Antitrust Chronicle

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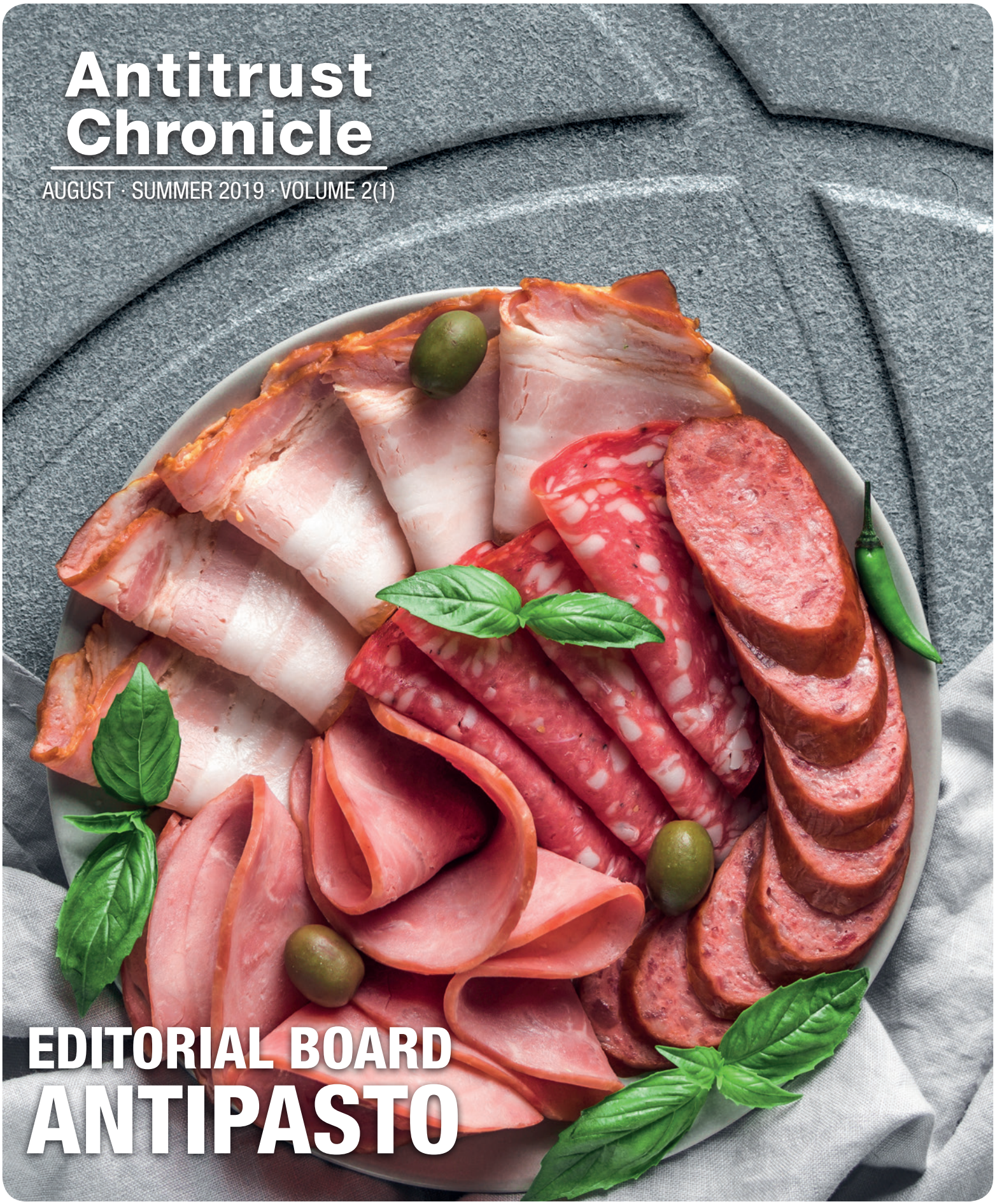

EDITORIAL BOARD ANTIPASTO

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

As part of our summer editions of the CPI Antitrust Chronicle, the August 2019 Antipasto Chronicle features articles from members of the CPI Editorial Advisory Board.

This compilation of articles covers a variety of jurisdictions and antitrust topics including EU competition issues in the digital era, prescription drug pricing, NCAA student-athlete compensation cases, non-horizontal mergers in China, antitrust whistleblower protection, and investigations & mergers in digital markets from a developing world's viewpoint, among others.

We are pleased to kick off this CPI Antitrust Antipasto edition with a CPI Talks… interview with Commissioner Christine Wilson of the Federal Trade Commission.

Looking down the road, the October Chronicle will feature articles from speakers at the 14th CRESSE Conference recently held in Rhodes, Greece. CPI had the opportunity to participate at the conference which featured keynote addresses by Robert Porter, Richard Gilbert, Fiona Scott Morton, and William Kovacic.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and Dennis Carlton among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

CPI Talks…

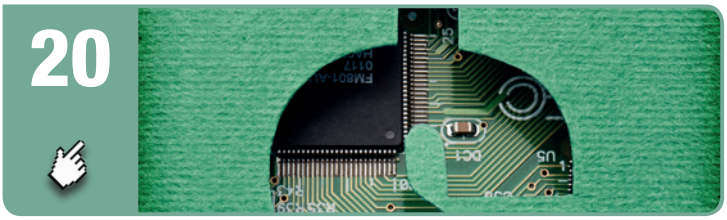
…with Christine S. Wilson

In this month's edition of CPI Talks we have the pleasure of speaking with Christine Wilson of the Federal Trade Commission ("FTC"). Ms. Wilson was sworn in on September 26, 2018 as a Commissioner of the FTC. Commissioner Wilson previously served at the FTC as Chairman Tim Muris' Chief of Staff during the George W. Bush Administration, and as a law clerk in the Bureau of Competition while attending Georgetown University Law Center.

Getting a Handle on Prescription Drug Pricing – A Modestly Radical Proposal

By Kent Bernard

Recently there has been a lot of discussion about the high cost of prescription drugs. Some of that commentary is thoughtful and informed. Much of it is not. What people are often focused on are the symptoms of the market failure, not the causes. High prices are a symptom; market power is a cause. If you want to make headlines, shout about the symptoms. It makes everyone feel good, but it doesn't do very much at all. If you want to have actual reform, you have to deal with the causes and not just the effects.



Pride and Prejudice: Investigations & Mergers in Digital Markets from a Developing World's Viewpoint

By Elisa V. Mariscal & Alexander Elbittar

While in the developed world there has been a growing interest in studying, opining, critiquing, and publicly acknowledging their *mea culpa* in a very lax application of agencies' competition enforcement in digital markets, agencies in developing countries have been trying to play catch up. Without detracting from the need to revisit and more carefully analyze anticompetitive conducts that can occur or may arise from market interactions among firms in a digital landscape, we want to view the problem from the particular lens of an agency in a developing. Why? Because certain conditions, present in the developed world may not yet have a hold in the developing world. In addition, developing countries may have important lessons to teach the developed world when looking at isolated regions, more at-risk or disadvantaged consumers, or may simply offer a different and novel way of viewing a problem with wider lenses than those currently being considered.

Blowing The Whistle on the Lack Of Antitrust Whistleblower Protection

By Jay L. Himes & Matthew J. Perez

With the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") set to sunset in June 2020, legislators and relevant stakeholders will debate the law's renewal and what changes, if any, should be made. A priority in the discussion should be whistleblower protection for individuals who disclose antitrust violations to the Department of Justice. Three protective features are appropriate. First, anti-retaliation protection for whistleblowers should be enacted. Second, a civil remedy for whistleblowers who suffer retaliation should be created. Finally, a bounty program to further incent whistleblowers to come forward should be adopted. The positive experiences of federal agencies with bounty programs confirm the adage: "money talks."

SUMMARIES

Competition Issues in the Digital Era – EU Developments

By Kyriakos Fountoukakos & Samuel Hall

Competition Commissioner, Margrethe Vestager, has labelled digitization the "*one big change that overshadows everything else.*" There is healthy debate among the competition law community as to whether such statements are exaggerated. Indeed, an alternative perspective is that competition law is flexible enough to deal with issues in the digital sector without any significant amendments in approach but rather by simply applying the existing rules in a flexible and appropriate manner. Competition authorities across the globe are increasingly devoting substantial resources to try to understand the issues posed by digitisation and to ensure effective competition in digital markets. For example, to be better equipped to deal with what it sees as the novel challenges posed by digital markets, the EU Commission appointed three expert advisors to prepare a report on "*Competition policy for the digital era*" which was published in April 2019. As this report is the only such report at EU level (there are several other national reports), section one of this article analyses the findings of the report in some detail. In section two, we focus on one of the principle issues regulators are grappling with in the context of digital markets: that is, ensuring effective competition in situations where a platform business also competes in other markets with companies that depend on that platform. In this section, we pay particular attention to the risk of regulation being introduced to remedy the concerns identified by competition regulators and discuss the recently adopted (June 2019) EU regulation on digital platforms.

Non-Horizontal Mergers in China: A Case Study of *KLA-Tencor/Orbotech*

By Vanesa Yanhua Zhang, John Jiong Gong & Amanda Jing Yang

In this paper, we analyze SAMR's conditional approval and its competition concerns regarding the proposed acquisition of Orbotech by KLA-Tencor. Upon analysis into the potential spillover effect, we conclude that there would be no harm to competition, considering the transaction's nature of being a conglomerate merger, a decided lack of economic incentive to tie or bundle, and the low entry threshold in the relevant markets. We further look into all the conglomerate transactions which were conditionally approved by China's antitrust agencies and found SAMR adopts a less interventionist approach to merger control as it prefers behavioral remedies over structural remedies. By analyzing the conditions that SAMR imposed on semiconductor transactions, we conclude that China is keen and strict on semiconductor concentrations with unique competition concerns and concentration parties in this industry shall be prepared and pay more attention to the merger filing in China.

A Comment on the *NCAA Student-Athlete Compensation* Cases

By Aaron M. Panner

Antitrust doctrine provides that any justification for a restraint of trade must be couched in terms of its benefits for competition: arguments that unrestrained competition undermines other social goals are treated as off-limits for purposes of the Sherman Act. This commentary considers how that focus affected the terms of debate in the district court's opinion in *In re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) and suggests that some of the strongest intuitive justifications for the NCAA's amateurism rules remained out of the picture.

WHAT'S NEXT?

For September 2019, we will feature Chronicles focused on issues related to (1) **LeadershIP EU**; and (2) **MFN, Loyalty Programs & Fidelity Rebates**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES OCTOBER 2019

For October 2019, we will feature Chronicles focused on issues related to (1) **CRESSE**; and (2) **EU Competition Reports**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with Christine S. Wilson

In this month's edition of CPI Talks we have the pleasure of speaking with Commissioner Christine S. Wilson of the Federal Trade Commission ("FTC").[1] Ms. Wilson was sworn in on September 26, 2018 as a Commissioner of the FTC. Commissioner Wilson previously served at the FTC as Chairman Tim Muris' Chief of Staff during the George W. Bush Administration, and as a law clerk in the Bureau of Competition while attending Georgetown University Law Center.

Thank you, Commissioner Wilson, for sharing your time for this interview with CPI.

1. Our recent CPI Chronicle for July featured articles on the *AT&T/Time Warner* case and vertical merger issues. Some authors argued that the Vertical Merger Guidelines need modernizing. Where do you stand on the proposals for new guidelines and what are some critical issues to address? And on the other hand, what doesn't need changing?

I'll start by stating the obvious: New vertical merger guidelines would only be useful if the FTC and Antitrust Division of the U.S. Department of Justice ("DOJ") (together, "the Agencies") issue them jointly. Joint guidelines ensure that we apply the same antitrust rules in the same way regardless of which agency handles the investigation. No business should be asked to comply simultaneously with two different legal standards.

So then the question becomes, do the Agencies see a good reason to issue new guidelines? Drawing upon the work of commentators who have engaged in thoughtful analysis of these issues,[2] I believe there are at least four reasons why the Agencies in the past have issued guidelines. First, the Agencies may use guidelines as a way to summarize the law, in essence a Restatement of Antitrust Law. Second, the Agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. Third, guidelines may disclose and formalize an approach the Agencies have heretofore used informally, like the 1992 Horizontal Merger Guidelines did with unilateral effects. Fourth, the Agencies may use guidelines to advance new analytic techniques, like the 1982 Horizontal Merger Guidelines did with the hypothetical monopolist test.[3]

I said in February 2019 that issuing new vertical merger guidelines *could* be useful because doing so "is, *at least conceivably*, compatible with at least one of the reasons we issue guidelines, identifying and codifying existing agency practices."[4] Although the Agencies have not issued new vertical merger guidelines since then, the law continues to develop in this area; the D.C. Circuit decided *AT&T/Time Warner* later that month,[5] and the FTC settled two mergers that included vertical elements.[6]

1 The views expressed herein are the Commissioner's own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

2 See Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines?*, 16 Geo. Mason L. Rev. 839 (2009); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, Antitrust 74 (Fall 2007); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers (filed Sept. 6, 2018).

3 See Christine S. Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go?, at 6, Keynote address at the GCR Live 8th Annual Antitrust Law Leaders Forum, Feb. 1, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf (citing Werden, Yde, and others).

4 *Id.* at 7.

5 *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

6 Press Release, Fed. Trade Comm'n, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger, Feb. 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc (settling merger that included horizontal and vertical elements by accepting divestiture limited to the problematic horizontal overlap); Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group, June 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition (accepting a divestiture to remedy both horizontal and vertical concerns in the Las Vegas area).

So what are the Agencies' existing practices? In brief, we consider both sides of the ledger by assessing anticompetitive and procompetitive effects. In terms of harm, we investigate whether, post-transaction, the combined firm would have the ability and incentive to reduce competition in an upstream or downstream market. In terms of benefits, we investigate whether the merger would generate cognizable efficiencies, including the elimination of double-marginalization ("EDM"). Note that while EDM gets perhaps the most attention, it is not the only type of vertical efficiency; in fact, vertical mergers may also generate other categories of efficiencies, including better aligning upstream and downstream incentives or giving a firm that is already vertically integrated a more efficient input or outlet.

If the decision is made to move forward, I believe new vertical merger guidelines should address at least four topics. First, the guidelines should follow the general Clayton Act jurisprudence and begin with the standard rebuttable presumption that vertical mergers are lawful.[7] Second, any new vertical merger guidelines should identify what a government plaintiff must show to rebut this presumption – what we typically call the *prima facie* case. Third, the guidelines should identify any affirmative defenses, like offsetting efficiencies, that a defendant may use to overcome a *prima facie* showing. And fourth, the guidelines should explain when and how the Agencies are likely to employ different types of vertical merger remedies, like firewalls.

2. What's the deal with the FTC's 13(b) authority?

For decades, the FTC has used Section 13(b) to halt certain unlawful practices that cause consumer injury. In 2018 alone, consumers received over $1.6 billion in redress stemming from FTC enforcement actions.[8]

Decades of cases have established two key principles. First, the FTC may bring actions in federal district court to obtain injunctive relief under 13(b). Second, the authority to grant injunctive relief confers upon courts the full panoply of equitable remedies, including equitable monetary relief.[9]

Our ability to protect consumers relies heavily on this authority. In 1994, Congress expressly affirmed that Section 13(b) authorizes the FTC to file suit to enjoin any violations of laws enforced by the FTC, to seek *ex parte* relief (including asset freezes), and to obtain consumer redress.[10] But both district court and appellate judges have raised questions about our authority that conflict with the clear intent of Congress and long-established case law.

A case in the Third Circuit held, in February 2019, that the FTC cannot seek injunctive relief when the challenged conduct is not "ongoing or imminent."[11] But fraudsters frequently cease their unlawful conduct when they learn of an impending law enforcement action. Similarly, companies often suspend dubious advertising claims or anticompetitive conduct during the pendency of an FTC investigation. The Third Circuit standard could prevent us from seeking injunctive or equitable monetary relief in these circumstances even if we can show that the conduct is likely to recur based on past practices. This outcome is contrary to both Congressional intent and the vast majority of Section 13(b) case law.

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7 Such a presumption would also be consistent with the empirical economic literature, which finds that the vast majority of vertical mergers are either competitively benign or efficiency enhancing. See, e.g. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 658 (2005) ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen & Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 Antitrust L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 Antitrust L.J. 943, 944 (1995) (agreeing with Reiffen & Vita that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

8 Fed. Trade Comm'n, 2018 Annual Highlights 25, Mar. 2019, available at https://www.ftc.gov/reports/annual-highlights-2018.

9 See *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2nd Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

10 108 Stat. 1691, 1790-91 (1994).

11 *FTC v. Shire Viropharma Inc.*, No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018); *aff'd*, 917 F.3d 147 (3rd Cir. 2019).

Another concerning development arose in a recent Ninth Circuit case.[12] There, one of the judges questioned the FTC's authority to obtain equitable monetary relief under Section 13(b) and suggested that the Ninth Circuit consider the issue *en banc*. The Ninth Circuit declined to do so. Courts have long held that by granting the FTC authority to seek injunctive relief, Section 13(b) gives courts the authority to grant the full range of equitable relief.[13] We believe this interpretation more accurately reflects Congressional intent and believe the Ninth Circuit correctly decided not to revisit this issue. Notably, no judge on the Ninth Circuit, including the judge who questioned the FTC's authority initially, voted to rehear the matter *en banc*.

Similarly, in a recent Seventh Circuit case, one of the panel judges aggressively challenged 30 years of the Circuit's own case law holding that the FTC can seek equitable monetary relief under Section 13(b), suggesting during oral argument that the precedent is no longer good law, even though the question was not really at issue in the case.[14] We are still awaiting a decision in that matter.

The FTC's authority under 13(b) also is at issue in an Eleventh Circuit case and another Third Circuit case, as well as in numerous cases pending in district courts. Although no court yet has held the FTC does not possess the authority, given the FTC's heavy reliance on 13(b) to protect consumers, and in light of these developments, I have urged Congress to clarify Section 13(b) of the FTC Act.

3. Welfare standards…consumer or total or otherwise. Please give us your thoughts on the swirling debates on what should be the standard for antitrust enforcement. What is the right balance point?

The debate over the standard for antitrust enforcement is part of a broader discussion started by critics who believe that modern antitrust policy should be radically restructured to address their claim that antitrust enforcement has declined, and that consumers concomitantly have been harmed, since the 1970s or 1980s. Yet, the statistics that these critics use to assert the failure of antitrust do not withstand scrutiny.[15] Similarly, the particular claimed shortcomings of the consumer welfare standard currently used by the Agencies and the courts are contradicted by the evidence.[16] Despite assertions to the contrary, the analytical framework employed by the Agencies and the courts clearly looks at more than effects on prices for consumers. For example, enforcers and judges look closely at the effects of mergers and business practices on quality and innovation. In fact, the *Horizontal Merger Guidelines* expressly address those concerns.[17] Similarly, buyer power and monopsony are already addressed by the Agencies,[18] although critics would have you believe otherwise. The FTC and DOJ have brought cases premised on these concerns.[19] Thus, a careful analysis reveals that, ultimately, the case for replacing the consumer welfare standard just isn't there.[20]

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12 *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN-VCF, 2016 WL 5791416, at *13 (D. Nev. Sept. 30, 2016), *aff'd*, 910 F.3d 417 (9th Cir. 2018).

13 See *supra* note 9 and accompanying text.

14 *FTC v. Credit Bureau Center, LLC*, 325 F. Supp. 3d 852 (N.D. Ill. 2018); *on appeal*, Nos. 18-2847 and 18-3310 (7th Cir).

15 See Statement of Comm'r Christine S. Wilson at 1-3, *In re Staples, Inc./Essendant, Inc.*, File No. 181-0180, Jan. 28, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf; Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 Antitrust L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, Antitrust, Fall 2018, at 74.

16 Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get, Luncheon Keynote Address at the George Mason University Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads (Feb. 15, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [hereinafter What You Measure Is What You Get]; Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, __ Pepperdine L. Rev. __ (forthcoming), available at https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/; Joe Kennedy, Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy, Info. Tech. & Innov. Foundation Report (Oct. 2018), at 5, available at http://www2.itif.org/2018-consumer-welfare-standard.pdf; Carl Shapiro, Opening Statement before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Hearing on The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt, at 3 (Dec. 13, 2017) ("[T]hose who say that the 'consumer welfare' standard is narrowly focused on price to the exclusion of other factors are simply incorrect: properly applied, the 'consumer welfare' standard includes a range of factors that benefit consumers, not just low prices but improved product variety and quality and of course more rapid innovation. Likewise those who say that the 'consumer welfare' standard is overly focused on short-term outcomes are mistaken.").

17 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (Aug. 19, 2010) ("Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. . . When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.").

18 See, e.g. *id.* § 12 Mergers of Competing Buyers, Example 24 (analyzing a hypothetical merger of the only two buyers of an agricultural product).

19 See, e.g. Grifols, S.A., FTC Dkt. No. C-4654 (Sept. 17, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter (requiring a divestiture to avoid the creation of monopsony power in the purchase of blood plasma).

20 See What You Measure Is What You Get, *supra* note 16.

You also asked where the current debate should lead. Any standard that is adopted must be cost-effective and feasible for the enforcement Agencies and courts to administer, and must lead to consistent and predictable results. Consequently, I believe the standard must be tethered to well-established economic principles and tools. The advantage of the current consumer welfare standard is its reliance on economic principles. We have the tools to implement the standard in a cost-effective manner, and we get consistent outcomes no matter who is implementing the standard. In other words, the results are objective.

In contrast, many of the alternatives advanced by critics would lead to subjective outcomes. When goals beyond consumer welfare and efficiency are pursued, enforcement is more likely to be captured by rent seekers and outcomes are more susceptible to political whims and influence. The alternatives to consumer welfare would willingly sacrifice lower prices for consumers and efficiently greater output in favor of limiting firm size or preserving older technologies. I am not aware of any opinion poll that shows consumers would prefer a world of smaller but higher cost firms that charge higher prices.

4. As the titles of some of your recent speeches suggest, "stay the course" and we all should "play by the same rules" seem to be themes that you focus on. Can you please go into a bit more detail on both of those themes?

Sure. In those speeches I responded to two complaints about the way we practice antitrust law today.

First, "stay the course" is my response to those who argue we must fundamentally rethink antitrust law in order to account for new technologies and business practices.[21] Specifically, some argue that technology markets are so fundamentally different that they require special antitrust rules. The last time we heard this argument, both the D.C. Circuit (in *Microsoft*) and the Antitrust Modernization Commission rejected it, finding our existing antitrust laws flexible enough to cover novel situations.[22] I believe the D.C. Circuit and the AMC both got it right then, and I believe the same answer applies today. So when I say "stay the course," I mean that our approach to antitrust is fundamentally sound and does not require us to make wholesale – and potentially ill-considered – changes.

Second, "we should all play by the same rules" is my response to those who argue that we should alter the fundamental rules of antitrust to help a favored group, such as small businesses, exporters, entrepreneurs, or innovators.[23] It is also my response to those who ask whether we need special antitrust rules for Big Tech.

The idea of special rules is almost as old as antitrust law itself. For example, Louis Brandeis, eponym of the neo-Brandeisians, represented many small businesses early in his legal career.[24] As a result of that experience, he decided that his former clients were morally and economically "better" than larger firms (prompting his phrase, the "curse of bigness").[25] So when the DOJ stepped up enforcement of the Sherman Act by attacking price-fixing cartels, many of which were comprised of the types of small enterprises Brandeis used to represent, he complained bitterly and sought, unsuccessfully, to allow his favored group legally to fix prices.[26]

That argument has come back into vogue in some quarters. In the United States, groups like the Open Markets Institute once again argue that small producers should be exempt from the antitrust laws, and permitted to engage in price-fixing with impunity, because they are inherently

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21 See Christine S. Wilson, All (Industries) in the Same Boat: Staying the Course on the High Seas of High Tech, Address at the CCIA Conference on Competition, Data, and Innovation in the Digital Economy, Mar. 28, 2019, https://www.ftc.gov/system/files/documents/public_statements/1512148/wilson_remarks_ccia_3-28-19.pdf [hereinafter Staying the Course].

22 See *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (per curiam); Antitrust Modernization Commission, Report and Recommendation 9 (Apr. 2007), available at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.").

23 See Christine S. Wilson, Why We Should All Play By the Same Antitrust Rules, from Big Tech to Small Business, Address at the American Enterprise Institute, May 4, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf [hereinafter Play By the Same Rules].

24 Thomas K. McCraw, Prophets of Regulation 87 (1984) (describing the typical Brandeis clients as "small and medium-sized manufacturers of boots, shoes, and paper," as well as "wholesalers and retailers")

25 *Id.* at 104 (quoting Brandeis at a Congressional hearing arguing that "[b]ig business is not more efficient than little business. It is a mistake to suppose that the department stores can do business cheaper than the little dealer" and explaining that department stores obtain an unfair advantage by buying "in bulk and avail[ing] themselves of quantity discounts"); see also Louis D. Brandeis, *A Curse of Bigness*, Harper's Wkly., Jan. 10, 1914, at 18, 18 (coining the phrase).

26 Prophets of Regulation, *supra* note 24, at 104 (describing Brandeis's proposal as seeking "that small retailers be exempted from the antitrust laws and permitted, in concert with each other, to fix the prices of consumer goods").

"better" than larger businesses.[27] Abroad, some argue that national champions should receive special treatment in merger reviews.[28]

In the United States, we believe that "the antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."[29] We sometimes forget the reason the Magna Carta is so important: It established the foundational legal principle that all people, up to and including the king, are subject to the laws of the land.[30] I believe that principle remains true today, and therefore reject special antitrust exemptions for favored groups. Or, to restate it in the affirmative, I believe we should all play by the same antitrust rules.[31]

5. Some would argue that the links between data protection, data portability, privacy, and antitrust law are gradually starting to bleed together. What are your thoughts on these links and what role should antitrust play in all of this? Does the United States need a GDPR or some equivalent or should the U.S. forge a different path?

Let me take those questions one at a time.

To your first question, I view privacy and data protection as topics distinct from competition law.[32] The FTC's antitrust and consumer protection authorities are based upon separate statutory provisions that were enacted at different times and for different reasons.[33] Competition law in the United States arose from concerns about large "trusts" and their ability to overcharge consumers. Although it is now statutory,[34] the underlying framework dates back to common law limitations upon restraints of trade. In contrast, U.S. privacy protections developed gradually and contain a broad mix of constitutional, statutory, and common law provisions at both the federal and state levels.[35] The separation of antitrust and consumer protection appropriately continues today.

Because we have many tools available to address privacy *qua* privacy directly, there is no need to shoehorn it into competition analysis. Conceptually, privacy and data security *could* be non-price facets of competition in some antitrust cases, if firms compete on the basis of privacy or data policies to attract customers.[36] But if privacy or data security issues not related to competition arise in the course of a merger review, then we appropriately handle those aspects as consumer protection matters.[37]

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27 Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, Apr. 26, 2019, https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/ (proposing complete antitrust immunity for "workers, professionals, [and] small businesses").

28 See, e.g. Federal Ministry for Economic Affairs and Energy, National Industrial Policy 2030, at 11, May 2, 2019, available at https://www.bmwi.de/Redaktion/EN/Publikationen/Industry/national-industry-strategy-2030.pdf?__blob=publicationFile&v=9 (arguing that "European and German competition law must be reviewed and changed where applicable" to promote the development of "National and European champions" that can compete "at eye level" with foreign firms); Konstantinos Efstathiou, The Alstom-Siemens Merger and the Need for European Champions, Bruegel, Mar. 11, 2019, https://bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/ (summarizing the debate in the EU).

29 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

30 U.K. Parliament, Why Is Magna Carta Significant?, https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartasignificant/ (last accessed July 23, 2019) ("Magna Carta is significant because it is a statement of law that applied to the kings as well as to his subjects. Although the idea of England as a community with a law of the land independent of the will of the king was implicit in custom before 1215, Magna Carta gave this concept its first clear expression in writing.").

31 See Play By the Same Rules, *supra* note 23.

32 See, e.g. Staying the Course, *supra* note 21.

33 See *id.* at 5 (citing Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and* The Right *[Approach]* to Privacy, 80 Antitrust L.J. 121, 138-150 (2015)).

34 See 15 U.S.C. § 1 *et seq.*

35 See Staying the Course, *supra* note 21, at 5-6 (noting provisions from the Fourth Amendment to the U.S. Constitution to modern federal statutes like the Gramm-Leach-Bliley and Fair Credit Reporting Acts to a limited right to privacy arising under the common law of various states).

36 For example, in the *Google-DoubleClick* merger the Commission investigated whether the merger would allow the merging firms to exploit consumer information "in a way that threatens consumers' privacy" but did not find any evidence that the proposed transaction would harm competition, including "non-price attributes of competition, such as consumer privacy." Statement of the Federal Trade Commission at 2-3, *Google/DoubleClick*, FTC File No. 071-0170, Dec. 20, 2007, available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

37 See, e.g. Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Erin Egan, Facebook, Inc., and Anne Hoge, WhatsApp Inc., Apr. 10, 2014, available at https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf; See Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Elise Frejke, Frejke PLLC, *In re RadioShack Corp.*, May 16, 2015, available at https://www.ftc.gov/system/files/documents/public_statements/643291/150518radioshackletter.pdf.

To your second question, I believe we need a comprehensive federal privacy law that sets expectations for businesses and empowers consumers to make informed decisions. From a practical perspective, the impending risk of conflicting state mandates makes passing federal privacy legislation particularly important.

That said, I do not believe we should adopt GDPR wholesale. We should instead learn from GDPR, emulating its best features and minimizing its negative, if unintended, consequences. On the one hand, GDPR contains many of the "best practices" for which the FTC has advocated over the years, including transparency and systematic risk assessment and mitigation protocols. On the other hand, GDPR also has significant weaknesses. For example, preliminary research indicates that GDPR has reduced innovation and investment in the EU.[38] It may also entrench incumbents, which can more easily afford to hire the necessary compliance staff and fund the development of compliant systems.

Procedurally, a new federal privacy law should provide the FTC with broad authority to deter abuses. In other privacy statutes, such as COPPA and Gramm-Leach-Bliley, Congress has built in a deterrence function by authorizing the FTC to impose civil monetary penalties even for first-time violations. It should repeat that approach here. Privacy is industry and technology neutral, so the law should likewise apply broadly, including reaching non-profits and common carriers. Given the pace of innovation in data-centric industries, carefully crafted federal privacy legislation will set expectations for the business community and empower consumers to make informed choices about when and how they share their data – while preserving or even enhancing incentives to innovate and compete. Thus, when drafting privacy legislation, Congress should ensure that competition and innovation are fostered rather than inhibited.

6. In a recent Wall Street Journal commentary, you referred to the district court's ruling in the *FTC v. Qualcomm* case as "alarming" and called for it to be revisited. Can you go into a few specifics?

Absolutely. As I wrote in the op-ed,[39] I believe the district court's ruling is both bad law and bad policy.

It is bad law because the district court radically expanded the substantive reach of antitrust law to create new legal obligations. The court did so primarily by reviving and expanding an old antitrust case called *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[40] The Supreme Court has said that firms have a very limited "duty to deal" and has characterized *Aspen* as "at or near the outer boundary" of U.S. antitrust law.[41] The district court, though, took *Aspen* even further. For example, because Qualcomm licensed some patents to some competitors in 1999,[42] the court ruled that it had a perpetual antitrust obligation to license every patent to every competitor.[43] The court also ruled that breaching a contract – in this case a "FRAND" promise – is itself an antitrust violation,[44] thereby permitting more intrusive remedies than otherwise would be available under contract law.

It is bad policy because the court's order appears to apply world-wide,[45] even though the jurisdiction of U.S. courts is limited both by U.S. law and principles of international comity. This provision of the order is also contrary to the longstanding policy of both Agencies, whose "general practice is to seek an effective remedy" that is both "restricted to the United States" and "tailor[ed] . . . to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions."[46]

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38 See Jian Jia, Ginger Zhe Jin & Liad Wagman, The Short-Run Effects of GDPR on Technology Venture Investment, NBER Working Paper No. 25248, Nov. 2018, available at https://www.nber.org/papers/w25248.pdf.

39 Christine S. Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J., May 29, 2019, https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055.

40 472 U.S. 585 (1985).

41 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

42 See *FTC v. Qualcomm Inc.*, No. 17-cv-00220, 2019 WL 2206013, at *4, 77, 83-84 (N.D. Cal. May 21, 2019).

43 See *id.* at *81-83 (finding the first element of *Aspen Skiing* met "because Qualcomm previously licensed its rivals" other patents in 1999, "but voluntarily stopped licensing rivals even though doing so was profitable" and ultimately concluding that "Qualcomm Has an Antitrust Duty to License its SEPs to Rivals").

44 See *id.* at *114-15 (concluding that "Qualcomm's Refusal to License Rivals Bolsters Qualcomm's Monopoly Share" because "Qualcomm also refuses to license rivals in violation of its FRAND commitments and its antitrust duty to deal with rivals").

45 See *id.* at *15, 20 (finding "the geographic boundaries" of the relevant markets "are worldwide"); *id.* at *137-140 (requiring Qualcomm to sell chips products to "customers" and "make exhaustive SEP licenses available to modem-chip suppliers" without including any territorial limitations).

46 Note by the United States ¶¶ 6, 9, Roundtable on the Extraterritorial Reach of Competition Remedies, Working Party No. 3 on Co-operation and Enforcement, OECD Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP/WP3/WD(2017)41, Dec. 1, 2017.

Thankfully, serious damage can yet be avoided. Since I wrote the op-ed, many others have echoed my concerns, including the DOJ.[47] With the matter now on appeal,[48] the Ninth Circuit Court of Appeals, and potentially the Supreme Court, will have a chance to assess the wisdom of the district court's sweeping legal and policy changes.

47 United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 6, 11, *FTC v. Qualcomm*, No. 19-16122 (9th Cir. filed July 16, 2019) (arguing the district court "erroneously expan[ded] *Aspen Skiing*" and that "the court failed to justify the extraterritorial obligations on Qualcomm"); see also, e.g. Jan Wolfe, *Qualcomm Has Strong Argument to Win Reversal of U.S. Antitrust Ruling: Legal Experts*, Reuters, May 31, 2019 ("Jonathan Barnett, a law professor at the University of Southern California, agreed that Koh's decision was in danger of being overturned by an appeals court," particularly on the *Aspen Skiing* analysis); Lisa Kimmel et al., District Court Decision in *FTC v. Qualcomm* Spawns Controversy: Four Issues to Watch on Appeal, June 4, 2019, https://www.crowell.com/NewsEvents/AlertsNewsletters/all/District-Court-Decision-in-FTC-v-Qualcomm-Spawns-Controversy-Four-Issues-to-Watch-on-Appeal ("[T]here are purely legal reasons to question the court's embrace of *Aspen Skiing* to impose a duty to license intellectual property given that the case did not involve the licensing of intellectual property. Moreover, the Federal Circuit has held that the antitrust laws do not impose any duty to share intellectual property and the relevant Ninth Circuit precedent has been widely criticized.").

48 *FTC v. Qualcomm*, No. 19-16122 (9th Cir.).

GETTING A HANDLE ON PRESCRIPTION DRUG PRICING – A MODESTLY RADICAL PROPOSAL

BY KENT BERNARD[1]

1 Adjunct Professor, Fordham University School of Law.

I. INTRODUCTION

Recently there has been a lot of discussion about the high cost of prescription drugs. Some of that commentary is thoughtful and informed.[2] Much of it is not.[3] Having spent over 30 years in the research based pharmaceutical industry; I bring a different perspective on these issues to the conversation. I've lived through and inside the product life cycle. What people are often focused on are the symptoms of the market failure, not the causes. High prices are a symptom; market power is a cause. If you want to make headlines, shout about the symptoms. It makes everyone feel good, but it doesn't do very much at all. If you want to have actual reform, you have to deal with the causes and not just the effects.

II. ARE SOME DRUGS OVERPRICED? ABSOLUTELY.

The poster child for abusive pricing has been Daraprim, an off-patent drug whose price went from $13.50/dose to $750/dose after Martin Shkreli bought the rights to it. The market for this drug is small (fortunately – toxoplasmosis is not something that you want to have). It has been estimated that for a company to get a generic approval for another source of the drug could cost at least $400,000.[4] After the price jump, Express Scripts announced a deal with Imprimis to provide a cheaper version.[5] It is unclear if that actually ever launched. Sources report that the drug is still at the $750 price point[6] and others speak of the possibility of launching the drug at a cheaper price (rather than speaking of a cheaper price that actually exists).[7] The other face on that poster belongs to J. Michael Pearson the former CEO of Valeant. Valeant jacked up the price of numerous old drugs, making a temporary hero of the CEO[8] for his immensely profitable if morally bankrupt strategy.

What makes these cases interesting is that the products were off patent. According to traditional economic theory, a huge price increase on an off-patent product should be like opening a grain bin in front of a family of hungry mice – you should get entry, and quickly. But that paradigm failed here. And the reasons why it failed help explain why the initial strategy was so profitable. Generalizations are seldom entirely accurate, but when you look at the patient populations for many of the drugs at issue here, you find that they are small in number. So, the first "barrier to entry" is simply that the market is small, and may not repay the cost of getting a generic approval, gearing up, and setting up distribution. The second point comes from the first: the existing supplier can threaten to cut price (or keep it low) and make entry by the second company a money losing proposition. The threat of an unprofitable (but still above cost) price may be all it takes to deter the new entrant. If it will cost the potential second entrant that $400,000 to see whether I am bluffing about cutting my price or not, he may well decide not to take that risk.

And then there is the EpiPen. While Mylan has made use of patents to protect the franchise, the nature of the "product" here (injectable epinephrine in an easy to use injector pen), combined with FDA regulations of such mixed drug/device entities, and supported by a truly awesome lobbying effort by Mylan, formed a substantial protective wall around the franchise. Indeed, the law requiring schools to have epinephrine injector pens on site was referred in the Presidential Press statement at its signing as the "EpiPen Law."[9] It doesn't get much better than that in terms of establishing your brand.

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2 See Harry First & RPS Submitter, *Excessive Drug Pricing as an Antitrust Violation*, 82 Antitrust Law J. 701 (2019).; Carrier, Lemley & Miller, *Playing Both Sides: Branded Sales, Generic Drugs and Antitrust Policy* (Stamford Law and Economics Olin, Working Paper No. 533, 2019), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3350629.

3 As Amy Walter, National Editor of The Cook Political Report put it so beautifully in speaking of reporters commenting on political polling; much of the commentary here is like preteens talking about sex. "They know all the words. They talk about it a lot. But they have no idea what they are talking about." Michael M. Grynbaum, *How to cover 2020: Assume Nothing and Beware of Twitter*, New York Times , April 16, 2019, https://www.nytimes.com/2019/04/16/business/media/2020-campaign-journalism-advice.html.

4 Foley & Lardner LLP, Don't Blame Patents For High Drug Prices (2015), Foley & Lardner LLP Blog (December 29, 2015), https://www.foley.com/dont-blame-patents-for-high-drug-prices-12-29-2015/.

5 *Ibid.*

6 Johnson, *What Happened to the $750 Pill that Catapulted Martin Shkreli to Infamy?*, The Washington Post, August 1, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/08/01/what-happened-to-the-750-pill-that-catapulted-pharma-bro-martin-shkreli-to-infamy/?noredirect=on&utm_term=.b46bab33baf8; see also Prices and coupons for Daraprim, GoodRx.com, https://www.goodrx.com/daraprim?dosage=25mg&form=tablet&label_override=Daraprim&quantity=4.

7 Marc Harrison, *How the not-for-profit Civica Rx will disrupt the generic drug industry*, STAT News, March 14, 2019, available at https://www.statnews.com/2019/03/14/how-civica-rx-will-disrupt-generic-drug-industry/.

8 See Milstead, *Valeant's $3-billion man: CEO's big bet pays off*, Toronto Globe & Mail, July 30, 2015, available at https://www.theglobeandmail.com/report-on-business/careers/management/executive-compensation/valeants-strong-performance-means-big-rewards-for-ceo/article25788189/. See also Pollack & Tavernise, *Valeant's Drug Price Strategy Enriches It, but Infuriates Patients and Lawmakers*, New York Times, October 4, 2015, https://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html.

9 Valerie Jarrett, *President Obama Signs New EpiPen Law To Protect Children with Asthma and Severe Allergies, And Help Their Families To Breathe Easier*, White House Blog (November 13, 2013), https://obamawhitehouse.archives.gov/blog/2013/11/13/president-obama-signs-new-epipen-law-protect-children-asthma-and-severe-allergies-an.

Did Mylan settle litigation in "interesting" ways? Yes. Did Mylan's contracts contain some highly questionable terms? Again, yes. A company with a dominant market position selling goods on condition that the buyer not deal with any competing product should set off fireworks at the antitrust agencies.[10] But this is just the visible part of the iceberg. The unfortunate fact is that the EpiPen saga demonstrates that we are simply not serious about getting a grip on prescription drug pricing.

How can I say that? Look at the actual prices that are still out there. The moral, and it is a sad one, is that if you just brazen it out and take the short-term PR hit, you can hold the vast majority of whatever price you charge. It is happening right now. Our public attention span is very short.

And when we do catch someone blatantly cheating, we take some of the profits in fines, pat ourselves on the back, and walk away. Mylan classified the EpiPen as a generic drug for federal rebate purposes while asserting its patents against potential competitors. When it was exposed, Mylan agreed to a settlement that cost it money but that left all of the patents intact.[11] If we were serious here, we would have viewed this as a classic situation for an estoppel. Mylan told the government in various filings and certifications that the EpiPen was a generic drug. Why not simply take them at their word? Make the patents unenforceable, along with imposing a fine so that the actual misclassification was unprofitable. That certainly would make it easier for competitors to enter the market. But we didn't do that. We took a fine, felt good about ourselves, and left Mylan's pricing power intact.

III. ARE PATENTS TO BLAME FOR HIGH DRUG PRICES? LESS THAN PEOPLE THINK.

What you have to remember about patents is that they expire. They are a wasting asset. I explored this in depth in an earlier article.[12] Many, if not most, of the cases that we are outraged about are cases where there is no patent protection involved.[13] Patents contribute to higher pricing, because that's what they were intended to do – reward inventors for their inventions. But the actual pricing of a patented new drug will depend on several factors beyond any patent protection:

1. What does the drug do (what disease does it treat)? You may have a great discovery but if it treats a trivial condition, you won't be able to charge much for it.

2. What existing drugs treat that disease or condition, how well do they treat it, and what do they cost? Are you a breakthrough, or a me-too?

3. Do you have a better safety/side effect profile than existing therapies? Safety sells, if the advantage is real. But if the other drugs used are relatively safe as well, your advantage may not translate into higher pricing.

4. Does your drug have a characteristic or feature that makes it unique? An oral form of an injectable drug has a very marketable feature. A form of drug that can be taken once a day has marketable advantages over one that needs to be taken three times a day.

The point is that not every invention is a market success. A patent allows the owner to exclude others from making, using or selling that invention. It does not necessarily give the patent owner market power.[14] More than one patented product can, and does compete.

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10 See, e.g. Swelitz & Silverman, *Mylan may have violated antitrust law in its EpiPen sales to* schools, legal experts say, Statnews (August 25, 2016), https://www.statnews.com/2016/08/25/mylan-antitrust-epipen-schools/.

11 See generally Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Mylan Agrees to Pay $465 Million to Resolve False Claims Act Liability for Underpaying EpiPen Rebates* (August 17, 2017), https://www.justice.gov/opa/pr/mylan-agrees-pay-465-million-resolve-false-claims-act-liability-underpaying-epipen-rebates.

12 Kent Bernard, When the Price Isn't Right–*Lundbeck and a Path to Analyze Competition in Drug Research and Development*, 59 Antitrust Bulletin 527, 548 (2014).

13 See, e.g. *supra* note 4.

14 *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006).

IV. SO WHAT EXPLAINS THESE OUTLIER CASES OF U.S. DRUG PRICING? TO COIN A PHRASE, IT'S COMPLICATED.

First, we need to recognize that it is very expensive and very risky to engage in new drug discovery, development and clinical testing. An economist at NYU crunched tons of data and found that of all the compounds that actually make it into the FDA clinical testing structure (i.e. make it out of the test tube and into an actual person), about 1 in 4000 makes it to market.[15] Even for a compound that makes it into Phase III clinical testing (the large scale trials that precede the actual application for FDA approval[16]) the chance of actually reaching the market is barely over 50 percent.[17] The history of the pharmaceutical industry is littered with examples of very promising drug candidates that crashed in burned in Phase III taking with them the huge investments already made.[18] While I was at Pfizer, we had a potential breakthrough compound for raising HDL ("good cholesterol"). It was in Phase III, in a study involving 15,000 patients. The investment was huge, as was the excitement over the drug. Then the study had to be prematurely terminated due to adverse effects that only showed up in the large numbers of this study.[19]

As far as costs go, they are enormous. Many experts in this area rely on estimates from the Tufts Center for the Study of Drug Development. That put the cost of bringing a medicine from invention to pharmacy shelf at about $2.7 billion. A major part of that cost is that the vast majority of the medicines that start being tested in people never make it to market at all. While people have attacked the numbers, they hold up fairly well.[20]

A rational person will only take a high and expensive risk if he can anticipate a large reward. But in our drive to have cheaper prices, we have actually decreased the incentive for drug discovery and development.

Patent protection is critical to the research based pharmaceutical industry.[21] It stands to reason that if we want companies to make large, risky investments in developing new drugs to protect the public health, those companies will want some assurance that if they succeed, they will be able to make a profit. Patents should provide that assurance. But there is a problem. Even the strongest patent may not win in litigation. Indeed, some put the odds of success for even that strongest patent at about 70 percent.[22] And if the patent owner loses, in effect his investment in the product is destroyed. One would expect in this scenario that we would want to encourage settlement of those patent cases that retain the research incentive and protect the patent life.

In fact, we have done the reverse. As a social judgement we have said that we prefer cheaper drugs next week to new and better drugs five or ten years from now. We have made it very difficult for innovators to settle cases where generic companies have put the patents at risk.[23] I am not rearguing that issue here. But we need to understand that if we want companies to make the investments, but effectively reduce the patent life protecting those investments, the result will be higher prices during what is left of the patent protected period. This is just Math 101.

So far we have discussed small market off patent drugs, and the impact of our policy choices regarding patented drugs. But what about off patent drugs with large markets, high prices and few competitors? What about insulin?

Insulin is a hormone which regulates the amount of glucose in the blood. If your body doesn't produce it, you need to take it in medicine form. While insulin as a drug has been around for almost 100 years, there is still no substitute for it (nor is there a form that can be taken orally).

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15 Abrantes-Metz, Adams & Metz, *Empirical Facts and Innovation Markets: Analysis of the Pharmaceutical Industry*, Antitrust Source 1 (March 2005).

16 See generally FDA, *The Drug Development Process*, https://www.fda.gov/forpatients/approvals/drugs/ (last visited June 10, 2019).

17 Abrantes-Metz et al., *supra* note 15.

18 See Bernard, *Innovation Market Theory and Practice: An Analysis and Proposal for Reform*, 7(1) Competition Policy International 159, 192 n. 38 and accompanying text (2011).

19 See Tall, Yvan-Charvet & Wang, *The Failure of Torcetrapib: Was it the Molecule or the Mechanism?* 27 Arteriosclerosis Thrombosis and Vascular Biology 257, 257-60 (2007), https://www.ahajournals.org/doi/full/10.1161/01.ATV.0000256728.60226.77.

20 See Harper, *The Cost Of Developing Drugs Is Insane. That Paper That Says Otherwise Is Insanely Bad*, Forbes, (October 16, 2017), https://www.forbes.com/sites/matthewherper/2017/10/16/the-cost-of-developing-drugs-is-insane-a-paper-that-argued-otherwise-was-insanely-bad/#553a3f7d2d45.

21 See, e.g. Kent Bernard & Willard K. Tom, *Antitrust Treatment of Pharmaceutical Patent Settlements: The Need for Context and Fidelity to First Principles*, 15 Fed. Cir. B. J. 617, 624-25 (2006); Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 NYU Law Review 1553, 1562 (2006).

22 Bernard and & Tom, *supra* note 21, 626.

23 See Kent Bernard, *Hatch-Waxman Case Settlements – The Supreme Court Churns the Swamp*, 15 Minn. J.L. Sci. & Tech. 123 (2014).

Three companies control the market, and the prices have skyrocketed.[24] Part of the problem is human nature. Companies come out with "new and improved" products all the time, and no one seems to ask if they really are better than the older ones. Doctors are reluctant to prescribe older insulin products[25] and many patients may not even be aware of them. Older insulins have been successively replaced with newer, incrementally improved products covered by numerous additional patents. The result is that more than 90 percent of privately insured patients with Type 2 diabetes in America are prescribed the latest and costliest versions of insulin.[26] A good overview of the actual costs of insulin and some thoughts as to the reasons for the pricing was put out by GoodRx.[27]

Insulin also has an odd regulatory status. Even though it is technically a biologic product, insulin had historically been approved as a drug. For a lot of regulatory reasons, this has made it tough to copy.[28] But unless there is a demand for an off patent (i.e. older) form of insulin, it is hard to see the pricing structure changing.

There is precedent for encouraging the use of an older drug even when there are newer alternatives on the market. A week after the terrorist attacks of September 11, 2001, anonymous letters laced with anthrax spores began arriving at media companies and congressional offices.[29] Bayer had a new drug, Cipro, with an indication for inhaled anthrax. Demand for Cipro skyrocketed.[30] But what was overlooked is that while inhaled anthrax was a new phenomenon, anthrax itself was well known. It is a disease found in cattle, and farmers have been exposed to it for millennia. The treatment for anthrax exposure in humans was traditionally penicillin or doxycycline.[31] Once doctors and policy makers realized that they had an existing, off patent, readily available, inexpensive treatment, generic doxycycline became the drug of choice.[32] If we could develop a medical consensus around the efficacy of older insulins, we might be able to shift demand over to them as well.

The idea of shifting demand from one drug to a less expensive one brings us to another area where our desire to get lower prices on drugs, may be a major factor in the high prices now. I am talking about pharmacy benefit managers ("PBMs"). The PBM offers to negotiate with drug companies on behalf of payers. In exchange for getting preferred status in a drug category in the PBM (the formulary), the drug company agrees to pay the PBM. We call it a "rebate" although actually it is simply a payment – a legalized kickback if you will – to the middleman.[33] A true rebate goes to the actual purchaser of the product, not a middleman who never buys or sells the drug in question. But the real problem isn't the description of the payment; it is that the interests of the PBM and its client are misaligned. Take two scenarios. In the first, the drug price would be $10, with a 10 percent rebate to the PBM. In the second, the drug price is $20 with a 20 percent rebate. As a payer, I want the first scenario – paying $10 for the drug. But for the PBM the second scenario is vastly more profitable. In the first scenario, the PBM gets $1. In the second scenario the PBM gets $4.[34] There is no rule (yet) that requires the amount of the rebate to be disclosed, or that all or any of the rebate be passed through to the payer. If the rebate does pass through to the payer, it can be viewed as a straight discount. So, in our example, the buyer would see the drug being priced at a net of $9 in the first scenario and a net of $16 in the second. The new lower price should win every time.

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24 See Nicholas Florko, *'Everyone is at fault': With insulin prices skyrocketing, there's plenty of blame to go around*, STATNEWS (February 19, 2019), https://www.statnews.com/2019/02/19/no-generic-insulin-who-is-to-blame/.

25 *Ibid.*

26 Belluz, The absurdly high cost of insulin, explained, VOX April 8, 2019 available at https://www.vox.com/2019/4/3/18293950/why-is-insulin-so-expensive.

27 Lee, How Much Does Insulin Cost? (September 21, 2018) available at https://www.goodrx.com/blog/how-much-does-insulin-cost-compare-brands/.

28 See Johnson, FDA says new rules should increase competition for insulin, but others aren't as sure, Modern Healthcare (December 11, 2018) available at https://www.modernhealthcare.com/article/20181211/NEWS/181219975/fda-says-new-rules-should-increase-competition-for-insulin-but-others-aren-t-as-sure.

29 See Timeline: How the Anthrax Terror Unfolded, NPR (February 15, 2011), available at https://www.npr.org/2011/02/15/93170200/timeline-how-the-anthrax-terror-unfolded.

30 See Petersen & Pear, A NATION CHALLENGED: CIPRO; Anthrax Fears Send Demand for a Drug Far Beyond Output, New York Times (October 16, 2001), available at https://www.nytimes.com/2001/10/16/business/a-nation-challenged-cipro-anthrax-fears-send-demand-for-a-drug-far-beyond-output.html.

31 See Merck Veterinary Manual, Overview of Anthrax, available at https://www.merckvetmanual.com/generalized-conditions/anthrax/overview-of-anthrax.

32 See Doxycycline becomes anthrax drug of choice in Washington, CNN.com (October 28, 2001), available at http://www.cnn.com/2001/HEALTH/conditions/10/27/doxycycline/.

33 See Yood & Gertler, HHS Proposes Rule to Eliminate Safe Harbor for PBM Drug Rebates, SheppardMullin Healthcare Law Blog (February 11, 2019) available at https://www.sheppardhealthlaw.com/2019/02/articles/healthcare-law/eliminate-safe-harbor-pbm-oig/.

34 One also might also think that this was a paradigmatic violation of Section 2(c) of the Robinson Patman Act, 15 U.S.C. Section 13 (c).

V. A PROPOSED SOLUTION – DON'T WADE INTO THE SWAMP, DRIVE AROUND IT

Some suggestions have been made that we can try to regulate PBM rebates, and perhaps have the Government "negotiate" drug prices for Medicare and Medicaid. Each of these has separate and disqualifying problems.

Regulating rebates, like regulating prices will be cumbersome and expensive. It also is likely to spawn even more complex schemes to keep the money flow to the intermediaries. A simpler and more effective system would be to require that all rebates be passed through to the payer. The PBM could then charge the payer a fee for its services. This would more accurately reflect the true roles of the participants, and eliminate the potential for conflicts of interest.

In terms of the government "negotiating" prices, let's not kid ourselves. The Government certainly has the power to determine what it will pay in its role as a purchaser of drugs. But to call it a negotiation is disingenuous. On the one side is a drug company. It has medicine to sell. On the other side is an entity with an army, a navy, an air force, nuclear weapons, the ability to print money, and the power to make conduct that it doesn't like into a criminal offense. The government does not negotiate; it specifies.

Both of these suggestions – regulating rebates and government negotiating prices – assume that much of the current structure remains intact. But that assumption is not necessary. If market forces make it unprofitable for existing generic drug companies to enter and bring the price of off-patent drugs down, let's attack that issue head on. Such an attack, in fact, is underway. Civica Rx, the initiative previously known as Project Rx, is the name of a new not-for-profit generic drug company that will help patients by addressing shortages and high prices of lifesaving medications. Since the initiative was announced in January 2018, more than 120 health organizations representing about a third of the nation's hospitals had contacted Civica Rx and expressed a commitment or interest in participating with the new company.[35] Civica Rx has identified 14 hospital-administered generic drugs as the initial focus of the company's efforts. It will be an FDA approved manufacturer and will either directly manufacture generic drugs or sub-contract manufacturing to reputable contract manufacturing organizations.[36] As of March 2019 the membership was over 800 hospitals. Civica's approach is both conservative and radical.

> What makes Civica different from other generic drug companies is our commitment to transparency, a one-price-for all model regardless of hospital size, and a membership structure that is open to all. We are pro-competitive and are committed to eliminating uncertainty in the generic drug supply chain, in part by entering long-term contracts with both our health system partners as well as with multiple manufacturing partners in multiple locations, allowing us to set the demand and ensure that we have dedicated manufacturing capacity for the drugs we need to deliver.[37]

Civica Rx's not-for-profit model attacks the two main factors that allow companies like Turing and Valeant to jack up their prices on off patent drugs: limited supplies of the drugs and the ease with which a pharmaceutical company with deep pockets can undercut anyone who'd consider investing in a competitor by drastically reducing the price long enough to put them out of business. That tactic won't work against Civic Rx (especially given the network of hospitals involved with the new venture).[38]

The beauty of this approach is that it allows for the reverse of the current in terrorem effect. Now, the current supplier can raise price and deter competitors because it can credibly threaten to undercut any new entrant. The Civica Rx model basically warns existing sellers that if you raise prices, we can come in and undercut you. It's the same potential threat, but this time the beneficiaries are the patients, not the dominant company. And by limiting the universe of drugs open to being copied this way to those that are off patent (or the off patent version of the drug – in the case of drugs such as insulin which are constantly being "improved" into new patented versions) we avoid interfering with legitimate patent rights and the innovation that they protect.[39]

We have a pathway to change the existing market dynamics. Do we have the will to use it?

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35 See https://civicarx.org/about/.

36 *Ibid.*

37 Commentary from Civica Rx CEO Martin VanTrieste, (March 24, 2019), available at https://civicarx.org/over-800-hospitals-now-a-part-of-civica-rx-to-stabilize-supply-of-generic-drugs/.

38 Harrison, How the not-for-profit Civica Rx will disrupt the generic drug industry, Statnews March 14, 2019, available at https://www.statnews.com/2019/03/14/how-civica-rx-will-disrupt-generic-drug-industry/.

39 We also avoid a messy issue over the Takings Clause of the Fifth Amendment.

PRIDE AND PREJUDICE: INVESTIGATIONS & MERGERS IN DIGITAL MARKETS FROM A DEVELOPING WORLD'S VIEWPOINT

BY ELISA V. MARISCAL & ALEXANDER ELBITTAR[1]

1 Mariscal is Adjunct Professor of Economics and Law at CIDE and director at Global Economics Group. Elbittar is Professor at CIDE and Advisor at Global Economics Group. Corresponding author is Mariscal, evmariscal@gmail.com. Both authors were involved as Experts in the *Walmart/Cornershop* merger mentioned here. We would like to thank comments from Ruben Guerrero. The views expressed in this paper belong to us alone, as do any mistakes.

I. INTRODUCTION

"It is a truth universally acknowledged that a single" agency in possession of a good theory of harm must be in search of an anticompetitive problem — this, even where a market has not been fully formed or understood. The contrary can also be true, said single agency may also not be ready to investigate an anticompetitive problem, even when foreclosure is staring it at its face, and is rampantly apparent to all who witness its unravelling right before their very eyes. But, jest aside, Jane Austen will only take us so far in telling a story of recent and future investigations into digital markets from the point of view of less developed countries. We shall, therefore, aim to start at the beginning of our narrative and arrive at our main argument more gradually.

While in the developed world there has been a growing interest in studying, opining, critiquing, and publicly acknowledging their *mea culpa* in a very lax application of agencies' competition enforcement in digital markets, agencies in developing countries have been trying to play catch up. Both the conversation and an urgency to learn the tools of analysis have led to a growing number of cases that look at actual and potential problems in the digital landscape. Multisided markets, indirect network externalities, critical mass, tipping, multihoming, demand inertia, behavioral biases, algorithmic competition, artificial intelligence and machine learning, big data analysis, privacy issues, etc. have all become household terms by now among the professional intelligentsia, with all of us concerned about their uses and limitations when it comes to antitrust matters.

Without detracting from the need to revisit and more carefully analyze anticompetitive conducts that can occur or may arise from market interactions among firms in a digital landscape, we want to view the problem from the particular lens of an agency in a developing or less developed country ("LDC"). Why? Because certain conditions, present in the developed world, may not yet have a hold in the developing world; and also because even if some other conditions can initially appear to be only relevant to developing countries, they may have important lessons to teach to the developed world when looking at isolated regions, groups of more at-risk, or disadvantaged consumers, or they may simply offer a different and novel way of viewing a problem with a wider lens than those currently being considered.

II. SOME ELEMENTS THAT NEED MORE ATTENTION IN DEVELOPING COUNTRIES

Among the key elements that need to be looked at carefully in developing economies and which may or may not be relevant to anticompetitive effects analysis in more developed nations include:

- Connectivity
- Demand-side issues
- Availability of information

We will take each one in turn and illustrate, wherever possible, with recent cases that we have been following, and been party to, in Latin America.

A fundamental pre-requisite to digital market emergence and growth is connectivity. Where connectivity does not exist or has been relegated due to a lack of funding or competition, even the existence of large players in the digital landscape will only affect those few consumers that have access to their services. By 2018, the mobile broadband subscription per 100 inhabitants in Mexico was 71, while for OECD countries the average was 110.[2] This, of course, does not detract from possible exploitative practices that large, dominant players may have on users, potential competitors, and/or firms that rely on their platforms to provide additional services, etc. But with lower connectivity, one needs to study carefully where connectivity exists, whether niche services are possible, and whether these allow for innovation and market growth to prosper. It is, in these instances, geographic regions and types of consumers where antitrust problems can arise and it becomes important to identify where they are to avoid making generalizations in markets where these services are not possible, have not yet grown, or are at best incipient. Needless to say, data to inform this analysis is vital, an element we take on later in this article.[3]

2 The fixed broadband subscriptions per 100 inhabitants in Mexico was 14.8, while for the OECD countries the average was 30 in 2018. See OECD, Broadband Portal, *Fixed broadband subscriptions per 100 inhabitants, per speed tiers* (Dec. 2018), https://www.oecd.org/internet/broadband/broadband-statistics/.

3 See, e.g. Cave & Mariscal, *The Impact of Asymmetrical Regulation on Less Well-Off Mexican Households* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251035. Also see Cave, Guerrero and Mariscal (2018), *Bridging Mexico's digital divide: an inside-out/outside-in view of competition and regulation*, http://ceeg.mx/publicaciones/ESTUDIO_2_2018-Bridging_Mexicos_digital_divide_Final_2018_12_20.pdf. We identify that for Mexico connectivity is low not in areas of simply low income, but where there are marginalized populations, far from populations centers as measured by distance to the largest city at the state level. All of this using fairly aggregate public data, a combination of INEGI's household surveys and the IFT's coverage maps.

However, connectivity alone does not ensure usage. Supply can only partly foster take-up, but users need to be sufficiently attuned to technology not just to connect, but to use, and to use in a way that adds value to them and moves their market interactions from a "real" world into a "virtual" one. In many developing countries — and for certain consumers in developed nations — digital literacy is scant and take-up is not fast, constant, or easy. For example, 2017 data comparing various countries in their use of internet puts Mexico last in five out of six categories — general use of internet, internet for online purchases, internet for banking, internet for interaction with government, and for information regarding government services — the exception being Mexico coming in ninth in the use of internet for job searches over the last 3 months.[4] Hence, the simple existence of large players in a market does not necessarily imply that they can have a substantial negative effect on consumer surplus even if they do in fact use their dominant position in a market.

Take the recent merger of Cornershop (a grocery delivery service on demand) and Walmart Mexico, recently barred by the Mexican antitrust authority ("COFECE"). Cornershop is a multisided-platform that allows buyers to search and purchase groceries online in different supermarkets and specialty stores and receive them promptly (within 90 minutes) and directly in their homes through services provided by a set of "independent shoppers" who specialize in packaging, transportation, and product selection. The merger was banned by the Authority on concerns, among others, that it would allow Walmart Mexico — a brick-and-mortar company — to harness its market power in physical space into the digital marketplace, either by expelling Walmart's competing supermarkets from the platform or by blocking entry of other competing platforms including refusing to participate in other platforms that competed with Cornershop.[5]

Walmart, whose national market participation in the category of supermarket stores is around 60 percent as measured by sales,[6] would appear to be dominant and yet sales in this sector only account for about 20 percent of Mexican households' food expenditure,[7] as most of them continue to make purchases in the traditional *tianguis* or street markets, small grocery stores, and popular markets. Walmart Mexico is essentially an intermediary of a wide range of grocery products. None of these products gives Walmart the ability to block the entry of any competing platform. In fact, as recently as July 31, 2019, Amazon opened its MEX3 Distribution Center in Mexico, its fourth, in the State of Mexico.[8]

Again, if we look at relative size and impact of potential foreclosure, numbers in developing economies are an important reference — they do not, of course, eliminate the possibility of potentially anticompetitive conduct, but rather put this possibility in a measurable context regarding harm. A platform like Cornershop emerges from the interaction of three sides of the market: supermarkets and specialized fresh produce stores, independent shoppers, and buyers interested in acquiring these products at a greater speed than they would purchase directly from the stores' own websites. One of the largest online sellers is Walmart, but these sales represent less than 2.3 percent[9] of its income and are not delivered in a timely fashion (between 4-5 hours, sometimes next day for fresh produce). Cornershop, the target in the merger operation, was considered to be the largest of the three main fresh produce sellers — assuming this is the smallest market being reviewed — but this participation is hardly certain or constant as evidenced by the recent exit, expansion, and entry of various players in the market: March 2019, Mercadoni, perceived to

4 OECD.Stat. https://stats.oecd.org. The outlier figure could simply be the result of having to use internet to upload or access job search websites, and not necessarily users undertaking their searches online. But without further information we can only speculate about the relevance of this piece of information.

5 On November 5, 2018, Walmart notified the acquisition of Cornershop by its parent company Walmart, Inc. that would subsequently pass on to the Mexican subsidiary Walmex. The merger was notified in both Mexico and Chile, where Cornershop also operates. The operation was approved by the competition authorities in Chile on January 11, 2018 and was not approved by Mexico's authority in its resolution CNT-161-2018 of May 27, 2019. See Fiscalia Nacional Economica, *Adquisición de control sobre. Delivery Technologies SpA por parte de Walmart Chile Rol FNE F161-2018* (January 11, 2019), https://www.fne.gob.cl/wp-content/uploads/2019/01/Informe-de-aprobaci%c3%b3n-F-161-2018-censurado.pdf; Cofece, *Versión pública de la resolución del expediente CNT-161-2018*, https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6008/9/4845885.pdf. Cornershop is an online platform that sells fresh produce from supermarkets and specialty stores as a premium service. It has trained a group of highly specialized shoppers who contact consumers to verify orders, modify products chosen according to availability and deliver produce within 90 minutes (sometimes 30 minutes) of the order being placed. In addition to the shoppers, Cornershop displays the products in its platform and charges a percentage (between 10 and 20 percent) on products sold through its platform by firms that are not members, in addition to delivery charges; for those firms that enroll as members, Cornershop only charges for delivery — these can be waived depending on the size and speed of delivery.

6 This number is an estimate based on Mexico's market study for agroindustry, using the 2014 information and imputing the growth rates it estimates for the 5 supermarket chains listed there (Walmart, Soriana, Chedraui, La Comer and OXXO). See Cofece, *Reporte sobre las condiciones de competencia en el sector agroalimentario*, at 360, https://www.cofece.mx/cofece/images/Estudios/COFECE_reporte_final-ok_SIN_RESUMEN_baja_RES-7enero.pdf. We are coauthors to the study informing the supermarket portion of Cofece's study, Delgado, Mariscal & Elbittar (2015).

7 This number comes from Cofece's study, which estimates that in 2014 only 18 percent of households made their food and fresh produce purchases in the modern distribution channel (supermarkets and convenience stores). See Cofece, *supra* note 6, at 349-50.

8 Ximena Leyva, *Amazon inaugura su centro de distribución en México*, EXPANSION.MX (July 31, 2019), https://expansion.mx/tecnologia/2019/07/31/amazon-inaugura-su-centro-de-distribucion-en-mexico.

9 See *Online Grocery in Mexico*, EUROMONITOR INTERNATIONAL (July 2018); see also Nathan Lustig, *An Overview of Latin America's Food Delivery Industry*, NATHANLUSTIG.COM (January 3, 2019), https://www.nathanlustig.com/an-overview-of-latin-americas-food-delivery-industry/, although some of its information is no longer accurate, as the industry has changed since the article was written January 2019.

be the number two player in fresh food just-in-time delivery exited one of the largest local markets, Mexico City; April 2019, Rappi, a Colombian company, with the largest food delivery app service in Mexico, which includes restaurant delivery as well as fresh produce, received an influx of 1 billion USD investment to expand its service offering throughout the region;[10] following Walmart's announcement that it would purchase Cornershop, the fourth largest supermarket group, La Comer, abandoned the platform to create its own competing business.[11] Thus, even though Walmart is "big" in retail it is unclear whether this transaction in the online world would have increased the chances of foreclosure in an incipient digital market with a not-as-yet established player, with relatively small sales and where a large portion of the population is excluded. This is especially true given that a large international entrant, Amazon, is making quick headway in Mexico.

Other objections mentioned by the authority and which would raise concerns, included the use of competitor data in a marketplace owned by the largest player as well as privacy issues relating to users' information. Both of these concerns are similar to more general theories of harm posed in digital markets everywhere in the world, for example, the very recent antitrust probes into Amazon's relationship as a marketplace with sellers that have come under scrutiny by German and Austrian competition authorities and is now settled.[12] Similar concerns have now been taken up by DG Comp.[13] For these theories of harm, there is little to be gained in making a distinction between a developed and a developing economy: the potential antitrust harm needs to be carefully studied and controlled if it is considered a problem.

A final note in this section, how analysis is undertaken in developing jurisdictions does require careful access and use of more detailed information about the distinct populations, users, clients, advertisers, and general economic agents at risk from a transaction. Trying to gauge harm from general, aggregated, and average statistics, especially when there is more inequality, may not only paint an inaccurate picture of the dynamics underlying the different markets, but may in fact ignore anticompetitive effects that do harm certain users or firms and which require speedier and stronger intervention. The probability of harming distinct populations by basing policy decisions on information that treats them all as equal and working with averages is greater the more unequally distributed is income, ethnicity, opportunities, access to markets, education, etc. elements that tend to characterize developing countries. This situation points to the importance of more microlevel data gathering efforts in developing countries, not just by government agencies but by private parties as well.

We tend to associate the growth of digital markets with increases in volumes of data generated that result from more virtual interactions, and all of this data being carefully organized and analyzed using artificial intelligence and sophisticated algorithms. Again, while this is the case in more mature, sophisticated markets, when few users participate in the online world to undertake "real world" transactions — purchases, banking, government services, etc. — and where businesses are focusing their efforts and investments in having an online presence and not necessarily in gathering online intelligence to grow, data gathering efforts appear to be low in their lists of priorities.

III. CONCLUSION

As competition authorities in less mature economies become more demanding in their data requirements for economic agents participating in digital markets, there should be a greater need to more carefully gather, clean, structure, and analyze information. Of course, the existence of publicly available information that is sufficiently disaggregated, recent enough to be useful, internally consistent and that can be comparable with past information in order to ascertain trends will be increasingly important. Public information provides a crucial, detailed context from which a reasonable narrative can be built and verified with private parties' information.

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10 The investment was made by SoftBank Group, which will be used to expand the presence of Rappi in the markets in which it currently has a presence as well as to expand to others. See Carolina Mandl, *Japan's SoftBank invests $1 billion in delivery app Rappi*, Reuters (April 30, 2019), https://www.reuters.com/article/us-softbank-investment-rappi/japans-softbank-to-announce-1-billion-investment-in-delivery-app-rappi-on-tuesday-report-idUSKCN1S619Y.

11 According to the Director of Marketing and Communication of La Comer, its strategy is to encourage the use of his own application and stop using the services of third parties. See Rosalía Lara, *La Comer rompe con Cornershop y acelera en su propio canal de e-commerce*, expansion.mx (October 10, 2018), https://expansion.mx/empresas/2018/10/10/la-comer-rompe-cornershop-y-acelera-en-su-canal-e-commerce.

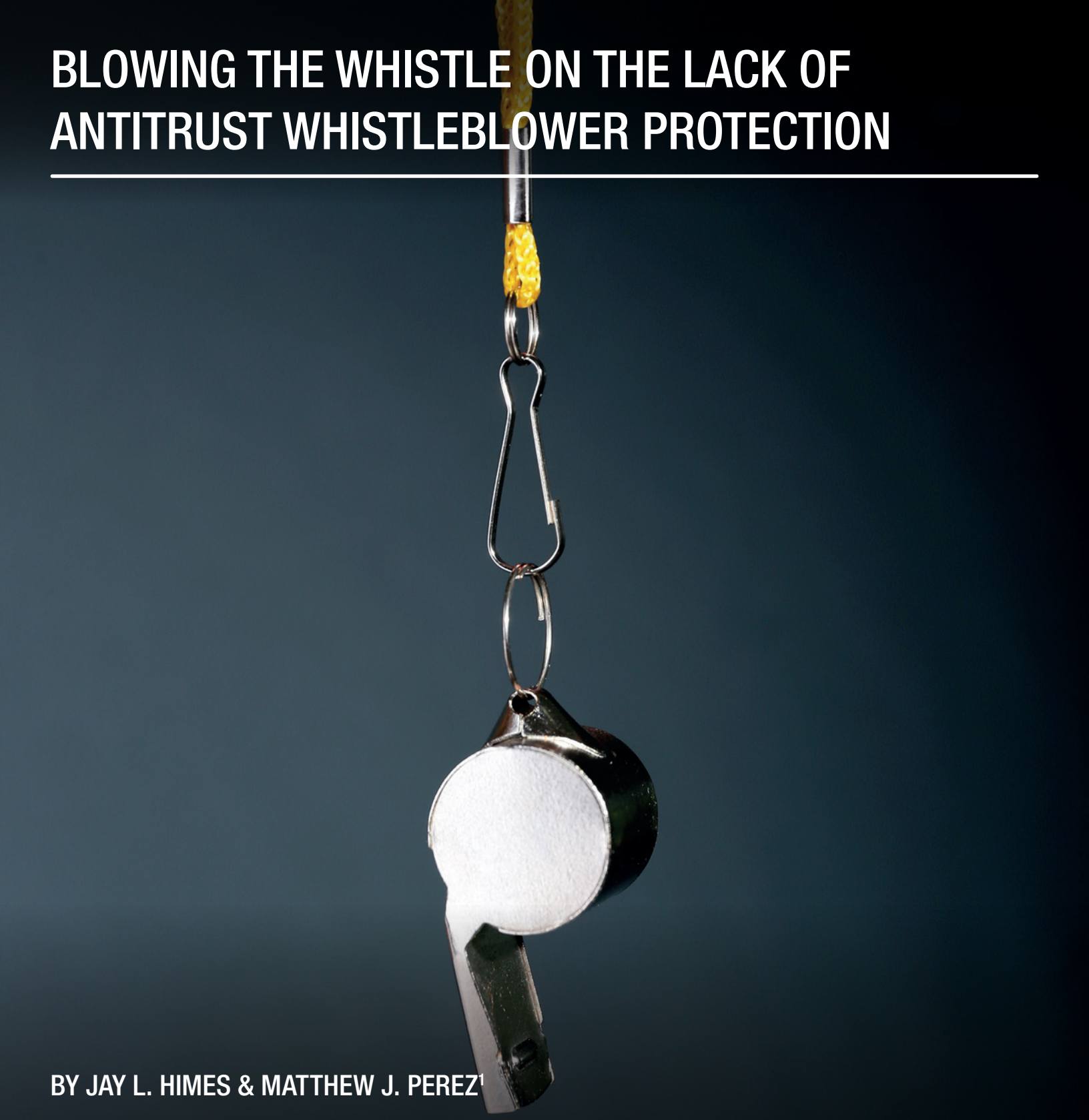
12 In November 2018, the Bundeskartellamt initiated abuse of dominance proceedings against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de. On July 2019, the Bundeskartellamt announced the end of the proceeding, as result, "*Amazon will adjust its terms of business for sellers active on its marketplace for the German marketplace amazon.de, for all European marketplaces and marketplaces worldwide including those in North America and Asia (…) The amendments address the numerous complaints about Amazon that the Bundeskartellamt received from sellers. They concern the unilateral exclusion of liability to Amazon's benefit, the termination and blocking of sellers' accounts, the court of jurisdiction in case of a dispute, the handling of product information and many other issues.*" Bundeskartellamt, Press Release, *Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces* (July 17 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17_07_2019_Amazon.pdf?__blob=publicationFile&v=4.

13 In July 2019, the European Commission opened an antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules. See EU Commission, Press Release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (July 17, 2019), https://europa.eu/rapid/press-release_IP-19-4291_en.htm.

Furthermore, a lack of information, particularly in the context of digital markets, means that there is no scope for empirically testing theories of harm advanced by authorities or by parties, and many of these theories of harm tend to be forward-looking and difficult to measure. Lack of detailed information also limits the possibility of justifying broad or narrow relevant markets using empirical evidence or determining whether broadening the scope of analysis, for example, is important when there is reason to believe linkages may result in harm to adjacent markets or reduction in the pace of innovation.

Reasonable economic arguments can, of course, be used in place of data when it is not available — but they cannot be tested. This is hardly the evidentiary standard we should be striving for in any market, let alone digital markets where our ability to look forward into the future can lead us to any possible outcome, including science fiction.

BLOWING THE WHISTLE ON THE LACK OF ANTITRUST WHISTLEBLOWER PROTECTION



BY JAY L. HIMES & MATTHEW J. PEREZ[1]

1 Mr. Himes is a partner at the law firm of Labaton Sucharow LLP and is co-chair of the Antitrust Practice Group. Mr. Himes is also the former Antitrust Bureau Chief, Office of the Attorney General of New York. Mr. Perez is Of Counsel at Labaton Sucharow.

I. INTRODUCTION

The DOJ Antitrust Division's recent public roundtable on the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") has renewed the interest in enacting whistleblower legislation to complement ACPERA and the Division's existing Leniency Program. Specifically, in submissions to the DOJ, the American Antitrust Institute ("AAI") and Committee to Support Antitrust Laws ("COSAL") have both advocated for legislation protecting individuals who disclose antitrust violations to the Antitrust Division.[2]

These submissions do not arise in a vacuum. In other areas of federal law enforcement, federal agencies administer successful whistleblower programs that generate billions of dollars in recoveries for the government. Many federal whistleblower programs include "bounty" provisions, which provide a monetary award to the whistleblower based on the recovery or fine obtained by the government.

Several years ago, the Government Accountability Office ("GAO") recommended the introduction of antitrust whistleblower legislation.[3] In response, legislators have repeatedly introduced antitrust whistleblower bills.[4] Support for antitrust whistleblower legislation has also developed in Europe, with the European Parliament having recently approved a directive requesting that all member states implement legislation to protect whistleblowers in a variety of settings, including those alleging violations of EU competition law.[5]

However, whistleblower protection (beyond antitrust leniency) has not had much traction in the Antitrust Division, which seems to view this approach as a potential nuisance, or even as a threat to its Corporate Leniency Program for detecting and prosecuting antitrust cartels. While the Antitrust Division's concerns should be considered, they should not shut the door to legislation protecting antitrust whistleblowers.

Below, we advocate for legislation affording fulsome protection for antitrust whistleblowers. We examine the previously considered antitrust whistleblower bills and developments in whistleblower programs in the United States and abroad. We also offer a proposal for an antitrust whistleblower program.

II. U.S. ANTITRUST AND WHISTLEBLOWERS

Antitrust Cartels typically operate in secret. To counter this condition, the Antitrust Division relies on the Leniency Program as its crown jewel. Nevertheless, as we discuss below, a more robust program should be developed in order to encourage whistleblowing.

A. The Leniency Program and ACPERA

Neither the Sherman Act nor the Clayton Act provide explicit protection for individuals who disclose antitrust violations to government officials. Although Clayton Act § 4 permits damages actions by "any person . . . injured in his business or property" by an antitrust violation,[6] courts have generally declined to recognize such standing for whistleblowers under Section 4.[7]

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2 See generally Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on the Antitrust Criminal Penalty Enhancement and Reform Act (May 31, 2019), https://www.justice.gov/atr/page/file/1168666/download#American%20Antitrust%20Institute%20(AAI); Submission by COSAL on the efficacy of the Antitrust Criminal Penalty and Enhancement Reform Act (ACPERA) (May 31, 2019), https://www.justice.gov/atr/page/file/1168671/download#Committee%20to%20Support%20Antitrust%20Laws%20(COSAL).

3 U.S. Gov't Accountability Office, *Report to Congressional Committees, Criminal Cartel Enforcement, Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, But Support Whistleblower Protection*, at 2 (2011), http://www.gao.gov/assets/330/321794.pdf (the GAO Report).

4 See The Criminal Antitrust Anti-Retaliation Act of 2012, S.3462, 112th Cong. § 216 (2012) (2012 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2013, S.42, 113th Cong. § 216 (2013) (2013 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2015, S.1599, 114th Cong. § 216 (2015) (2015 CAARA); The Criminal Antitrust Anti-Retaliation Act of 2017, S.807, 115th Cong. § 216 (2017) (2017 CAARA).

5 See Michael Acton, *Antitrust whistleblowers safe after tweaks to new EU law, Dutch regulator says*, MLEX (Mar. 19, 2019), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1075114&siteid=190&rdir=1; Press Release European Parliament, Protecting whistle-blowers: new EU-wide rules approved (Apr. 16, 2019), http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved.

6 15 U.S.C. § 15.

7 See, e.g. *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519 (7th Cir. 1982) (holding that former corporate president who was terminated and subsequently blacklisted "has sustained no 'antitrust injury' because, while he may have suffered some injury-in-fact, he was not the target of the alleged anticompetitive practices"); *Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 96-97 (3d Cir. 1986) (holding that a terminated broker lacked standing to pursue Clayton Act damages claim); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1345 (E.D. Va. 1987) (finding that plaintiff's transfer and "constructive termination" did not create standing to pursue a claim under the Clayton Act). But see *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984) (holding that retaliation against an employee was actionable under Clayton Act § 4).

However, in order to enhance detection and prosecution of criminal cartels, the Antitrust Division has created its Leniency Program, a nearly 30-year old non-statutory policy directive that allows both companies and individuals to self-report *per se* antitrust violations in exchange for immunity from criminal prosecution.[8] To obtain immunity, the Division requires that certain conditions be met, the most salient of which are that the disclosing party: (1) must be the first one to disclose the violation; and (2) must provide continuing cooperation with the Division's criminal investigation and prosecution.[9]

In addition to the Leniency Program, in 2004, Congress enacted ACPERA "to increase the number of companies and individuals applying for antitrust leniency with the [Antitrust Division] — and thus the detection of cartels — while simultaneously benefiting consumers by offering an incentive for leniency applicants to cooperate with plaintiffs in their civil cases."[10] ACPERA sought to remove a perceived potential disincentive to self-reporting: the risk of treble damages liability to civil plaintiffs.[11] For applicants who satisfy ACPERA's cooperation requirement, the statute: (1) limits the leniency applicant's liability to single damages, based on the applicant's market share; and (2) eliminates joint and several liability for damages caused by the conspiracy overall. In 2010, Congress renewed ACPERA for another 10 years. Absent further congressional action, the law will expire in June 2020.

While providing relief to self-disclosing leniency applicants, ACPERA is silent on protection for whistleblowers. However, in July 2011, a GAO study on ACPERA recommended that Congress consider further amending the law to include anti-retaliation protection to individuals who expose antitrust violations. The GAO concluded that "[b]y considering a civil remedy for whistleblowers who are retaliated against for reporting criminal antitrust violations, Congress could provide existing whistleblowers an assurance of protection for their efforts and, further, could motivate additional individuals to come forward with evidence of criminal cartel activity."[12]

Although Antitrust Division officials took no position on the need for whistleblower protection, several stakeholders interviewed by the GAO opined that providing whistleblower protection "could motivate additional individuals to come forward to DOJ with evidence of criminal cartel activity, resulting in the prosecution of more criminals and the disruption of more cartels."[13] This view was supported by officials from the Securities Exchange Commission ("SEC"), Internal Revenue Service ("IRS") and the Occupational Safety and Health Administration ("OSHA"), three agencies that have their own whistleblower programs.[14]

While the Antitrust Division was agnostic with regard to anti-retaliation whistleblower protection, it opposed adding a bounty as an additional incentive for individuals to disclose antitrust violations. Officials expressed the view that a financial reward would undermine a whistleblower witness's credibility before a jury and also incent false or erroneous reporting.[15] The Division further thought that administering a bounty program would require additional resources to investigate tips, communicate with whistleblowers, and process bounty claims.[16] By contrast, officials outside of the Antitrust Division noted that work-arounds existed to mitigate the need to rely on whistleblower information.[17]

B. Legislative responses to the GAO Report

One year after the GAO Report, in July 2012 Senators Patrick Leahy (D-Vermont), Herb Kohl (D-Wisconsin), and Chuck Grassley (R-Iowa) introduced the Criminal Antitrust Anti-Retaliation Act ("CAARA"). The proposed legislation followed the GAO's recommendations and included: (1) an anti-retaliation provision prohibiting companies from terminating or otherwise disciplining whistleblowers for disclosing antitrust violations to

8 See generally Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), https://www.justice.gov/atr/file/810281/download; Dep't of Justice, Leniency Policy for Individuals (Aug. 10, 1994), https://www.justice.gov/atr/individual-leniency-policy.

9 See generally Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), https://www.justice.gov/atr/file/810281/download; Dep't of Justice, Leniency Policy for Individuals (Aug. 10, 1994), https://www.justice.gov/atr/individual-leniency-policy.

10 GAO Report at 2.

11 150 Cong. Rec. S3610-02, at S3614 (April 2, 2004).

12 GAO Report, at 50.

13 GAO Report, at 46.

14 GAO Report, at 46. See also SEC, Office of the Whistleblower, https://www.sec.gov/whistleblower; IRS, Whistleblower – Informant Award, https://www.irs.gov/compliance/whistleblower-informant-award; OSHA, The Whistleblower Protection Programs, https://www.whistleblowers.gov/.

15 GAO Report, at 39-40.

16 GAO Report, at 38-45.

17 GAO Report, at 40.

enforcement agencies or Congress; and (2) a civil remedy provision permitting relief for whistleblowers who suffered retaliation in the form of back-pay (with interest), special damages (e.g. litigation costs and expert and attorney's fees), and reinstatement of seniority.[18] In remarks introducing the bill, Senator Leahy stated that he had "long supported vigorous enforcement of the antitrust laws" and that the bill was "a necessary complement to them."[19]

CAARA's proposed protections came with a caveat: there would be no protection if the whistleblower had: (1) "planned and initiated a violation or attempted violation" of antitrust laws or any other criminal law; or (2) obstructed or attempted to obstruct the Antitrust Division's antitrust investigation.[20] Notably, unlike whistleblower protection in other enforcement areas, there was no provision awarding the whistleblower a bounty in the event of a successful prosecution.[21] Senator Leahy explained that CAARA was "carefully drafted to ensure that whistleblowers have no incentive to bring forth false claims" — a likely nod to the concerns expressed by Antitrust Division officials in the GAO study.[22]

The Senate's 2012 CAARA bill was not voted on.[23] But the following year Senators Leahy and Grassley introduced CAARA again, with only minor changes from the 2012 version. In November 2013, the Senate passed the bill by "unanimous consent."[24] However, when the bill reached the House, it died without a vote.[25] This pattern recurred when in 2015 and 2017, Senators Leahy and Grassley introduced CAARA bills containing provisions identical to the 2013 version.[26] Each time, the bill passed in the Senate, but died in the House.[27]

In July 2019, Senators Grassley and Leahy again re-introduced CAARA. With a Democratic majority now controlling the House and increased public debate over antitrust enforcement, there may be traction for enactment not present when the earlier bills were introduced.[28]

III. WHISTLEBLOWER LEGISLATION IN OTHER AREAS OF LAW ENFORCEMENT

Federal whistleblower legislation goes back at least as far as the False Claims Act ("FCA"), which was enacted in 1863 during the Civil War. The FCA enabled private citizens to bring claims on behalf of the government for fraud perpetrated against it.[29] As a reward for disclosing and helping prosecute such fraud, "relators" — as FCA plaintiffs are called — were given a bounty equal to 50 percent of the recovery.[30]

In 1986, Congress amended the FCA to give whistleblowers a right of action against anyone who retaliated against them for disclosing the FCA violation.[31] The relief available includes reinstatement, back-pay, litigation costs, and attorney's fees.[32] And even before the 1986 FCA

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18 2012 CAARA, § 216(a)-(c). See also 158 Cong. Rec. S5736 (statement of Senator Leahy: "The legislation we introduce today was inspired by a recent report and recommendation from the Government Accountability Office which, based on interviews with key stakeholders, found widespread support for anti-retaliatory protection in criminal antitrust cases.")

19 158 Cong. Rec. S5736.

20 2012 CAARA § 216(a)(2).

21 See, e.g. 18 U.S.C. § 1514A (Sarbanes Oxley whistleblower protections); 15 U.S.C. § 78u-6 (SEC whistleblower program); 26 U.S.C. § 7623 (IRS whistleblower program); 7 U.S.C. § 26 (CFTC whistleblower program)

22 158 Cong. Rec. S5736; GAO Rep. at 38-39.

23 GovTrack.us. (2019). S. 3462 — 112th Congress: Criminal Antitrust Anti-Retaliation Act. Retrieved from https://www.govtrack.us/congress/bills/112/s3462.

24 GovTrack.us. (2019). S. 42 — 113th Congress: Criminal Antitrust Anti-Retaliation Act of 2013. Retrieved from https://www.govtrack.us/congress/bills/113/s42.

25 GovTrack.us. (2019). S. 42 — 113th Congress: Criminal Antitrust Anti-Retaliation Act of 2013. Retrieved from https://www.govtrack.us/congress/bills/113/s42.

26 2015 CAARA, § 216; 2017 CAARA, § 216.

27 See GovTrack.us. (2019). S. 1599 — 114th Congress: Criminal Antitrust Anti-Retaliation Act of 2015. Retrieved from https://www.govtrack.us/congress/bills/114/s1599 (2015 CAARA); GovTrack.us. (2019). S. 807 — 115th Congress: Criminal Antitrust Anti-Retaliation Act of 2017. Retrieved from https://www.govtrack.us/congress/bills/115/s807 (2017 CAARA).

28 S. 2258, 116th Cong., 1st Sess. (July 24, 2019). The sunset of ACPERA in June 2020 may offer an additional impetus for enacting whistleblower protection. See ACPERA § 211(a).

29 31 U.S.C. §§ 3729, *et seq.*

30 NYSBA Commercial & Federal Litigation Section, Antitrust Committee, *Whistle While You Work—For a Cartelist: Whistleblower Protection and Antitrust*, 20 N.Y. Litigator 8 (Fall 2015). This bounty percentage has since been reduced to at most 30 percent of a recovery. See 31 U.S.C. § 3730(d).

31 False Claims Amendments Acts of 1986, 100 Stat. 3153, at § 3 (1986).

32 31 U.S.C. § 3730(h).

amendments, labor and civil rights laws were passed to include protection for those who disclosed violations or cooperated with government officials investigating violations.[33] Since 1986, Congress has also passed whistleblower legislation covering other federal laws, including those enforced by the IRS, the SEC, and the Commodity Futures Trading Commission ("CFTC").

For example, the Tax Relief and Health Care Act of 2006[34] expanded the IRS's whistleblower program and reinforced the authority of the Secretary of the Treasury to "pay such sums as he deems necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[35] Although the bounty level is discretionary, whistleblowers who "substantially contribute[…]" to the prosecution of tax law violations are entitled to at least 15, but not more than 30, percent.[36] Awards, however, may be reduced if the bounty claim is made by an "individual who planned and initiated the actions that led to the [violation]." And to the extent that the individual is convicted of a crime in connection with the disclosed violation, "Whistleblower Office shall deny any award."[37]

The SEC and CFTC also have legislatively created whistleblower programs. Protections for whistleblowers of securities violations began with the Sarbanes-Oxley Act of 2002 ("SOX").[38] SOX prohibited public companies from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee" who discloses a violation or potential violation of the securities laws to the SEC, Congress, or any other regulatory body.[39] Whistleblowers subjected to retaliation can seek relief in the form of reinstatement with the same seniority, back-pay with interest, and special damages (e.g. costs and expert witness and attorney's fees).[40]

After a rash of post-SOX financial frauds, which caused the collapse of financial markets and the Great Recession, Congress reinforced SOX by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[41] Dodd-Frank enhanced whistleblower protection by, among other things, empowering the SEC to grant bounties of up to 30 percent of any recovery to whistleblowers who provide "original information" leading to the prosecution of securities violations.[42] Dodd-Frank also enhanced the relief whistleblowers could obtain if they were victims of retaliation by permitting the recovery of twice the back-pay owed.[43] The law also protects the anonymity of whistleblowers who choose to proceed that way.[44] As with the IRS whistleblower program, persons are disqualified from receiving an award if they are convicted of criminal conduct arising from the violation disclosed.[45]

Dodd-Frank also created a separate CFTC whistleblower program to encourage detection of financial fraud in commodities and derivatives markets.[46] The terms for eligibility, anonymity, and scope of the bounty are largely identical to those enacted for SEC's program.[47]

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33 See, e.g. Civil Rights Act of 1964, 78 Stat. 241 (1964), codified at 42 U.S.C. § 2000e-5(g) & (k) (providing for reinstatement, back-pay, and attorneys' fees); Occupational Safety and Health Act, 84 Stat. 1603 (1970), codified at, 29 U.S.C. § 660(c)(1) & (2) (prohibiting discrimination against whistleblower for revealing OSHA violations and permitting whistleblower to seek relief in the form of reinstatement with back-pay); Federal Mine Safety and Health Act, 91 Stat. 1304 (1977), codified at, 30 U.S.C. § 815(c) (prohibiting discrimination against or disciplining of employee who discloses violations of act and permitting such an employee to seek relief in the form of reinstatement, back-pay with interest or any other such remedy as may be appropriate).

34 120 Stat. 2922 (2006).

35 26 U.S.C. § 7623(a). See also IRS, History of the Whistleblower/Informant Program, https://www.irs.gov/compliance/history-of-the-whilstleblower-informant-program (last visited July 17, 2019).

36 26 U.S.C. § 7623(b)(2). To the extent that a whistleblower provides less than "substantial contribution" — e.g. where the disclosure is "based principally on disclosures" from "judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media"—the IRS Whistleblower Office's award is capped at 10 percent. 26 U.S.C. § 7623(b)(2)(A).

37 26 U.S.C. § 7623(b)(3).

38 SOX § 806, 116 Stat. 745 (2002), codified at, 18 U.S.C. § 1514A.

39 18 U.S.C. § 1514A(a).

40 18 U.S.C. § 1514A(c).

41 124 Stat. 1376-2223 (2010).

42 15 U.S.C. § 78u-6(a)(3) and (b).

43 15 U.S.C. § 78u-6(h)(1)(C).

44 15 U.S.C. § 78u-6(h)(2). The SEC is prohibited from disclosing any information that may reveal the identity of the whistleblower "unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or [a grand jury proceeding]." *Id.*

45 15 U.S.C. § 78u-6(c)(2).

46 See 7 U.S.C. § 26; 17 C.F.R. §§ 165, *et seq.*

47 *Compare* 15 U.S.C. § 78u-6 *with* 7 U.S.C. § 26.

The whistleblower programs administered by the SEC, CFTC, IRS, and DOJ Civil Division (which oversees FCA whistleblower actions) have: (1) led to tens of thousands of tips; (2) awarded hundreds of millions of dollars in bounties; and, most significantly, (3) resulted in judgments, fines, and recoveries many times the amount of the bounties paid.[48] Table 1 summarizes the data.

TABLE 1: RECOVERIES AND BOUNTIES AWARDED

Agency	Amount Recovered by Government	Whistleblower Bounties Since Inception of Program	Largest Whistleblower Bounty to Date
SEC	>$1 billion[49]	>$300 million	$50 million[50]
CFTC	>$730 million[51]	>$90 million[52]	≈$30 million[53]
IRS	>$4.6 billion[54]	>$797 million[55]	$104 million[56]
DOJ Civil Division	>$59 billion[57]	>$7.0 billion[58]	$250 million[59]

These statistics demonstrate the success of U.S. whistleblower programs generally. Indeed, two recent FCA whistleblower actions led to the discovery of bid-rigging cartels: one involving supplies to U.S. military bases in South Korea, and the other involving USAID infrastructure contracts in Egypt. Combined, the DOJ recovered $283 million, with the enforcement action against the South Korean bid-rigging cartel yielding the largest-ever antitrust-based FCA recovery.[60] These results further suggest that the Antitrust Division's reluctance to adopt whistleblower protection as an aid in detecting antitrust violations is short-sighted.

48 The SEC alone received nearly 23,000 tips from all 50 states between 2011 and 2017. *Whistleblower Awards Over $300 Million for Tips Resulting in Enforcement Actions*, SEC, https://www.sec.gov/page/whistleblower-100million (last visited July 1, 2019). The CFTC received over 2,000 tips between FY 2012 and FY 2018, with the largest year-over-year increase occurring between FY 2017 and FY 2018, when the number of tips jumped 63 percent. See CFTC 2018 Annual Report on the Whistleblower Program and Customer Education Initiatives, at 4, https://whistleblower.gov/sites/whistleblower/files/2018-10/FY18%20Annual%20Report%20to%20Congress%20Final.pdf.

49 Whistleblower Awards Over $300 Million for Tips Resulting in Enforcement Actions, SEC, https://www.sec.gov/page/whistleblower-100million (last visited July 1, 2019).

50 See *id.*

51 CFTC, The Whistleblower Program, https://www.whistleblower.gov/ (last visited July 17, 2019).

52 *Id.*

53 CFTC 2018 Annual Report on the Whistleblower Program and Customer Education Initiatives, at 3, https://whistleblower.gov/sites/whistleblower/files/2018-10/FY18%20Annual%20Report%20to%20Congress%20Final.pdf.

54 Summary of totals found in IRS Whistleblower Annual Reports FY 2008 – FY 2018, which are available at https://www.irs.gov/compliance/whistleblower-office-annual-reports.

55 *Id.*

56 See David Kocieniewski, Whistle-Blower Awarded $104 Million by I.R.S., N.Y. Times (Sept. 11, 2012), https://nyti.ms/2FquDHA.

57 Civil Division, U.S. Dep't of Justice, Fraud Statistics Overview (Oct. 1, 1986 – Sept. 30, 2018) https://www.justice.gov/civil/page/file/1080696/download?utm_medium=e-mail&utm_source=govdelivery.

58 *Id.*

59 The 10 Largest Qui Tam Whistleblower Rewards, James T. Ratner, https://www.qui-tam-attorney.com/10-largest-qui-tam-whistleblower-rewards.html (last visited July 1, 2019).

60 See Constantine I Cannon, Three South Korean Companies to Pay $236 million, Resolving Civil and Criminal Liability for Bid Rigging Alleged in Constantine Cannon Whistleblower Suit (Nov. 14, 2018), https://constantinecannon.com/2018/11/14/south-korean-bid-rigging-whistleblower/#https://constantinecannon.com/2018/11/14/south-korean-bid-rigging-whistleblower/; Press Release, DOJ, Harbert Companies Agree to Pay $47 Million to Resolve False Claims Act Allegations (Mar. 20, 2012), https://www.justice.gov/opa/pr/harbert-companies-agree-pay-47-million-resolve-false-claims-act-allegations.

IV. WHISTLEBLOWER LEGISLATION — AN INTERNATIONAL PERSPECTIVE

The United States is not the only country to offer protection to, or financial bounties for, individuals who disclose unlawful activities. For example, the Canadian Competition Bureau, which is charged with prosecuting violations of the Canadian Competition Act, has established the "Criminal Cartel Whistleblowing Initiative" to serve as "a way for members of the public to provide information to the Competition Bureau regarding possible violations of the criminal cartel provision of the Competition Act."[61] Under the law, the whistleblower's identity is kept confidential, and employers are forbidden from terminating or disciplining employees for disclosing potential violations to the Bureau.[62]

In Europe, the evolution of whistleblower legislation has, until recently, been slow and spotty. As late as 2013, only a handful of European countries — the United Kingdom, Norway, the Netherlands, Hungary, Romania, and Switzerland — had legislation specifically directed towards whistleblowers.[63] The UK, the pioneer for whistleblower legislation in Europe, enacted the 1998 Public Interest Disclosure Act ("PIDA"), which covers all employees — public and private, as well as independent contractors — who report: "(1) criminal offenses, (2) failure by a person to comply with a legal obligation, (3) miscarriages of justice, (4) dangers to health and safety, (5) dangers to the environment, or (6) concerns that information about one of these matters is being deliberately concealed."[64] Under PIDA, employees reporting these "protected disclosures" shall "not . . . be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."[65] However, PIDA does not provide a bounty for those who make protected disclosures.

Most other European countries did not have special protection for whistleblowers. Some have suggested that the absence of such legislation is in part due to: (1) the belief that workers in many member states already have sufficient protections against unfounded termination or discipline[66]; (2) cultural norms discouraging whistleblowing generally[67]; and (3) the need to protect the data privacy and due process rights of managers and companies accused of misconduct.[68]

Recognizing the cultural and institutional inertia in many European Union member states, in April 2014, the Council of Europe issued a report recommending that "member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest."[69] The Council's recommendations included ensuring the confidentiality of a whistleblower's identity and protection against retaliation.[70]

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61 Canadian Competition Bureau, Whistleblowing initiative, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html. See also Competition Act, R.S.C. 1985, c. C-34, §§ 66.1, 66.2 (Can.).

62 Competition Act, § 66.2 (Can.).

63 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law – International Labor & Employment Law Committee (May 2013), at 7, https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf.

64 Jenny Mendelsohn, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 Wash. U. Global Stud. L. Rev. 723, 737 (2009). See also PIDA, § 1 (adding § 43B(1)(a)-(f) to Employment Rights Act of 1996), https://www.legislation.gov.uk/ukpga/1998/23/section/1.

65 PIDA, § 2 (adding § 47B to Employment Rights Act of 1996), https://www.legislation.gov.uk/ukpga/1998/23/section/2.

66 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law – International Labor & Employment Law Committee, at 7-8 (May 2013), https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf (noting that in France, Spain, and Germany, employers are generally required to show some form of cause prior to terminating an employee).

67 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law – International Labor & Employment Law Committee, at 16 (May 2013), https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf ("German society shares cultural norms that are antithetical to the promotion of protections for whistleblowing."); Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 14 (Apr. 30, 2014), https://rm.coe.int/16807096c7 ("There are also cultural and social attitudes that work against protecting whistleblowers. Some of these stem from traditional hierarchical organisational structures in which obedience is valued to the extent that it works against the flow of communication (including about wrongdoing) from the lower to the upper ranks, or similarly where obedience to an organisation is emphasised more than its accountability to those it is meant to serve.").

68 Thad M. Guyer & Nikolas F. Peterson, *The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project*, ABA Section of Labor & Employment Law – International Labor & Employment Law Committee, at 15 (May 2013), https://www.whistleblower.org/wp-content/uploads/2018/11/TheCurrentStateofWhistleblowerLawinEurope-1.pdf (commenting on French experience).

69 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 6 (Apr. 30, 2014), https://rm.coe.int/16807096c7.

70 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, at 9-10 (Apr. 30, 2014), https://rm.coe.int/16807096c7.

After the Council's 2014 report, several European countries enacted new legislation, adding explicit whistleblower protections or bolstering existing ones. For example, in October 2017 the Italian Parliament passed Italy's first whistleblower legislation, protecting anonymity, banning retaliation, and providing sanctions for retaliation.[71] The same year, the UK's Competition & Markets Authority ("CMA"), launched its "Cracking down on Cartels" campaign to encourage individuals to report competition law violations. Under the program, the CMA offers whistleblowers bounties of up to £100,000 and protects their identity if they choose to proceed anonymously.[72] While direct participants in the cartel are generally ineligible to receive a bounty, the program guidelines leave open the possibility of a bounty "where the role of the person in the cartel was relatively peripheral - for example that of an employee who was occasionally directed by his superiors to attend a cartel meeting and who was not asked to take an active part in decision-making about the cartel."[73] Notably, in 2018, the program's first full year, tips to the CMA increased 18 percent over the number received in 2017, suggesting public awareness of the program and an increased willingness to report potential violations.[74]

Europe's development of whistleblower protection continues. In response to scandals uncovering tax evasion and corruption — including the "Luxembourg Leaks"[75] and "Panama Papers"[76] scandals — the European Parliament recently issued a directive establishing "new, EU-wide standards to protect whistle-blowers revealing breaches of EU law in a wide range of areas" including EU competition law.[77] Specifically, Recital 17 of the Whistleblower Directive states that the new rules are intended to bolster the enforcement of EU competition laws and work in conjunction with the existing European Commission leniency policy:

> ***[T]he protection of whistleblowers to enhance the enforcement of Union competition law, including State aid would serve to safeguard the efficient functioning of markets in the Union, allow a level playing field for business and deliver benefits to consumers. As regards [sic] competition rules applying to undertakings, the importance of insider reporting in detecting competition law infringements has already been recognised in the EU leniency policy as well as with the recent introduction of an anonymous whistleblower tool by the European Commission.***[78]

The Whistleblower Directive seeks to impose common, minimum standards across the EU for: (1) internal and external reporting mechanisms; (2) the types of disclosures that are protected; and (3) prohibitions against retaliation for making protected disclosures.[79] The Whistleblower Directive also attempts to balance the need for companies to manage their internal affairs and the recognition that internal reporting procedures may be ineffective, result in employee retaliation, lead to the destruction of evidence, or jeopardize law enforcement efforts.[80]

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71 International Bar Association, Whistleblower Protections: A Guide, at 48 (Apr. 2018), https://www.ibanet.org/Conferences/whistleblowing.aspx (follow link to download report).

72 CMA Reporting Form, https://cma-553899.workflowcloud.com/forms/c35b (last visited June 21, 2019); Norton Rose Fulbright, *Whistleblowing in Italy* (May 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/35ad57e2/whistleblowing-in-italy#section2.

73 CMA, Rewards for Information About Cartels, at 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf.

74 Amir Sherdil Rana, *The Competition and Markets Authority's Compensation Campaign: Is the UK On the Way to Adopting an Award System for Corporate Crime Reporting?* The Corporate Social Responsibility & Bus. Ethics Blog (June 11, 2019), https://corporatesocialresponsibilityblog.com/2019/06/11/cma-award/.

75 The Luxembourg Leaks or "LuxLeaks" involved the leak of documents revealing efforts by international companies, with the help of accounting firms, to evade tax obligations through complicated tax structures based out of Luxembourg. See International Consortium of Investigative Journalists, Luxembourg Leaks: Global Companies' Secrets Exposed, https://www.icij.org/investigations/luxembourg-leaks/ (last visited June 23, 2019).

76 The Panama Papers scandal involved the leak of documents revealing efforts by a Panamanian law firm to assist an array of individuals, from celebrities and sports stars to fraudsters and drug traffickers, to evade taxes in various jurisdictions. See International Consortium of Investigative Journalists, About the investigation – Panama Papers, https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/ (last visited June 23, 2019).

77 Press Release, European Parliament, Protecting whistle-blowers: new EU-wide rules approved (Apr. 16, 2019), http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved; Directive (EU) 2019/ [NUMBER PENDING ASSIGNMENT FROM OFFICIAL JOURNAL of the European Parliament and of the Council of [DATE PENDING] on the protection of persons reporting on breaches of Union law (Apr. 10, 2019), http://www.europarl.europa.eu/doceo/document/A-8-2018-0398-AM-155-155_EN.pdf (the "Whistleblower Directive").

78 Whistleblower Directive, Recital 17, http://www.europarl.europa.eu/doceo/document/A-8-2018-0398-AM-155-155_EN.pdf (bold and italics in original).

79 See Michael Huertas, *EU Parliament adopts Whistleblowing Directive proposal – what is next for financial services firms?*, Dentons (Apr. 23, 2019), https://www.dentons.com/en/insights/articles/2019/april/23/eu-parliament-adopts-whistleblowing-directive-proposal#footnote1.

80 *Compare* Whistleblower Directive, Recital 47 ("As a principle, therefore, reporting persons should be encouraged to first use the internal channels and report to their employer, if such channels are available to them and can reasonably be expected to work.") *with* Recital 63 ("In other cases, the use of internal channels could not reasonably be expected to function properly.").

The Whistleblower Directive further notes that breaches of competition law may be the type of violation where employees can skip internal reporting and go straight to the Commission or national authorities.[81] The Directive protects whistleblower disclosures, where the whistleblower "had reasonable grounds to believe that the reporting or disclosure of such information was necessary for revealing a breach pursuant to this Directive."[82] Moreover, in actions by whistleblowers alleging retaliation, the Directive establishes a burden shifting model: where the whistleblower establishes any form of retaliation (whether by termination, demotion, transfer, or the like), the burden shifts to the employer to "prove that [the action] was based on duly justified grounds."[83]

In sum, there is increasing vigor in Europe to enact legislation encouraging and protecting whistleblowers. Europe not only appears to be catching up to the United States, but, particularly for antitrust and competition law, now offers whistleblower protection exceeding that available here.

V. RETURNING STATESIDE: A PROPOSED ANTITRUST WHISTLEBLOWER PROGRAM

As noted above, whistleblower programs in several areas of federal law enforcement attest to their effectiveness and value. Thus, the Antitrust Division's lack of enthusiasm for such legislation warrants close and critical scrutiny. We outline below an antitrust whistleblower program, borrowing in part from existing programs in the United States and internationally. Our proposal has three main parts: (1) the creation of discrete anti-retaliation rights and remedies for whistleblowers subjected to retaliation; (2) the creation of a bounty program for whistleblowers who provide original information that leads to the successful prosecution of antitrust violations; and (3) the delegation to an independent DOJ unit the decision regarding bounty eligibility and level of award.

Whistleblower protection provisions. There seems to be little disagreement about the value of protecting whistleblowers from retaliation and providing a remedy in the event of retaliation. Members of Congress, federal officials administering whistleblower programs in other areas of law, and a growing number within the international community agree that individuals with knowledge of wrongdoing should be encouraged to come forward and report without fear of reprisal. Antitrust Division officials themselves do not appear to have strong opposition to such measures, instead questioning "whether there was a need for such a provision and whether it makes sense to create an antitrust-specific civil remedy."[84]

The need for such legislation is real, however. The most notable instance of retaliation against a whistleblower was that of Martin McNulty, who refused to participate in a customer allocation conspiracy and was terminated and later blackballed after he disclosed the packaged-ice price-fixing cartel's existence to the Antitrust Division. Mr. McNulty attempted to use the Crime Victims' Right Act to redress the financial harm he suffered, but lost in both the district court and court of appeals on a motion to dismiss.[85] If Congress had enacted anti-retaliation legislation protecting antitrust whistleblowers, Mr. McNulty would not have had to argue for a strained reading of federal victim rights legislation.

The CAARA bills provide a good framework for the protection that should be provided to antitrust whistleblowers. The bills permit whistleblowers to seek relief either administratively through the Secretary of Labor, or, if the Secretary of Labor does not issue a final decision within 180 days, through litigation in federal court.[86] The relief provided includes reinstatement, back-pay with interest, and special damages[87] CAARA whistleblower protections could be strengthened, however.

First, the 2017 CAARA bill excludes from protection individuals who "planned and initiated a violation or attempted violation of the antitrust laws."[88] This eligibility limitation seems unwarranted. Antitrust whistleblowers risk much by disclosing what they know and assisting prosecutors. Being black-balled from an industry can spell financial ruin for whistleblowers. Persons who come forward nonetheless should be protected

81 Whistleblower Directive, Recital 63.

82 Whistleblower Directive, Article 21(2).

83 Whistleblower Directive, Article 21(5).

84 GAO Report at 47.

85 See *In re McNulty*, 597 F.3d 344, 352 (6th Cir. 2010) ("Here, we agree with the district court's holding that McNulty is not a victim for the purposes of the CVRA. . . . To fire an employee and prevent a former employee from being hired by another company may be illegal under the civil law, but they are not inherently criminal actions, nor are they actions inherent in the crime of conspiracy to violate antitrust laws to which Arctic Glacier pled.").

86 See 2017 CAARA, § 216(b)(1).

87 See 2017 CAARA, § 216(c).

88 2017 CAARA § 216(a)(2)(A).

from retaliation even if they were involved in the cartel activity. Other federal whistleblower programs generally do not deny retaliation protection on this basis, but instead usually take criminal involvement into account only in deciding the amount of the bounty award, or whether to deny a bounty entirely.[89]

Second, filing a complaint with the Secretary of Labor (or a comparable DOJ official) should not be a precondition to the whistleblower's own lawsuit in federal court. This is an unnecessary barrier that would leave the whistleblower in limbo for six months while awaiting a final administrative decision. This limbo period increases the risk that the employer may discover the whistleblower's identity, thereby resulting in the individual becoming a pariah at the company — still employed while trying to perform job responsibilities in increasingly inhospitable and thus stressful surroundings. As with other federal whistleblower legislation (e.g. Dodd-Frank), whistleblowers should be free to pick their path to remedy acts of retaliation without preconditions.

Third, the legislation should explicitly prohibit any agreement, policy form, or condition of employment that might otherwise limit the remedies available under the statute. For example, employment agreements requiring arbitration of retaliation claims arising under this law should be unenforceable. Such conditions of employment would plainly discourage whistleblowers from reporting violations, as well as hamper their ability to enforce their right to seek appropriate relief in the event of retaliation. SOX forbids such arrangements in the securities area.[90] So, too, should CAARA, which used SOX as the model for its anti-retaliation provisions.[91]

With these tweaks, CAARA would ensure that antitrust whistleblower protection is sufficiently robust to encourage individuals to report antitrust violations, whether or not they participated in the conduct giving rise to the violation.

Implementing a Bounty Program for Whistleblowers. Along with protection against retaliation, antitrust legislation should also include a bounty program, providing whistleblowers the opportunity to recover a financial award for disclosing antitrust violations. Despite the Antitrust Division's opposition, there does not seem to be strong (if any) evidence that a bounty would significantly disadvantage the Division's efforts to investigate and prosecute antitrust violations, or otherwise interfere with its Leniency Program.

The experiences of other agencies with bounty programs are instructive. The IRS, SEC, CFTC, and DOJ Civil Division have collectively recovered several billion dollars as a result of whistleblower tips.[92] IRS and DOJ Civil Division officials have also noted that, but for the whistleblowers, many of these recoveries would not have occurred.[93] Internationally, whistleblower bounty programs also appear to have had positive results. In the United Kingdom, the CMA's whistleblower bounty program provides rewards of up to £100,000. Although cartel participants are generally ineligible for a bounty, the CMA leaves open the possibility that, depending on their level of involvement, a cartel participant could receive a bounty. As noted above, the number of tips received by the CMA as a result of its campaign has increased substantially. Thus, rather than curtailing the program, Andrew Tyrie, the CMA's Chairman, has reportedly sought to increase the potential rewards and protections for whistleblowers because he believes they are "inadequately compensated for the risks they incur to their livelihoods and careers, and insufficiently protected from having their identities disclosed."[94]

Recognizing that many whistleblowers may themselves be participants in an antitrust violation, the bounty program for antitrust whistleblowers can be more limited in scope than that offered in other areas of law enforcement. While whistleblowers take significant risks in revealing criminal cartels, they should not get rich from their own unlawful behavior. Similar to the CMA's bounty program, the upper limit for a bounty under a U.S. antitrust whistleblower bounty program can be capped at a dollar level, rather than metered against the amount of the government's recovery. By contrast, for whistleblowers who are not participants in the unlawful conduct — "mere" witnesses — the bounty program could look more like the IRS, SEC, and CFTC programs, which permit the whistleblower the ability to obtain a percentage of the total recovery.

The Antitrust Division's arguments against a whistleblower bounty are not particularly persuasive. To begin with, under the Leniency Program, the recipient company's employees who testify are probably cartel participants anyway, but they have escaped imprisonment or fine. These individuals already are subject to impeachment on that basis. A financial bounty would not seem likely to make a whistleblower-witness materially less credible at trial.

89 See, e.g. 7 U.S.C. § 26(c)(2)(B); 15 U.S.C. § 78u-6(c)(2)(B).

90 18 U.S.C. § 1514A(e).

91 See 158 Cong. Rec. S5736 (remarks from Senator Leahy: "[CAARA] is modeled on the successful anti-retaliation provisions of the Sarbanes Oxley Act").

92 See Table 1, above.

93 GAO Report at 44.

94 Barney Thompson, *Number of whistleblowing reports on UK cartels up 18% last year*, Fin. Times (May 27, 2019), https://www.ft.com/content/bd41277c-7d54-11e9-81d2-f785092ab560.

Equally important, DOJ's Criminal Division and the U.S. Attorney's offices nationwide prosecute countless federal crimes involving murder, assault, and other acts of violence, often relying on the most unsavory of witnesses. Witnesses in these cases have sometimes been immunized entirely, or otherwise fairly anticipate favorable treatment on sentencing based on their cooperation. They also may receive the benefits of the federal witness protection program to induce their cooperation. Again, having to rehabilitate a whistleblower-witness in an antitrust prosecution should not be materially more challenging.

Besides, antitrust prosecutions are not likely to rise or fall on the testimony of a whistleblower alone. Cartels, after all, necessarily involve multiple companies. Therefore, trial witnesses will include multiple percipient witnesses besides the whistleblower. Criminal antitrust cases will also invariably have extensive documentary evidence corroborating the cartel activity. Indeed, as IRS and DOJ Civil Division officials noted in response to GAO inquiries, prosecutors can avoid potential whistleblower-witness constraints by independently corroborating the information provided through other sources.[95]

Finally, just as the Antitrust Division relies on its Leniency Program to incent companies to turn in other cartel participants, so too, it should welcome having a financially-incented whistleblower, whose information creates the opportunity not only for additional cartel detection, but also for "flipping" other cartel participants into cooperating in exchange for consideration on sentencing.

Nor would a bounty seem likely to increase the amount of false or erroneous information provided. First, intentionally providing false information to government prosecutors or investigators is a felony punishable by up to five years in prison.[96] Second, false reporting can also be addressed by conditioning the availability of a bounty on the truthfulness and accuracy of the whistleblower's information. For example, Dodd-Frank permits the SEC and CFTC to deny a bounty to a whistleblower who provides false information.[97] Similar provisions could be enacted in antitrust whistleblower legislation to discourage false reporting.

Delegating bounty determination issues to an independent DOJ unit. The IRS, SEC, CFTC, and other federal agencies have separate whistleblower offices. It is not clear, however, that this structure would be appropriate to handle antitrust whistleblowers. The Division already has a long-established Leniency Program to incent self-reporting, which includes leniency for individuals employed by cartel participants who first bring antitrust violations to the Division's attention. There is no readily apparent reason why the Division could not develop comparable intake procedures and follow-up investigation for individual whistleblowers.

However, it might make sense to delegate to a DOJ unit other than the Antitrust Division the responsibility for determining bounty eligibility and amount. The Antitrust Division could be authorized to initiate a "bounty-determination proceeding" at a point it deems appropriate. Then, both the Division and the whistleblower, represented by counsel, could present their positions. The independent DOJ unit would decide whether a bounty should be awarded and its level within statutorily-prescribed limits. An internal appeal to the Attorney General or its designee could also be provided. This framework would introduce a degree of impartiality into the bounty-determination decision.

VI. CONCLUSION

With ACPERA approaching its sunset, legislators and relevant stakeholders will soon debate its renewal and what changes, if any, should be made. Whistleblower protection should be a priority. These provisions would incent individuals to disclose antitrust crimes. And, by providing the Antitrust Division with yet another potential source of information, they also would bolster (not hinder) the existing Leniency Program — and, in turn, destabilize existing cartels and discourage the formation of new ones.

Anti-retaliation protection for individuals with knowledge of antitrust violations who report to the Antitrust Division should be enacted. The provision should bar retaliation even if the whistleblower participated in the violation. A civil remedy for retaliation is also warranted. Introducing a bounty program would further incent whistleblowers to come forward. The positive experiences of other federal agencies with bounty programs confirm the adage: "money talks."

95 See GAO Report at 40 ("For example, an IRS official stated that they do not use whistleblower-provided information as the basis for an assessment of wrongdoing, but rather try to obtain corroborating information from another source because the whistleblower has a personal interest in the success of the case and his or her credibility may be questioned in litigation.").

96 See 18 U.S.C. § 1001(a) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully. . . makes any materially false, fictitious, or fraudulent statement or representation. . . shall be fined under this title, imprisoned not more than 5 years . . .").

97 15 U.S.C. § 78u-6(i); 7 U.S.C. § 26(m).

COMPETITION ISSUES IN THE DIGITAL ERA – EU DEVELOPMENTS

BY KYRIAKOS FOUNTOUKAKOS & SAMUEL HALL[1]

1 Kyriakos Fountoukakos, Managing Partner of the Brussels office of Herbert Smith Freehills LLP, Kyriakos.Fountoukakos@hsf.com; Samuel Hall, Associate in the Brussels office of Herbert Smith Freehills LLP, Samuel.hall@hsf.com. The contents of this publication are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. The views expressed in this article are personal to the authors and do not reflect the interests of Herbert Smith Freehills LLP or any of its clients.

I. INTRODUCTION

"*When we look to the future, we see one big change that overshadows everything else [.]…There are really only two types of industry today – those that have been transformed by digitisation, and those that will be.*"[2]

There is debate among the competition law community as to whether such statements are exaggerated. Indeed, many commentators argue that competition law may be flexible enough to deal with issues in the digital sector without any significant amendments in approach but rather by simply applying the existing rules in a flexible and appropriate manner without abandoning legal and economic rigor. Others caution that stretching competition law to protect interests such as privacy has its own limitations.[3]

Nonetheless, the above comments of Competition Commissioner, Margrethe Vestager, are a clear indication of the impact and influence the European Commission ("EU Commission") anticipates digital markets will have on society in the years to come. The importance placed on this sector by the EU Commission, along with many other competition authorities across the globe, is demonstrated by the considerable resources they are allocating to ensuring effective competition in digital markets – both in the form of specific enforcement actions against major tech players, and market studies/inquiries intended to enhance their understanding of the intricacies of digital markets and the competition law tools needed to govern them.

A. Enforcement Actions

During the first half of 2019 alone, we have seen, *inter alia*, the opening of numerous abuse of dominance investigations at EU and Member State level against both Apple and Amazon;[4] a worldwide first-of-its-kind decision of the German FCO finding that Facebook abused its dominant position through its use of unfair business terms;[5] the opening of a formal investigation under Article 101 TFEU into Insurance Ireland's alleged exclusionary data sharing practices;[6] and a fine of €1.49 billion imposed on Google following the EU Commission's finding that it had abused its dominant position in the online advertising market[7] (taking the cumulative total of fines imposed on Google for antitrust infringements beyond €8 billion). Merger deals involving some aspects of data have also been looked at closely – even where, upon closer investigation, they did not, in fact, raise substantive antitrust concerns (e.g. see the EU Commission's review of Apple's acquisition of Shazam[8]).

B. Market Studies/Inquiries

Competition regulators are also increasingly focusing on understanding the challenges they consider digital markets to pose as a result of certain characteristics that these markets possess (including extreme returns to scale, the impact of network externalities, and the central role of data (explained in greater detail in section two below)). Because the enforcement tools competition authorities have at their disposal were (generally speaking) not designed with the dynamics of digital markets in mind, widespread debate has been triggered as to whether reform is needed or whether pre-existing regimes simply need to be interpreted and applied in a manner that considers the specificities of digital markets.

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2 See Margrethe Vestager, Competition Commissioner, European Commission, Speech at the OECD/G7 Conference: Competition and the digital economy (Jun. 3, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en.

3 See the comments (as reported by the New York Times) of Eline Chivot, Senior Policy Analyst for the Centre for Data Innovation, who reportedly stated that using competition policy to pursue objectives that are unrelated to competition "*introduces uncertainty.*" Adam Satariano, *Big Tech 'Knows You Better Than Your Wife.' He Plans to Rein It In,* New York Times (Jul. 7, 2019), https://www-nytimes-com.cdn.ampproject.org/c/s/www.nytimes.com/2019/07/07/business/facebook-google-antitrust-germany.amp.html.

4 Discussed further in Section Three below.

5 See Herbert Smith Freehills LLP, *German FCO forces Facebook to change its data collection policy*, https://sites-herbertsmithfreehills.vuturevx.com/46/19286/compose-email/german-fco-forces-facebook-to-change-its-data-collection-policy.asp.

6 See EU Commission, Press Release, *Antitrust: Commission opens investigation into Insurance Ireland data pooling system* (May 14, 2019), http://europa.eu/rapid/press-release_IP-19-2509_en.htm; see also Herbert Smith Freehills LLP, *The next step in the battle for data? EU Commission opens formal investigation into Ireland's insurance market*, (May 20, 2019).

7 See EU Commission, Press Release, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising* (March 20, 2019), http://europa.eu/rapid/press-release_IP-19-1770_en.htm.

8 See EU Commission, Press Release, *Mergers: Commission clears Apple's acquisition of Shazam* (Sept. 6, 2018), http://europa.eu/rapid/press-release_IP-18-5662_en.htm.

Director General of DG COMP, Johannes Laitenberger, has expressed a desire "*to revisit assumptions and theories in light of new facts*," emphasizing that "*the complexity and novelty of digitized markets and practices means that we need to place even more importance on understanding markets*";[9] UK chancellor, Philip Hammond, has recently labelled the UK's competition regime "*unfit for purpose*" given the rise in online platforms;[10] while Germany is currently in the process of amending its national competition law in order to address the dynamics of digital markets (reform is likely to be agreed in Autumn 2019).[11]

In recent years a number of reports, inquiries, and studies have been published with the aim of further informing the debate. In May 2016, the French and German competition authorities published a joint study on data and its implications for competition law;[12] in 2017, the EU Commission issued its e-Commerce sector inquiry[13] which, *inter alia*, resulted in antitrust investigations into a number of companies' online sales strategies and concluded with several decisions imposing fines on companies that were found to be in breach of the rules;[14] in March 2018, the French Competition Authority concluded its inquiry into display online advertising;[15] and in July 2019, Italy's competition authority, communications authority, and data protection authority published joint policy recommendations following their digital sector inquiry (the final report is expected to be published this year, however, no specific date has been set).[16]

In 2019 alone we have seen the publication of the Furman Report[17] in the UK (commissioned by HM Treasury) which recommends an *ex ante* regulatory approach for digital markets as well as a number of wide-ranging changes to the UK competition regime; publication by the UK CMA of a report on *ex post* evaluation of merger control decisions in digital markets;[18] the launch by the CMA of a market study into online platforms and digital advertising;[19] and in the U.S., publication by the Committee for the Study of Digital Platforms, chaired by Professor Fiona Scott Morton, of a report calling for greater competition among digital platforms[20] and the announcement that the U.S. Department of Justice is reviewing the practices of market leading online platforms.[21]

The EU Commission has always been at the forefront of enforcement in the digital sector, going back to its pursuit of Microsoft in the 2000s. However, it has not been as active as national competition authorities in conducting market inquiries into digital platforms and big data issues (with the exception of the aforementioned e-commerce inquiry which was much more specific to vertical restraints concerning the sale of

9 Johannes Laitenberger, Directorate General for Competition, European Commission, *Closing remarks at the "Shaping competition policy in the era of digitisation" conference* (Jan. 17, 2019), http://ec.europa.eu/competition/speeches/text/sp2019_01_en.pdf.

10 See *UK competition laws may be 'unfit for purpose' in digital era, says Hammond*, MLEX (Jun. 12, 2019).

11 See *Germany targets digital competition rule overhaul for autumn 2019 - FIW Innsbruck*, PARR (Mar. 11, 2019).

12 See Autorité de la Concurrence & Bundeskartellamt, *Competition Law and Data* (May 10, 2016), http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf.

13 See European Commission, *Final report on the E-commerce Sector Inquiry*, COM (2017) 229 final (Oct. 5, 2017).

14 For example, the EU Commission imposed fines on *Asus* (AT.40465), *Denon & Marantz* (AT.40469), *Philips* (AT.40181), *Pioneer* (AT.40182), *Guess* (AT.40428), *Nike* (AT.40436), and *Sanrio* (AT.40432); accepted commitments from *Hollywood Studios* (AT.40023); and is conducting an ongoing investigation into *Universal Studios* (AT.40433).

15 See Autorité de la Concurrence, *Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet* (Mar. 6, 2019), http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf.

16 The policy recommendations are available in Italian; AGCM, AGCOM & Granteprivacy, *Big Data, indagine conoscitiva congiunta – linee guida e raccomandazioni di policy* (2019), https://www.garanteprivacy.it/documents/10160/0/Big+Data.+Linee+guida+e+raccomandazioni+di+policy.+Indagine+conoscitiva+congiunta+di+Agcom%2C+Agcm+e+Garante+privacy.pdf/563c7b0e-adb2-c26c-72ee-fe4f88adbe92?version=1.1.

17 See J. Furman, D. Coyle CBD, D. McAuley, A. Fletcher OBE & P. Marsden, *Unlocking digital competition, Report of the Digital Competition Expert Panel* (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

18 Competition and Markets Authority, *Ex-post Assessment of Merger Control Decisions in Digital Markets Final Report* (May 3, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

19 Further information on the UK CMA's *online platforms and digital advertising market study* is available via the following link: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

20 *Committee for the Study of Digital Platforms*, *Market Structure and Antitrust Subcommittee Report,* George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business (May 15, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F.

21 See The United States Department of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (Jul. 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

goods online). The EU Commission has finally weighed in with a report.[22] On April 4, 2019, the EU Commission published an in-depth report on "*Competition policy for the digital era*." Competition Commissioner, Margrethe Vestager appointed a panel of three special advisers to prepare the report, which is intended to contribute to the EU Commission's ongoing deliberations on how competition policy should develop to ensure pro-consumer innovation in digital markets (the "Special Advisers' Report").[23]

We look at this report in section two of this article which outlines the key findings of the Special Advisers' Report. In section three, we focus on one of the principle issues regulators are focusing on in the context of digital markets: that is, ensuring effective competition in situations where a platform business also competes in other markets with companies that depend on that platform.[24] In other words, where "*the very same business becomes both player and referee, competing with others that rely on the platform, but also setting the rules that govern that competition.*"[25]

II. EU COMMISSION SPECIAL ADVISERS' REPORT ON "*COMPETITION POLICY FOR THE DIGITAL ERA*"

The wide-ranging Special Advisers' Report addresses, among other things:

- The way digital markets work and the implications for competition law analysis.
- The aim of EU competition law in the context of digital markets.
- The possibility of revising the thresholds under the EU Merger Regulation ("EUMR") to capture "killer acquisitions" by dominant platforms of early-stage, low-revenue, high-value innovators.
- How competition law should be applied to digital platforms and data.

A. How Digital Markets Work and Implications for Competition Law Analysis

The Special Advisers' Report starts by focusing on what it considers to be the key characteristics of the digital economy.

It finds that the way digital markets function can make markets work in favor of incumbents whose position can become entrenched and difficult to dislodge. This is because of effects such as extreme returns to scale (i.e. that the cost of producing digital services is proportionally much less than the number of customers served); network externalities (i.e. that the number of users on a platform is a very important factor making it more difficult for smaller entrants to migrate); and data, which can be a crucial input to many online services, production processes, and logistics.

All these factors heavily influence competition law analysis in this sector.

B. Aim of EU Competition Law in the Context of Digital Markets

The Special Advisers' Report does not suggest a fundamental rethink to the goals of competition law in the context of digital markets, pointing out that the current rules, concepts, and methodologies are sufficiently flexible to adapt to the specific challenges they pose and that "*vigorous competition policy enforcement is still a powerful tool to serve the interests of consumers and the economy as a whole.*"

22 We note that the report reflects the views of the independent experts that prepared the report, rather than the official position of the EU Commission.

23 See J. Cremer, Y. A. de Montjoye & H. Schweitzer, *Competition policy for the digital era* (Apr. 4, 2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

24 For a number of other competition law issues which arise in the context of digital markets elsewhere, see, e.g. Herbert Smith Freehills LLP, *German FCO forces Facebook to change its data collection policy* (Feb. 11, 2019), https://sites-herbertsmithfreehills.vuturevx.com/46/19286/compose-email/german-fco-forces-facebook-to-change-its-data-collection-policy.asp; Herbert Smith Freehills LLP, *Data Assets: Protecting and Driving Value in a Digital Age* (2019), https://www.herbertsmithfreehills.com/file/34571/download?token=TIH6MmgN.

25 Margrethe Vestager, Competition Commissioner, Address at the OECD/G7 Conference: Competition and the digital economy (Jun. 3, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en.

Nonetheless, the Special Advisers' Report identifies "under-enforcement" as a problem in the digital world and proposes a re-think of the standard of proof. Where consumer harm cannot be measured, it suggests that platforms' strategies to reduce competition should be forbidden in the absence of clear benefits to consumers. Further, in highly concentrated markets with high barriers to entry, the Special Advisers' Report suggests erring on the side of disallowing potentially anticompetitive conduct, with the burden of proof reversed and placed on the incumbent to demonstrate the pro-competitive effects of the behavior. This may include presumptions in favor of a duty to ensure interoperability. This rethink of the standard/burden of proof could have important implications as it could make it easier for a regulator to find an infringement and adopt a decision prohibiting potentially abusive conduct.

Furthermore, the Special Advisers' Report proposes reducing competition policy's emphasis on market definition. Due to the rapidly evolving nature of market boundaries in the digital sphere, it is suggested that more emphasis should be placed directly on theories of harm and identification of anticompetitive strategies rather than market definition.

With regard to the measurement of market power, the Special Advisers' Report suggests analyzing whether platforms are (1) unavoidable trading partners with "intermediation power" – even where a market may seemingly look fragmented and (2) possessors of data that is not available to market entrants.

Finally, the report addresses the interplay between competition law enforcement and regulation and notes that the two can go hand in hand, with competition law analysis informing the public and legislative debate (we discuss this possibility further in section three below).

C. Review of EUMR Thresholds

A growing concern for the EU Commission (and other regulators) in recent years has been acquisitions by dominant platforms of innovative start-ups with quickly growing user bases and significant competitive potential. These transactions may be carried out by larger players with the aim of early elimination of potential rivals (also known as "killer acquisitions").

Under the current EUMR thresholds, despite their competitive potential, the low turnover of such targets often means that these transactions fall outside the EU Commission's jurisdiction.

While certain Member States (e.g. Austria and Germany) have already introduced alternative thresholds based on transaction value, the Special Advisers' Report concludes that it is too early at this stage for similar amendments to be made to the EUMR. However, the authors display an openness to introducing appropriate amendments to the EUMR thresholds in the future depending on the performance of the transaction value-based thresholds recently introduced in some Member States.

D. Changes to the Substantive Analysis of Mergers under the EUMR

The Special Advisers' Report notes that the current significant impediment to effective competition test ("SIEC") is flexible enough to deal with mergers involving digital incumbents buying smaller rivals. However, it stresses that there is a need to revisit the substantive theories of harm to properly assess certain specific cases. The Special Advisers' Report proposes a heightened degree of control for acquisitions of small start-ups by dominant platforms and/or ecosystems. In particular, the following questions will be important: (i) does the acquirer benefit from barriers to entry linked to network effects or use of data? (ii) is the target a potential or actual competitive constraint within the technological/users' space or ecosystem? (iii) does its elimination increase market power within this space, notably through increased barriers to entry? (iv) if so, can the merger be justified by efficiencies?

E. How Competition Law Should be Applied to Digital Platforms and Data

When it comes to platforms, the Special Advisers' Report focusses on ensuring that both competition "for the market" (i.e. keeping the market contestable so that new entrants can come in) and competition "in the market" (i.e. on the dominant platform itself) remain vibrant.

To protect competition for the market, the possibility of multi-homing and switching as well as interoperability and data portability are seen as key for allowing market entrants to attract customers. Dominant platforms that restrict these practices should be required to justify their conduct on grounds of efficiencies.

While the Special Advisers' Report recognizes that the use of most favored nation ("MFN") clauses can have both pro- and anticompetitive effects, it suggests that the use of wide MFNs (restricting price competition between platforms) should be prohibited. Narrow MFNs (restricting price competition between the seller's own website and the platform provider) may be permitted, but only in circumstances where there is sufficiently strong competition between platforms.

When it comes to competition in the market/on the platform, the Special Advisers' Report stresses that dominant platforms "*have a responsibility to ensure that their rules do not impede free, undistorted, and vigorous competition without objective justification*" and must ensure a "*level-playing field*" for competition on the platform. The report discusses specific issues such as leveraging and self-preferencing by a dominant platform that competes with goods or services provided by competing suppliers on the platform (we discuss this issue further in section three below). Self-preferencing is not seen as abusive *per se* but must be analysed under an effects-based test. Importantly the Special Advisers' Report notes that intervention may be necessary not only where the platform meets all the criteria under the "essential facility" doctrine (access to the platform is essential to compete), but also wherever the conduct is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale. Remedies in such situations may be challenging and where the self-preferencing has significantly benefitted the platform's market position *vis-à-vis* its competitors, they may need to include a restorative element.

Regarding data, the Special Advisers' Report looks at the interplay with the GDPR, access to personal data, data portability, data sharing, and access to data for competitors.

As regards access to data under Article 102 TFEU, the report is cautious and does not recommend lowering the threshold for mandating data sharing. On the contrary, it stresses that a thorough analysis will be required as to whether access to the data in question is truly indispensable and where it is not, authorities should not intervene. The Special Advisers' Report also draws attention to other means of controlling data access, e.g., via sector-specific regulation[26] and judicial or administrative measures.

While this falls short of recommending a data-focused overhaul of EU competition rules, following the publication of the Special Advisers' Report, Commissioner Vestager emphasized that "*as data becomes the key to success, the huge quantities of information that some big businesses have can give them an edge that rivals cannot match*."[27]

It is therefore clear that the increasingly data-driven nature of business in the digital sector continues to be under the EU Commission's scrutiny and that the EU Commission will be looking to intervene where it considers access to data as indispensable for competition to function in a particular market.

F. Concluding Remarks

The Special Advisers' Report contains a number of important (and controversial) points suggesting increased scrutiny of platforms, increased vetting of acquisitions by digital players and a focus on the use of data.

As tweeted by Chief Economist at DG COMP, Tommaso Valletti, the Report was written on a pro bono basis by independent academics and therefore does not reflect the EU Commission's official position. Nevertheless, it is envisaged that the Report will be an important reference point for the EU Commission as it continues to deliberate its approach to competition policy in the digital era.

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26 We note that there is precedent for regulatory attempts at EU level to enable the pro-competitive sharing of data. For example, access to vehicle repair and maintenance information under Regulation (EC) 715/2007; access to trading data under Directive 2014/65/EU ("MiFID2"); and the sharing of customer data under Directive (EU) 2015/2366 ("Payment Services Directive" ("PSD2")).

27 Margrethe Vestager, Competition Commissioner, Speech at the European Consumer and Competition Day, Bucharest (Apr. 4, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en.

III. PLATFORMS AS "PLAYER AND REFEREE" – COMPETITION "ON THE PLATFORM"

As is clear from the Special Advisers' Report, there are many issues that competition regulators are grappling with in order to ensure effective competition in digital markets. However, Commissioner Vestager has stated that "*one of the most important messages from* [the Special Advisers' Report] *is that we need to address the power of digital platforms.*"[28] Against this backdrop, the second part of this article focuses on one particular matter that has come to prominence in recent months: that is, the competition law issues that arise in circumstances where a platform business also competes in other markets with the companies that depend on that platform.[29]

> On June 3, 2019, at the OECD conference on Competition and the Digital Economy, Commissioner Vestager stated that:
>
> *one of the biggest issues we face is with platform businesses that also compete with companies that depend on the platform [.]… competing with others that rely on the platform but also setting the rules that govern that competition. It's easy to see how this sort of double role can bring a risk of conflict of interest; a risk that the operator of a platform will be tempted to tweak the rules and features of the platform to benefit its own services.*

These concerns are reflected by the fact that, in recent times, we have seen a number of complaints, investigations, and decisions being made against platforms operating in this type of dual role – notably, against Google, Amazon, and Apple.

In June 2017, the EU Commission fined Google €2.42 billion for systematically prioritizing its own comparison shopping service in its search results at the expense of the offerings of rival comparison shopping services.[30] The EU Commission found that when a consumer entered a query into the Google search engine, Google's comparison shopping service would appear at the top of the search results, whereas the results of competitors would be ranked much lower and would be much less visible to customers. The EU Commission held these practices to have "*stifled competition on the merits in comparison shopping markets*" and ordered Google to grant equal treatment to rival comparison shopping services and its own service. The decision has been attacked before the EU General Court and this appeal is currently pending.[31]

More recently, the EU Commission has launched a formal investigation into the way Amazon performs its dual role as an online sales platform and a competitor of third-party retailers that make sales on Amazon. In the wake of the investigation, Commissioner Vestager stated that "*E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don't eliminate these benefits through anti-competitive behaviour.*" Amazon is facing allegations that it misuses the data it obtains from third party retailers (in its capacity as a platform), to improve its competitive position in other markets *vis-à-vis* such third party retailers.[32] As part of its investigation, the Commission will review the standard agreements Amazon has in place with its marketplace sellers (which allow Amazon's retail business to utilize third party data); as well as the role of data in the selection of the winners of the "Buy Box," a prominent feature on Amazon allowing customers to add items from a specific retailer directly into their shopping carts.[33] Amazon has also had to face a number of investigations by national competition authorities, also in relation to the way in which it uses its position as a platform to leverage its competitive position in other markets on which the users of its platform are active. While Amazon has now reached settlement with the German and Austrian

28 Margrethe Vestager, Speech, *supra* note 2.

29 For further discussion of a number of other competition law issues that arise in the context of digital markets, see our previous publications as listed at footnote 24 above.

30 EU Commission, Press Release, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (Jun. 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

31 See Case T-612/17, Action brought on 11 September 2017 -- *Google and Alphabet v. Commission*, OJ 2017 C 369/37. For disclosure purposes, we note that one of the authors of this article, Kyriakos Fountoukakos, represents Google in its appeal before the General Court.

32 See for example the comments of Oliver Prothmann (President of the German association of e-commerce, BVOH) relating to insights he received from traders informing him that Amazon Retail "*can react better than individual traders*" because it has "*access to all marketplace data.*" See Aoife White, *Amazon Merchants' Fears Fuel European Union Antitrust Probe,* Bloomberg (Jul. 17, 2019), https://www.bloomberg.com/news/articles/2019-07-17/amazon-faces-eu-battle-as-vestager-opens-antitrust-probe.

33 See EU Commission, Press Release, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon (Jul. 17, 2019), https://europa.eu/rapid/press-release_IP-19-4291_en.htm.

competition authorities,[34] the investigations of the authorities in Luxembourg and Italy are ongoing.[35]

Apple has also been subject to a series of complaints at both EU and Member State level.[36] Spotify complained to the EU Commission that by forcing Spotify to use the Apple payment system and to pay a 30 percent commission fee, Apple inhibits Spotify's ability to compete on fair terms with Apple Music.[37] Separately, two parental control software companies, Qustodio and Kidslox have complained that Apple blocked parental control apps from the App Store because they compete with Apple's Screen Time. In a press release, Qustodio stated that its app "*had been available and coexisting peacefully on the App Store for years until Apple moved into the space as a competitor in September 2018 by pre-installing its own Screen Time service on all iOS 12 devices, activating it by default, and making it non-removable from those devices in any way.*"[38]

Competition law enforcement or regulation? – The EU Platform Regulation

This significant increase in actions against platform companies performing the dual role of both platform and competitor demonstrates the focus that competition authorities are placing on this issue. How they deal with these scenarios going forward is something that will need to be closely monitored.

In the first instance, Commissioner Vestager has indicated that we can expect to see further decisions taking a similar approach to that seen in the Google Shopping case (as explained above) i.e. where the EU Commission required the platform to treat other companies' services equally to its own. However, interestingly, Commissioner Vestager has also suggested that these concerns could also be addressed through regulation:

> *we shouldn't assume that the competition rules are the only answer to this issue. […] [A] regulatory approach could be a useful model, to tackle other problems which the platform economy creates.*
>
> *…it may even be necessary for governments to reassert control of parts of the digital world, when they find that commercial interests alone don't provide the services we need.*[39]

Commissioner Vestager pointed to the regulation on platform-to-business trading (the "Platform Regulation") as an example of how a regulatory approach may be a fitting response to some of the challenges competition enforcers see as being posed by digital markets. The text of the Platform Regulation was adopted by the Council on June 14, 2019 and will take effect 12 months after its publication in the Official Journal of the EU.[40]

The Platform Regulation will apply to online market places, online software application stores, social media, and search engines, and seeks to create a body of rules which "*provide businesses with a more transparent, fair and predictable online business environment, as well as an efficient system for seeking redress.*"[41] Among other things, the Platform Regulation requires platforms to provide a statement of reasons when they decide to restrict a business' use of its services, and to disclose publicly (i) the parameters by which they determine how business users are ranked in their search results and (ii) any differentiated treatment they grant to goods/services they offer directly.

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34 See German Competition Authority, *Case summary: Amazon amends its terms of business worldwide for sellers on its marketplaces –Bundeskartellamt closes abuse proceedings* (Jul. 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4; see also Austrian Competition Authority, *Case summary: Amazon.de – Marktplatz* (Jul. 19, 2019) (available in German), https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB_Amazon-Fallbericht_20190717.pdf.

35 See *EC closely coordinating with US FTC, Luxembourg, Italy on Amazon abuse probe*, PARR (Jul. 19, 2019).

36 The Dutch competition authority has also opened an investigation into whether Apple favors its own news app over other apps for news media that are available on the Apple App Store.

37 *Brussels poised to probe Apple over Spotify's fees complaint*, Financial Times (May 5, 2019), https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d.

38 *Qustodio & Kidslox File a Complaint Against Apple with the European Commission over Abuse of Dominant Position*, GlobeNewswire (Apr. 30, 2019), http://www.globenewswire.com/news-release/2019/04/30/1812192/0/en/Qustodio-Kidslox-File-a-Complaint-Against-Apple-with-the-European-Commission-over-Abuse-of-Dominant-Position.html.

39 Margrethe Vestager, Speech, *supra* note 2.

40 European Council, Press Release, *EU introduces transparency obligations for online platforms* (Jun. 14, 2019), https://www.consilium.europa.eu/ro/press/press-releases/2019/06/14/eu-introduces-transparency-obligations-for-online-platforms/.

41 *Id.*

While these provisions in the Platform Regulation are clearly targeted at behaviors deemed by the EU Commission in both past decisions and current investigations to be problematic, it is possible that the EU Commission will contemplate additional regulation containing more onerous provisions in order to prevent such competition issues arising in the first place. Commissioner for Digital Economy and Society, Mariya Gabriel, has pointed out that the Platform Regulation will be the "*first-ever regulation in the world that addresses the challenges of business relations within the online platform economy.*"[42] This indicates (1) that the EU Commission is not afraid to enter new territory when it comes to addressing the challenges posed by digital markets; and (2) that the regulatory response to these challenges is very much in its infancy and has the potential for further development.

Indeed, there is a precedent for competition law enforcement actions being followed up by the enactment of regulations seeking to address the issues identified in the preceding competition action. In April 2015, the Italian, French, and Swedish competition authorities accepted commitments from Booking.com following investigations into its use of MFN clauses.[43] Subsequently, Italy passed a law including a specific provision in relation to the use of MFNs in contracts between online travel agencies and suppliers of touristic services. Similarly, in France the *loi Macron* introduced a provision to ensure that online travel agencies do not apply MFN clauses in contracts with hotels.[44]

As part of the same trend, in December 2007, the EU Commission found Mastercard's interchange fees on cross-border transactions in the EEA to restrict competition between banks. The EU Commission's findings were confirmed by the European Court of Justice in September 2014. In April 2015, a new regulation capping interchange fees for cards issued and used in Europe was adopted.[45]

It remains to be seen whether the new EU Commission which will start its mandate on November 1, 2019 will have greater appetite for legislative intervention in this area.

IV. CONCLUSION

The European Council has indicated that at present, over one million businesses based in the EU trade through online platforms.[46] This illustrates the significance of online platforms to EU consumers and indicates that the effective enforcement of competition law in digital markets will, in all likelihood, continue to be a primary focus of both the EU Commission and Member State competition authorities going forward.

Perhaps a more telling indication of the momentum gathering behind this subject is Donald Trump's recent indication that his administration would look into the activities of a number of the U.S. tech giants.[47] While we are accustomed to the proactive enforcement of antitrust rules in Europe, this has not always been the case in the U.S., where the authorities have generally taken a less interventionist approach based on the belief that the markets are best placed to remedy themselves. In line with President Trump's promises, in July 2019 Apple, Amazon, Facebook, and Google were reportedly summoned to testify in front of a House Judiciary Committee subcommittee as part of its investigations into the threats large tech companies pose to competition.[48]

On top of this, a recent study commissioned by the University of Chicago's business school (prepared by a panel chaired by Fiona Scott Morton) found that while some markets may self-correct, this may not always be the case in markets dominated by large digital platforms. The report suggests that the U.S. should create a new specialist "Digital Authority" to better regulate digital platform markets. In the UK the recent Furman report on "Unlocking digital competition" similarly proposes the creation of a new digital markets unit to support greater competition and consumer choice in digital markets.

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42 EU Commission, Statement, *Digital Single Market: Commission welcomes European Parliament's vote on new rules to improve fairness and transparency of online platforms* (Apr. 17, 2019), http://europa.eu/rapid/press-release_STATEMENT-19-2160_en.htm.

43 See *Booking.com probes closed by Italian, French and Swedish competition authorities*, PaRR (Apr. 2, 2015).

44 See D&P Studio Legale, *Online Travel Agencies market: the ban of the MFN clauses in Italy or the so-called "Booking Law,"* Lexology (Sept. 14, 2017), https://www.lexology.com/library/detail.aspx?g=2d2ab9fe-a2a5-4f37-be33-914f5a30f441.

45 See EU Commission, Press Release, *Antitrust: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees* (Apr. 26, 2019), http://europa.eu/rapid/press-release_IP-19-2311_en.htm?locale=FR.

46 European Council, Press Release, *EU introduces transparency obligations for online platforms* (Jun. 14, 2019).

47 See *EU 'attacking' Apple, Google, Facebook for 'easy money,' Trump complains*, MLex (Jun. 10, 2019).

48 See Tony Romm, *Apple, Amazon, Facebook and Google to testify to Congress on antitrust*, The Washington Post (Jul. 9, 2019), https://www.washingtonpost.com/technology/2019/07/09/apple-amazon-facebook-google-testify-congress-antitrust/?utm_term=.15f7a43e5c00.

While questions remain unanswered as to exactly *how* competition authorities will enforce competition law in digital markets (i.e. whether in addition to competition law actions, this will also include the enactment of regulation), the substantial resources being dedicated to better understanding this field indicates that reaching a satisfactory solution is high on the regulatory agenda. We are, therefore, sure to see developments in this regard within the near future.

NON-HORIZONTAL MERGERS IN CHINA: A CASE STUDY OF *KLA-TENCOR/ORBOTECH*

BY VANESSA YANHUA ZHANG, JOHN JIONG GONG & AMANDA JING YANG[1]



1 Vanessa Yanhua Zhang, Managing Director at Global Economics Group (Beijing and New York) and Senior Researcher at MRLC of Renmin University (Beijing, China). John Jiong Gong, Professor of Economics at the University of International Business and Economics (Beijing) and Director at Global Economics Group (Beijing, China). Amanda Jing Yang, Senior Manager at Global Economics Group. The authors are grateful to the comments from the editors. None of the institutions above necessarily shares the views expressed in this article and we retain sole responsibility for any errors.

I. INTRODUCTION

On February 13, 2019, China's State Administration for Market Regulation ("SAMR") conditionally approved KLA-Tencor Corporation's ("KLA-Tencor") acquisition of Orbotech Ltd. ("Orbotech"), which marks the final antitrust clearance of this global transaction in all the related jurisdictions around the globe.[2] KLA-Tencor and Orbotech (collectively the "Parties") reached an acquisition agreement on March 18, 2018, with KLA-Tencor planning to acquire all of Orbotech's shares in cash and stock. After the acquisition, Orbotech will become a KLA-Tencor wholly-owned subsidiary.

On April 28, 2018, SAMR received the filing application from the Parties, and commenced the preliminary review process on June 26, 2018. On July 25, 2018, SAMR decided to conduct further investigation into this merger request and extended the investigation period. When the extended phase of further investigation expired on December 18, 2018, the Parties of the merger request withdrew the application. However, on December 20, 2018, the Parties re-submitted the filing application. SAMR was concerned that this merger might have an adverse impact of excluding and restricting competition in the semiconductor deposition and etching equipment market where Orbotech operates.

Upon investigation, SAMR concluded that KLA-Tencor and Orbotech had both vertical and conglomerate relationship in the markets of process control equipment, deposition equipment, and etching equipment. To address the competition concerns of SAMR, the Parties submitted the remedial plan on February 1, 2019, which, according to SAMR, could ease the expressed unfavorable effects.

Considering the potential effect of excluding and restricting competition in the markets of semiconductor deposition and etching equipment, as well as the remedial plan, SAMR decided to approve the merger request with a set of conditions, which will be valid for five years from February 13, 2019. The Parties and the merged entity are required to continuously provide semiconductor process control equipment and related services to the manufacturers of deposition and/or etching equipment in the Chinese market by following the Fair, Reasonable and Non-Discriminatory ("FRAND") principle. They are also prohibited from conducting tying/bundling or imposing unreasonable transaction conditions without proper reasons when supplying semiconductor process control equipment and deposition and/or etching equipment in the Chinese market. Orbotech is also prohibited from accessing the protected information belonging to other manufacturers of deposition and/or etching equipment.

II. CASE ANALYSIS

Founded in the U.S. in 1997, KLA-Tencor is a NASDAQ-listed company. It provides advanced process control and process-enabling solutions for manufacturing wafers and reticles, integrated circuits, printed circuit boards, packaging, and flat panel displays. KLA-Tencor has businesses across the globe, covering the U.S., Germany, France, Italy, Mainland China, India, Korea, Japan, Taiwan, etc.[3] KLA-Tencor is also expanding its businesses and has established ten offices in China.[4]

Founded in Israel in 1981 and also a NASDAQ-listed company, Orbotech's main products include production and inspection equipment for printed circuit boards ("PCBs"), advanced packaging, flat panel displays ("FPDs"), and etching and deposition equipment for front-end specialty applications and back-end advanced packaging for the semiconductor industry.[5] In May 2011, Orbotech established Orbotech Electronics (Suzhou) Co., Ltd. in Suzhou, China, which is engaged in the test and development of automated optical inspection ("AOI") equipment software and maintenance services.[6]

2 Anti-Monopoly Bureau of the State Administration for Market Regulation, *Announcement of the State Administration for Market Regulation on Anti-Monopoly Review Decision regarding the Conditional Approval of KLA-Tencor's Acquisition of Orbotech*, 2019 No. 7 (February 13, 2019), available at http://gkml.samr.gov.cn/nsjg/xwxcs/201902/t20190220_290940.html.

3 KLA-Tencor, *Company Factsheet*, KLA-TENCOR.COM, available at https://www.kla-tencor.com/documents/KLA_Fact-Sheet.pdf.

4 *KLA-Tencor: Continuing to Increase Investment in China, Process Control Being the Key*, EE TIMES, November 14, 2017, available at https://www.eet-china.com/news/201711140851.html.

5 Orbotech, *About Orbotech*, available at: https://www.orbotech.com/company/about, accessed on March 16, 2019.

6 Suzhou Industrial Park, *Orbotech Electronics (Suzhou) Opens in SIP*, SIPAC.GOV.CN, May 26, 2011, available at http://www.sipac.gov.cn/english/categoryreport/IndustriesAndEnterprises/201105/t20110526_90443.htm.

A. Market Definition

According to the SAMR decision, SAMR defined a global market of process control equipment, deposition equipment for specialty and advanced packaging, and etching equipment for specialty and advanced packaging as the relevant markets and concluded that the merger has or may have the effect of potentially excluding and restricting competition in the markets of semiconductor deposition and etching equipment.

Process control equipment is used to monitor the manufacturing and packaging procedures of semiconductor components, inspect the defects during the manufacturing procedures and measure the key indicators, which can be divided into the categories of leading-edge applications (for leading-edge devices manufacturing wafers smaller than 28 nanometers), specialty applications (for specialty devices manufacturing wafer bigger than 28 nanometers) and advanced packaging applications (for detecting defects and measuring indicators in back-end wafer packaging) according to the applicable procedures and various precision requirements. Deposition equipment adds thin layers of conductive or non-conductive materials to a wafer, while etching equipment selectively removes materials from unmasked portions of a wafer. Etching and deposition equipment can also be divided into the categories of leading-edge, specialties and advanced packaging applications.

With the rapid development of the manufacturing and packaging techniques for semiconductor components, there are no constant and well-defined boundaries for leading-edge applications, specialty applications, and advanced packaging applications.

KLA-Tencor's businesses cover process control equipment mostly for leading-edge applications, although its products are also finding some limited usages for specialties and advanced packaging applications. Orbotech products cover specialties and advanced packaging etching and deposition equipment. But as technology evolves, it may have the possibility of entering the leading-edge etching and deposition equipment market. Therefore, SAMR defined the following relevant product markets: i.e. process control equipment, deposition equipment for specialty and advanced packaging applications, and etching equipment for specialty and advanced packaging applications. Meanwhile, SAMR also analyzed the potential effect of the transaction on the market of deposition and etching equipment for leading-edge applications.

Due to no obvious barrier on cross-border sales of semiconductor equipment and the global supply and procurement nature of semiconductor equipment, the geographic market is naturally defined as the global market. However, as more than 80 percent of China's semiconductor equipment is imported, SAMR also focused on the merger impact on the China market.

B. Theory of Harm

Upon investigation, SAMR raised concerns regarding the merger's potential adverse impact of harming competition in the relevant markets. The theory of harm is essentially built on the spillover effect which is related to the nature of a conglomerate merger. In other words, the competition concern comes from the possibility that the merged entity would leverage its market position in one relevant market to exclude and restrict competition in another relevant market.

The most important is how the theory of harm works in this case. According to SAMR, the merged entity would have a dominant position in the market of process control equipment, with the market share of 50-55 percent and 55-60 percent respectively in the global and China markets. Note that the process control equipment is used mostly for leading edge applications. Market power is then hypothesized to be leveraged to expand and strengthen the merged entity's (Orbotech's) position in the market of etching and deposition equipment, which are almost exclusively used for specialty and advanced packaging applications. SAMR was concerned that the merged entity would conduct vertical foreclosure against other etching and deposition equipment manufacturers through the measures of refusal to deal, differentiated treatment, unreasonably excessive pricing, etc. SAMR also looked into the possibility of bundling, which might harm competition in the etching and deposition equipment markets.

As experts retained by the filing Parties, our view is that there is no horizontally overlapping business and very limited vertical relationship between the two merging companies. This merger is a conglomerate merger, which involves the acquisition of complementary products in neighboring markets (the market of process control equipment and the market of etching and deposition equipment). As a matter of antitrust economics, a conglomerate merger may raise limited or no antitrust concerns, which is generally procompetitive and often brings efficiency gains to the industry.

Conglomerate transactions potentially harm competition only when a party with significant market power in one market is able to engage in tying, bundling, or other means to gain market share in another relevant market. Although this type of transaction is technically and hypothetically possible, we show that there is a decided lack of economic incentive to do so. In other words, there are costs, in the form of loss of sales for example, associated with this type of tying conduct, and the upside gains in the deposition and etching markets pale in comparison to this

loss. Furthermore, even if the Parties could do so, the conduct does not necessarily cause harm to competition or overall consumer welfare. On the contrary, a mixed bundling strategy could in fact be welfare-enhancing and beneficial to the demand side under normal circumstances.[7]

Considering the low entry threshold in the relevant markets of both process control equipment for specialty application and for wafer-level advanced packaging applications, and the vibrant competition in the areas from many alternative suppliers and the second-hand equipment brokers, even if KLA-Tencor has a high market share, it lacks substantive market power in the relevant markets. Thus, although tying and bundling are technically and hypothetically feasible, whether it is commercially capable of doing so is very much questionable. That is, even if KLA-Tencor engaged in tying and bundling, customers of KLA-Tencor or Orbotech may easily respond by simply switching to an alternative supplier. There would be no harm to competition.

III. POLICY IMPLICATIONS

A. Remedies

Based on our analysis, the merger would cause little harm to competition in any of the relevant markets of concern to SAMR. Nevertheless, SAMR still took a remedial approach, presumably out of an abundance of caution, which is all understandable given the Chinese government's intense interest of developing the semiconductor industry through indigenous innovation. The tying and bundling practice, albeit totally unlikely in our view, is still explicitly prohibited by SAMR for five years after the approval of the merger. In addition, according to the remedial plan, which only includes behavioral remedies, KLA-Tencor, Orbotech, and the merged entity shall continue to provide semiconductor process control equipment and services to etching and/or deposition equipment manufacturers in China under the FRAND principle. Moreover, they cannot impose unreasonable transaction conditions without proper reasons. Orbotech is also prohibited from accessing the protected information of other manufacturers of deposition and/or etching equipment.

B. Patterns of Remedies from Previous Cases

As far as we know, SAMR has conditionally approved 8 conglomerate mergers and blocked 1 merger (*Coca-Cola/Huiyuan*) from 2008 to 2019. It certainly has an obvious preference for behavioral remedies versus structural remedies, as all of the 8 mergers were imposed with behavioral remedies. In Table 1 below, we summarize these mergers and the associated remedies imposed by SAMR.

These mergers cover a wide range of industries, including energy, e-commerce, electronics, semiconductor, printer, glasses, and aviation. The duration of these behavioral remedies was mostly 5 years.

SAMR imposed only behavioral remedies on the pure conglomerate mergers and vertical and conglomerate mergers, which are *GE/Shenhua*, *Walmart/Yihaodian*, *Merck/AZ Electronics*, *Broadcom/Brocade*, and *KLA-Tencor/Orbotech*. Regarding the three mergers which are at least horizontal and conglomerate, only one was imposed with both structural and behavioral remedies, which is *United Technologies/Rockwell Collins*. The structural remedies require the divestiture of relevant assets but do not require an upfront buyer before the completion of the merger. And the behavioral remedies are mostly relevant to no tying or bundling practices, continued supply of relevant products and services, no differentiated treatment, no disclosure of relevant business information, etc.

7 Christine Halmenschlager & Andrea Mantovani, *On the Private and Social Desirability of Mixed Bundling in Complementary Markets with Cost Savings*, 39 Info. Econ. & Policy 45 (2017).

Table 1. Remedy for Conditionally Approved Conglomerate Mergers

Case	Date of Approval	Merger Type	Overlapping Industry	Remedy Type	Duration of Behavioral Remedy
GE/Shenhua	11/10/11	Conglomerate	Energy	Behavioral	7 Years
Walmart/Yihaodian	08/13/12	Conglomerate	E-Commerce	Behavioral	4 Years
Merck/AZ Electronics	04/30/14	Conglomerate	Electronics	Behavioral	3 Years
Broadcom/ Brocade	08/22/17	Vertical and Conglomerate	Semiconductor	Behavioral	10 Years
HP/Samsung	10/05/17	Horizontal and Conglomerate	Printer	Behavioral	5 Years
Essilor/ Luxottica	07/25/18	Vertical, Horizontal and Conglomerate	Glasses	Behavioral	5 Years
United Technologies/ Rockwell Collins	11/23/18	Horizontal and Conglomerate	Aviation	Structural and Behavioral	5 Years
KLA-Tencor/ Orbotech	02/13/19	Vertical and Conglomerate	Semiconductor	Behavioral	5 Years

There have been five mergers that SAMR approved with conditions in the semiconductor industry. Table 2 below shows the remedies that SAMR imposed. In *MediaTek/Mstar* and *Advanced Semiconductor Engineering/Siliconware*, SAMR imposed unique hold-separate remedies. This might be interpreted as a type of hybrid of structural and behavioral remedies. In *NXP/Freescale*, SAMR required that the transaction could not close until the divestiture took place. We note that SAMR tends to have a less interventionist approach in the semiconductor industry, as it imposed only behavioral remedies in both *Broadcom/Brocade* and *KLA-Tencor/Orbotech*, and the duration of behavioral remedies decreased from 10 years to 5 years. It's also encouraging to see that in *Advanced Semiconductor Engineering/Siliconware*, SAMR used an economic analysis in its merger review process. SAMR analyzed the correlation coefficient of the profit margins of the involved parties, and concluded that they were close competitors.

Table 2. Remedy for Conditionally Approved Mergers in the Semiconductor Industry

Case	Date of Approval	Merger Type	Remedy	Duration of Behavioral Remedy	Time of Antitrust Investigation
MediaTek/Mstar	08/26/13	Horizontal	Hold Separate	3 Years	13 Months
NXP/Freescale	11/25/15	Horizontal	Divestiture	N/A	7.5 Months
Broadcom/ Brocade	08/22/17	Vertical and Conglomerate	Guarantee of Interoperability, Information Firewall, No Tying or Bundling	10 Years	7 Months
ASE/SPIL	11/24/17	Horizontal	Hold Separate, Reasonable Transaction Terms	24 Months	15 Months
KLA-Tencor/ Orbotech	02/13/19	Vertical and Conglomerate	Guarantee of Supply, No Tying or Bundling, Information Protection	5 Years	9.5 Months

Generally speaking, SAMR imposed more strict remedies on semiconductor concentrations than antitrust authorities in other jurisdictions. In *MediaTek/Mstar*, Taiwan's Fair Trade Commission ("TFTC") approved the acquisition and concluded that the merger would not hamper market competition but benefit the local economy. South Korea's Fair Trade Commission ("KFTC") also granted its approval but required no supply interruption for clients of both companies and no price monopoly. However, SAMR concluded that the concentration would eliminate and restrict competition in the relevant market in mainland China and imposed hold-separate remedies.

The *Broadcom/Brocade* transaction was conditionally approved in the EU, the U.S., and China. However, the antitrust authorities in those three jurisdictions imposed different behavioral remedies on the deal. European Commission required Broadcom to cooperate closely and in a timely manner with competing suppliers to achieve the same level of interoperability,[8] while the U.S. Federal Trade Commission approved the deal with Broadcom's commitment to establish a firewall in order not to use the sensitive confidential information of Cisco, Brocade's only competitor in the worldwide market for fiber channel switches.[9] In China, the remedies encompassed both the guarantee of the interoperability and the establishment of the firewall. Furthermore, SAMR also required no tying or bundling of fiber channel switches.[10]

SAMR's attitude towards *ASE/SPIL* (*Advanced Semiconductor Engineering/Siliconware Precision Industries*) was quite similar to the two transactions above. Both the Taiwan Fair Trade Commission and the U.S. Federal Trade Commission gave clearance to the merger, while SAMR conditionally approved the transactions with China's unique hold-separate remedy, in addition to some other behavioral remedies.

It appears that SAMR continues to be cautious with merger requests in the semiconductor industry in 2019. In *KLA-Tencor/Orbotech*, behavioral remedies were imposed in China, in contrast to unconditional approvals in all other relevant jurisdictions.

Meanwhile, China's antitrust authority is sometimes in line with the European and U.S. authorities in merger reviews. In *NXP/Freescale*, the remedies that SAMR imposed were quite similar to those imposed by the European Commission and the KFTC, including the divestiture of NXP's RF power business.

IV. CONCLUSION

The *KLA-Tencor/Orbotech* case is presumably a difficult case from SAMR's perspective, given the large market power of KLA-Tencor in the process control equipment market. This is particularly the case due to the overwhelmingly zealous attitude of the Chinese government towards indigenous innovation in the semiconductor industry. However, we are relieved to see that antitrust economic reasoning at the bureau prevailed over anything else. The bottom line is that a competition harm theory in the case of a conglomerate merger needs to be carefully examined, not just from a technically and hypothetically feasible perspective, but also from the economic incentive and viability perspective.

We also observe from this case that SAMR appears to adopt a less interventionist approach to merger control in that it prefers using behavioral remedies instead of structural remedies. However, it's still worthwhile to point out that the semiconductor industry, due to its sensitive nature, is still one of the focuses of SAMR's merger reviews. China has its own unique characteristics in the wake of its industrial policies and industry development, which may be quite different from other jurisdictions such as the U.S. and the EU. Therefore, the antitrust authority's competition concerns may, accordingly, be quite different.

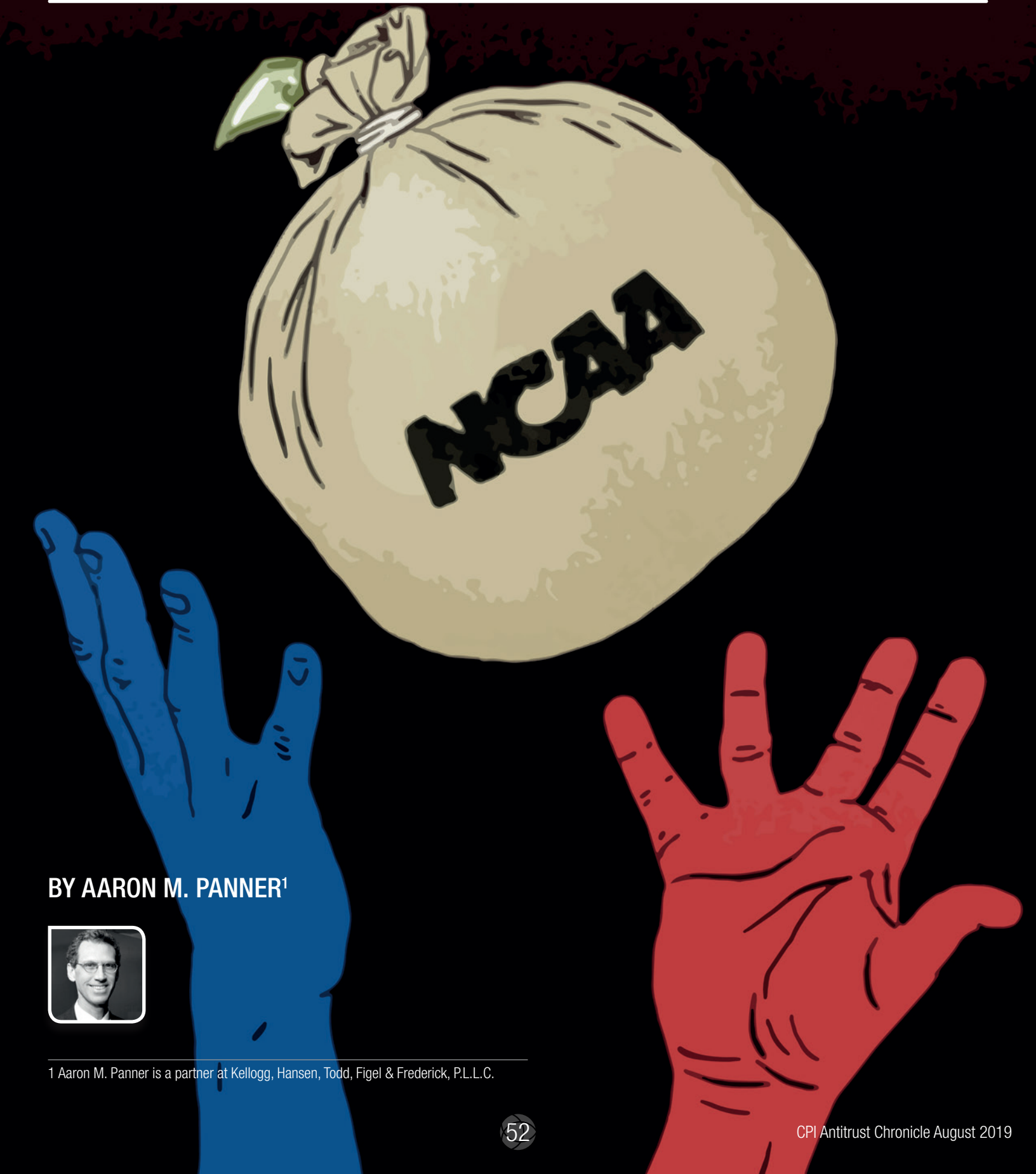
With China's increasing role and influence in the global semiconductor industry, parties that file global mergers worldwide should pay more attention to the antitrust regulatory approval process in China, prepare the merger filing with sound and rigorous economic analysis, and always be ready to address the unique competition concerns from China's antitrust authority.

8 European Commission, Press Release, *Mergers: Commission clears acquisition of Brocade by Broadcom, subject to conditions*, May 12, 2017, available at http://europa.eu/rapid/press-release_IP-17-1309_en.htm.

9 *In the Matter of Broadcom Ltd. and Brocade Communications Systems, Inc.*, FTC Dkt. C-4622, FTC Decision and Order (August 17, 2017), available at https://www.ftc.gov/enforcement/cases-proceedings/171-0027/broadcomlimitedbrocade-communications-systems.

10 Ministry of Commerce, *Announcement of the Ministry of Commerce on Anti-Monopoly Review Decision regarding the Conditional Approval of Broadcom's Acquisition of Brocade*, 2017 No. 46 (August 22, 2017), available at http://www.mofcom.gov.cn/article/b/c/201708/20170802632069.shtml.

A COMMENT ON THE *NCAA STUDENT-ATHLETE COMPENSATION* CASES



BY AARON M. PANNER[1]

1 Aaron M. Panner is a partner at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.

As a third-year law student, I was among a lucky five dozen to study antitrust law with Philip Areeda – tragically, the last group to do so. Ill with leukemia (though that was not generally known), Professor Areeda nevertheless agreed when that first semester class ended to supervise an independent study project in my second semester. I was, I believe, his last student.

The topic of my paper was non-commercial boycotts, and it sought to address the circumstances under which antitrust law could reach – and penalize – efforts to pool economic power to achieve ends that were not strictly commercial. On the one hand, there was *FTC v. Superior Court Trial Lawyers Association*,[2] an opinion from the Supreme Court addressing an agreement among trial lawyers to refuse to represent indigent defendants until the District of Columbia agreed to increase the compensation paid for that work. The boycott was effective – leading to higher hourly rates – but gave rise to an FTC complaint, which made its way to the Supreme Court. In an opinion by Justice Stevens, the Court noted that the boycott "may well have served a cause that was worthwhile and unpopular"; that "the preboycott rates were unreasonably low"; and that "the increase has produced better legal representation for indigent defendants."[3] All of that was beside the point. "[R]espondents' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[4] "Prior to the boycott [respondents] were in competition with one another, each deciding independently whether and how often to provide services to the District."[5] "The agreement . . . was designed to obtain higher prices . . . and was implemented by a concerted refusal to serve an important customer."[6] "The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output" and thus unlawful.[7] In other words, when antitrust law is the hammer, everything looks like a nail.

On the other hand, there was *National Organization for Women v. Scheidler*.[8] In that case, plaintiffs alleged that defendants (anti-abortion activists, groups, and a testing laboratory) engaged in a conspiracy to close women's health centers providing abortions. In addition to RICO claims (dismissed but later restored by the Supreme Court), plaintiffs alleged that the defendants had violated the Sherman Act, including by coercing businesses to refuse to deal with the abortion clinics. There may have been reasons that plaintiffs' claims failed to allege an element of an antitrust claim. But the Seventh Circuit did not decide the case on those grounds. Instead, it found that the activities at issue were *categorically* outside the reach of the antitrust laws because the antitrust laws were not designed to "protect an industry faced with violent opposition from some segment of the public."[9] The case suggests that there is an appropriate domain for antitrust – "prevent[ing] business competitors from making restraining arrangements for their own economic advantage" – and conduct outside that realm is not subject to antitrust regulation.[10]

These two decisions were not too hard to reconcile, but as I continued to read cases from the federal courts involving antitrust actions against groups engaged in non-commercial boycotts, I failed to discover the key to all mythologies. For some courts, non-commercial purpose seemed like a basis for something like immunity from antitrust scrutiny; for others, it was beside the point, and the only question was whether the challenged agreement effectively aggregated the actors' market power. I complained to Professor Areeda that the cases could not be reconciled through any single formulation that I could discern. He dispensed valuable wisdom: it's no surprise that the cases cannot be reconciled, because courts approach these issues in different and mutually inconsistent ways. Some of the cases seem to be in conflict because they are. The law is messy and imperfect. Understanding courts' various approaches and the underlying currents is the job of the antitrust lawyer as much as it is attempting to articulate the best rule.

2 493 U.S. 411 (1990).

3 *Id.* at 421.

4 *Id.* at 422.

5 *Id.*

6 *Id.* at 422-23.

7 *Id.* at 423.

8 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994).

9 *Id.* at 621-22. The court also found that "[t]he plaintiffs have not alleged that the defendants are exercising market power to harm their businesses . . . . [and] have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers." *Id.* at 622-23. But if the complaint had failed to allege any violation of the Sherman Act – irrespective of the goal of the actions – the Court's discussion of violent protest and its relationship to the history of the Sherman Act would have been unnecessary.

10 *Id.* at 621. No doubt, one can dispute whether the trial lawyers' boycott is fairly characterized as non-commercial: they wanted to charge more for their services.

I was reminded of the non-commercial boycott cases when reading Judge Wilken's March decision ruling on the latest antitrust challenges to the NCAA's limits on student-athlete compensation.[11] A brief history: in 2009, Ed O'Bannon, a former star basketball player at UCLA, sued the NCAA, claiming that the NCAA's amateurism rules, insofar as they barred student-athletes from accepting compensation for the use of their names, images, and likenesses (for example, in video games) violated the Sherman Act; Sam Keller, a former quarterback for Arizona State and Nebraska, also brought suit. The district court (Claudia Wilken, J.) found that challenged rules, evaluated under the Rule of Reason, violated Section 1 of the Sherman Act.[12] The Ninth Circuit largely affirmed.[13] The court of appeals rejected three of the NCAA's threshold arguments: that the Supreme Court had already endorsed the NCAA's amateurism rules in *NCAA v. Board of Regents of the University of Oklahoma*,[14] that the compensation rules are outside the scope of the Sherman Act because they do not regulate commercial activity, and that plaintiffs had not suffered antitrust injury.[15] The court then held that the rules could not be condemned as *per se* unlawful but were instead subject to scrutiny under the Rule of Reason.[16] The Ninth Circuit agreed with the district court that the challenged rules had an anticompetitive effect by blocking an aspect of competition among schools for recruited athletes.[17]

In the district court, the *NCAA* in *O'Bannon* had offered four justifications for the challenged compensation rules – (1) promoting amateurism; (2) promoting competitive balance; (3) integrating student-athletes in the academic community; and (4) increasing output. The district court accepted the first and third justifications but rejected the other two; the Ninth Circuit held that, on appeal, the NCAA relied exclusively on the promotion of amateurism to justify the rules.[18] The Ninth Circuit agreed with the district court that the compensation rules do serve procompetitive purposes by promoting integration of academics and by preserving the popularity of NCAA sports as a distinct product from professional sports.[19] But the court found that the district court had not clearly erred in finding that there were less restrictive ways to promote amateurism than the compensation rules then in effect – namely, raising the grant-in-aid cap (previously limited to the cost of tuition, room and board, and books) – to the full cost of attendance.[20] The court, however, vacated the portion of the district court's opinion that had authorized cash payments of up to $5,000 per year as failing to preserve amateurism as effectively as a rule that barred outright cash payments.[21]

Accordingly, Judge Wilken was not writing on a blank slate in the *Grant-in-Aid* case – far from it – but, at the same time, the parties had been litigating for several years (the first case had been filed in March 2014) and had assembled a substantial factual record to further test some of the premises underlying the decisions in the *O'Bannon* case. The court moved quickly through market definition – defined as the market for student-athletes' services, a market in which the members of the NCAA have substantial market power on the buyers' side – and anticompetitive effect – that is, the reduction in compensation that student athletes would otherwise receive.[22] The bulk of the opinion addressed procompetitive justifications and less restrictive alternatives, and here, the district court broke new ground.

The court began by evaluating the NCAA's claim that preserving amateurism was a "'key part of the demand for college sports.'"[23] Although this justification had been accepted in *O'Bannon*, the district court proved skeptical. For starters, the district court found that the defendants had failed to provide any coherent definition of "amateurism." Amateurism could not be simply defined as not "pay for play," because NCAA

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11 *In re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019). The compensation caps apply to all Division I student athletes; the plaintiff class comprised men's and women's Division I college basketball players and Division Football Bowl Subdivision ("FBS") football players.

12 *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

13 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) ("*O'Bannon II*").

14 468 U.S. 85 (1984).

15 *O'Bannon II*, 802 F.3d at 1061-69.

16 *Id.* at 1069.

17 *Id.* at 1070.

18 *Id.* at 1072.

19 *Id.* at 1073-74.

20 *Id.* at 1074-75.

21 *Id.* at 1078.

22 *Grant-in-Aid*, 375 F. Supp.3d at 1067-70.

23 *Id.* at 1070. In addition to the NCAA, eleven Division I conferences were named as defendants. See *id.* at 1058 n.1. For convenience, I will sometimes refer to the defendants collectively as "NCAA."

rules allowed certain types of compensation, including in the form of "unrestricted cash," for athletic performance.[24] This mattered, the court held, for two reasons: first, it undercut the claim that existing limitations on pay were driven by any defensible concept of amateurism; second, the fact that consumers "enjoy watching sports played by student-athletes who receive compensation . . . belies Defendants' position that the challenged current restrictions . . . are necessary to preserve consumer demand."[25] At this point – the court having seemingly rejected its most important procompetitive justification – things were looking bleak for the NCAA's efforts to limit compensation.

But the district court pulled back from the brink. While refusing to credit any interest in "amateurism," the Court did credit "the importance to consumer demand of maintaining a distinction between college sports and professional sports."[26] And the court (perhaps grudgingly) accepted that "some of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports."[27] And it found that "the distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries . . . in professional sports."[28] "Rules that prevent unlimited payments . . . therefore, are procompetitive when compared to having no such restrictions."[29] By contrast, "rules that limit or prohibit non-cash education related benefits" – as well as certain other restrictions on compensation – "do not serve to foster consumer demand."[30]

The district court then rejected outright the NCAA's "integration" justification. It found that although "student-athletes benefit from receiving a college education," there was no evidence that the challenged compensation limits promote those benefits or promote academic integration.[31]

The district court then considered plaintiffs' proposed less-restrictive alternatives. It found that eliminating all limits on compensation would not be as effective as current rules in preserving consumer demand; likewise, removing caps on cash or cash-equivalent awards or incentives could "lead to unlimited cash payments" and fail to preserve the pro-competitive benefits of the challenged restrictions.[32] The court concluded that allowing the NCAA to limit grants-in-aid and compensation and benefits unrelated to education, as well as academic or graduation awards and incentives in excess of those currently allowed, while prohibiting other limits on education-related benefits, would be virtually as effective as current rules in preserving consumer demand, without giving rise to significantly increased costs.[33]

The district court's decision leaves the reader with the impression that the court was not far away from throwing out the NCAA's compensation limits altogether.[34] The district court began from the premise that the members of the NCAA are producers of an entertainment product – big-time inter-collegiate football and basketball – for which they need personnel – the scholar-athletes – whom the member schools compete to attract. It's certainly possible that, if the NCAA permitted it, certain NCAA member schools might pay cash compensation to star recruits. On that assumption, there may be student athletes who are missing out on an economic opportunity, albeit a short-term one, as a result of the NCAA's limitations on pay for student-athletes. To be clear, the district court's conclusion that big-time intercollegiate sports is a business is nothing new, one that the district court could hardly revisit in light of the Ninth Circuit's decision in *O'Bannon II*.[35] But, as a result, the scope of permissible justifications for the compensation limits was sharply restricted.

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24 *Id.* at 1071; see *id.* at 1071-74 (describing forms of compensation allowed, including through the Student Assistance Fund, the Academic Enhancement Fund, per diem payments, family travel expenses, cash stipends, post-graduate scholarship, and payment from outside sources, including national Olympics committees).

25 *Id.* at 1074-75; see also *id.* at 1075-77 (rejecting testimony by NCAA's expert and accepting testimony by plaintiffs' expert to the effect that increases in compensation had not led to decreases in consumer demand).

26 *Id.* at 1082.

27 *Id.*

28 *Id.* at 1083.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 1087.

33 *Id.* at 1087-91.

34 This would not have prevented individual conferences from adopting such rules. Today, certain conferences – notably, the Ivy League – have stricter amateurism rules than the NCAA.

35 See 802 F.2d at 1064-65 (rejecting as "not credible" the argument that NCAA compensation rules "are mere 'eligibility rules' that do not regulate any 'commercial activity'").

We learned in Professor Areeda's class that a defendant cannot justify a restraint of trade by arguing that competition undermines a goal unrelated to competition, that is, an argument that competition brings undesirable side-effects is off limits. Thus, in *National Society of Professional Engineers v. United States*,[36] the defendants defended a "canon of ethics" that "prohibit[ed] competitive bidding by its members" because such bidding would risk producing "inferior engineering work endangering the public safety."[37] The district court found that justification categorically inadmissible, and the court of appeals and then the Supreme Court affirmed. Whether a rule of *per se* illegality or the Rule of Reason applies to a particular restraint, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry."[38]

Given that restriction, the NCAA was limited in its ability to argue that its compensation limits were good for the member schools, helping to preserve their character as academic institutions, for the benefit of society as a whole.[39] The most straightforward version of that argument appears to be out of bounds as a doctrinal matter, at least to the extent it is understood as suggesting that unrestrained competition (for student-athletes) is bad for the NCAA's member institutions and society as a whole. To be sure, one can be cynical about whether the members of the National Society of Professional Engineers were primarily concerned about the quality of engineering work (rather than the risk that competition would reduce their compensation); some may be cynical about the motivations of some NCAA member institutions as well. But as the Ninth Circuit explained in *O'Bannon II*, cynicism is not the issue. "Even if the NCAA's concept of amateurism had been perfectly coherent and consistent, the NCAA would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws."[40]

Accordingly, the NCAA, as it had in *O'Bannon*, argued – successfully – that college sports is a distinct product that consumers value, in significant part, because it involves competition among student-athletes; it is not minor league professional sports. That, of course, begs the question whether consumer demand would be affected if the student athletes on the field were being paid salaries or other unrestricted cash compensation. The district court accepted that it would – and, despite apparent misgivings, preserved the core of the NCAA's prohibition on compensation for student athletes. It might be argued that there is something unsatisfying about the court's conclusion that the member schools of the NCAA can agree to limit student-athlete compensation because consumers prefer to watch competitors who are not being paid. Plaintiffs argued that, at least in football and basketball, student-athletes generally lack any alternative, if they want to pursue an athletic career, to playing college sports. Were the NCAA rules not in place, perhaps certain NCAA member institutions (in, say, the SEC) would adopt more liberal rules about compensating football players than (say) the ACC. Fans could choose the product they liked better.

That said, it is harder to imagine such a world in which the teams from the hypothetical SEC and ACC continue to compete, as the teams of one conference become increasingly professionalized. Moreover, perhaps what makes big-time NCAA sports so attractive to fans is the consumer appeal of truly nationwide competition among all of the leading colleges and universities in the country. Preserving the basic distinction between the amateur and the professional may indeed be a sine qua non for college football and basketball to continue to compete among available sports entertainment options. Moreover, if that is so, the district court may well have gone *too* far – if one accepts that the NCAA has to set limits on compensation for big time athletics to continue to attract fans, it is fair to wonder why the district court has the authority under the antitrust laws to adjust those limits – to rule that the NCAA could have adopted the limits constructed by the district court without violating the antitrust laws, but not the (only marginally different) limits that it had put in place.

A legal realist might fairly ask whether the decisions in the student-athlete compensation cases reflect a different calculus than the one that the Rule of Reason would dictate. Amateurism in college sports – though far from a fixed ideal and for all of its imperfections – is part of a tradition dating back more than a century. It would take a bold court to dismiss it as the mere artifact of unjustified cartel behavior. At the same time, the courts may be responsive to arguments that some student athletes – notwithstanding the value of tuition, room, board, and other benefits – are being exploited. Rather than throw out the entire system, the courts may be trying to nudge the NCAA to offer athletes greater protection and to reward them a bit more generously for the value they deliver. That might be a fair accommodation. But that sort of regulatory oversight is not what the antitrust laws – or federal courts – are generally thought to provide.

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36 435 U.S. 679 (1978).

37 *Id.* at 681.

38 *Id.* at 692.

39 The NCAA's argument that compensation limits promote integration of student-athletes seems more limited than a broad argument about institutional character – it emphasizes specifically the experience of the student athletes and their place within the university.

40 802 F.2d at 1073.

For my first two years in college, my roommate was a varsity hockey player; he had a picture on the wall of his older brother, who was an enforcer (or "goon") in the NHL, sitting on Guy LaFleur. My roommate could have played junior hockey in Canada and pursued a professional hockey career as a teen-ager, but instead he pursued an education while playing Division I hockey. He was drafted out of college and was making it as a professional until an injury ended his career. With a degree in engineering, he went into business and is a successful entrepreneur. An academic all-American, he was a genuine scholar-athlete; the NCAA helped to make his career – his careers – possible. The NCAA could credibly argue, in response to an antitrust complaint, that courts should look at the big picture: that the NCAA's system – unique in the world – delivers tremendous benefits to student athletes, fans, and member institutions, and that dismantling one aspect of that system – rather than leaving incremental change to the NCAA – risks removing an element on which the system as a whole depends. That might well be true. But because the lens of antitrust law is limited to the benefits for competition that a challenged restraint delivers, these broader arguments – whatever their intuitive force – remained out of the picture.

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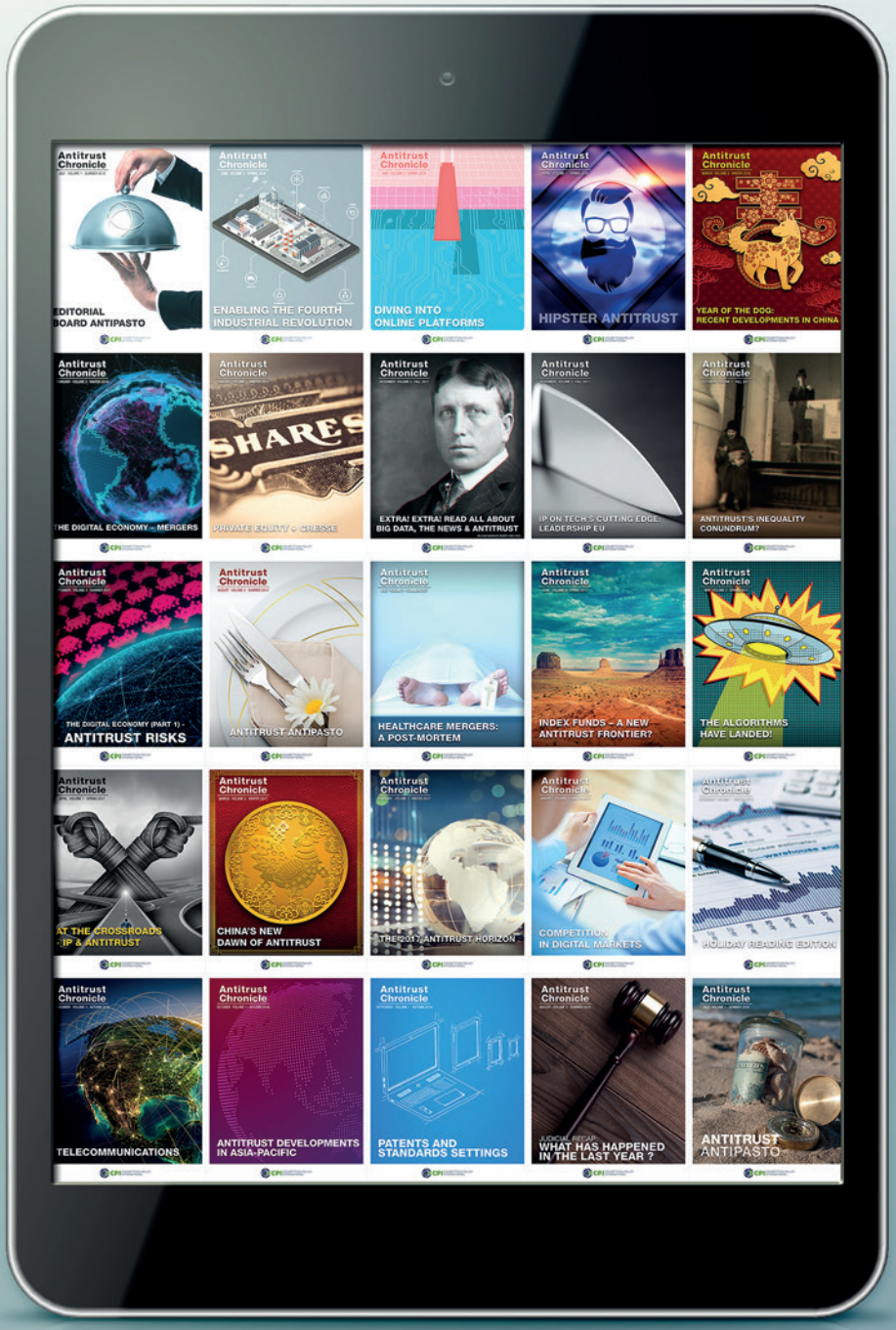


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