on efficiencies evidence would allow courts to rule in merger cases without a thorough analysis of a mergers' likely competitive effects.[84]

Moreover, there are not systematic difficulties in using empirical evidence to make direct comparisons of a merger's procompetitive and anticompetitive effects. To the contrary, modern economic models and computing technology enable reliable predictions of a merger's effects on price and other key economic metrics. In most merger cases, the asserted harm is that lost competition will increase prices, and the government often presents economic evidence predicting the magnitude of such price increases.[85] Similarly, multiple courts have assessed the efficiencies claimed by merging parties and estimated, in dollars, those that were likely to be achieved.[86] Thus, the courts, plaintiffs, and merging defendants can evaluate what effects on price are likely due to increased concentration, a loss of direct rivalry between two competitors, and cost savings the merger will produce. They also can compare likely harms and benefits to determine whether a particular merger may lessen competition substantially.

Post-*General Dynamics*, the only rational way to resolve a Section 7 case is to require the government to prove that a substantial lessening of competition is likely despite defendants' evidence of cognizable efficiencies, if any. Unless the government can prove that prices will likely increase, even after accounting for downward pressure on prices from whatever efficiencies are likely to be achieved, then a merger should not be invalidated or enjoined. That is the only way that courts can assess an "acquisition's total competitive effect,"[87] meaning its net effect on competition under a "totality-of-the-circumstances approach."[88]

Unfortunately, as shown above, numerous courts have gotten the efficiencies standard wrong. Contrary to the language of Section 7, these courts in effect shifted the burden of persuasion to defendants, and then enhanced it by requiring "clear" or "certain" proof that the mergers would be procompetitive. Had these cases been decided under the actual

probability standard imposed by Section 7, and without shifting the burden of persuasion to the defendants, many of them may well have come out differently.

Conclusion

Although quantifying likely harm and efficiencies may not be possible in all instances, in many instances the parties and the courts can quantify and compare a merger's potential procompetitive and anticompetitive effects. Because the goal of Section 7 is to prevent only mergers that are likely to substantially lessen competition, courts should not disregard or devalue proof of efficiencies by imposing stricter burdens of production on merging entities than apply to plaintiffs' proof of potential anticompetitive effects. Nor should courts shift the burden of persuasion to defendants to prove that a merger is procompetitive or refuse to compare a merger's propensity to increase prices due to higher concentration and decrease prices due to lower fixed and variable costs. ■

[1] 15 U.S.C § 18.

[2] United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

[3] *Id.* at 991.

[4] *Id.* at 983.

[5] *Id.* at 989.

[6] United States v. Phila. Nat'l Bank, 374 U.S. 321, 362-63 (1963). The Supreme Court subsequently backed away from this "clearly showing" language in a series of cases beginning with *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). *See Baker Hughes*, 908 F.2d at 990-91 (explaining that the court "at the very least lightened the evidentiary burden on a section 7 defendant" by requiring merely a showing to rebut a prima facie case, rather than a clear showing).

[7] *Phila. Nat'l Bank*, 374 U.S. at 364-65.

[8] United States v. Aluminum Co. of Am., 377 U.S. 271, 278-281 & n.6 (1964). The Court also may have been concerned that Rome was a quasi-maverick producer, because it noted that Rome "was a pioneer in aluminum insulation" and that Rome had a first-class marketing operation that Alcoa used to distribute its entire product line after the merger. *Id.* at 281.

[9] United States v. Von's Grocery Co., 384 U.S. 270, 272, 277 (1966).

[10] *Id.* at 272-74.

[11] *Id.* at 280-81 (White, J., concurring).

[12] *Von's Grocery*, 384 U.S. at 281 (White, J., concurring).

[13] The HHI measures concentration by adding together the squares of the market shares of each firm in the relevant market. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 & n.9 (D.C. Cir. 2001). An increase in HHI from pre-merger to post-merger can be derived by calculating 2ab, where a and b represent the combining firms' respective pre-merger market shares. *Id.*

[14] Available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf. Section III.A.1 of the 1982 Merger Guidelines specifies that the DOJ likely would not challenge any merger where the post-merger HHI was below 1000, or any merger with a post-merger HHI between 1000 and 1800, with less than a 100-point increase in HHI. In *Von's Grocery*, the HHI increase was just under 40, given the 4.7% and 4.2% market share of Von's and Shopping Bag pre-merger. Moreover, because the other top 10 firms post-merger would have split approximately 35% share among them (after removing the 8% share of the market leader and the 7.5% share of the number two grocer, the combined Von's-Shopping Bag, from the 50% share held by the top 12 firms), with none of them having greater than the merged entity's 7.5% share, the total post-merger market HHI could not have exceeded 1000. Since the 1982 Merger Guidelines were adopted, the HHI thresholds have only increased. *See* U.S. Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines § 5.3, available at https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf (defining unconcentrated markets as below 1500 HHI, moderately concentrated markets as between 1500 and 2500 HHI, and highly concentrated markets as above 2500 HHI, and specifying that increases of at least 100 HHI points in moderately and highly concentrated markets are required to potentially raise significant competitive concerns).

[15] California v. Am. Stores Co., 495 U.S. 271, 275 (1990).

[16] *See* 1968 Merger Guidelines §§ 5-7, available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf. While *Von's Grocery* was decided before the 1968 Merger Guidelines were promulgated, the guidelines may have reflected the DOJ's positions taken in mergers challenged in the preceding years, including in *Von's Grocery*.

[17] *See* 1968 Merger Guidelines §§ 6-7.

[18] United States v. Pabst Brewing Co., 384 U.S. 546, 547 (1966).

[19] *Id.* at 551-53.

[20] *Von's Grocery*, 384 U.S. at 301 (Stewart, J., dissenting).

[21] *Id.* at 282-83.

[22] *Gen. Dynamics*, 415 U.S. at 494-98. Furthermore, two years prior to the merger the combined firm represented 12.4% and 23.2% share based on past production in the two relevant geographic markets. By 1967, eight years after the merger, their combined share had dropped to 10.9% and 21.8% in those markets. *Id.* at 496.

[23] *Id.* at 498-504.

[24] United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-61 (1970).

[25] *Id.* at 374-77 (Harlan, J., dissenting) (referring to this approach as "antitrust numerology" and a "numbers test").

[26] *Id.* at 379-81 (noting that such entities "are of much greater competitive significance in this market" than the majority acknowledged because they "offer close substitutes for the products and services that are most important to the appellee banks," and thus must be considered in "appraising the *significance* of the concentration percentages thus calculated") (emphasis in original).

[27] *Gen. Dynamics*, 415 U.S. at 498-99.

[28] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347, 390 (2011).

[29] *Baker Hughes*, 908 F.2d at 984.

[30] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 66-67 (D.D.C. 2015).

[31] *Baker Hughes*, 908 F.2d at 985.

[32] *Id.* at 985-86; *see also* United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1282-83 (7th Cir. 1990) (noting that the trend of outlawing virtually all horizontal mergers under Section 7 culminated with *Von's Grocery*, and since then "a more moderate interpretation of section 7 has prevailed" that focuses on whether mergers are likely to harm consumers). The Second Circuit recently acknowledged this shift away from relying on "post-merger market share as essentially irrebuttable proof of market power" in the 1960s to the "more nuanced and text-based interpretation of Section 7" that the Supreme Court adopted in the 1970s. *See* In re AMR Corp., 2023 U.S. App. LEXIS 6504, at *3-7 (2d Cir. Mar. 20, 2023).

[33] *Phila. Nat'l Bank*, 374 U.S. at 371.

[34] FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

[35] *Phillipsburg Nat'l Bank*, 399 U.S. at 367-68.

[36] 386 U.S. at 597-58 (Harlan, J., concurring). In that case, Justice Harlan was referring to mergers involving "a conglomerate or product-extension merger [that] rests on a market-structure demonstration that the likelihood of anticompetitive consequences has been substantially increased." *Id.* at 598. But the principle remains the same and ought to apply regardless of the form of merger under consideration.

[37] 2010 Merger Guidelines § 10. The new draft merger guidelines proposed by the DOJ and the FTC seek to make this requirement even harsher by requiring that the efficiencies "will produce substantial competitive

benefits that could not be achieved without the merger," rather than looking at whether the efficiencies likely would be produced and are unlikely to be achieved without the merger. Draft Merger Guidelines § IV.3.A, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmerger-guidelines2023.pdf.

[38] 2010 Merger Guidelines § 10. Merging parties should be wary of relying only on the judgments of internal employees in calculating efficiencies, as many courts require that any facts or assumptions used to calculate efficiencies must be based on objective and reasonable sources "that could be verified by a third party." United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 91 (D.D.C. 2011).

[39] *Baker Hughes*, 908 F.2d at 985-86; Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (acknowledging, in Section 1 action, that mergers and other similar combinations "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively").

[40] *Heinz*, 246 F.3d at 720 n.18 (quoting 4 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 941b, at 154 (1980)).

[41] *Id.* at 720. The D.C. Circuit reversed the district court's decision not to enter a preliminary injunction, finding that the high market concentration levels presented by the government could be rebutted only by "proof of extraordinary efficiencies" that the merger parties had not yet supplied. *Id.* at 720-21. But the court cautioned that it was not deciding whether the claimed efficiencies were sufficient to rebut a prima facie case. *Id.* at 727 & n.26.

[42] FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222-23 (11th Cir. 1991). The court held that the trial court improperly considered efficiencies in that case because the evidence of efficiencies was pure speculation and the merging parties never specifically explained how they expected to generate their claimed efficiencies. *Id.* at 1223-24.

[43] ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014).

[44] FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999).

[45] *Id.* In a decision not recommended for full-text publication, the Sixth Circuit also affirmed a district court order finding that the defendants successfully rebutted the FTC's prima facie case, in part through evidence of more than $100 million in cost savings "that would redound to the benefit of consumers." FTC v. Butterworth Health Corp., 1997 U.S. App. LEXIS 17422, at *6-9 (6th Cir. July 8, 1997).

[46] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 151-53, 158-59 (D.D.C. 2004) (explaining that evidence established the merger would result in some cost reductions that would benefit competition); *see also* United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 140, 146-49 (E.D.N.Y. 1997) (finding $25-$30 million in efficiencies were likely to be achieved and benefit consumers, but not relying on these efficiencies in declining to enjoin the merger, because the government did not establish a relevant product market); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 680 (D. Minn. 1990) (finding expected efficiency of increased production volume would better enable firm to compete with the market leader and such evidence, in conjunction with proof of easy entry and that buying power by downstream customers would mitigate potential price increases, was sufficient to show that no substantial lessening of competition was likely). The agencies also have credited likely efficiencies in deciding to permit proposed mergers, as when the third and fourth largest pharmaceutical wholesalers merged. *See, e.g.*, Statement of the FTC, AmeriSource Health Corp./Bergen Brunswig Corp. (Aug. 24, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/08/amerisourcestatement.pdf.

[47] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207-17 (S.D.N.Y. 2020).

[48] *Id.* at 217.

[49] *Id.* at 244-46, 248-49.

[50] St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., 778 F.3d 775, 788-90 (9th Cir. 2015). Previously, the Ninth Circuit refused to consider a defendant's argument that its merger would increase its operational efficiency, contending that "[t]his argument has been rejected repeatedly." *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (citing *Phila. Nat'l Bank*, 374 U.S. at 370). In *St. Luke's*, the Ninth Circuit suggested that *RSR* dealt only with efficiencies outside of the relevant market, and therefore it remained "uncertain" whether the defense could apply in other contexts. *St. Luke's*, 778 F.3d at 789.

[51] *St. Luke's*, 778 F.3d at 790-91 ("[A] successful efficiencies defense requires proof that a merger is not, despite the existence of a *prima facie* case, anticompetitive.").

[52] *Id.* at 790-92 ("Courts recognizing the defense have made clear that a Clayton Act defendant must 'clearly demonstrate' that 'the proposed merger enhances rather than hinders competition because of the increased efficiencies.'" (quoting *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 137)).

[53] *Id.* at 791-92.

[54] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347-48, 350 (3d Cir. 2016). The Third Circuit later clarified that its holding in *Hershey* about the need for "extraordinary" efficiencies did not require efficiencies to be extraordinary in every case. Rather, the "magnitude of the efficiencies needed to overcome a prima facie case depends on the strength of the likely adverse competitive effects of a merger," and the extraordinarily high HHI numbers in *Hershey* required that verifiable efficiencies be "equally extraordinary to overcome the likely anticompetitive effects." FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 176-77 (3d Cir. 2022).

[55] *Heinz*, 246 F.3d at 720-22.

[56] United States v. Anthem, Inc., 855 F.3d 345, 353-55 (D.C. Cir. 2017) ("*Anthem II*") (stating it would proceed as though efficiencies "could be such a defense under a totality of the circumstances approach").

[57] *See, e.g.*, *Penn State Hershey*, 838 F.3d at 347-48; *see also St. Luke's*, 778 F.3d at 790-91.

[58] *Anthem II*, 855 F.3d at 353.

[59] *Id.* at 356. Health insurance customers generally fall into one of two buckets: (1) fully insured customers, who pay premiums to a health insurer for processing medical claims and paying for medical services, with the health insurer bearing the risk that the amount it receives in premiums may not cover the cost of paying for medical services; and (2) self-insured customers, also called administrative services only or ASO customers, who pay an ASO fee to a health insurer for processing claims and providing access to a network of doctors and medical facilities that have committed to providing services at negotiated prices, with the customer bearing the responsibility to pay the cost of all services utilized. *Id.* at 351.

[60] *Id.* at 356 (emphasis added).

[61] *Id.* at 359-60.

[62] *Id.* at 360, 362-63. Oddly, the majority admitted that over 70% of the calculated medical cost savings were expected to go to ASO customers (*id.* at 353), for whom the majority found "any reduction in medical rates would result in savings that automatically pass through to the customer." *Id.* at 362.

[63] *Anthem II*, 855 F.3d at 375-77 (Kavanaugh, J., dissenting).

[64] *Id.* at 376-77 (quoting *Baker Hughes*, 908 F.2d at 984, 986).

[65] *Id.* at 374 (Kavanaugh, J., dissenting) (emphasis in original). In *Anthem I*, the DOJ also brought a monopsony claim, in which it alleged that the merged Anthem-Cigna would exercise so much purchasing power that it would achieve an anticompetitive reduction in provider prices upstream. United States v. Anthem, Inc., 236 F. Supp. 3d 171, 234 (D.D.C. 2017) ("*Anthem I*"). In other words, to save its prima facie Section 7 case, the government argued that provider prices would not go down, but to bolster its monopsony case the government also argued that provider prices necessarily would go down. The district court never decided the monopsony claim. *Id.* at 203.

[66] *Anthem II*, 855 F.3d at 362.

[67] *Id.* at 375.

[68] *Baker Hughes*, 908 F.2d at 984 (emphasis in original).

[69] *Anthem II*, 855 F.3d at 380 (Kavanaugh, J., dissenting) (emphasis in original).

[70] *See, e.g.*, FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1090 (N.D. Ill. 2012) (rejecting efficiencies that the parties had an economic incentive to pursue because "the fact that it might make business sense to [pursue such efficiencies] after the merger does not *guarantee* that the identified efficiencies will be attained") (emphasis added).

[71] For example, in United States v. Aetna Inc., 240 F. Supp. 3d 1, 42-43, 46-47 (D.D.C. 2017), the government's case relied on high post-merger HHIs and

a merger simulation predicting $500 million in increased insurance premiums (although its expert cautioned this figure was imprecise and the focus should therefore be on the direction of predicted price changes, not their magnitude). The defendants presented evidence of $2 billion in efficiencies that would initially go to the merged firm, of which about 42% would then flow to consumers in indirect cost savings, as well as another $300 million in savings that would go directly to consumers. *Id.* at 95-96. But the court questioned whether $460 million in claimed efficiencies were likely to be realized in their entirety, and held that $170 million in other efficiencies were not merger-specific. *Id.* at 96-98. But then, without stating what portion of the efficiencies it believed were cognizable and comparing those to the harm it thought likely to occur, the court summarily concluded that the merging parties failed to prove "extraordinary efficiencies" sufficient to rebut the high HHIs. *Id.* at 98.

[72] Remarks of Christine S. Wilson, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, June 24, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf.

[73] Herbert Hovenkamp, Appraising Merger Efficiencies, 24 GEO. MASON L. REV 703, 725-26 (Spring 2017).

[74] *Id.* at 713-15; *see also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) ("noting that "the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively"); *ProMedica*, 749 F.3d 559, 571 (6th Cir. 2014) ("[T]he goal of antitrust law is to enhance consumer welfare.").

[75] Hovenkamp, *supra* note 73, at 734-35.

[76] Hovenkamp, *supra* note 73, at 735.

[77] George Kosicki & Miles B. Cahill, *Economics of Cost Pass Through and Damages in Indirect Purchaser Antitrust Cases*, 51 Antitrust Bull. 599, 612 (2006).

[78] *Baker Hughes*, 908 F.2d at 982-83.

[79] Crane, *supra* note 28, at 387-88.

[80] Indeed, *Philadelphia National Bank* may prohibit using efficiencies as an affirmative defense: "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371. This tracks how an affirmative defense would work, excusing the merger despite its violation of Section 7 because there is some other social or economic reason to permit it. In the typical efficiencies case, however, efficiencies evidence is used to show there will be no substantial lessening of competition—and hence no Section 7 violation—in the first place.

[81] *Baker Hughes*, 908 F.2d at 991.

[82] Crane, *supra* note 28, at 387-89 (noting that the 2010 Merger Guidelines § 10 already contain a mnemonic device, but one that promotes asymmetrical treatment by confirming that the agencies will not compare the magnitudes of cognizable efficiencies and likely harm to competition).

[83] With other efficiencies—such as improved innovation or quality—there may be no choice but to approximate. For example, it is unclear how one could compare the claimed healthcare quality improvements in *St. Luke's* to likely price increases, although quality-adjusted prices could have been used to make some comparisons. *See, e.g.*, Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503, 516 (2001). That is no reason, however, to insist on nothing more than a "rough approximation" of how price efficiencies compare to likely price increases, or to require greater proof of quality efficiencies than proof of negative price effects. *But see* 4A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 971f (2016) ("As a general matter we would not require any calculus comparing likely price increase effects with likely efficiency effects and showing that resulting post-merger prices will be no higher than pre-merger prices as anything other than a rough approximation.").

[84] *See, e.g.*, *Anthem II*, 855 F.3d at 364 (holding the district court did not clearly err in finding a lack of "extraordinary efficiencies" sufficient to "constrain likely price increases," while admitting the district court never calculated proven efficiencies or harms in order to compare them, and holding that it was not even required to do so); *Aetna*, 240 F. Supp. 3d at 96-98 (questioning cognizability of only certain efficiencies and then concluding that the efficiencies would not outweigh likely harms, without quantifying either likely efficiencies or likely harms).

[85] *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 66-67 (D.D.C. 2015) (discussing a merger simulation model offered by the FTC's expert witness that calculated increased prices in the relevant product market of approximately $900 million).

[86] *See, e.g.*, *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 146-49; *Arch Coal*, 329 F. Supp. 2d at 151-53.

[87] *Univ. Health*, 938 F.2d at 1223.

[88] *Baker Hughes*, 908 F.2d at 984.

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All Is Not Lost: Personal Jurisdiction in a Post-BMS World

BY JONATHAN EDELMAN AND MEEGAN HOLLYWOOD

IN A TYPICAL ANTITRUST CLASS ACTION, plaintiff purchasers sue multiple sellers on behalf of a class of similarly situated purchasers nationwide. The purchasers often allege that the sellers conspired to raise prices on some good or service.[1] Nationwide classes are key to class actions of all types—but are especially important to these antitrust cases—because they allow plaintiffs to bring cases that may not be economical to pursue on a state-by-state basis and enable all cases to be resolved more efficiently.

The Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California* ("*BMS*"),[2] which introduced new requirements for plaintiffs attempting to sue companies using specific personal jurisdiction, sent shock waves throughout the antitrust class action bar. Importantly, *BMS* was a coordinated mass action, not a class action, but if courts applied *BMS*'s restrictions to class actions, plaintiffs would find it significantly harder to certify nationwide classes.

Six years in, *BMS*'s application to class actions has been limited and uneven. While a handful of courts have taken the dramatic step of applying *BMS*'s rules to class actions, most courts have declined to do so or have dodged the issue on procedural grounds. The nationwide class action therefore remains largely intact, and *BMS* has not disturbed any major antitrust cases. Litigants, however, risk running afoul of *BMS*'s requirements if they remain unaware of the issues it presents—especially with regard to limitations on named class plaintiffs.

This article offers practical guidance to class action practitioners—particularly in the antitrust context—who may be unfamiliar with personal jurisdiction issues generally and with *BMS* specifically. Though *BMS*'s logic is not often applied to unnamed class members in class actions—and the Third, Sixth, and Seventh Circuits have expressly declined to do so—litigants filing cases outside of those circuits face some risk of *BMS* being used to dismiss their class claims. Further, *BMS* has highlighted existing law requiring that courts have personal jurisdiction as to the claims of all named class plaintiffs. This article addresses the arguments practitioners may want to consider when they make and respond to personal jurisdiction challenges arising from *BMS* and its application to class actions.

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Personal Jurisdiction

BMS is a case about the constitutional limits of personal jurisdiction. Under the doctrine of personal jurisdiction, a defendant cannot be sued in a forum—that is, a court—unless it has enough contacts with the forum state to comply with the Constitution's Due Process Clause.[3] Under Supreme Court precedent, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[4]

Minimum contacts can be established via either specific jurisdiction or general jurisdiction. A forum may assert specific jurisdiction over a defendant when the litigation "aris[es] out of or relate[s] to the defendant's contacts with the forum."[5] For example, a defendant has minimum contacts in New York where the company offers a product to customers in New York, often ships products to customers in New York, and ships the product to New York that is the subject of the litigation.[6] In antitrust law in particular, Section 12 of the Clayton Act allows for the exercise of personal jurisdiction over corporations nationwide, meaning that any court in the United States can exercise personal jurisdiction so long as the corporation has minimum contacts with the United States as a whole.[7]

A forum may assert general jurisdiction over a defendant—that is, jurisdiction regardless of how the suit originated—"when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[8] In practice, it may be difficult to establish general jurisdiction outside of a corporation's place of incorporation or headquarters (often termed "principal place of business").[9]

Finally, a defendant can also consent to personal jurisdiction, regardless of whether personal jurisdiction is proper.[10] A defendant can consent either explicitly, such as in a stipulation, or implicitly, such as by filing an answer to the complaint or failing to raise the defense in a pre-answer motion.[11]

BMS's Limitations on Specific Personal Jurisdiction

BMS considered a mass tort suit against the maker of blood-thinning drug Plavix for product liability and misrepresentation.[12] The plaintiffs, a group of over 600 Plavix users from 34 states, did not seek class treatment but instead sued in state court in California, under California tort law as part of a coordinated mass suit. Defendant BMS was incorporated in Delaware and headquartered in New York, so California courts could not assert general jurisdiction under recent Supreme Court precedent. BMS did sell Plavix extensively in California, although its California sales were not especially high compared to other states.[13]

BMS contested California courts' exercise of personal jurisdiction over the claims brought by non-California

residents in the mass suit. The California Supreme Court applied a "sliding scale approach to specific jurisdiction," finding that because BMS had "extensive contacts with California," courts could exercise specific jurisdiction even for claims with a "less direct connection" to the state.[14] The California Supreme Court allowed for specific jurisdiction because, applying this sliding scale approach, "the claims of the nonresidents were similar in several ways to the claims of the California residents."[15]

The U.S. Supreme Court rejected California's approach. Instead, Justice Alito, writing for the Court, held that without an "'affiliation between the forum and the underlying controversy,' specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[16] Because BMS lacked that affiliation for the claims of non-California residents, there could be no specific jurisdiction.[17]

Though the Court's opinion did not consider any impacts on class actions, Justice Sotomayor noted the ambiguity raised by the decision in a spirited dissent and remarked that the opinion "hands one more tool to corporate defendants determined to prevent the aggregation of individual claims."[18] In response, the majority noted that the plaintiffs could nonetheless "join[] together in a consolidated action in the States that have general jurisdiction over BMS," such as New York or Delaware.[19] Further, the majority noted that the decision "leave[s] open the question whether" its restrictions on specific jurisdiction apply in federal courts—or only in state courts, as considered there.[20]

Post-*BMS* Lower-Court Decisions: Absent Plaintiffs

Since *BMS*—and with no further guidance from the Supreme Court—lower courts have wrestled with Justice Sotomayor's implied question of how to apply *BMS* to class actions where defendants challenge the court's specific jurisdiction over them for the claims of unnamed, out-of-state plaintiffs. Class actions differ from mass actions in that one or more named plaintiffs sue on behalf of similarly situated, unnamed class members (also known as "absent" class members), who are nevertheless bound by the judgment in the case unless they opt out.[21] Class actions are governed by Federal Rule of Civil Procedure 23, which requires courts to "certify" that a class and its representatives meet certain requirements, as a check to ensure that absent class members' interests are being adequately and efficiently represented.[22]

Courts have taken three main approaches toward *BMS*'s application to non-resident, absent class members: most courts have declined to apply *BMS* in class actions and allowed the exercise of specific jurisdiction; some have sidestepped the issue based on timing reasons; and a handful have applied *BMS* to prevent the exercise of specific jurisdiction over non-resident class members. This section will discuss those approaches in turn.

***Courts declining to apply* BMS.** Most courts considering *BMS* in the context of class actions—including the two Courts of Appeals to directly consider the issue—have held that *BMS* does not apply to class actions and consequently denied any objections to the exercise of personal jurisdiction.[23]

The first Court of Appeals to consider *BMS*'s application to class actions was the Seventh Circuit in *Mussat v. IQVIA, Inc.*[24] *Mussat* involved a putative nationwide class action brought in the U.S. District Court for the Northern District of Illinois by an Illinois plaintiff against a defendant incorporated in Delaware and headquartered in Pennsylvania for violations of the Telephone Consumer Protection Act. The district court had applied *BMS* and ordered the nationwide class to be struck from the pleadings based on lack of personal jurisdiction.

Chief Judge Wood, writing for a unanimous panel that included future Supreme Court Justice Amy Coney Barrett, reversed the district court and held that *BMS* should not apply to class actions. Declaring that "[p]rocedural formalities matter," the panel called attention to the differences between class actions and coordinated mass actions, including that a class action must undergo class certification procedures to bind absent class members.[25] The court further reasoned that "[n]onnamed class members . . . may be parties for some purposes and not for others" and are not considered parties when assessing subject matter jurisdiction or venue.[26] Accordingly, "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so."[27]

The court offered two final observations. First, applying *BMS* to class actions would prevent nationwide class actions, a disfavored outcome because neither Supreme Court precedent nor Rule 23 "frowns on class actions."[28] Second, *BMS* "expressly reserved the question whether its holding extended to the federal courts at all" as further support for not applying *BMS* to class actions—although the court did not explore the federal–state court issue further.[29]

Borrowing heavily from *Mussat*, the Sixth Circuit also declined to apply *BMS* to class actions in *Lyngaas v. Curaden AG*.[30] There, a divided panel of the Sixth Circuit rejected the defendants' personal jurisdiction challenge and "follow[ed] the[] lead [of *Mussat*] in holding that *Bristol-Myers Squibb* does not extend to federal class actions." The court called attention to "the certification procedures set forth in Rule 23" for class actions, reasoning that "[t]he different procedures underlying a mass-tort action and a class action demand diverging specific personal jurisdiction analyses."[31]

Dissenting as to this jurisdictional issue, Judge Thapar opined that courts must have "personal jurisdiction over all parties for each claim—including the claims of absent class members."[32] Judge Thapar reasoned that, because courts can bind both named and absent class members to its judgment, class actions are similar to the mass action considered in *BMS* and should be treated similarly.

In dicta, the Third Circuit also endorsed the *Mussat* and *Lyngaas* approach. In *Fischer v. Federal Express Corp.*, a unanimous panel held that *BMS* requirements *did* apply to Federal

Labor Standards Act collective actions but "did not change the personal jurisdiction question with respect to class actions."[33]

None of the district courts considering *BMS* in the context of antitrust class actions has applied its restrictions to absent class members. For example, in *Hospital Authority of Metropolitan Government of Nashville v. Momenta Pharmaceuticals, Inc.* ("*MGH*"), the U.S. District Court for the Middle District of Tennessee considered a putative class action brought by a city-run hospital in Tennessee and a health benefit plan based in New York against two out-of-state drugmakers.[34] The plaintiffs alleged that the drugmakers conspired to fix prices and monopolize the market for a drug used to treat heart attacks, in violation of the Sherman Act and various state antitrust and consumer protection laws.[35]

On a motion to dismiss, the drugmakers argued that the court lacked specific jurisdiction under *BMS* because the plaintiffs "assert[ed] putative class action claims as non-Tennessee residents, on behalf of non-Tennessee residents, and under non-Tennessee laws, based on enoxaparin purchases made outside Tennessee."[36] That court, which considered the issue before *Mussat*, *Lyngaas*, or *Fischer*, rejected the drugmakers' argument, holding that *BMS* does not apply to class actions.[37] The court reasoned—similarly to *Mussat* and *Lyngaas*—that class actions were procedurally different from mass actions because "the named plaintiffs are the only plaintiffs actually named in the complaint" and class certification "suppl[ies] due process safeguards not applicable in the mass tort context."[38] The class was later certified and the parties eventually settled.[39]

These cases reflect the view of the majority of district courts across the country, which have held that *BMS* does not apply to class actions—including all courts considering the issue in antitrust cases.[40] A 2019 review of the case law—before any circuit-level decisions on the issue—found that 48% of district court decisions in which the argument was raised declined to apply *BMS* to class actions, whereas only 13% of district court decisions applied *BMS* (38% of decisions did not reach the issue).[41] The vast majority of courts addressing the issue since the review have declined to apply *BMS* and allowed for courts to exercise personal jurisdiction over the claims of absent class members so long as the named plaintiffs satisfied personal jurisdiction requirements.[42]

Courts sidestepping jurisdictional holdings. Instead of ruling on the ultimate issue of *BMS*'s application to absent class members, some courts have found challenges to personal jurisdiction under *BMS* to be premature and therefore deferred any determinations on the merits. Under this rationale, *BMS* has placed litigants in a catch-22 of sorts when applied to class actions, because litigants can only object to personal jurisdiction relating to absent class members after their arguments are already waived.

Under longstanding practice and precedent, defendants must object to the exercise of personal jurisdiction in their initial pleading or motion to dismiss; otherwise, they waive their personal jurisdiction objections.[43] But when a party files a putative class complaint, the class has not yet been certified, so absent class members' claims are not yet before the court.[44] Accordingly, some courts have held that objecting to personal jurisdiction in a motion to dismiss filed in advance of class certification may be premature, while objecting after class certification may risk waiver.[45]

Three Courts of Appeals have considered this timing issue. All have found that defendants do not waive personal jurisdiction objections over absent class members' claims by failing to include them in a motion to dismiss; instead, objections regarding absent class members are premature prior to class certification.[46] For example, in *Moser v. Benefytt, Inc.*, a California resident filed a putative nationwide class action in the U.S. District Court for the Southern District of California against a telemarketing company incorporated in Delaware and headquartered in Florida.[47] The defendant did not object to the exercise of personal jurisdiction in its motion to dismiss; instead, it raised objections as part of its opposition to class certification. The district court denied the defendant's objection, holding these personal jurisdiction-related objections waived under Fed. R. Civ. P. 12(h).

On appeal, a divided Ninth Circuit panel reversed, holding that the defendant's personal jurisdiction defense was not "available" at the motion to dismiss stage, so it could not be waived.[48] Though the plaintiff requested that the panel decide the merits of the *BMS* issue, the panel demurred, remanding to the district court for a ruling on the merits.[49]

Federal district courts in the Northern District of California, Southern and Eastern Districts of New York, Northern and Southern Districts of Illinois, District of Maryland, District of Massachusetts, District of New Jersey, Eastern District of Pennsylvania, and Southern District of Indiana have all declined to issue *BMS* merits rulings and instead deferred consideration of personal jurisdiction to class certification.[50]

Courts applying* BMS *and declining to exercise specific jurisdiction. Although some courts have broken with the general trend and applied *BMS* to class actions (though none have done so in antitrust cases), their numbers have dwindled since *Mussat* and *Lyngaas*. *Mussat* abrogated several Illinois district court decisions that had applied *BMS* to absent class members, leaving only two decisions from across the country that have not been abrogated: *Stacker v. Intellisource, LLC*[51] and *Carpenter v. PetSmart, Inc.*[52]

Stacker considered a putative nationwide class action alleging violations of the Fair Credit Reporting Act filed in the U.S. District Court for the District of Kansas. The plaintiff was a Kansas resident; the defendant was an LLC headquartered in Colorado.[53] On the personal jurisdiction issue, the court acknowledged that "the majority of district courts and two circuit courts" declined to apply *BMS*; nevertheless, it applied *BMS* and held that the claims of non-Kansan class members "would be subject to dismissal due to lack of personal jurisdiction."[54] The court acknowledged that its holding conflicted with *Mussat* and the *Lyngaas* majority but reasoned that those cases were "not persuasive" for the reasons expressed

in Judge Thapar's dissent in *Lyngaas*. The court reasoned that "[a] defendant should not be required to litigate claims that have no connection to this state solely because the claims are those of unnamed class members."[55] Accordingly, the court struck the plaintiff's class allegations from the complaint.[56]

Carpenter, which was decided before *Lyngaas* or *Mussat*, similarly struck the plaintiff's allegations seeking certification of a putative nationwide class of hamster habitat purchasers in the U.S. District Court for the Southern District of California, where the defendant was incorporated in Delaware and headquartered in Arizona.[57] The court reasoned that different procedures in class actions (like Rule 23 class certification) compared to mass actions were simply "a distinction without a difference" and did not merit any differences in personal jurisdiction analysis between class actions and mass actions.[58]

The discussion above shows that most courts have been reluctant to apply *BMS* to the claims of absent class members. First, courts have distinguished class actions from mass actions based on the procedural protections (like class certification requirements) present in class actions that were not present in the *BMS* mass action. Second, courts have worried that applying *BMS* would disrupt nationwide class actions writ large, in ways not contemplated by the Supreme Court or Rule 23. Any momentum for applying *BMS* to class actions appears to have been stalled by the Sixth and Seventh Circuits' decisions declining to apply *BMS* to absent class members (and the Third Circuit's dicta suggesting the same). Still, courts are unlikely to hold that defendants have waived objections to the exercise of personal jurisdiction if they fail to raise them in the original pleadings or motions to dismiss.

Post-*BMS* Lower-Court Decisions: Named Plaintiffs

In addition to requiring courts to show that personal jurisdiction can be exercised over the claims of all mass action plaintiffs, *BMS* also reminded courts that they must be able to exercise jurisdiction over the claims of all *named* plaintiffs in the case—including all the named plaintiffs in a class action. Therefore, where some of the *named* class plaintiffs were non-residents and failed to show that they had a connection to the forum state, courts have emphasized post-*BMS* that the court must have personal jurisdiction as applied to named plaintiffs and dismissed these non-resident plaintiffs' claims.[59]

For example, in *Lugones v. Pete & Gerry's Organic, LLC*, a putative class of free-range egg consumers sued the maker of Nellie's Free Range Eggs for misleading labeling in the U.S. District Court for the Southern District of New York ("SDNY"). The named plaintiffs included consumers from both New York and other states who did not claim to have any connections to buying eggs in New York. The egg maker was based in New Hampshire. The court declined to apply *BMS* to unnamed class members, but it dismissed the claims of the named plaintiffs who did not reside in New York, holding that the "weight of authority" showed that *BMS*'s personal jurisdiction restrictions apply to named class plaintiffs.[60]

Multidistrict litigation (MDL), however, has been a different story, with the majority of courts declining to apply *BMS* to even named plaintiffs. In *In re Delta Dental Antitrust Litigation*, the Judicial Panel on Multidistrict Litigation (JPML) considered an objection to personal jurisdiction by the plaintiffs in an SDNY case that was transferred to the Northern District of Illinois as part of an MDL.[61] The MDL case was a putative nationwide class action brought by several named plaintiff dentists—who together were residents of ten states—against an Illinois-based nationwide association of dental insurance companies and over 30 state-based affiliates of the association.[62] The MDL dentist plaintiffs alleged that the association abused its monopsony power to restrict competition, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[63] They further alleged that the court had specific jurisdiction over both the national and state-based defendants through each defendant's contacts and business in Illinois, as well as each defendant's conspiring with the Illinois-based members of the association.

The SDNY case alleged the same course of events, but the named plaintiffs were all New York dentists and the only defendant was a New York Delta Dental insurance affiliate.[64] Further, the SDNY plaintiffs alleged both Sherman Act violations and New York state law violations.[65]

After the JPML conditionally transferred the SDNY case to the MDL in the Northern District of Illinois, the New York dentists opposed transfer on the basis that the Northern District of Illinois could not exercise specific jurisdiction over either party in the SDNY case.[66] The New York dentists argued that the JPML should apply *BMS*'s personal jurisdiction requirements, which would prevent jurisdiction because neither party had any contacts in Illinois.

The JPML rejected that argument, holding that "the transferee court can exercise personal jurisdiction to the same extent that the transferor court could,"[67] and that *BMS* did not "necessitate[] unraveling more than forty years of MDL jurisprudence."[68]

Courts have largely affirmed the holding of *In re Delta Dental* in MDL cases,[69] but the decisions have not been unanimous. In *In re Dicamba Herbicides Litigation*, a putative nationwide class of farmers sued seed makers Monsanto and BASF for harmful effects of several herbicides and herbicide-resistant seeds.[70] The case was transferred from across five districts to the U.S. District Court for the Eastern District of Missouri.[71] The named plaintiffs were residents of eight states, including Missouri; Monsanto was headquartered in Missouri, and BASF, a German corporation, had U.S. headquarters in either North Carolina or New Jersey.[72] The court applied *BMS* and dismissed the nationwide class claims against BASF, citing to a string of Northern District of Illinois cases applying *BMS* (which have since been overruled by *Mussat*).[73]

In sum, *BMS* has emphasized the limitations under which named plaintiffs can bring a class action, requiring a showing of jurisdiction in class actions that include non-resident named plaintiffs. Other than *Dicamba Herbicides*, however,

courts have not used *BMS* to limit class actions where named non-resident plaintiffs' claims have been transferred to the court via an MDL, as doing so would prevent MDL courts from exercising jurisdiction in many cases.

Accounting for *BMS* in Your Litigation

The analysis above shows that the drastic changes that class action lawyers feared (or hoped for) after *BMS* have not materialized. Though Justice Alito's opinion left open the question of whether courts would need to show they can exercise personal jurisdiction as to the claims of absent class members, in practice, courts have rarely applied *BMS* to class actions. Applying *BMS* to class actions has become rarer still post-*Mussat* and *Lyngaas*, which provided sound reasoning for distinguishing *BMS* from class actions. Further, the Supreme Court may not have much appetite to overrule *Mussat* and *Lyngaas*, both because there has yet to be a circuit split on the issue, and because Justice Amy Coney Barrett already declined to apply *BMS* to class actions in *Mussat*. Therefore, the risk of *BMS* being used to invalidate a nationwide class action is relatively low.

Plaintiff's lawyers, however, can take steps to mitigate that risk. First, plaintiff's lawyers should consider where to bring suit, and if possible, file in the defendant's "home" jurisdiction, so that the court could exercise general jurisdiction over the defendant and avoid any *BMS* issues altogether. If doing so is impractical—or if there are multiple defendants in multiple states—filing in the Third, Sixth, or Seventh Circuits where reasonable grounds exist to do so would provide the least risk of any *BMS* application.

Second, plaintiff's lawyers should focus on the substance of why it is incorrect to apply *BMS* to class actions, rather than potential waiver issues. *Mussat*, *Lyngaas*, and—for an antitrust context, *MGH*—provide strong rationales for distinguishing class actions from the mass tort action considered in *BMS*. These rationales include courts' consideration of only named plaintiffs in decisions on subject-matter jurisdiction and venue, absent class members' lack of participation in the lawsuit, and simply the fact that most courts have declined to apply *BMS* to class actions. Courts in all circuits (except for the Federal Circuit) have declined to apply *BMS* to class actions, so plaintiff's lawyers can apply the rationale of a court in their circuit—if not the same court considering the case.[74]

Finally, *BMS* has emphasized the need for plaintiff's lawyers to ensure that *named* plaintiffs can meet personal jurisdiction requirements. Despite courts' reluctance to apply *BMS* to claims of *absent* class members, courts have been less willing to excuse deficiencies in showing that the court can exercise jurisdiction over the claims of named plaintiffs. Not all plaintiffs need reside in the same state as the forum, but all plaintiffs must be able to show that their claim is connected to that state unless the plaintiffs can invoke Clayton Act Section 12's nationwide jurisdiction against corporations.[75]

If moving to dismiss a class action, defense lawyers should take note of the timing issues that *BMS* presents. Moving to dismiss absent class members' claims before the class is certified is generally premature, and failing to raise the defense will not constitute waiver. But it may help to flag the issue for the court in a footnote or otherwise.

Defense lawyers can look to Judge Thapar's dissent in *Lyngaas*, which emphasized the fact that class actions can bind both named and absent class members. Defense lawyers should be aware, however, that these arguments are unlikely to succeed—and are foreclosed in the Sixth and Seventh Circuits.

Antitrust lawyers know that antitrust class actions are among the most complex procedural cases in the federal courts, and personal jurisdiction is but one of many issues that may arise in the course of litigation. *BMS* has perhaps made it more likely that these personal jurisdiction issues will arise in your litigation. But *BMS*'s impact remains limited in class actions. As before, lawyers should take care to show that the court can exercise personal jurisdiction as to the claims of their named class plaintiffs, but making the showing as to unnamed class members is unnecessary. The nationwide class action, always thought to be on the brink of demise, lives to fight another day. ■

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[1] *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 1:06-md-1775 (E.D.N.Y.) (nationwide plaintiff classes of air cargo purchasers sue more than three dozen air cargo providers for conspiracy to raise prices).

[2] 582 U.S. 255 (2017).

[3] Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945); Rush v. Savchuk, 444 U.S. 320, 327 (1980); *see generally* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (4th ed. updated 2023). The forum state must also allow for personal jurisdiction by statute; however, a majority of states have enacted personal jurisdiction statutes to extend the reach of personal jurisdiction to the maximum allowed under constitutional due process. 4A Federal Practice and Procedure, *supra*, § 1069.

[4] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (quoting *Int'l Shoe*, 326 U.S. at 316); *see generally* 4 Federal Practice and Procedure, *supra* note 3, § 1067.1.

[5] Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (alterations in original) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

[6] Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 166–67 (2d Cir. 2010); *see also, e.g.*, *In re* Chinese Manufactured Drywall Prod. Liab. Litig., 742 F.3d 576, 589 (5th Cir. 2014); Logan Prods., Inc. v. Optibase, Inc., 103 F.3d 49, 53 (7th Cir. 1996); *see generally* 2 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 6:30 (6th ed. updated 2023).

[7] 15 U.S.C. § 22; Phillip E. Areeda (late) & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 271c2 (5th ed. 2023); *see, e.g.*, *In re* Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003) ("The ensuing minimum contacts analysis looks to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction comports with due process."); Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 449 (6th Cir. 2012).

[8] *Daimler AG*, 571 U.S. at 127 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

[9] BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 413 (2017). The recent decision, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), discussed an alternative way to find general jurisdiction against companies outside of their place of incorporation and principal place of business based on a corporation's consent to appear in state court as a condition of registering

to do business within that state. It remains unclear, however, exactly how much *Mallory* will impact the general-jurisdiction jurisprudence.

[10] *Burger King*, 471 U.S. at 472 & n.14; *see also* 5B Federal Practice and Procedure, *supra* note 3, § 1351.

[11] Fed. R. Civ. P. 12(h)(1); 5B Federal Practice and Procedure, *supra* note 3, 1351; *see also, e.g.*, Am. Fid. Assur. Co. v. Bank of N.Y. Mellon, 810 F.3d 1234, 1241 (10th Cir. 2016); Coleman v. Kaye, 87 F.3d 1491, 1498 (3d Cir. 1996).

[12] Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 259 (2017).

[13] *Id.* at 259.

[14] *Id.* at 260.

[15] *Id.*

[16] *Id.* at 264.

[17] *Id.* at 265.

[18] *Id.* at 278 (Sotomayor, J., dissenting); *see also id.* at 278 n.4 ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.").

[19] *Id*. at 268.

[20] *Id.* at 269. After the Class Action Fairness Act of 2005, most class actions are litigated in federal court. *See, e.g.,* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 660 (2012). Thus, if the *BMS* decision were limited to state courts, it would effectively not apply to class actions.

[21] 1 Newberg and Rubenstein on Class Actions, *supra* note 6, § 1:5.

[22] Fed. R. Civ. P. 23; 1 Newberg and Rubenstein on Class Actions, *supra* note 6, § 1:5.

[23] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2; Daniel Wilf-Townsend, Essay, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 Yale L.J. Forum 205, 226 (2019).

[24] 953 F.3d 441 (7th Cir. 2020).

[25] *Id.* at 446–47.

[26] *Id.* at 447 (alteration in original) (quoting Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002)).

[27] *Id.*

[28] *Id.* at 448.

[29] *Id.*

[30] 992 F.3d 412 (6th Cir. 2021).

[31] *Id.* at 435.

[32] *Lyngaas*, 992 F.3d at 440 (Thapar, J., concurring in part and dissenting in part).

[33] 42 F.4th 366, 375 (3d Cir. 2022).

[34] 353 F. Supp. 3d 678, 684 (M.D. Tenn. 2018); Amended Complaint, ¶¶ 13–15, *MGH*, No. 3:15-cv-1100 (M.D. Tenn. Dec. 21, 2017), ECF No. 191.

[35] *MGH*, 353 F. Supp. 3d at 684–85.

[36] *Id.* at 690.

[37] *Id.* at 692.

[38] *Id.* (quoting Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018), *aff'd on other grounds sub nom.* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020)).

[39] Order of Preliminary Approval of Settlement, *MGH*, No. 3:15-cv-1100 (M.D. Tenn. Jan. 3, 2020), ECF No. 488.

[40] *See also* Kadow v. First Fed. Bank, No. 8:19-CV-566-PWG, 2020 WL 5230560, at *11 (D. Md. Sept. 2, 2020) (denying *BMS*-based objection in antitrust class action). Though *In re Dental Supplies Antitrust Litigation* dismissed a defendant based on lack of specific jurisdiction, that defendant had no contacts with the forum state as to *any* plaintiff, so *BMS* issues did not arise. No. 16-CV-696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

[41] Wilf-Townsend, *supra* note 23, at 228. Percentages may not add up to 100% due to rounding.

[42] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2 (counting over 30 courts since 2019 that declined to apply *BMS*, compared to six that have applied *BMS* to absent class members).

[43] Moser v. Benefytt, Inc., 8 F.4th 872, 877 (9th Cir. 2021); Fed. R. Civ. P. 12; 5B Federal Practice and Procedure, *supra* note 3, § 1351.

[44] *Moser*, 8 F.4th at 877.

[45] *See id.*; *Molock*, 952 F.3d at 300.

[46] *Moser*, 8 F.4th at 877 (finding objections not waived); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 251 (5th Cir. 2020) (same); *Molock*, 952 F.3d at 299.

[47] 8 F.4th at 874.

[48] *Id.* at 877. In a dissenting opinion, Judge Cardone disagreed with the panel's conclusion that the personal jurisdiction question was properly before the court under rule 23(f). *Id.* at 879 (Cardone, J., dissenting).

[49] *Id.* at 877. The case settled before the court issued any rulings. Moser v. Health Ins. Innovations, Inc., 17-cv-1127 (N.D. Cal. Sept. 7, 2022), ECF No. 206.

[50] See 4 Federal Practice and Procedure, *supra* note 3, § 1067.2 (collecting cases).

[51] No. 20-2581-JWB, 2021 WL 2646444 (D. Kan. June 28, 2021).

[52] 441 F. Supp. 3d 1028, 1037 (S.D. Cal. 2020); *see also* 4 Federal Practice and Procedure, *supra* note 3, § 1067.2.

[53] 2021 WL 2646444, at *1.

[54] *Id.* at *11.

[55] *Id.* at *10–11.

[56] *Id*. at *11.

[57] 441 F. Supp. 3d at 1033.

[58] *Id*. at 1037.

[59] *See, e.g.*, Lugones v. Pete & Gerry's Organic, LLC, 440 F. Supp. 3d 226, 236 (S.D.N.Y. 2020); Wiggins v. Bank of Am., N. Am., 488 F. Supp. 3d 611, 622–23 (S.D. Ohio 2020) (citing cases); Sloan v. Gen. Motors LLC, No. 16-CV-07244-EMC, 2019 WL 6612221, at *9 (N.D. Cal. Dec. 5, 2019) ("The overwhelming majority of federal courts have held that *Bristol-Myers* applies to claims brought by named plaintiffs in class actions.").

[60] *Lugones*, 440 F. Supp. 3d at 235.

[61] 509 F. Supp. 3d 1377, 1378 (J.P.M.L. 2020).

[62] *Id.* at 1378 n.1; Consolidated Complaint, ¶¶ 9–21, *In re* Delta Dental Antitrust Litig., 1:19-cv-06734 (N.D. Ill. Nov. 26, 2019), ECF No. 96.

[63] Consolidated Complaint, ¶ 156, *In re Delta Dental*, 1:19-cv-06734, ECF No. 96.

[64] Complaint, ¶¶ 22–25, Ben Zvi v. Delta Dental of N.Y., Inc., 1:20-cv-05628 (S.D.N.Y. July 21, 2020), ECF No. 1.

[65] *Id.*, ¶¶ 195, 200 (citing the Donnelly Act, N.Y. Gen. Bus. Law § 340 (McKinney 2023)).

[66] *In re Delta Dental*, 509 F. Supp. 3d at 1379.

[67] *Id.* (quoting *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 297 n.11 (3d Cir. 2004)).

[68] *Id.* at 1380.

[69] *See, e.g., In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., 601 F. Supp. 3d 625, 695 (C.D. Cal. 2022), *opinion clarified sub nom. In re* ZF-TRW Airbag Control Units Prod., No. LA-ML-19-02905, 2022 WL 19425927 (C.D. Cal. Mar. 2, 2022); *In re* McKinsey & Co., Inc., Nat'l Prescription Opiate Consultant Litig., 543 F. Supp. 3d 1377, 1379 n.6 (J.P.M.L. 2021).

[70] 359 F. Supp. 3d 711, 718 (E.D. Mo. 2019).

[71] *In re* Dicamba Herbicides Litig., 289 F. Supp. 3d 1345, 1347 (J.P.M.L. 2018).

[72] *Dicamba Herbicides*, 359 F. Supp. 3d at 723.

[73] *Id.* at 724.

[74] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2.

[75] *See, e.g.*, *MHG*, 353 F. Supp. 3d at 692 (finding personal jurisdiction as applied to claims of non-Tennessee health plan, which nevertheless purchased the relevant drug for Tennessee residents).

ABA ANTITRUST LAW SECTION

COUNCIL HIGHLIGHTS 2022-2023

Pursuant to its mandate under the Section's bylaws, the Council provided general supervision and control of the affairs of the Section. The Council received regular reports from representatives from the Multistate Antitrust Task Force of the National Association of Attorneys General, the U.S. Judiciary, the ABA Board of Governors, the Canadian Bar Association, the American Antitrust Institute, the ABA Young Lawyers Division, and the ABA Law Student Division.

1) The Council approved submission of sets of comments to U.S. and international government agencies regarding draft guidelines, rules, or policy documents.

   a. China's Antimonopoly Law-August 2022
   b. Ireland's Leniency Policy Addendum-September 2022
   c. Ireland's CCPC Access to File-September 2022
   d. European Commission's Regulation 1 Consultation-September 2022
   e. Baseball Exemption Comments-October 2022
   f. FTC's Privacy and Data Protection Ruling-October 2022
   g. Chilean Compliance Programs-October 2022
   h. Peru Suspicious Joint Bidding-October 2022
   i. FTC Commercial Surveillance-November 2022
   j. New Zealand Guidelines on Market Power-November 2022
   k. Joint Comments on the Australian Treasury's Consultation in Response to the ACCC's Digital Platform Regulatory Reform Recommendations-January 2023
   l. Views of the American Bar Association Antitrust Law Section on the Federal Trade Commission's Notice of Proposed Rulemaking on Non-Compete Clauses—February 2023
   m. FTC's NPRM to prohibit non-compete agreements with employees-March 2023
   n. The Government of Canada's Consultation on the Future of Competition Policy in Canada—April 2023
   o. The European Commission's "Call for Evidence" regarding abuses of dominance under Article 102 TFEU—April 2023
   p. The Government of Canada's Consultation on the Future of Competition Policy in Canada—Revised—May 2023
   q. Comments of the American Bar Association's Antitrust Law Section and International Law Section on the Competition Authority of Kenya's Draft Consolidated Administrative Remedies and Settlement Guidelines—May 2023
   r. Comments of the American Bar Association's Antitrust Law Section and International Law Section on the draft guidelines on non-horizontal mergers published by the Brazilian Administrative Council for Economic Defense ("CADE")—August 2023

2) The Council approved the program proposals for the 2023 Antitrust Law Spring Meeting on October 10, 2022.

3) The Council approved to co-sponsor the ABA House of Delegates Artificial Intelligence Solution with the ABA Cybersecurity Task Force on November 15, 2022,

4) The Council approved the Professional Conduct Pledge on November 23, 2022,

5) The Council approved the creation of a new Foreign Investment committee on March 28, 2023.

6) The Council approved the change of Women.Connected and Diversity.Advanced from Administrative to Substantive committees on March 28, 2023.

7) The Council approved the name change of Antitrust Magazine Online to the Antitrust Source on March 28, 2023.

8) The Council approved the ABA Cybersecurity Legal Task Force Resolutions 608, 609 & 609A on June 9, 2023.

9) The Council approved the Advisory Board's recommendation on funding two programs, In-House Institute and Next Level Technology & Communication, for fiscal year 2024 on June 20, 2023.

Antitrust Law Section

2022-2023 Comments and Acknowledgments

The enactment of competition laws and the establishment of enforcement agencies throughout the world have triggered numerous requests in recent years for the submission of comments on competition proposals. Relying on the contributions of Section members and others, the American Bar Association Antitrust Law Section has been exceptionally active this year in sharing its perspectives on important competition issues through the submission of written comments to several competition agencies and organizations. All these comments are available on the Section's website:

Antitrust Comments, Reports & Amicus Briefs (americanbar.org)

We would like to recognize and thank the following individuals who contributed their time and substantive expertise to these efforts during the last year:

Ireland | Joint Comments on the Draft Guidelines on Access to the File Published by the Irish Competition and Consumer Protection Commission | September 14, 2022

- ✦ Hill Wellford and Mackenzie Wallace

Ireland | Joint Comments on the Irish Leniency Policy Addendum | September 14, 2022

- ✦ Tasneem Chipty, Brendan Glackin, Liam Heyli, Tara Kelly, Evan Miller, and Hill Wellford

European Union | Joint Comments on the European Commission's Consultation on Antitrust Procedural Rules | October 5, 2022

- ✦ Clio Angeli, Joost Fanoy, Yajing Jiang, James Langenfeld, Paul Lugard, Jay Modrall, Tim Raats, Morten Skroejer, Allison Simpkins, and Drew Wilson

United States | Comments to Congress on Eliminating Baseball's Antitrust Exemptions | October 2022

- ✦ Leah Brannon, and Catherine Cervone, Amanda Lewis, Tim Snyder, and Greg Werden

United States | FTC's Privacy and Data Protection Rulemaking | October 2022

- ✦ Aryeh Friedman, Laura Riposo VanDruff, David Turetsky, and Emilio Varanini

Chile | Joint Chilean Competition Authority Consultation for the Update of Its "Competition Law Compliance Programs" Guidelines | October 28, 2022

- ✦ Terry Calvani, Julian Pena, Amadeu Ribeiro, and Pablo Trevisan

Peru | Joint Guidelines Draft to Identify Suspicious Joint Bids in Public Procurement Under Peruvian Competition Act | October 31, 2022

- ✦ Rosa Abrantes-Metz, Tamara Dini, Veronica Irastorza, and Julian Pena,

United States | Comment on the Advanced Notice of Proposed Rulemaking on Commercial Surveillance and Data Security Practices | November 2022

- ✦ Aryeh Friedman, Svetlana Gans, Alysa Hutnik, Laura Riposo Vandruff, David Turetsky, Emilio Varanini, and Deon Woods Bell and Thomas Zych

New Zealand | Joint Comments on the Draft New Zealand Misuse of Market Power Guidelines | December 1, 2022

- ✦ Sarah Bartels, David Colino, George Hay, Jim Langenfeld, Pritika Magima, Craig Malam, Andrew Matthews, Felicity McMahon, Rob Nicholls, Michael Osborne, Taylor Ownings, and Douglas Rathbun.

European Commission | Joint Comments on the European Commission's Public Consultation on a Draft Revised Market Definition Notice | January 13, 2023

- ✦ Paul Lugard and Jay Modrall

Australia | Joint Comments on the Australian Treasury's Consultation in Response to the ACCC's Digital Platform Regulatory Reform Recommendations | February 17, 2023

- ✦ Pedro Anitelle, Gabriela Antonie, Elizabeth Avery, Anna Belgiorno-Nettis, Paula Camara, Marcos Drummond Malvar, John Eichlin, Mathew Heim, Susan Jones, Jim Langenfeld, Haidee Leung, Craig Malam, Amy Mudge, Amadeu Ribeiro, and Ada Wang

United States | Views of the American Bar Association Antitrust Law Section on the Federal Trade Commission's Notice of Proposed Rulemaking on Non-Compete Clauses| February 2023

- ✦ David Balan, Catherine Cervone, Jennifer Driscoll, James Langenfeld, Amanda Lewis, Joshua Shapiro, and Emilio Varanini

United Kingdom | Draft Guidance on Environmental Sustainability Agreements | April 11, 2023

- ✦ Jay Modrall

European Commission | Joint Comments of the American Bar Association's Antitrust Law Section and International Law Section on the European Commission's "Call for Evidence" regarding Abuses of Dominance Under Article 102 TFEU | May 2, 2023

- ✦ Paul Lugard and Jay Modrall

Kenya | Joint Comments of the American Bar Association's Antitrust Law Section and International Law Section on the Competition Authority of Kenya's Draft Consolidated Administrative Remedies and Settlement Guidelines | May 25, 2023

- ✦ Vani Chetty, Danielle Haugland, John Oxenham, and Christopher Yook

Canada | Joint Comments of the American Bar Association's Antitrust Law Section and International Law Section on the Government of Canada's Consultation on the Future of Competition Policy in Canada | June 8, 2023

- ✦ Leah Brannon, Neil Campbell, Zee Derwa, Mark Katz, Amanda Lewis, and Timothy Snyder

The Section also would like to recognize and thank the International Comments and Policy and U.S. Comments and Policy Committees under the leadership of Leah Brannon, Elizabeth Kraus, Amanda Lewis, Abbott Lipsky, Jr., Timothy Snyder, and Randolph Tritell; the Ethics and Compliance and Cartel and Criminal Practice Committees; and the International Law Section.