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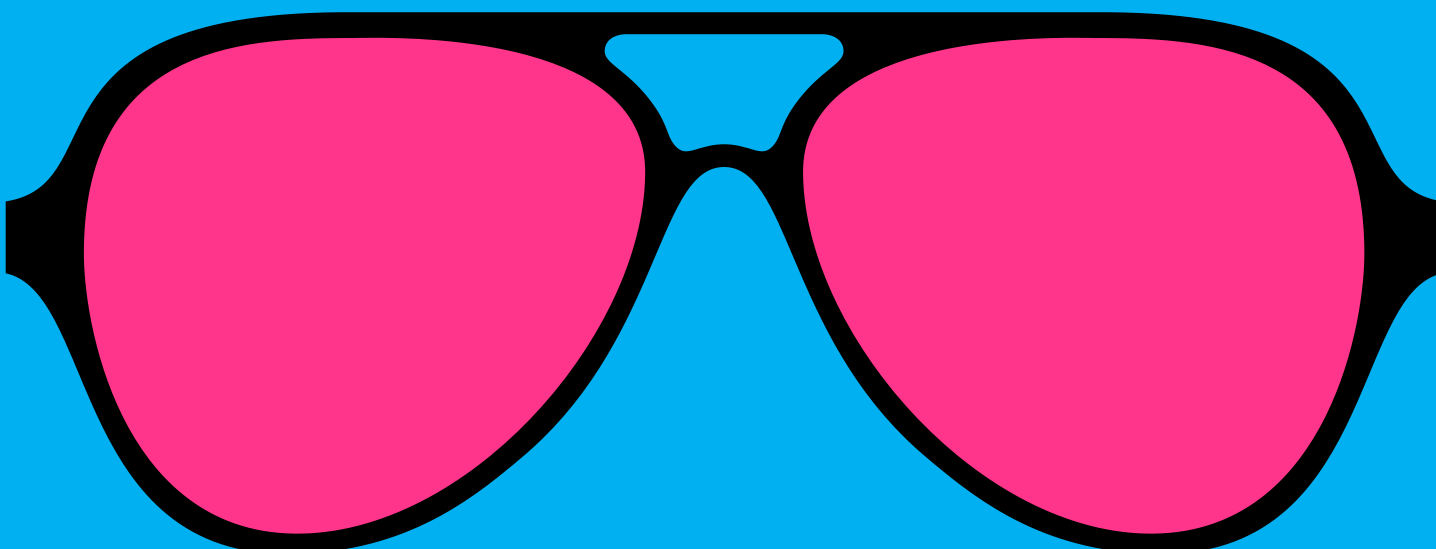

Biden's Antitrust

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Antitrust has been subject to an unusual degree of public attention of late. In the U.S., President Biden has made antitrust enforcement a key pillar of his agenda. New appointees at the Federal level (notably Jonathan Kanter & Lina Khan at the DOJ & FTC, respectively) have pledged to aggressively enforce the antitrust rules, including in areas that have not been a focus for several decades.

The pieces in this Chronicle provide an overview of the Biden administration's ambitions, its achievements so far, and critiques of aspects of new shifting antitrust policy in the U.S.

Eleanor M. Fox provides historical context by setting out the foundational role the U.S. has had in pioneering the very notion of antitrust law. Throughout the 20th Century, U.S. enforcers and courts developed a set of rules that was harsh on price-fixing, powerful firms' exclusionary practices, and mergers that would consolidate power. In recent years, however, certain observers have been critical of developments in U.S. antitrust enforcement. As the article notes, there is a perception (held rightly or wrongly) that the U.S. has been less active than needed in key new sectors of the economy, while Europe (and others) heeded a call to action. The piece sets out the characteristics of U.S. law (and in particular the enforcement of Section 2 of the Sherman Act) that may be responsible for this perceived loss of thought leadership, and points out how the new administration may be able to bring about change.

Karen Hoffman Lent & Michael Sheerin outline how the new leadership teams at the DOJ and FTC have been more than willing to heed the president's call. There is at present a clear ambition to reshape antitrust enforcement practices, and perhaps even the structure of the antitrust laws themselves. Nonetheless, the DOJ and FTC face significant hurdles to doing so. Recent public promises by enforcers will likely test the already taxed resources at the agencies.

Sandeep Vaheesan provides an overview of how the DOJ's enforcement and advocacy have in practice operated in the first year of the current administration. The DOJ has filed several criminal cases against employers for colluding against workers, challenged a merger that would allegedly harm workers, and deemed certain methods of competition unfair. If the agencies build on the DOJ's first steps, there is the potential to, as the author puts it, revive an historical antitrust tradition that seeks to protect consumers, workers, suppliers, and competitors from powerful economic actors, based on bright-line rules (as opposed to a "rule of reason").

Jay Ezrielev & Joseph J. Simons turn to the substance of certain of the laws and guidelines that the new administration is seeking to reshape. Specifically, in January of this year, the FTC and DOJ announced a joint public inquiry aimed at amending the agencies' merger guidelines, which were last revised in 2010. The article offers a number of recommendations relating to the structure, underlying principles, goals, and overall content of any proposed revised set of Guidelines. Notably, the authors argue that preserving and enhancing dynamic competition should be a core goal of merger policy and that any new Guidelines should reflect this principle.

Steven Cernak & Luis Blanquez reflect on the meta-context for the Biden administration's ambitions to reform antitrust laws. As the piece notes, unlike previous administrations, the changes proposed by this administration amount (at least in principle) to a fundamental transformation of antitrust enforcement. As noted above, the administration has attempted to begin this process and has made some steps toward achieving its goal. Nonetheless, any reform to the antitrust *status quo* faces opposition from vested interests and skepticism from a judiciary trained in it. The article ponders the likelihood of whether the administration's changes are truly the beginning of a permanent alteration to the antitrust landscape.

Finally, **Sean P. Sullivan** analyzes the new agency appointees' approach to the key issue of market definition, which is an existential step in almost any antitrust analysis. As the article notes, this is an appropriate target for review but also potentially perilous territory. Even slight missteps in an enforcer's approach market definition could spell potential disaster for broader objectives. To contribute to a solid foundation for any new policy direction, the article identifies seven common myths of market definition and explains how best to avoid them.

The selection of articles in this Chronicle should be of interest to any practitioner, academic or interested party seeking to understand how a recently changed political environment will influence the direction of antitrust law as it evolves into the 21st Century.

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

Sincerely,

CPI Team

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THE DECLINE, FALL, AND RENEWAL OF U.S. LEADERSHIP IN ANTITRUST LAW AND POLICY

By Eleanor M. Fox

The United States has lost its world leadership in antitrust, evidenced by its narrow conception of market power and its abuse. This essay pinpoints exactly where the U.S. has fallen behind and suggests how it can regain footing, this time not as hegemon but sharing the reins with sister jurisdictions.

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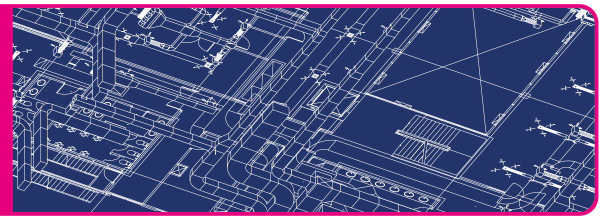

A "REVITALIZATION OF ANTITRUST": TOUGH TALK AND BROAD PROMISES IN THE FIRST YEAR OF THE BIDEN ADMINISTRATION

By Karen Hoffman Lent & Michael Sheerin

President Biden made vigorous antitrust enforcement a key pillar of his agenda during his first year in office, setting the tone himself in July with a wide-ranging executive order that tasked more than a dozen federal agencies with policing alleged anticompetitive conduct across the economy. As expected, new leadership at the DOJ and FTC has been more than willing to heed the president's call, and both Jonathan Kanter & Lina Khan have pledged to aggressively enforce the antitrust laws, including in areas that have been not been a focus of antitrust enforcers for at least several decades. No one can doubt the administration's ambition to reshape antitrust enforcement practices, and perhaps the antitrust laws themselves, but the DOJ and FTC face meaningful hurdles to doing so, including Khan's & Kanter's long and growing list of public promises that could really test the already taxed resources at both agencies.

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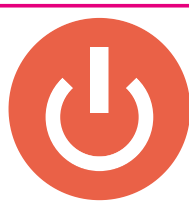

UPDATING THE MERGER GUIDELINES: A DYNAMIC REBOOT

By Jay Ezrielev & Joseph J. Simons

In this article we offer a number of recommendations for updating the merger guidelines. Our comments address six distinct areas: (1) the guidelines' structure, (2) guiding principles, (3) merger enforcement goals, (4) analysis of future competition, (5) innovation, and (6) efficiencies. The main theme of our comments is the importance of dynamic competition in merger analysis. Firms engage in dynamic competition by investing in innovation, product promotion, reputation, and productive capacity. We argue that preserving and enhancing dynamic competition should be a core goal of merger policy and that the new Merger Guidelines should reflect the importance of dynamic competition analysis in merger review.

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BIDEN'S ANTITRUST: THE TRANSFORMATION IS HERE BUT WILL IT LAST?

By Steven Cernak & Luis Blanquez

Like all new administrations, the Biden Administration entered office promising change in antitrust policy. Unlike previous administrations, however, the change this Administration promised was nothing less than the total transformation of antitrust enforcement. In its first year, the Administration has begun that transformation by overhauling enforcement personnel, starting to make policy changes, and promising much more. But will it last? The potential overthrow of the antitrust *status quo* faces opposition from entrenched interests and skepticism from a judiciary trained in it. It will take time to make the new ideas stick — will the new antitrust leaders have that luxury? In this article, we explore the subtle and not-so-subtle changes in antitrust policy made by the Biden Administration in its first year and consider the likelihood that these changes are just the beginning of a drastic and permanent alteration of the antitrust landscape.

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BEGINNINGS OF AN ANTITRUST REVOLUTION?

By Sandeep Vaheesan

President Biden made antitrust law — and reforming it — an important part of his administration's agenda. Nearly nine months after he issued a sweeping Executive Order on Promoting Competition in the American Economy, an assessment of the Department of Justice and Federal Trade Commission's activity reveals some progress. Both federal antitrust agencies have stepped up merger enforcement, including against vertical consolidations, but have done far less on unfair conduct. They have a great deal to do if they want to break with 40 years of policy and practice that have elevated short-term consumer interests above all else and made the open-ended rule of reason the default analytical framework of antitrust. The DOJ's enforcement and advocacy suggest a broader rethinking of antitrust may be afoot in the Biden administration. The DOJ has filed several criminal cases against employers for colluding against workers, challenged a merger that would likely harm workers, and deemed certain methods of competition unfair. If the agencies build on the DOJ's nascent steps, they could revive and expand a historical antitrust tradition that protects consumers, workers, suppliers, and competitors from powerful corporations and applies bright-line rules to mergers and unfair competitive practices.

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SEVEN MYTHS OF MARKET DEFINITION

By Sean P. Sullivan

Roughly a year into control of the federal antitrust agencies, President Biden's antitrust team is turning its attention to policies and enforcement practices. They seem poised to start, as antitrust so often does, with market definition. This is an appropriate target for review but also perilous territory for the administration. Even slight missteps in market definition could spell disaster for broader enforcement objectives. To help policy work start from a solid foundation, this essay identifies seven common myths of market definition and explains how to avoid them.

WHAT'S NEXT?

For May 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Healthcare** ; and (2) **No Poach Agreements**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, 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 April 2022

For June 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **FDI**; and (2) **Intermediaries**.

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.

THE DECLINE, FALL, AND RENEWAL OF U.S. LEADERSHIP IN ANTITRUST LAW AND POLICY

BY ELEANOR M. FOX[1]

1 Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. The author thanks her colleague Harry First for his helpful comments. This essay was written in connection with the 2022 ABA Antitrust Section Spring Meeting panel, Is the United States Falling Behind? The author thanks the panel "team" – Jim Lowe, Joe Coniglio, Vanessa Turner, Andy Gavil & Suyong Kim – for the many engaging discussions on this topic, which greatly informed her own thoughts.

I. INTRODUCTION

The United States was the pioneer in antitrust law. By and through the 1960s and most of the 1970s, it developed a law that was harsh on price-fixing, harsh on powerful firms' exclusionary practices, and harsh on mergers that consolidated power. It was admired world over as the leader in competition law and policy.

Post-World War II, U.S. antitrust was exported to Germany and Japan as the economic law of democracy. In the late 1950s, to anchor peace in Europe, six European nations formed the European Economic Community (later to grow to 28 nations and then to contract to 27), drawing from the U.S. Sherman Act as well as from the German law against restraints.

Over the next many years, scores of nations adopted competition law, taking lessons from both the U.S. and the EU. But by early in the new millennium, the bloom was off the U.S. anti-monopoly rose.

U.S. monopoly law shrank in its reach while public concerns about monopolies grew. People came to fear that very big business – epitomized by Big Tech – was taking control of their lives; that the market system works for the elites, not for "the people"; that the unbridled market facilitates growth of power; that U.S. antitrust just stands by, while Europe (and others) heed a call to action.

What are the characteristics of the U.S. law that may be responsible for its loss of hegemony? This essay will catalog them with particular regard to Section 2 of the Sherman Act, which is exemplary. Can the deficits[2] be cured and U.S. leadership regained? After cataloguing the characteristics, the essay reflects on the current winds of change and suggests a way forward.

II. SALIENT CHARACTERISTICS OF U.S. ANTITRUST LAW, WITH A FOCUS ON UNILATERAL CONDUCT

This section identifies eight characteristics which seem to have played a role in the shift of hegemony from the U.S. to the EU.

1. Limits inherent in Section 2. Section 2 of the Sherman Act has built-in limits by reason of its terminology and coverage. Section 2 of the Sherman Act prohibits "monopolization," implying a higher level of power than EU "abuse of dominance" (prohibited by EU Treaty ("TFEU") Article 102). Moreover, EU Article 102 covers exploitative conduct (such as charging excessive prices) as well as exclusionary acts, while Section 2 covers only exclusionary acts; and EU Article 102 prohibits exclusionary acts that distort competition on the merits, such as leveraging by gatekeeping platforms to secure advantages, while Section 2 prohibits only exclusionary acts that increase market power and harm consumers, typically evidenced by higher prices and lower output.[3]

Meanwhile, especially in new economy markets, we see market players bigger than nations; they appear to have significant power, which may not count as monopoly power under Sherman Act precedents, and many of the documented abuses are either exploitative or distortive of competition on the merits without lessening output. Thus, the Sherman Act has blind spots, and many dominant firm abuses fall within them. At least, it may take an army of lawyers and economists to make the long march uphill to the courts, knowing that they face a real risk of final dismissal when, many years later, they reach the Supreme Court's threshold.

2. Trivialization of Section 2. From the Reagan administration (1981) up to the inauguration of President Biden in 2021 (with some relief during the Clinton and Obama years),[4] the monopolization offense has been trivialized. The establishment antitrust community and the antitrust agencies in many administrations treated the monopoly offense as not an important one,[5] eclipsed by cartels, "the supreme evil of anti-

2 Not all policy thinkers agree that the U.S. characteristics are deficits. Some believe that the U.S. reluctance to condemn unilateral conduct, even by a monopolist, is a hallmark of good policy; policy that contributes to an environment that incubates innovation. See e.g. Joshua D. Wright et al., *Requiem for a Paradox, The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. State L.J. 293 (2019). By that perspective, while the U.S. is not in step with interventionist jurisdictions, it is taking the high road.

3 *Verizon Communications v. Law Offices of Curtis V. Trinko* (Trinko), 540 U.S. 398, footnote 4 (2004).

4 See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

5 E.g. Timothy Muris, The FTC and the Law of Monopolization, 67 Antitrust L.J. 693 (2000); Wright, *supra* note 2.

trust."[6] It is common "wisdom" in U.S. Supreme Court case law that business, when it acts unilaterally and not in combination with competitors, almost always acts in the interests of consumers (after taking what it will off the top – which is "mere" exploitation); that unilateral exclusionary acts against consumer interests are very rare; and that the main effect of antitrust intervention against unilateral acts is to undercut successful firms' incentives to invent and to protect inefficient rivals from hard competition. This is sometimes called "Chicago School antitrust." Its assumptions ignore market realities. It is out of step with the world. Even though post-Chicago scholarship has tried to soften the stridence,[7] this literature has not made a dent in Supreme Court jurisprudence since 1992.[8] The Supreme Court has re-made Section 2 jurisprudence in the libertarian image, and the stance of the Court is not expected to change unless and until Congress changes it.

As a result, Section 2 of the Sherman Act makes it very hard for a plaintiff to prove that a violator has sufficient power to pass the first screen of the monopolization violation – that the firm has monopoly, just at a time when there is a widespread perception in the competition community that firms with significant strategic market power, whether or not they are monopolies or even dominant, are wreaking harm on competition. Likewise, the U.S. Section 2 jurisprudence makes it hard to prove conduct that violates the Sherman Act. Thus, Judge Boasberg dismissed (with right to replead) the Section 2 complaint in FTC v. Facebook for failure of the FTC to sufficiently plead that Facebook was a monopoly,[9] Judge Gonzalez Rogers dismissed the Section 2 complaint of Epic against Apple after trial, finding that Apple is not a monopoly,[10] and Judge Boasberg dismissed as not an antitrust violation the FTC's claim that Facebook cut off an inventive young firm (Vine) doing business on its platform because, even if Facebook is a monopoly, it has the right to choose not to deal.[11]

Outside of the U.S., demoting the unilateral conduct violation is aberrational. In much of the world, exercise of dominant power is *the* problem, often stemming from historic state ownership and state support privileging favored firms, or simply in view of non-functional markets.

3. Goals – even in the space of pro-market goals. In the United States the dominant formulation of goals of antitrust is narrow: consumer welfare in the interests of efficiency. The principal approach is: Let the market work and do not invoke antitrust unless the impugned conduct will reduce output across the whole market and prices will rise.[12] EU and most nations' goals of competition law are broader and more flexible. For example, EU competition law values undistorted market processes and making markets work better.[13] It cares about consumers but not exclusively. This flexibility is helpful to control abuses (as in conduct of Big Tech) where output restriction is not the problem.

4. Efficiency. The U.S. caselaw and policy-speakers privilege the word "efficiency." They use the word in a stylized way that assumes that great latitude for firm action, even monopolists' action, will incentivize the best innovation and best/lowest price production and delivery of products and services consumers want. This thumb-on-the-scale for incumbents has collapsed the scope of U.S. antitrust. And however narrow this approach is when applied to U.S. markets, it is particularly unfitting when applied elsewhere. For example, in countries with weak markets and economies that need to develop competition because they do not yet have it, the aspiration to achieve efficiency of their economy requires more focus on preventing exclusionary acts and easing conditions of entry facing outsiders than on safeguarding dominant firms' freedom to act.

5. Distributional concerns; abuse of a superior bargaining position or position of dependence. The Sherman Act has no room for distributional concerns, and indeed regards such concerns as perverse on grounds that their incorporation would shrink the pie and make everyone worse off. A number of jurisdictions have a more expansive conception of abuse of power. Antitrust laws of Germany, Central and Eastern European nations, Japan and many other Asian nations, and many developing countries prohibit abuse of a superior position or of economic

6 *Trinko*, 540 U.S. at 408.

7 E.g. Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107 (2020); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (summer 2021).

8 See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

9 See *FTC v. Facebook*, Inc., __ F. Supp. 3d __ (D.D.C. June 29, 2021). The FTC filed an amended complaint. The court denied Facebook's motion to dismiss the amended complaint, commenting that although now the FTC had "cleared the pleading bar," "the agency may well face a tall task down the road in proving its allegations. __ F. Supp. 3d __ (D.D.C. Jan. 11, 2022).

10 *Epic Games v. Apple*, __ F. Supp. 3d __ (N.D. Cal. Sept. 10, 2021).

11 *FTC v. Facebook*, *supra*, note 9.

12 See e.g. *Ohio v. American Express Co.*, 585 U.S. __ (2018).

13 See e.g. *Post Danmark II*, Case C-23/14, EU:C:2015:651, paras. 70-72; *Google LLC v. Commission*, Case T-612/17, EU:T:2021:763, appeal pending.

dependence, and their laws would lose legitimacy without it.[14] Abuse of a superior position is not an element of U.S. or EU law, although EU recognizes the right of its member states to occupy this space and many have. U.S. antitrust law and rhetoric oppose it.

6. The not-my-problem problem. U.S. antitrust law and rhetoric oppose consideration of (other) non-competition/market values. When a non-market issue is raised, the general response is either: That is not a problem (e.g. more access for SMEs), or: Antitrust is the wrong tool to solve it. Most other jurisdictions hear out the claims and may consider accommodation. Some of these issues are front and center today, as sustainability, poverty, and massive inequality are recognized as existential problems.[15]

7. Attitude. A tone (by some) of intellectual superiority towards jurisdictions that have chosen a different path[16] has not endeared the U.S. cause. Sometimes jurisdictions are in need of more learning, but sometimes they are expressing different needs based on their nation's terrain or policy choices based on a different appreciation of competitive harm; sometimes both. Nudging the world to see it the U.S. way had some success in the 1990s and '00s but may have run its course.

8. The European advantage. The EU model has certain built-in advantages (as well as disadvantages, not elaborated here), both because of incentives and because of form.

Just after the fall of the Berlin Wall in winter 1989, the Central and Eastern European nations adopted market economies and were poised to adopt competition laws. The United States competed with the EU in visiting the new democracies and trying to "sell" their model. The EU was overwhelmingly successful, of course, for most of the new democracies aspired to be members of the EU. The playing field for the U.S. was hardly level.

The 1990s were a fertile time for adoption of antitrust by other nations as well, and most adopters were more attracted to the EU model. The EU model offered apparently (not necessarily actually) clearer principles of law in view of the more explicit language of the European Treaty and the numerous guidelines and block exemptions. Moreover, greater flexibility on goals, attention to access for SMEs, control of state-conferred privilege, and the administrative system, were all welcomed. U.S. law was seen as opaque. The statutes contain so few words at such a high level of generality that they give no guidance. It takes experts to understand and advise on what the law requires. And, for civil law countries, an adjudicative system was seen as excessively litigious.

Another very different characteristic of EU law could commend it, especially in view of current market realities. Perceived abuses by new economy giants cross not only geographic but also disciplinary lines. EU provides the foundation and institutions for a holistic vision.[17] The EU competition law is linked with the law and policy of the European Union. For example, the European Union has a project for a single digital market. Obligations to complete the single market are enforced by several directorates-general in addition to the competition directorate-general. Sustainability is a value engrained in the Treaty, expressly applicable across disciplines. Privacy regulation is explicit and community-wide. Thus, the EU has a scaffolding structure while U.S. antitrust has a silo structure. While silos have some advantages,[18] scaffolds may be more congenial in an age of cross-border, cross-discipline effects.

III. CHANGE ON THE HORIZON

The first seven characteristics describe U.S. antitrust law as it is, but change is on the horizon.[19] The limits of the Sherman Act and especially Section 2 are widely acknowledged.[20] Indeed those very limits became a flashpoint for advocating change. The neo-Brandeis movement

14 See K&L Gates Hub, The Enforcement of Abuse of Economic Dependence in the EU, 28 Jan. 2021, https://www.klgates.com/The-Enforcement-of-Abuse-of-Economic-Dependence-in-the-EU-1-28-2021, reporting on the growing trend of abuse of economic dependence laws in Europe.

15 Some of the social problems are also market problems. For example, sustainability issues can stem from market failures, and consumers may have preferences for "green" products. The need for inclusive development in developing countries can coincide with good antitrust principles identifying exclusionary restraints.

16 U.S. officials' response to the EU decision to enjoin General Electric's acquisition of Honeywell is an example. See Eleanor Fox & Daniel Crane, Global Issues in Antitrust and Competition Law (2d ed. 2017), p. 394.

17 See Pierre Larouche & Alexandre de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, 12 J. Eur. Competition Law & Practice 542 (2021), point I.A (the architecture of the EU connects the internal market regimes; they are "components of a coherent whole").

18 Purity of analysis, focus; less room for playing political favorites.

19 See William Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (summer 2021).

20 See e.g. C. Paul Rogers III, The Incredible Shrinking Antitrust Law and the Antitrust Gap, 52 U. Louisville L. Rev. 67 (2013).

arose in the late 2010s.[21] Neo-Brandeisians wage a full-throated attack on conservative antitrust.[22] They would call power to account, break up big business, pave the way for a thriving community of small businesses, provide a level playing field for firms without power, and include as targets of the antitrust crusade a variety of social harms attributed to big business power and influence. All who listened to campaign addresses by 2020 Democratic Presidential candidates Elizabeth Warren and Bernie Sanders heard the concerns of neo-Brandeisians well articulated.

Antitrust had at last returned to popular discourse. Joe Biden won the Presidential election and put prominent neo-Brandeisians into key government positions. He issued an Executive Order requiring that competition and fair distribution of wealth and opportunity be given sway across all agencies. He handed the reins of the Federal Trade Commission to Lina Khan, chairperson, with the implicit charge to transform antitrust. Meanwhile, even before the 2020 elections, Congress held hearings, memorialized the findings, and introduced bills, many bipartisan, to facilitate aggressive antitrust enforcement on subjects ranging from mergers, exclusionary practices, Big Tech platforms' self-preferencing, interoperability and data portability, access to platforms and to data, and antitrust standards in general.

Will neo-Brandeisian antitrust cure the U.S. deficiencies and restore U.S. antitrust leadership in the world? These are complicated questions. There is some concern, powered by one interpretation, that the neo-Brandeisian school goes wide of the mark and gives too little respect to markets and consumer-serving qualities of business strategies. This may be an unfounded fear for there is much reform to be done within a paradigm that unleashes markets and respects consumer interests, and the large preponderance of the Biden antitrust agencies' initiatives thus far fit this category.[23] The new heads of the U.S. antitrust agencies are likely to have congenial consultations with antitrust officials of the world likewise concerned with new forms of power and their control, but, absent dramatic legislation that fundamentally changes the direction of the U.S. law, the traction of their policies is uncertain.

IV. A WAY FORWARD

Reflection on the identified characteristics of U.S. antitrust suggests a diagnosis and way forward. As background, there are two salient points. First, the U.S. may have been the hegemon when U.S. antitrust was the only significant competition law in the world and when all other jurisdictions were neophytes, but as soon as the EU and other jurisdictions became well-grounded in antitrust, it was time for the U.S. to move over and share the space. Second, antitrust problems are increasingly cross-national and global, and the antitrust domain is increasingly confronted with existential social dilemmas as to which business power and even the antitrust laws[24] are considered part of the problem. There is need for community-wide thinking; for dialogue on a global conception of antitrust, how it does and should contain market power and its abuses, and how it fits into the political economy ecosystem.

The U.S. is out of step with the world in its appreciation of what is unilateral power that should be controlled by antitrust, and what is an abuse of that power. The U.S. is also lagging behind in the world conversation on social values (e.g. sustainability, inequality, fairness) and how to absorb them into or coordinate them with antitrust analysis. This second difference is less critical than the first because concepts of power and abuse are at the core of antitrust. Nonetheless, nudging the U.S. antitrust community to listen, engage, and contribute to the conversation (beyond the Biden administration, which does contribute) is an important task.

U.S. leadership can be restored, but not in terms of a sole leader. The U.S. can be rehabilitated as a co-leader. This implies common understanding and more than one model. Germany, the Netherlands, the UK, Australia, South Korea, and South Africa, in their separate ways, can offer models that incorporate particular social values (environment, poverty, inequality, SMEs, inclusion). The EU, as a common market, can advance leadership on cross-border, cross-discipline, holistic solutions. The United States can extoll virtues of market-only antitrust, if it chooses, and continue to share expertise in cartel prosecution and horizontal merger analysis. But co-leadership would be facilitated by much more harmony at the core of antitrust analysis.

21 See e.g. Lina Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

22 See Kovacic, *supra* note 19.

23 The FTC's withdrawal of the 2015 policy statement confining FTC enforcement to a narrow consumer welfare standard [July 1, 2021] fits this category. The FTC Act's prohibition of unfair methods of competition should surely reach farther than Sherman Act consumer welfare. The current paradigm – Do not intervene unless output or aggregate consumer surplus is lessened -- is outmoded and indeed not applied except by the most conservative wing of the antitrust community of lawyers and economists who would never have voted for an antitrust statute beyond a law against cartels. "Consumer welfare" can be applied more copiously, but the words have a lot of baggage as well as ambiguity and they do suggest a narrower interpretation than, for example, making markets work for the people.

24 For example, do antitrust rules and principles sometimes stand in the way of progressive agreements to rid the atmosphere of greenhouse gasses?

How can we get the U.S. back in step with the world in appreciating power and abuse? The answer involves a background insight, which is especially applicable to common law countries. Antitrust law formation – in the shadow of very general proscriptive language – best evolves case-by-case, fitting the law to the facts. The problem in the U.S. is: the Supreme Court has crafted a reactionary law. This will not change without legislation because the Supreme Court's ideological balance will not change – at least not for the duration of many of our lifetimes, in view of the absence of judicial term limits. It is hard to mandate the needed change by legislation without interfering with the common law fact/law process.[25] There is, however, a promising way – legislative repeal of the major Supreme Court path-changing decisions since 1993. This means repeal of *Trinko*,[26] *linkLine*,[27] *Brooke Group*,[28] *Ohio v. American Express*,[29] and *California Dental Association*,[30] and explicit return to the line of *Kodak ITS*,[31] *Aspen Skiing*,[32] and related opinions[33] which together comprise a coherent narrative of power and its abuse.

As a needed supplement: Much abusive conduct by dominant firms (in particular, Big Tech/Big Data) is well documented but doubtfully prohibited by the current toothless Sherman Act Section 2.[34] Application of the restored, realistic jurisprudence would condemn most of these abuses, but litigation to catch up with reform of the law will take too long. Recognizing the problem of inordinately slow case-by-case adjudication, as well as shortfalls in coverage of traditional antitrust, several jurisdictions have developed lists of conduct by the Big Tech platforms that should not be tolerated, and they are introducing ex ante prohibitions side-by-side ex post antitrust enforcement.[35] The U.S. should take a page from the playbooks of the EU[36] and the UK,[37] and modify the lists and standards as necessary to allow justifications as necessary to respect different business models; and the FTC should do rulemaking with a view to proscribing the designated offensive conduct.[38] Congress would need to legislate to confirm the FTC's antitrust rulemaking power and to grant it the power to penalize.

These changes will bring the U.S. back into step with the world at the core of antitrust and allow the U.S. to retake reins, albeit this time jointly with co-equal sister jurisdictions.

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25 See all pending antitrust bills, including Senator Klobuchar's omnibus bill, The Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Congress (2021-22). The drafters struggle to find language to proscribe a new standard.

26 *Supra* note 5.

27 *Pacific Bell Telephone Co. v. linkLine Communications*, 556 U.S. 438 (2009).

28 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

29 *Supra* note 12.

30 *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

31 *Supra* note 8.

32 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

33 E.g. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), aff'd, 347 U.S. 521 (1954). To return to the narrative before the Court's sharp turn to the right, and to anchor the law, the legislature should embed the dissenting opinion of Justice Breyer joined by Justices Ginsburg, Sotomayor and Kagan in *Ohio v. American Express*, and the dissenting and concurring opinion of Justice Breyer joined by Justices Stevens, Kennedy and Ginsburg in *California Dental Association*. With repeal of *Trinko*, the legislature should embed the opinion of the Second Circuit Court of Appeals, 294 F.3d 307 (2d Cir. 2002), which the Supreme Court reversed.

34 See Eleanor Fox, Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide, 98 Neb. L. Rev. 297 (2019-2020).

35 See Larouche & de Streel, *supra* note 17.

36 See Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15.12.2020, COM(2020) 842 final, Articles 5 and 6, subject to amendments pending adoption.

37 See UK Digital Markets Unit, https://www.gov.uk/government/collections/digital-markets-unit.

38 Proscriptions would shift the burden of proof of harm and allow justifications in appropriate cases. See Eleanor Fox and Harry First, We Need Rules to Rein in Big Tech, CPI Antitrust Chronicle October 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724595. Compare the UK's bespoke treatment of platforms and their conduct within the new Digital Markets Unit of the Competition and Markets Authority.

A "REVITALIZATION OF ANTITRUST": TOUGH TALK AND BROAD PROMISES IN THE FIRST YEAR OF THE BIDEN ADMINISTRATION

BY KAREN HOFFMAN LENT & MICHAEL SHEERIN[1]

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President Biden made antitrust enforcement a central focus of his first year in office to an extent and in ways that are unprecedented in modern U.S. history. While recent presidents typically have left antitrust enforcement policy to their appointees at the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), Biden played a central role in setting forth his administration's antitrust agenda. From his sweeping executive order in July to the promises made by his appointed leadership at the FTC and DOJ, the administration has been clear that it intends to fundamentally rethink — if not rewrite — 40 years of broadly accepted antitrust enforcement principles. This effort also comes at a time when there is some bipartisan support in Congress for new legislation to help expand and update existing laws that some view as unable to keep up with the competitive dynamics of the modern economy. If passed, these pending bills could dramatically alter the antitrust landscape and tighten the restrictions that apply to many companies doing business with U.S. customers.

While there is certainly disagreement regarding the merit of this more progressive approach to antitrust enforcement, the administration's ambition to push the boundaries of antitrust enforcement is not in doubt. FTC Chair Lina Khan & Assistant Attorney General of the DOJ Jonathan Kanter have not shied away from setting forth a long and growing list of antitrust enforcement priorities, including some areas that have been outside the mainstream of antitrust enforcement for decades. Despite the administration's frequent saber-rattling, questions remain as to exactly how far the agencies can go in achieving the administration's lofty goals in light of meaningful procedural and legal impediments. To be sure, Khan & Kanter have already implemented procedural and policy changes likely to have some meaningful chilling effect on certain conduct (particularly mergers), but these incremental changes are hardly the tectonic shifts that have been promised. In fact, notwithstanding the aggressive rhetoric, the agencies' enforcement actions in 2021 were generally based on antitrust theories well within the bounds of the past several decades of antitrust enforcement. Finally, it is worth wondering at this stage whether such a broad agenda may itself be a potential hurdle to achieving meaningful and lasting change in light of significant resource constraints at the agencies. This article takes stock of the promises made, the actions taken and the potential roadblocks ahead.

I. "A REVITALIZATION OF ANTITRUST"

Then-candidate Biden made few specific promises on the campaign trail with respect to antitrust. In fact, it was one of the few issues where there was some consensus between the candidates, as the Trump administration had largely broken with republican orthodoxy and itself pursued an aggressive enforcement agenda compared to recent administrations. After relative silence on antitrust issues during his first few months in office, Biden made clear his views in July when he issued his sweeping Executive Order on Promoting Competition in the American Economy, surprising many in terms of its boldness and specificity. While Biden endorsed the U.S. capitalist system as "the world's greatest force for prosperity and growth" in prepared remarks, the Order paints a picture of an economy devoid of meaningful competition and in which "decades of industry consolidation" had led to a range of economic harm, including higher prices, lower wages and stifled innovation. And the only remedy to these ills, according to Biden, is a "whole-of-government" approach that requires more than a dozen federal agencies to "vigorously" enforce the antitrust laws to restore competition.

The Order is highly specific in this respect, tasking federal agencies (led by the DOJ and FTC) with carrying out 72 separate initiatives designed "to promptly tackle some of the most pressing competition problems across our economy," ranging from the very broad (e.g. finding ways to lowering high prescription drug prices) to the more prescriptive (e.g. banning the use of non-compete clauses in employment agreements). The Order also targets a multitude of industries for particularly close scrutiny, including healthcare, transportation, agriculture, internet service, technology, and banking and consumer finance, while also generally placing heavy emphasis on promoting and protecting competition in labor markets.

The Order was hardly the President's last word on the issue, as Biden has since publicly leveled allegations of anticompetitive conduct at several other industries, including "Big Meat" processors and "Big Oil" producers. More broadly, Biden has alleged that unspecified anticompetitive conduct is a root cause of two of his most persistent political bogeymen — supply chain disruptions and inflation — and he has directed the FTC and DOJ to investigate suspected wrongdoing, leading the FTC to launch a broad study into supply chain disruptions in November and the DOJ to announce in February that it was launching its own cooperative effort with foreign antitrust regulators to prosecute companies that "exploit supply chain disruptions."

While the FTC and DOJ remain the fulcrum of Biden's antitrust enforcement strategy, one tangible impact of the Order is the extent to which Biden dragged other agencies into the antitrust fray. For example, in September, the Federal Aviation Administration announced plans to award sixteen gates at Newark airport to low-cost-carriers in an effort to boost competition. In January, the Department of Agriculture joined with the DOJ in a public pledge to seek more aggressive antitrust enforcement to protect farmers, ranchers, and other agricultural producers and growers from unfair and anticompetitive practices. And in February, the Department of Treasury issued a report calling for greater antitrust enforcement in the alcoholic beverage industry just days before the Department of Defense issued a similar report calling for aggressive action against pervasive consolidation between defense contractors and others in the private sector on which the DOD relies. While these actions can largely be painted as symbolic unless they result in meaningful enforcement changes, they nevertheless make clear that antitrust enforcement is an administration-wide priority and underscore the “revitalization of antitrust” that Biden’s chief antitrust advisor and architect of the Order, Tim Wu, has promised.

II. PUTTING POLICIES INTO ACTION: THE VANGUARD OF THE NEO-BRANDEISIANS

The statements coming out of the White House and other agencies make good headlines but lack teeth absent capable and willing enforcers at the DOJ and FTC to carry them out. For that reason, Biden’s most impactful moves in his first year were his decisions to nominate Lina Khan to Chair the FTC & Jonathan Kanter to lead the Antitrust Division of the DOJ. While they have markedly different backgrounds and experience — Khan is a “bonafide rockstar and visionary” of the progressive antitrust movement (to quote Kanter), an academic and the youngest FTC chair in history, while Kanter is a seasoned antitrust practitioner who has spent most of his career defending many of the large corporations he is now tasked with policing — they share a clear-eyed commitment to carry out Biden’s antitrust vision, as well as realize their own respective long-held policy goals of dramatically changing U.S. antitrust enforcement practices.

Only eight months on the job, Khan has not disappointed those who pushed for her nomination, as all of her actions to date are imbued with her uncompromising belief that the fundamental principles of antitrust enforcement for the past 40 years have been wrong. Consistent with the President’s own rhetoric, Khan has not been shy about setting a broad agenda for the FTC and making bold promises about the future of antitrust enforcement. As Chair, she has called for aggressive antitrust enforcement involving a wide array of industries and practices. In addition, she has taken steps to reset the baseline of the FTC’s enforcement principles by withdrawing a 2016 policy statement that committed the agency to applying the consumer welfare standard in its enforcement of Section 5 of the FTC Act, withdrawing the FTC from supporting the 2020 Vertical Merger Guidelines and announcing a joint initiative with the DOJ to revise the 2010 Horizontal Merger Guidelines. She also has responded to some of Biden’s more specific directives, including the previously mentioned supply chain study targeting major retailers, wholesalers and consumer goods manufacturers, and she has pledged to reinvigorate the FTC’s rulemaking authority.

But her most impactful contributions to date have been a series of policy and procedural changes to key aspects of the FTC’s enforcement approach. Among other things, in a series of 3-2 party-line votes at the Commission level, she has made it easier for Staff to open investigations, closed perceived loopholes in the Hart-Scott-Rodino Act reporting requirements that determine what mergers must be reported to the DOJ and FTC, brought back the use of prior approval requirements in merger consents, continued to suspend early termination of HSR waiting periods, and began issuing “warning letters” to companies whose merger activity has been placed on a watch list of sorts. Khan also is widely understood to have encouraged Staff to open more merger investigations, issue more Second Requests, and take a more expansive view on potential theories of anticompetitive harm, including with respect to labor, social justice, and environmental issues. Anecdotally, there also are signs that FTC Staff have been instructed to be less cooperative and transparent with parties that are subject to investigation. In addition, she has been clear that she believes the FTC should litigate more and settle less. This all amounts to shrewd maneuvering by Khan to make antitrust investigations, and particularly merger reviews, more onerous, costly, and time consuming, with the clear goal of creating a deterrent effect.

Only confirmed by the Senate in November, Kanter has not had long to make his impact on the DOJ in any formal way; but despite expectations by some that he would pursue a more moderate path than Khan, Kanter’s public statements thus far suggest close ideological alignment. In fact, since being confirmed, Kanter has heaped praise on his FTC counterpart and the two have pledged close cooperation and coordination between the agencies. On the policy front, Kanter has been a longtime advocate for more aggressive enforcement against single firm conduct and has pledged to make that a priority. He similarly has focused on the importance of protecting competition in labor markets, touting the DOJ’s recent spate of criminal indictments in that area. In addition, he has joined Khan in accepting Biden’s challenge to revisit the 2010 Horizontal Merger Guidelines and similarly has questioned some of the underpinnings of the past several decades of antitrust enforcement (although he has not gone as far as Khan in saying the consumer welfare standard should be abandoned). He also surprised many when he recently echoed Khan’s preference for litigation over settlement in merger cases, actually going further than Khan in saying that settlements “fail to move the law forward” and would be “the exception, not the rule” in the future. Early returns also suggest the DOJ is taking other pages from the FTC’s playbook, including by opening more merger investigations, considering more expansive theories of harm and overall seeking to use process and timing to stymy merger activity.

Khan & Kanter moved quickly in 2021 to implement changes at their agencies that signal more aggressive enforcement coming. And while the practical impact of these procedural maneuverings at the FTC and DOJ cannot be dismissed, these are incremental and potentially ephemeral changes that fall far short of the expansive promises that have been made. Indeed, as Republican FTC Commissioner Wilson has pointed out, the fact is that antitrust enforcement was measurably down in 2021 compared to prior years. Moreover, the cases that were brought have been on tried and true theories of antitrust harm that fall well within the antitrust jurisprudence that Khan & Kanter have vowed to change, and the arguably bolder cases, such as the FTC's suit against Facebook, were inherited from the previous administration. We expect the agencies to take bolder steps in 2022 but where and how far they go are very much in question.

III. WHAT'S ON THE MENU FOR 2022?

Taking the administration at its word, the agencies have a shockingly long "To Do" list.

First, the agencies start the year with a reasonably full plate of matters that carried over from 2021, including a number of significant merger investigations and pending litigations (including FTC administrative trials), several high-profile ongoing conduct investigations and litigations in the big tech space, parallel FTC and DOJ investigations into supply chain issues, and public commitments to rewrite the Horizontal Merger Guidelines by the end of the year.

Second, antitrust leadership (including the President) have collectively pledged to "focus" on alleged anticompetitive practices in a long list of targeted industries, including healthcare (hospitals, pharmaceuticals, PBMs, and medical devices), transportation, agriculture, internet service, technology, banking and consumer finance, grocery stores, oil, meat processing, beer, and defense. After taking such a public stance, the White House likely will be expecting near-term results across the board.

Third, rather than prioritize any specific category of harm or alleged conduct, Khan & Kanter have repeatedly promised to expand the boundaries of antitrust enforcement beyond (but not to the exclusion of) traditional focus areas of mergers and illegal coordinated conduct. Both also have pledged to devote greater resources to investigate a wide variety of topics, including self-preferencing by online platforms, monopolization, monopsony issues, vertical agreements (mergers and otherwise) and anticompetitive practices in labor markets. This is on top of President Biden's broad mandate that they investigate the role of anticompetitive conduct in ongoing inflation and supply chain issues across the entire U.S. economy.

Tackling all of these issues in any meaningful way during the course of an administration would require a Herculean effort. Tackling them in a year would be impossible, particularly when both Khan & Kanter have acknowledged that their agencies are already underwater trying to deal with a "tidal wave" of merger filings. What's more, Khan's & Kanter's own policies are just as likely to exacerbate these resource constraints as they are to achieve meaningful enforcement victories. Policies that push Staff to open more investigations with broader theories of harm and less willingness to cooperate with parties' counsel necessarily will result in a greater number of broad investigations that require substantial staffing. In addition, a blanket refusal to settle merger cases deprives both the parties and Staff of one of the most expeditious (and long-accepted) means to resolve legitimate anticompetitive concerns. Moreover, while the agencies' clear intent is to deter merger activity by making the HSR review process more painful, merging parties and their counsel already are responding in kind to the agencies' tough tactics, including by refusing to accommodate Staff's requests for more time to investigate and utilizing their own litigation strategies to put the agencies to the test.

Rather than enable Staff to conduct broader reviews, the agencies could find themselves limited to the relatively bare bones review timelines afforded by the HSR Act, which would make it challenging to reach informed decisions, let alone be prepared to litigate against defendants that could be prepared to pursue more aggressive litigation strategies. And even were that not the case, Khan's & Kanter's strong preference for litigation could prove very challenging for agencies that historically have struggled to staff more than 2-3 litigations at any one time. Finally, these resource constraints have been exacerbated by substantial Staff departures from the agencies over the past year (particularly the FTC), including of experienced attorneys in leadership positions and with litigation experience. The procedural changes at the agencies may be designed to stem the tide of merger filings, but they are at least as likely to instead flood the agencies with litigation that they are not equipped to handle.

In the near-term, staffing constraints are among the most significant roadblocks to the administration's sweeping agenda, but they are not the only factors. Along with requiring substantial human capital, litigation is also expensive. Both Khan & Kanter have cited the need for more funding; the prospects for that seem murky, particularly for the FTC, which has drawn the ire of some prominent Republicans in Congress who have gone so far as to introduce legislation to strip the FTC of its antitrust enforcement authority. In addition, Khan will at least for the immediate future have to contend with a 2-2 partisan split at the Commissioner level that will limit her ability to take bold action. For example, in February, a Khan-supported proposed study into PBMs was scuttled when the Republican Commissioners voted against the measure. Unlike Kanter, who benefits from more unilateral authority, Khan likely will need to wait for a new Commissioner to be confirmed before she can continue her agency overhaul.

And hovering over it all is 40 years of case law that Khan & Kanter have admitted is generally unfavorable to their expansive interpretation of the antitrust laws, including by being rooted in the consumer welfare standard that Khan in particular eschews. This is not to suggest that the FTC and DOJ will be afraid to push the envelope, but they will have to be strategic in what novel theories they pursue and how they pursue them. They may claim not to be concerned with losing in court, but even Khan & Kanter must harbor some doubts about pursuing litigation that could prove fatal to their policy goals.

IV. CONCLUSION

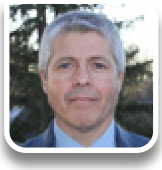
The tough talk will no doubt continue in Biden's second year, and the business community and antitrust practitioners should not doubt Khan's & Kanter's willingness to take bold action at their own peril. That said, absent new legislation and/or substantial additional funding for the agencies, we are unlikely to see the type of sweeping systematic changes that have been promised due to several significant impediments. Instead, we can expect the DOJ and FTC to continue to find ways to use the tools at their disposal to chill merger activity and other alleged anticompetitive conduct, without much clarity as to how effective that will prove to be in the long term. In addition, notwithstanding public promises to focus on essentially everything, we also expect the agencies will continue to prioritize their antitrust enforcement efforts in certain industries (e.g. big tech), particularly where they may see an opportunity to score a significant victory in an ongoing litigation.

We also fully expect that the FTC and DOJ will seek to expand the scope of their enforcement lens, including by testing less-established theories of harm. This is particularly true with respect to labor competition, as we expect the DOJ to bring more criminal indictments for anticompetitive labor practices and we have already seen Khan try to add a labor theory of harm to a recent FTC challenge to a hospital merger. Other more novel theories may appear as add-ons to merger challenges or other cases rooted in more widely accepted theories of harm (e.g. the DOJ's recent challenge to a publishing merger on quasi-monopsony and labor grounds), but we do not expect a fundamental realignment of the antitrust case law in the coming year.

Teddy Roosevelt, widely touted as the country's first trustbusting president, famously said "speak softly and carry a big stick; you will go far." President Biden and his antitrust lieutenants have taken a decidedly different tack, but we'll have to wait and see just how far it will take them.

UPDATING THE MERGER GUIDELINES: A DYNAMIC REBOOT

BY JAY EZRIELEV & JOSEPH J. SIMONS[1]



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I. INTRODUCTION

In this article we offer a number of recommendations for updating the merger guidelines. The Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (the "Agencies") have issued a Request for Information on Merger Enforcement (the "RFI"), seeking "public comment on how the agencies can modernize enforcement of the antitrust laws regarding mergers."[2] In the RFI, the Agencies seek information on how "new learning related to firm and market behavior" should inform the merger guidelines.[3] The Agencies' inquiry is aimed at "modernizing merger guidelines to better detect and prevent anticompetitive deals."[4] Our comments address six distinct areas: (1) the guidelines' structure, (2) guiding principles, (3) merger enforcement goals, (4) analysis of future competition, (5) innovation, and (6) efficiencies.

The main theme of our comments is the importance of dynamic competition in merger analysis. Dynamic competition may take several forms. Firms engage in dynamic competition by investing in innovation, product promotion, reputation, and productive capacity. We argue that preserving and enhancing dynamic competition should be a core goal of merger policy and that the new Merger Guidelines should reflect the importance of dynamic competition analysis in merger review.

II. THE GUIDELINES' STRUCTURE

The new Merger Guidelines should combine horizontal and vertical merger theories into a single comprehensive document. There is significant overlap between the current Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, and combining both the horizontal and vertical theories of harm into one document would provide a more efficient organization of the Agencies' merger enforcement policies. We recommend adding a "Non-Horizontal Effects" section that would incorporate the theories discussed in the 2020 Vertical Merger Guidelines.

We also recommend adding two more sections to the new Merger Guidelines: "Future Competition" and "Innovation." The Future Competition section would focus on loss of future competition effects. The Innovation section would focus on innovation effects. Moving the current Innovation subsection from the Unilateral Effects section to be its own standalone section would improve the organization of the guidelines. The current Unilateral Effects section focuses on static competition, whereas the new Innovation section would cover dynamic competition. We also recommend adding a "Multisided Platforms" subsection under the Unilateral Effects section to address the unique issues raised by multisided platforms.[5] Other than these proposed changes to the structure of the guidelines, the new Merger Guidelines should retain the current structure of the Horizontal Merger Guidelines.

III. GUIDING PRINCIPLES

The overarching guiding principles for the new Merger Guidelines should be accuracy and transparency. The new Merger Guidelines should accurately describe current enforcement policies. The Guidelines should not include analytical approaches or policies that the Agencies would like to pursue in the future but are not currently pursuing. It may be important to have experience with specific policies before including them in the guidelines. Experience with actual enforcement may suggest the need to modify some aspects of the policy. Moreover, successful Agency experience with a new policy or technique for at least some significant period of time would likely make the new approach more attractive to the courts. We offer several recommendations, in response to the RFI, on how merger enforcement policies should change. However, we suggest that the Agencies gain some experience with the new policies before incorporating them in the new Merger Guidelines.

The new Merger Guidelines should stay within the confines of antitrust law. The Agencies may exercise prosecutorial discretion in enforcing merger cases, but the new Merger Guidelines should not include policies that exceed the Agencies' mandate of enforcing antitrust laws. Incorporating such policies in the new Merger Guidelines would make the guidelines a less credible authority for the courts.

2 REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (January 18, 2022) at 1, https://www.justice.gov/opa/press-release/file/1463566/download.

3 *Id.* at 2.

4 JUSTICE DEPARTMENT AND FEDERAL TRADE COMMISSION SEEK TO STRENGTHEN ENFORCEMENT AGAINST ILLEGAL MERGERS (January 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

5 We defer the discussion of merger enforcement in the context of multisided platforms until a later time.

IV. MERGER ENFORCEMENT GOALS

The new Merger Guidelines should make clear that the goals of merger enforcement include protecting and enhancing dynamic competition. Dynamic competition analysis examines how firms compete over multiple periods. Firms engage in dynamic competition by investing in innovation, production capacity, reputation, and product promotion.[6] Dynamic competition (and innovation competition in particular) is a significant driver of economic growth.[7] The new Merger Guidelines should explicitly recognize the importance of dynamic competition for competition policy.

Early industrial organization research used static (single period) analytical frameworks to study competition.[8] Such frameworks do not allow for firm interactions that link current actions and future outcomes. Static models examine competition that occurs within a single period, but they do not consider the effects of competition across time periods. The economics literature on industrial organization has made significant advances in analyzing dynamic competition effects.[9]

The current Horizontal Merger Guidelines largely focus on static competition effects.[10] For example, the Entry section of the current Horizontal Merger Guidelines focuses on whether post-merger entry would be "timely, likely, and sufficient" to deter or counteract harmful static competitive effects (such as short-term price increases).[11] Indeed, the current Horizontal Merger Guidelines ("HMG") state that: "[t]he unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[12] This statement of the "unifying theme" suggests a static focus. Competition to acquire market power (through investment in innovation, production capacity, reputation, and product promotion) is an inherent element of dynamic competition.[13]

Mergers may also enhance merging firms' market power by encouraging investment or through realization of efficiencies. Such merger effects should not be condemned as anticompetitive.[14] Seeking to acquire market power is not anathema to antitrust law. However, if a merger enhances market power by eliminating competition or weakening rivals, such an acquisition of market power may be anticompetitive.

6 Our usage of the term "product" encompasses both products and services.

7 One need look no further than the pharmaceutical companies' response to the COVID-19 pandemic to appreciate the importance of innovation competition to the U.S. economy.

8 See Robert S. Gibbons, Game Theory for Applied Economists 1-53 (1992).

9 See, for example, David Besanko, Ulrich Doraszelski, & Yaroslav Kryukov, *How Efficient Is Dynamic Competition? The Case of Price as Investment*, 109 Am. Econ. Rev. 3339 (2019); C. Lanier Benkard, Przemyslaw Jeziorski, & Gabriel Y. Weintraub, *Oblivious Equilibrium for Concentrated Industries*, 46 RAND J. Econ. 671 (2015); Richard Ericson & Ariel Pakes, *Markov-Perfect Industry Dynamics: A Framework for Empirical Work*, 62 Rev. Econ. Stud. 53 (1995); Gautam Gowrisankaran, *A Dynamic Model of Endogenous Horizontal Mergers*, 30 RAND J. ECON. 56 (1999); Ariel Pakes & Paul G. McGuire, *Stochastic Approximation for Dynamic Analysis: Markov Perfect Equilibrium and the 'Curse' of Dimensionality*, 69 ECONOMETRICA 1261 (2001); Gautam Gowrisankaran & Robert J. Town, *Dynamic Equilibrium in the Hospital Industry*, 6 J. Econ. Manag. Strategy 45 (1997); and Patrick Bajari, C. Lanier Benkard, & Jonathan Levin, *Estimating Dynamic Models of Imperfect Competition*, 75 ECONOMETRICA 1331 (2007); David Besanko, Ulrich Doraszelski, Yaroslav Kryukov, & Mark Satterthwaite, *Learning-by-Doing, Organizational Forgetting, and Industry Dynamics*, 78 ECONOMETRICA 453 (2010). Also, see discussion in Jay Ezrielev & Janusz A. Ordover, *The 2010 Horizontal Merger Guidelines: A Static Compass in a Dynamic World?*, ANTITRUST SOURCE, Oct. 2010.

10 Although there is some discussion of dynamic competition effects in the current Horizontal Merger Guidelines, the main focus is on static competition effects.

11 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 9 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 ("A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.").

12 HMG § 1.

13 For example, investing in a brand may increase a firm's short-term pricing power but may also spur dynamic competition among firms.

14 See CONGLOMERATE EFFECTS OF MERGERS – NOTE BY THE UNITED STATES, OECD Competition Committee Meeting at 4-5 (June 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf ("It is now recognized that efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally 'good deal' suffer loss of sales or market share. Mergers are one means by which firms can improve their ability to compete. It would be illogical, then, to prohibit mergers because they facilitate efficiency or innovation in production. Unless a merger creates or enhances market power or facilitates its exercise through the elimination of competition—in which case it is prohibited under Section 7—it will not harm, and more likely will benefit, consumers." (emphasis in original, footnote omitted)).

Dynamic competition analysis has long been an integral element of antitrust, including merger enforcement.[15] Many recent merger challenges and investigations have focused on innovation effects (which are dynamic competition effects).[16] For example, the DOJ's recent challenge of the proposed Visa/Plaid transaction alleged that: "[i]f the acquisition were enjoined, Plaid – on its own or in combination with a company other than Visa – would continue to act as a disruptive competitor, developing and launching new, innovative solutions in competition with Visa," but "[i]n the hands of Visa, this would change dramatically."[17]

The new Merger Guidelines should also clarify other goals of merger enforcement. The guidelines should explain that merger enforcement goals do not include advancing the interests of one group of individuals at the expense of others. Rather, merger enforcement should aim to increase economic growth and prosperity.

V. ANALYSIS OF FUTURE COMPETITION

The new Merger Guidelines should include a Future Competition section dedicated to the analysis of future competitive effects. The Agencies have long recognized the importance of future competition in merger assessments. The current Horizontal Merger Guidelines state that the guidelines "reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency" and that "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."[18] However, the current Horizontal Merger Guidelines do not fully reflect the challenges and complexities of analyzing future competitive effects. The Future Competition section should provide a more comprehensive description of how the Agencies assess these effects.

Nascent competitor acquisitions represent an important category of mergers where future competition is the focus of the analysis. A nascent competitor is a firm that is not yet a significant competitor in the relevant market but may become one over time.[19] There have been numerous recent challenges of nascent competitor acquisitions.[20] The Agencies have pursued two distinct theories of harm in these cases.[21] The first theory is the loss of future competition. The second theory is the loss of innovation. We propose that the new Innovation section discuss innovation effects and that the Future Competition section focus on the loss of future competition effects.

The loss of future competition effects are substantially similar to the loss of current competition effects except that there is more uncertainty about future effects and the effects occur later. The assessment of loss of future competition effects requires the analyst to predict how markets would evolve over time, with and without the merger. In some cases, courts and Agencies may predict future market evolution by examining documents and testimony regarding the nascent competitor's plans for entering the relevant market. In certain industries, such as pharmaceuticals and electric utilities, market evolution may be relatively predictable, at least over the near term. Consider, for example, an acquisition of a drug in late stages of development. In this case, analysts may be able to predict what competition in the market will look like in the next few years by examining the market participants' drug development plans. Analysts may also be able to predict the likely future market structure based on which firms own critical assets, such as patents or mining rights. But other industries may be less predictable.

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15 See, for example, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (discussing the role of product promotion in enhancing inter-brand competition), *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (discussing the role vertical restraints in providing incentives to invest in services and product promotion), *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (discussing the need for future recoupment in a predatory pricing strategy), *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (discussing innovation and nascent competition), *California Dental Assn. v. FTC*, 526 U.S. 756 (1999) (discussing advertising restrictions), and *Polygram Holding, Inc. v. FTC*, 416 F. 3d 29 (D.C. Cir. 2005) (discussing advertising restrictions). See also Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012).

16 These cases include the FTC's challenges of the *Thoratec/HeartWare, Illumina/Pacific Biosciences, AbbVie/Allergan, Illumina/Grail*, and *Nvidia/Arm* transactions and the DOJ's challenges of the *Bayer/Monsanto, Applied Materials/Tokyo Electron*, and *Visa/Plaid* transactions. See START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL – NOTE BY THE UNITED STATES, OECD Competition Committee Meeting (June 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

17 Complaint (Nov. 5, 2020) at 18, *United States v. Visa Inc. and Plaid Inc.*, (N.D. Cal.) (No. 3:20-cv-07810), https://www.justice.gov/atr/case-document/file/1334736/download.

18 HMG § 1.

19 Some mergers may also be the reverse of nascent competitor acquisitions where the merging parties are current competitors but the competitive significance of one of the merging parties is declining. In these cases, the merger-induced change in market concentration may overstate concerns about future effects.

20 See START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL – NOTE BY THE UNITED STATES, *supra* note 16.

21 See Jay Ezrielev, *Uncertainty and Two Theories of Harm in Nascent Competitor Acquisitions*, CPI ANTITRUST CHRON. (Feb. 2022); and Nancy L. Rose & Carl Shapiro, What Next for the Horizontal Merger Guidelines? (Forthcoming) Antitrust Magazine, Spring 2022.

Another important factor for the assessment of loss of future competition effects is the ease of entry and expansion. Impediments to entry and expansion may keep firms from countering any future competition losses. Loss of future competition effects may be significant in cases where the acquisition target owns key assets (such as patents) that give it a unique ability to challenge the acquirer. Conversely, firms in markets without significant entry and expansion impediments may rapidly counteract any future competition losses. Nascent competitor acquisitions in such markets may encourage more entry as potential entrants may view entry for buyout as a profitable strategy.[22] Rapidly changing market shares or frequent entry and exit may indicate an absence of significant entry and expansion impediments.[23]

Overall, however, the applicability of the loss of future competition theory may be limited by uncertainty about future competition. In cases where the expected entry by the nascent competitor is relatively distant in time and in markets that are relatively unpredictable, determining what the future state of competition will look like at the time of entry by the nascent competitor may be difficult.[24] In these cases, any assessments under the loss of future competition theory may be unreliable, making challenges under this theory difficult.[25] The new Merger Guidelines should discuss the limits of the loss of future competition theory in challenging nascent competitor acquisitions. When are the effects too speculative for merger challenges?

A number of commentators argue that nascent competitor acquisitions may produce significant competitive harm (in the expected value sense) even if there is a low probability of future competition between the merging parties, absent the merger.[26] Low probability of harm is still harm, particularly when the potential harm (if it materializes) would be large. However, a nascent competitor acquisition may also lead to efficiencies or new entry with a similarly low-probability. It is important for the analysis of future competitive effects to treat harms and benefits symmetrically to avoid bias.

VI. INNOVATION

The stakes are high for getting antitrust policy right when it comes to innovation because of the enormous economic benefits of innovation. Courts and Agencies should weigh innovation effects heavily in merger review. Innovation effects are particularly important in nascent competitor acquisitions. Nascent competitor acquisitions can become "killer acquisitions" when the acquirer terminates the target's innovation because the innovation poses a competitive threat to the acquirer's existing business.[27] However, nascent competitor acquisitions can also spur innovation.[28] It is critical for the Agencies and courts to take advantage of economic tools in analyzing mergers' innovation effects.

The new Merger Guidelines should provide a clear and comprehensive framework for determining when mergers raise innovation competition concerns. Innovation effects analysis need not rely on predictions about future competition. Instead, Agencies and courts may consider how a merger would affect the merging firms' incentives and abilities to engage in innovation, based on currently available information. What ultimately matters is whether the acquirer intends to reduce innovation investment because of any loss of dynamic competition. To answer this question, Agencies and courts may assess the evidence of post-merger innovation investment plans. However, it is also important to gauge innovation effects using economic analysis.

We propose an economic framework for analyzing the innovation effects of nascent competitor acquisitions and other types of mergers.[29] For nascent competitor acquisitions, the economic framework contemplates a situation where an incumbent firm is seeking to acquire a nascent competitor that is developing a new product that is a potential competitive threat to the incumbent's existing (legacy) market. We refer to this new product as the "nascent market." In addition, the merging firms may each be developing competing new products. The economic framework includes nine key factors (described below) for the assessment of innovation effects.

22 See Eric Rasmusen, *Entry for Buyout*, 36 J. Ind. Econ. 281 (1988).

23 Conversely, stable shares and little history of entry may indicate significant impediments to entry and expansion.

24 See Ezrielev, *supra* note 21.

25 It may still be possible to pursue these cases under an innovation theory of harm. See Ezrielev, *supra* note 21.

26 See C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879 (2020), https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/1.

27 Colleen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions*, 129 J. Political Econ. 649 (2021).

28 See Carl Shapiro, "Competition and Innovation: Did Arrow Hit the Bull's Eye?" in *The Rate and Direction of Inventive Activity Revisited* 361-404 (eds. Josh Lerner and Scott Stern 2012); Richard Gilbert, *Five not so Easy Pieces to Make Antitrust Work for Innovation*, CPI ANTITRUST CHRON. (Oct. 2018); and Jay Ezrielev, *An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions* (March 22, 2021), https://ssrn.com/abstract=3810486.

29 The economic framework is discussed in greater detail in Ezrielev, *supra* note 28.

1. Replacement: Replacement measures the degree to which a successful nascent market replaces or cannibalizes the incumbent's profits from an existing (legacy) market. The nascent market's replacement of the incumbent's legacy market may be full or partial. The merged firm's incentive to reduce investment in developing the nascent market increases with the degree of replacement. The presence of replacement is a prerequisite for any harm to innovation for nascent competitor acquisitions.

2. Nascent Market Size: This factor represents the potential profitability of the nascent market relative to the legacy market. The greater is the nascent market size (or potential profitability of the nascent market), the greater is the merged firm's incentive to invest in developing the market. Nascent market size may mitigate the acquirer's incentives to reduce innovation.

3. Synergies: This factor represents the enhancement in the merged firm's innovation capability relative to that of the standalone merging firms. Mergers generate synergies by combining complementary assets of the merging firms.

4. Appropriability: This factor represents the degree to which firms are able to capture the value generated by their innovative activity. Appropriability strengthens the incentives to innovate. The acquisition may increase appropriability by internalizing spillovers from innovation or by enabling the merged firm to obtain greater value from using or licensing its technology (for example, by bundling patents).

5. Third Party Competition: This factor gauges competition from non-merging firms in developing the nascent market. Any attempts by the merged firm to eliminate or significantly reduce nascent market innovation may induce additional investment by other firms. Competition from non-merging firms mitigates any reduction in post-merger innovation investment by the merged firm.

6. Entrenchment: This factor represents the extent to which the incumbent may defend its legacy market from the competitive threat of the nascent market by engaging in "entrenchment" conduct. Entrenchment may impede nascent market innovation. Entrenchment may include negative advertising about the nascent market or lobbying the government to impose stricter regulations on the nascent market. The acquisition would limit or eliminate entrenchment, which may spur nascent market innovation.

7. Innovation Competition: This factor represents potential competition between the merging firms in developing a new product. The elimination of this innovation competition may reduce incentives to engage in innovation.

8. Merger Incentives: This factor considers whether a merger between the incumbent and the nascent competitor may be mutually beneficial. The merger may not be mutually beneficial (in the absence of efficiencies) if there is competition from non-merging firms in developing the nascent market.[30] In this case, the acquisition of the nascent competitor suggests the presence of mitigating factors (such as synergies) that incentivize the parties to merge.

9. Entry Incentives: This factor considers the notion that prohibiting nascent competitor acquisitions may reduce entry incentives. Prohibiting acquisitions that are ex post anticompetitive may raise ex ante entry impediments and deter entry by nascent competitors.

Note that the two factors that can result in harm to innovation competition are Replacement and Innovation Competition. The presence of at least one of these two factors is a necessary condition for any loss of innovation competition. The Replacement factor is unique to nascent competitor acquisitions, whereas the Innovation Competition factor may be present in all types of mergers. To assess a merger's net innovation effect, analysts must compare the effects of the Replacement and Innovation Competition factors with the beneficial effects of the other factors.

The Replacement effect can be measured as the product of the replacement percentage (the expected share of the incumbent's existing product that will be replaced by the nascent product) and the future expected margin of the legacy product to be replaced. The replacement percentage is essentially a dynamic diversion ratio. The replacement percentage multiplied by legacy product margin is a dynamic version of the value of diverted sales.[31] The Innovation Competition effect can be similarly measured as the product of the expected dynamic diversion ratio between the two future products and their expected margins.[32]

30 This effect is comparable to that of mergers between firms in a static Cournot model. Such mergers are usually unprofitable (other than mergers to monopoly) for the merging firms in the absence of cost efficiencies. (See Stephen W. Salant, Sheldon Switzer, & Robert J. Reynolds, *Losses from Horizontal Merger: The Effects of an Exogenous Change in Industry Structure on Cournot-Nash Equilibrium*, 98 Q. J. Econ. 185 (1983).) The fact that we observe such mergers suggests that the mergers produce cost efficiencies.

31 The current Horizontal Merger Guidelines discuss a static version of the value of diverted sales in the Unilateral Effects Section. See HMG § 6.1.

32 This dynamic diversion ratio would incorporate the probabilities of successful development of the two future products as well as the expected substitutability (or cross-elasticity of demand) between the products.

VII. EFFICIENCIES

Agencies and courts should credit dynamic competition and operational efficiencies in merger review. Dynamic competition efficiencies include innovation efficiencies, but they also include efficiencies that enhance other forms of dynamic competition. Firms engage in dynamic competition by investing in innovation, product promotion, production capacity, logistics, reputation, distribution capacity, training, human resources, and customer service. In addition, firms engage in dynamic competition by securing supply and service agreements, adopting new technologies, and entering strategic partnerships. Dynamic competition efficiencies reduce investment costs, increase investment incentives, and enhance the capabilities of the merging firms.

The economics literature provides many examples of dynamic competition efficiencies. A merger may spur additional investment by solving the "holdup" problem associated with relation-specific investments.[33] As we discuss in the previous section, a merger may create innovation synergies by combining complementary assets. For example, a merger may create innovation synergies by combining the technological know-how of one firm with the other firm's superior ability to commercialize new technology. Mergers may also enable faster and more widespread adoption of new technologies.[34] Moreover, a merger between a firm with low capital costs and another firm with promising investment prospects may spur investment by matching low financing costs with better investment opportunities.[35]

The Efficiencies section of the current Horizontal Merger Guidelines focuses largely on static competition efficiencies. Although the guidelines discuss innovation efficiencies, the discussion generally takes a skeptical view of these efficiencies.[36] Nonetheless, innovation efficiencies can produce significant benefits, and it is important that the Agencies and courts give these efficiencies due consideration in merger review.

It is likewise important for the Agencies and courts to recognize operational efficiencies in merger review.[37] These efficiencies may eliminate the use of redundant resources, freeing up resources for more efficient use, which can stimulate economic growth. Operational efficiency may also reduce the use of physical resources, thereby generating environmental benefits. The new Merger Guidelines should make it clear that operational efficiencies are cognizable even if they do not lower the static marginal cost of supply.

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33 See Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979); and Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. Polit. Econ. 691 (1986).

34 See Boyan Jovanovic & Peter L. Rousseau, *Mergers as Reallocation*, 90 Rev. Econ. Stat. 765 (2008).

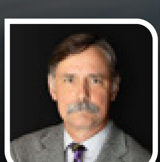
35 Finance literature shows a positive relationship between firm cash flow and investment. See, for example, Steven M. Fazzari, R. Glenn Hubbard, & Bruce C. Petersen, *Financing Constraints and Corporate Investment*, 1988 Brookings Papers on Econ. Activity 141 (1988).

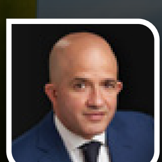
36 See HMG § 10 ("Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions.").

37 The current Horizontal Merger Guidelines attribute little weight to operational efficiencies in merger assessments. See HMG § 10 ("[T]he Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.").

BIDEN'S ANTITRUST: THE TRANSFORMATION IS HERE BUT WILL IT LAST?

BY STEVEN CERNAK & LUIS BLANQUEZ[1]





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I. INTRODUCTION

All new administrations and their antitrust leaders arrive promising change. But the Biden Administration leaders' promises are for much greater change, nothing less than a total transformation of the antitrust policy that has been in place for decades. Such a generational transformation cannot be accomplished in just a year; however, the contours of the intended change are clear and the process to effectuate it has begun. Below, we describe the biggest steps to date and discuss its likelihood for long-term survival.

II. TRANSFORMATION: FROM WHAT? TO WHAT?

While there is not complete consensus among those favoring the antitrust status quo or the highly transformed state, some general principles can be identified. Driven by a Chicago and Harvard School combination[2] and exemplified in Supreme Court opinions like *Sylvania*[3] and *Trinko*,[4] the *status quo* focuses on the economic efficiency goals of the consumer welfare standard; is wary of excessive agency or court intervention in the economy lest competitive behavior be over-deterred; and is most concerned about cartel agreements and large horizontal mergers.

The Biden Administration's new antitrust paradigm is the opposite. Instead of the consumer welfare's focus on consumers, the new version would seek to protect "workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[5] Under this new paradigm, enforcement officials would attempt to intervene in the marketplace much more frequently through aggressive litigation positions, structural remedies in more merger matters, and rulemaking. Finally, enforcement officials following the new paradigm would continue and even increase challenges to cartels and horizontal mergers but would also more actively challenge alleged monopolization, vertical mergers, and price discrimination.[6]

III. PERSONNEL IS POLICY[7]

To pursue the transformation to this new antitrust paradigm, the Biden Administration took several steps in its first year, beginning with the selection of its top officials. As with any incoming administration, the two most prominent and important picks were the heads of the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ"). Lina Khan was sworn in as Chair of the FTC in June. She had brief stints as a professor at Columbia, an assistant to FTC Commissioner Rohit Chopra, and counsel to the House Judiciary Committee's Antitrust Subcommittee. Her many writings, beginning even in law school, have been highly critical of the antitrust *status quo*, especially as applied to so-called "big tech" companies like Amazon.[8]

Jonathan Kanter was confirmed as Assistant Attorney General for DOJ in November. After a brief stint at the FTC's Bureau of Competition, he practiced antitrust law for about twenty years in three major Washington firms before forming his own antitrust boutique. Like Khan, Kanter has been critical of recent antitrust enforcement policy, especially as applied to "big tech" firms.[9]

Unlike other incoming administrations, the Biden Administration also named a Special Assistant to the President for Technology and Competition Policy. Tim Wu, formerly a Columbia professor and author of several books and articles on competition policy,[10] filled that position in March. Since then, he has called recent antitrust enforcement and policies a "failed 40-year experiment."[11]

2 For an explanation of why the usual Chicago School myopia is misleading, see Kovacic, W. E. (2007). *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix. Columbia Business Law Review*, 2007(1).

3 *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

4 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

5 Majority Staff Report of Antitrust Subcommittee of House Judiciary Committee, *Investigation of Competition in Digital Markets* at 392 (2020).

6 For one description of the principles of the new paradigm and its recent rise, see Kovacic, W.E. *Root and Branch Transformation: The Modern Transformation of U.S. Antitrust Law and Policy?, Antitrust* Summer 2021, at 46.

7 Note the irony of using this phrase, first popularized during a Reagan Administration with a completely different take on antitrust enforcement. See, e.g. *Personnel is Policy* by Herbert Meyer, American Thinker, Feb. 3, 2007, available at https://www.americanthinker.com/blog/2007/02/personnel_is_policy.html.

8 See e.g. *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (Jan. 2017).

9 It Took Forever to Get Confirmed. Now All He Has to Do is Fix All of Antitrust Law, Politico, December 2021.

10 See e.g. *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports, 2018.

11 See e.g. https://www.law360.com/articles/1426882/white-house-adviser-touts-revitalization-of-antitrust-.

Kanter & Khan have slowly filled agency leadership positions. Some recent picks have strengthened connections with groups that could support stronger antitrust enforcement if not transformation. Eric Posner (DOJ) and Spencer Weber Waller and John Kwoka (FTC) are academics who have consistently called for greater enforcement in numerous articles and speeches. Sarah Oxenham Allen (DOJ) headed up Virginia's antitrust enforcement and just stepped down as head of the antitrust group for the National Association of Attorneys General. These connections to like-minded academics and state enforcers could widen the base of support for the Administration's push to change the approach to antitrust enforcement.

Like all incoming administrations, the Biden Administration's FTC and DOJ have seen turnover in the career staff who will implement any new strategies of the agencies' leaders. Private anecdotal reports, however, have put this current staff turnover at a much higher level. Some commentators have suggested that the new leadership's ridicule of past antitrust enforcement, much of it conducted by current staff, has been a management mistake.[12] After all, how can you motivate staff, or even entice them to stay at the agency, if you tell them that their life's work was misguided, even evil?

We have come around to the opposite view. Yes, staff disgruntlement and departures might slow down the transformation process in the short run. But in the long run, "personnel is policy"[13] and only a whole new cadre of staff attorneys and economists who share the beliefs of the new leadership can hope to tear down the old antitrust edifice and build a new and lasting one. So expect the staff departures to continue and the replacements to be academics and others, like Posner, Kwoka, Allen & Waller mentioned above, not tainted by past enforcement "mistakes."[14]

IV. SOME SIGNIFICANT CHANGES ALREADY. FOR THE BEST? PROBABLY NOT

These new personnel have begun to make real changes, right now, in antitrust enforcement. We have already seen some controversial moves that, if they stand in the long term, might significantly change the antitrust landscape in the U.S.

A. Drastic Changes in the Merger Review Process

Changes to the merger review process have been at the heart of the new Administration, especially after Khan became the head of the FTC.

First, the agencies suspended the Hart-Scott-Rodino early-termination program early in 2021 by which the agencies affirmatively would clear the most routine mergers and similar transactions in less than 30 days, allowing them to close. Now, all parties, even those to transactions that raise no antitrust issues, must wait the entire 30 days before closing. That temporary suspension continues with no end in sight. Unfortunately, because most parties had requested early termination and received it, the change in policy means that hundreds of transactions that posed no competitive issues have been delayed for an unclear benefit.

Second, the FTC withdrew the Vertical Merger Guidelines, issued jointly — just last year — with the DOJ, together with the FTC's Vertical Merger Commentary.[15] The FTC stated that the guidance documents include unsound economic theories that are unsupported by the law or market realities. The statements by the various Commissioners showed the deep divisions within the FTC, about merger review and antitrust enforcement generally since Khan joined the Commission.

The statement by the FTC majority[16] asserts that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies. The statement explains the majority's concerns with the Guidelines' treatment of the purported pro-competitive benefits of vertical mergers, especially its treatment of the elimination of double marginalization. The dissenting Statement of Commissioners Phillips & Wilson[17] starts with a bang: "Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware." The statement goes on to not only lament the confusion the withdrawal will generate, but contrast the process used when the Guidelines were issued — months of public

12 See e.g. Kovacic, *Root and Branch, supra* Note 5 at 52.

13 See *supra* Note 6.

14 https://www.competitionpolicyinternational.com/kanter-appoints-new-special-assistant-at-doj-antitrust-division/.

15 https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines?utm_source=govdelivery.

16 https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca.

17 https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-0.

input and debate — with the process used for their withdrawal — no public input and, seemingly, no discussion even at the FTC outside the offices of three Commissioners.

Third, in early 2022, the FTC joined the DOJ in considering a complete rewrite of both the Horizontal and Vertical Merger Guidelines.[18] The agencies expect to have a draft of the new Guidelines by the end of 2022. The exact changes the agencies will propose are not yet known; however, based on their statements made and questions posed for public comment, below are some of the key questions that could lead to drastic changes in merger review:

- Should new Guidelines further de-emphasize market definition in favor of an approach that tries to directly predict competitive effects?
- Should presumptions based on market shares or similar measures be strengthened?
- Should effects on parties other than consumers, like labor and local communities, receive greater emphasis?
- Should effects on elements other than price, such as product quality and wages, receive greater emphasis?
- Should some efficiencies, such as lower input prices from suppliers, be seen as reasons to challenge the merger?
- Should distinctions between horizontal and vertical transactions reflected in the guidelines be revisited considering trends in the modern economy?

The agencies also seek input on possible updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition, as well as how to account for key areas of the modern economy like digital markets, which often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current guidelines do not address in detail.

Fourth, in August 2021, the FTC stated that some proposed mergers would receive form letters at the end of the 30-day initial review period saying that an antitrust investigation remains open, and that the FTC might challenge the transaction if the parties close it.[19] This means now that some parties will no longer receive the "no news is good news" treatment at the end of the initial 30-day waiting period; instead, if the FTC is the reviewing agency, it might, or might not, issue a letter informing the parties that it has not yet determined if the transaction is anti-competitive. If it issues such a letter, the FTC will continue to investigate under some indeterminate rules for some indeterminate amount of time. While the parties are free to close the transaction, the FTC letter warns them that the FTC might later challenge the transaction and try to unwind it. While seemingly small, the new process is another step by the FTC that reduces a major benefit of the HSR process — near certainty.

Last, but not least, in August 2021, the FTC also changed a long-standing informal interpretation about how potential HSR filers should view debt repayments when determining if the transaction is large enough to warrant a filing.[20] Until then, the FTC has interpreted HSR rules to exclude from the size of the transaction calculation the payoff of a target's debt by the acquiring person in transactions involving the acquisitions of voting securities and noncorporate interests (though not of assets). The rationale was that the purchaser of a majority of an issuer's stock automatically acquires the issuer's preexisting liabilities and so that fact presumably is reflected in the stock's acquisition price. But in September 2021, the FTC withdrew that informal interpretation. According to the FTC blog post, it appears that some merging parties have structured their deals to take advantage of this interpretation and avoid an HSR filing. Target companies may take on debt shortly before the merger and then have the acquiring person retire it as part of the transaction, thus reducing the size of the transaction, perhaps to a level whereby the parties can avoid a filing. In our view, at the margin, this change likely will result in more HSR filings. For instance, it will affect those transactions where the size of the transaction matters, such as transactions of private equity firms focused on the "middle market".

B. President Biden Executive Order on Promoting Competition in the American Economy

In August 2021 President Biden issued the Executive Order on Promoting Competition in the American Economy (the "Order").[21] The Order aimed to reduce the trend of corporate consolidation, drive down prices for consumers, increase wages for workers and facilitate innovation. It established a Whole-of-Government effort to promote competition in the American economy by including 72 initiatives across numerous agencies to enforce existing antitrust and other laws that may impact competition. The goal is to combat what the Administration sees as excessive concentration of industry and abuses of market power, as well as to address challenges posed by new industries and technologies. The Fact

18 https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

19 https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings?utm_source=govdelivery.

20 https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering?utm_source=govdelivery.

21 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

Sheet[22] further explains how the Order encourages the leading antitrust agencies to focus enforcement efforts on problems in key markets and coordinates other agencies' ongoing response to corporate consolidation.

The Order specifically addresses merger review by encouraging antitrust agencies to revisit and update the Merger Guidelines (both horizonal and vertical) and challenge so-called bad mergers previously cleared by past Administrations. As explained above, the FTC and DOJ already have begun to implement this recommendation.

The Order also calls on both the FTC and DOJ to enforce the antitrust laws vigorously. In particular, the Order encourages the Chair of the FTC to exercise the FTC's statutory rulemaking authority in areas such as:

- Agriculture: Unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by some manufacturers that prevent farmers from repairing their own equipment;
- Healthcare: Unfair anticompetitive agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs;
- Banking: Unfair exclusionary practices in the brokerage or listing of real estate;
- Transportation: Anticompetitive marketing, advertising, and pricing policies;
- Labor Markets: Non-compete agreements;
- Internet Service: Preventing Internet Service Providers — ISPs — from making deals with landlords that limit tenants' choices to revive the "Broadband Nutrition Label" and require providers to report prices and subscription rates to the FCC, to limit excessive early termination fees, and to restore Net Neutrality rules undone by the prior administration;
- Online platforms: Announcing an Administration policy of greater scrutiny of mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on user privacy. It further encourages the FTC to establish (i) rules on surveillance and the accumulation of data, and (ii) rules barring unfair methods of competition on internet marketplaces.
- Beer, wine, and spirits. Requesting the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC, to submit a report assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants. On February 2022, the Department of Treasury issued its report and expressed serious concerns about increased consolidation in the $250 billion U.S. alcohol market, while at the same time, outlining several reforms that it believes would boost competition, including increased merger scrutiny and reducing regulatory burdens for new entrants.[23]

C. The FTC's New Agenda Moving Forward

In parallel, in 2021 the FTC also passed some new resolutions updating its rulemaking procedures to set the stage for stronger deterrence of corporate misconduct,[24] while authorizing investigations into key law enforcement priorities for the next decade.[25] As Khan stressed in her statement,[26] priority targets include repeat offenders; technology companies and digital platforms; and healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals.

V. BUT WILL IT LAST?

So, the Administration has already made some big changes in antitrust enforcement and is planning for more. But will all those changes last? The prior revolution in antitrust thinking that enshrined the consumer welfare standard and other elements of the *status quo* did not happen

22 https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

23 https://home.treasury.gov/system/files/136/Competition-Report.pdf.

24 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger.

25 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities.

26 https://www.ftc.gov/system/files/documents/public_statements/1591510/remarks_of_chair_khan_on_the_investigatory_resolutionsjuly_1_2021.pdf.

overnight. Writings by academics in the '50s[27] and '60s[28] led to Supreme Court opinions[29] and more writings[30] in the '70s and '80s. Policy was enshrined by twelve years of choices by the enforcers of the Reagan and Bush I Administrations. Those looking to overturn the antitrust *status quo* have the writings from the last few years.[31] Some of those same authors now lead antitrust enforcement and policymaking in the Biden Administration. While the revolutionaries' progress to date in overthrowing the current antitrust regime is impressive, some obstacles might block their ultimate success.

First, any novel enforcement moves by DOJ or the FTC will need to convince the judiciary. All DOJ enforcement and much of the FTC's must be enforced by courts in the first instance. The FTC's administrative hearings are subject to appellate review by the courts. The statutory and constitutional basis for the FTC to avoid the judiciary and rely solely on antitrust rulemaking under its "unfair methods of competition" power is unclear.[32] So all agency enforcement actions could face judicial review eventually. In such court arguments, the agencies will need to deal with decades of judicial precedent incorporating antitrust's *status quo* being interpreted by judges who were trained under it. One example of the attitudes the agencies are likely to face is the Supreme Court's opinion in Alston, an antitrust plaintiff's victory that generated a unanimous opinion chock full of praise for the *status quo*'s most cherished ideas and opinions.[33] Yes, courts have interpreted the antitrust statutes as malleable with changes in economic thinking; however, the agencies will face an uphill battle in convincing the judiciary that any radical changes are warranted now.

And the agencies and any others advocating for radical changes will face stiff opposition. Some entities — such as some companies[34] being sued or academics[35] and think tanks[36] historically supportive of the antitrust *status quo* — will oppose nearly all such changes and fight at every turn. Others who might support greater antitrust enforcement and be natural allies might be opposed to wholesale changes to the current framework.[37] They might also be put off by rhetoric that describes their past efforts in the antitrust arena as misguided at best, maybe even evil.

Finally, making durable any drastic changes to the antitrust *status quo* will take time. Today's *status quo* was developed over decades with years' worth of academic and popular articles and Supreme Court opinions and twelve years of Reagan and Bush I agency enforcement and judicial picks. Those advocating for change now certainly have the articles and popular books but one year of the Biden Administration probably is not enough to make all the desired changes, and make them durable. What if Democrats suffer setbacks in coming elections? Some Republicans today seem to favor some changes to antitrust enforcement, especially regarding "Big Tech," but will they reverse any Biden-era changes if given the chance? Will other Democrats who gain power have the same policies and the enthusiasm to push them or will there be a return to Clinton/Obama policies? In the era of Twitter and ever shorter news cycles, will the support to at least "do something" with antitrust wane, or even turn on agency enforcers who cannot quickly overcome the obstacles detailed above?

VI. CONCLUSION

In its first year, the Biden Administration has taken the first steps to a total transformation of antitrust law. Only time will tell how successful the effort will be.

27 See e.g. Director & Levi, *Law and the Future: Trade Regulation*, 51 Northwestern University Law Review 281 (1956).

28 See e.g. Bork & Bowman, *The Crisis in Antitrust*, Fortune, December 1963, at 138.

29 See e.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984).

30 See e.g. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) and Easterbrook, *The Limits of Antitrust*, 63 Texas. Law Review 1 (1984).

31 See e.g. *supra* Notes 7 and 8 and Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (2019).

32 See e.g. Ohlhausen & Rill, *Pushing the Limits: A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce, August 12, 2021.

33 *NCAA v. Alston*, 594 U.S. ___, (2021). For commentary on the opinion, see e.g. Cernak, *Alston v. NCAA: Helpful for Future Antitrust Defendants?*, The Antitrust Attorney Blog, June 23, 2021.

34 See e.g. *Axon Enterprise, Inc. v. Federal Trade Commission, et. al.*, (20-15662)(cert. granted Jan. 24, 2022).

35 See e.g. authors at Truth on the Market, avail at https://truthonthemarket.com/.

36 See e.g. U.S. Chamber of Commerce, esp. here: https://www.uschamber.com/regulations/u-s-chamber-of-commerce-stands-up-to-ftc-going-rogue.

37 Several authors have noted the presence of more than two sides debating antitrust's future. See e.g. Melamed, *Antitrust Law and Its Critics*, 83 Antitrust L.J. 269 (2020) and Ohlhausen, *Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust*, 35 Antitrust 3 (Summer 2021).

BEGINNINGS OF AN ANTITRUST REVOLUTION?

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I. INTRODUCTION

The Biden administration has made antitrust law a key part of its agenda. Last July, the president issued a sweeping executive order entitled "Promoting Competition in the American Economy" that featured 72 directives and recommendations to his administration.[2] In a speech accompanying the executive order, Biden faulted Robert Bork for leading the courts and enforcers astray with his consumer welfare ideology.[3] In addition to committing the entire administration to antimonopoly enforcement and policymaking, the president urged the Department of Justice and the Federal Trade Commission to break with the 40-year bipartisan *status quo* of antitrust that has permitted and encouraged consolidation and monopolization across the economy and to restore the Rooseveltian (Theodore & Franklin) antitrust tradition of "capitalism working for people."[4]

Nine months later, a review of the DOJ and the FTC record reveals some progress, but a great deal that needs to be done in the remainder of Biden's time in the White House. As a threshold matter, the president and Senate Democrats have not prioritized staffing the antitrust agencies. The DOJ's Antitrust Division did not have a permanent chief until November 2021,[5] and the FTC does not have a fifth commissioner and is deadlocked on key matters.[6]

With this caveat on appointments, what have the federal antitrust agencies accomplished so far? Both have prioritized merger enforcement and challenged consolidations that likely would have been permitted or only remedied by previous Democratic and Republican administrations. At the same time, the ongoing merger wave shows the limits of more litigation alone and underscores the need to remake merger policy — an undertaking the DOJ and the FTC have initiated. In the conduct arena, the advances have been more limited. The DOJ has brought employer collusion into its criminal prosecution crosshairs, but otherwise the agencies have taken very few fresh steps to address unfair practices.

If the DOJ and the FTC want to break with the status quo, they will have to do much more. The DOJ's enforcement and advocacy suggest something broader may be in the works. The Antitrust Division has taken concrete steps to protect the interests of workers from employer and other forms of buyer power and advocated for reduced reliance on the traditional rule of reason.

If the agencies build on the DOJ's moves so far, what might a fundamental rethinking of antitrust look like? It should reject the two mainstays of antitrust over the past 40 years: the ideology of consumer welfare and the rule of reason as the default analytical standard. First, the agencies should aim to distribute power downward, expanding antitrust law's protected classes beyond consumers and explicitly bringing workers, suppliers, and rivals under the protection of the antitrust umbrella too. Second, they should reject the standards-like and resource-intensive rule of reason and endorse and enact bright-line rules that categorically prohibit certain practices, such as non-compete clauses for workers and exclusionary contracting by dominant firms.

II. REINVIGORATION OF ANTI-MERGER ENFORCEMENT

The federal antitrust agencies have stepped up anti-merger enforcement. While they have accepted remedies for some mergers, they have sought to enjoin several mergers in their entirety. An increase in merger enforcement alone is not novel given recent history. Past Democratic administrations appeared to be more aggressive in challenging mergers than their Republican counterparts.[7] What is notable now is the types of mergers and the grounds on which they are being challenged.

2 Exec. Order on Promoting *Competition* in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 Joseph R. Biden, Jr., President of the United States, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

4 *Id.*

5 U.S. Dep't of Justice, Meet the Assistant Attorney General, https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general.

6 See e.g. Bob Herman, *FTC Won't Study Pharmacy Benefit Managers*, Axios, Feb. 17, 2022, https://www.axios.com/ftc-wont-study-pharmacy-benefit-managers-pbm-16f433c6-a60a-4c61-9c28-a7577bb8514f.html.

7 See e.g. Jonathan B. Baker & Carl Shapiro, *Response: Evaluating Merger Enforcement During the Obama Administration*, 65 Stan. L. Rev. Online 28 (2012).

The DOJ and the FTC have revived vertical merger enforcement after a multidecade dormancy. Apart from the DOJ's unsuccessful suit against AT&T's acquisition of Time Warner in the Trump years,[8] litigation against vertical mergers was rare from the late 1970s through 2020.[9] In the past year alone though, the FTC challenged three vertical mergers[10] and successfully forced the merging parties in two of them to abandon their proposed consolidations.[11] Last month, the DOJ sued to stop UnitedHealth's acquisition of Change Healthcare, principally on vertical grounds.[12]

The DOJ seemingly broke new ground with its litigation against Penguin Random House's proposed acquisition of Simon & Schuster.[13] This deal would combine Penguin Random House (the largest publisher in the United States) with Simon & Schuster (the fourth-largest publisher), two of the so-called "Big Five" in book publishing.

The DOJ challenged the merger solely on buyer power grounds. It did not allege a theory of harm to readers. The DOJ argued the merger would harm authors in general and authors of anticipated best sellers specifically who would seek contracts with one of the Big Five publishers. If the Big Five became the Big Four, the DOJ alleged authors would be hurt by the diminished competition among publishers for their manuscripts and proposals, translating to reduced royalties and other forms of author compensation. This may be the first merger challenge in court that was based purely on harms to sellers of a good or service.[14]

The current merger wave, however, shows the limits of an enforcement-only strategy. In calendar year 2021, the DOJ and the FTC received more than 4,000 merger notifications.[15] This is a record number of merger filings. In fiscal year 2019, the agencies received 2,089 merger notifications and in 2013 a comparatively modest 1,326.[16]

This merger wave exposes a basic deficiency in current merger policy: It fails to deter consolidation. Even with ramped-up enforcement, corporations recognize that the agencies do not have the capacity to investigate and litigate even a small fraction of the problematic mergers that they confront. In September 2021, an FTC official conceded that her agency does not have enough staff to fully review every merger application they received within the 30-day statutory waiting period.[17]

So long as the agencies evaluate mergers using a complicated and costly rule of reason-like framework in which they attempt to predict the effects of a proposed consolidation,[18] corporations will feel confident they can pursue ever-more audacious mergers. They can count on the

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

9 Steven C. Salop, *Invigorating Vertical Merger Enforcement,* 127 Yale L.J. 1962, 1964 (2018).

10 Press Release, Fed. Trade Comm'n, FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022). https://www.ftc.gov/news-events/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical; Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger; Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

11 Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www.ftc.gov/news-events/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations; Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www.ftc.gov/news-events/press-releases/2022/02/statement-termination-of-nvidia-attempted-acquisition-of-arm-ltd.

12 Press Release, Dep't of Justice, Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

13 Press Release, Dep't of Justice, Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

14 Eriq Gardner, *In Targeting ViacomCBS' Simon & Schuster Sale, Biden's Antitrust Team Makes First Bold Move*, Hollywood Rep., Nov. 10, 2021, https://www.hollywoodreporter.com/business/business-news/viacomcbs-simon-schuster-sale-bidens-antitrust-team-makes-first-bold-move-1235045112/.

15 Fed. Trade Comm'n, Premerger Notification Program, https://www.ftc.gov/enforcement/premerger-notification-program.

16 Fed. Trade Comm'n & Dep't of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 2020 1-3, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

17 Holly Vedova, Fed. Trade Comm'n, Adjusting Merger Review to Deal with the Surge in Merger Filings (Aug. 3, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

18 See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010) ("Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects."); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) ("That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness[.]").

DOJ and the FTC's inability to litigate more than a few mergers at a given time. Even with increased enforcement, anti-merger policy, at present, serves as little more than a minor impediment to overall corporate consolidation.

The agencies have recognized the shortcomings of current merger policy and initiated actions to strengthen the underlying rules. First, the FTC reinstituted a prior approval policy in merger complaints and settlements. Specifically, "the Commission returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged."[19] This will deter firms from pursuing the same or similar acquisitions that the FTC previously blocked or remedied.

Second, and more consequentially, the DOJ and the FTC have opened a review of their current merger guidelines.[20] They are examining and taking public comments on the 2010 DOJ/FTC Horizontal Merger Guidelines and the 1984 DOJ Non-Horizontal Merger Guidelines. While the outcome of this effort cannot be predicted, the agencies could issue radically more aggressive guidelines that reject the rule of reason-like framework of the current guidelines and adopt bright-line rules tied to market share and concentration, much as the first merger guidelines published by the DOJ in 1968 did.[21] Guidelines do not carry the force of law and do not bind the courts. The courts, however, have treated the guidelines as persuasive authority and adopted them into case law.[22] New guidelines that are rooted in statutory text, legislative history, and Supreme Court precedent, as well as reflecting the empirical research on mergers, could push the courts in a pro-enforcement direction on merger policy.

III. MOSTLY QUIET ON THE CONDUCT FRONT

In contrast to the enforcement and policymaking activity on mergers, the DOJ and the FTC have been less active in addressing unfair competitive conduct. The most notable change is the DOJ broadening the crosshairs of its criminal anti-collusion enforcement to target wage-fixing and other conspiracies among rival employers. The major developments on monopolization have been in cases that the Trump administration initiated. The relative inaction on the conduct front can be attributed, in part, to the delay in nominating and confirming Jonathan Kanter to lead DOJ's Antitrust Division and the ongoing deadlock between two Democrats and two Republicans at the FTC.

The DOJ has prioritized prosecution of collusion among employers. It has brought a series of criminal indictments against firms and managers involved in no-poach, wage-fixing, and other forms of horizontal collusion among rival employers.[23] For instance, the DOJ obtained an indictment against "a former manager of a major aerospace engineering company and five executives of outsource engineering suppliers . . . for participating in a long-running conspiracy to restrict the hiring and recruiting of employees among their respective companies."[24] Through these actions, the DOJ has put into effect a policy announcement made by the DOJ and the FTC at the tail end of the Obama administration. In the Antitrust Guidance for Human Resources Potential published in October 2016, the DOJ stated it "intends to proceed criminally against naked wage-fixing or no-poaching agreements" among employers.[25]

Anti-monopolization enforcement has been mostly quiet since President Biden took office on January 20, 2021. The FTC filed an amended complaint against Facebook,[26] after District Judge James Boasberg dismissed the original complaint the Trump administration had

19 Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25. 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

20 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

21 U.S. Dep't of Justice, 1968 Merger Guidelines §§ 5-6.

22 Hillary Greene, *Guideline Institutionalization: The Role of Guidelines in Antitrust Discourse*, 48 Wm. & Mary L. Rev. 771 (2006). For a case that relied extensively on the analytical framework set out in the merger guidelines, see *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

23 E.g. Press Release, Dep't of Justice, Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges (Jan. 28, 2022), https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges; Press Release, Dep't of Justice, DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care; Press Release, Dep't of Justice, Former Health Care Staffing Company Executives Charged in Superseding Indictment with Wage Fixing and Obstruction (Apr. 19, 2021), https://www.justice.gov/usao-edtx/pr/former-health-care-staffing-company-executives-charged-superseding-indictment-wage.

24 Press Release, Dep't of Justice, Six Aerospace Executives and Managers Indicted for Leading Roles in Labor Market Conspiracy that Limited Workers' Mobility and Career Prospects (Dec. 16, 2021), https://www.justice.gov/usao-ct/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-1.

25 Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016), https://www.justice.gov/atr/file/903511/download.

26 Press Release, Fed. Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

filed in December 2020.[27] (In a January 2022 order, the judge allowed the FTC to take one of its two claims against Facebook to trial.[28]) The FTC, along with a group of states, won a monopolization case against Vyera Pharmaceuticals' CEO Martin Shkreli in January and obtained substantial monetary and equitable relief against him,[29] though once again this was a case that the previous administration had brought.[30] The only new FTC monopolization matter involved Broadcom and was settled: the chipmaker agreed to stop using exclusive dealing and similar arrangements with manufacturers of broadband and set top devices as well as service providers.[31]

The DOJ has brought one new monopolization case since President Biden took office. Last month, it filed suit to stop a merger-to-monopoly in the market for pebbled fiberglass reinforced plastic wall panels.[32]

While Chair Lina Khan raised the possibility of new uses of the FTC's Section 5 "unfair methods of competition"[33] authority in July 2021,[34] the FTC has not initiated any Section 5 cases or rulemakings so far. When the FTC had a Democratic majority last summer, it sought comment on the general problem of unfair contractual terms, as well as two petitions for rulemaking that the Open Markets Institute (where I work) and its allies had submitted concerning non-compete clauses and exclusive dealing and related agreements.[35] The FTC has not opened a rulemaking proceeding on either petition, nor did it commit to doing any unfair methods of competition rulemakings in the Statement of Regulatory Priorities that it submitted to the Office of Management and Budget last year.[36]

IV. A REVOLUTION THAT IS YET TO COME

The DOJ and the FTC have taken important steps to revive antitrust law against corporate power. What they have done so far is encouraging but does not constitute a qualitative shift from what came before. The agencies' record thus far bears a resemblance to the Clinton administration's increased antitrust enforcement against powerful corporations. In particular, the DOJ during the Clinton years stepped up anti-merger (and -monopoly) litigation,[37] but critically stuck with the ideological revolution that the Reagan administration had instigated in which the agencies deemed consumer interests to be paramount and, for example, treated mergers as generally neutral or beneficial. [38]

Yet, the Biden administration is only in its second year. It is premature to dismiss the possibility of something much bigger from the DOJ and the FTC. Indeed, enforcement and advocacy by the agencies, especially the DOJ, suggest not just more litigation but a potential philosophical and doctrinal reconstruction of antitrust in the coming years.

27 *FTC v. Facebook, Inc.*, 2021 WL 2643627 (D.D.C. 2021).

28 *FTC v. Facebook, Inc.*, 2022 WL 103308 (D.D.C. 2022).

29 *FTC v. Shkreli*, 2022 WL 135026.

30 Press Release, Fed. Trade Comm'n, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

31 Press Release, Fed. Trade Comm'n, FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct (July 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-charges-broadcom-illegal-monopolization-orders-semiconductor.

32 Complaint at 16-17, *United States v. Grupo Verzatec S.A.*, (N.D. Ill. 2022) (No. 22-01401).

33 15 U.S.C. § 45.

34 Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

35 Fed. Trade Comm'n, Solicitation for Public Comment (Aug. 5, 2021), https://downloads.regulations.gov/FTC-2021-0036-0022/content.pdf.

36 Fed. Trade Comm'n, Statement of Regulatory Priorities, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

37 Antitrust Div. Workload Stats. FY 1990-1999, https://www.justice.gov/sites/default/files/atr/legacy/2009/06/09/246419.pdf.

38 See e.g. Joel I. Klein, Assistant Atty Gen., Dep't of Justice, Antitrust Div., The Importance of Antitrust Enforcement in the New Economy, Address to New York State Bar Association Antitrust Law Section Program (Jan. 29, 1998) ("In keeping a watchful eye on the marketplace, we are concerned with consumers, not competitors, and even if it's boring to see the same person win over and over again, as long as those victories are based on economic efficiency, it will be good for consumers and the antitrust enforcers ought to stay out of the way."); U.S. Dep't of Justice & Fed. Trade Comm'n, 1997 Horizontal Merger Guidelines § 4 ("[M]ergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.").

The DOJ has made buyer power a target of its enforcement program. In the past year, the DOJ filed at least five criminal cases against firms, executives, or managers for colluding against their workers. Even though the Obama administration announced a plan to criminally prosecute employer-side collusion, little came of this until 2021. The DOJ has also targeted buyer power in its merger enforcement. It challenged Penguin Random House's acquisition of Simon & Schuster solely on buyer power grounds, alleging the consolidation would harm authors.

An amicus brief the DOJ filed in a National Labor Relations Board matter is another sign of a possible philosophical revolution. In the Atlanta Opera case, the NLRB will decide the test for independent contractors — which workers enjoy genuine independence and are not subject to employment-like control?[39] The DOJ filed a brief articulating the relationship between antitrust and labor law and urged the NLRB to clarify and narrow its test for independent contractors. The DOJ noted that workers who are classified or misclassified as independent contractors lose the right to engage in concerted activity under the National Labor Relations Act and that their concerted activity may even violate the antitrust laws. Importantly, the DOJ argued that firms that misclassify their workers obtain a critical — and unfair — competitive advantage over rivals that comply with labor and employment law.[40] The DOJ's argument and its use of the "unfair competition" frame represent a different approach to antitrust law, which has long treated "competition" as something categorically good and failed to explicitly distinguish among different forms of competition.[41]

The DOJ has also taken preliminary steps to rely less on the rule of reason. In the case against UnitedHealth Group's acquisition of Change HealthCare, the DOJ alleged that the merger is presumptively illegal under Supreme Court precedent (not only the Horizontal Merger Guidelines) because it would create an unduly high level of concentration in the already concentrated market for electronic data interchanges (used to process insurance claims filed by doctors and hospitals).[42] The DOJ once again invoked Supreme Court precedent against horizontal mergers that "significantly increase concentration in an already concentrated market" in the suit to stop Grupo Verzatec's acquisition of Crane Composites, a rival producer of pebbled fiberglass reinforced plastic wall panels.[43] Although this "structural presumption" announced by the Supreme Court in 1963 remains good law,[44] the agencies, in recent times, have typically eschewed it when challenging mergers among competitors.

The DOJ has also supported simpler legal tests in its advocacy work. In a statement of interest filed in a state court case concerning the enforcement of non-compete clauses against anesthesiologists, the DOJ argued the restraints may be *per se* illegal horizontal market allocation agreements in effect and noted that some restraints (formally subject to the rule of reason) may be condemned under an abbreviated "quick look, or truncated rule-of-reason analysis" test.[45]

V. WHAT MIGHT AN ANTITRUST REVOLUTION LOOK LIKE?

If the agencies build on the DOJ's nascent moves described above, what might a different antitrust regime look like? What would be its philosophical orientation and its doctrines and rules? I offer one possible alternative vision of antitrust law here that would generalize the steps the DOJ has taken over the past year.

A new antitrust should break with the forty years of consumer welfare. The Supreme Court in 1979 described the Sherman Act as "a consumer welfare prescription." [46] This was a radical reinterpretation and narrowing of the Sherman Act's historical purpose. In prior decades,

39 Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc.* (NLRB) (Case 10-RC-276-292), https://www.justice.gov/atr/case-document/file/1470846/download.

40 *Id.* at 7.

41 See e.g. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

42 Complaint at 37, *United States v. UnitedHealth Group Inc.*, (D.D.C. 2022) (No. 22-00481).

43 Complaint at 10, *United States v. Grupo Verzatec S.A.*, (N.D. Ill. 2022) (No. 22-01401).

44 *United States v. Philadelphia National Bank*, 374 U.S. 321, 363-64 (1963). Courts have applied the presumption when the antitrust agencies have used it. E.g. *Polypore International, Inc. v. FTC*, 686 F.3d 1208, 1214 (11th Cir. 2012).

45 Statement of the Interest of the United States at 5-7, *Beck v. Pickert Medical Group*, P.C. (2d Jud. Dist. Ct. Nev.) (No. CV21-02092), https://www.justice.gov/atr/case-document/file/1477091/download.

46 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)).

the Court had spoken of the Sherman Act as "a comprehensive charter of liberty"[47] and stated the Sherman Act "does *not* confine its protection to consumers, or to purchasers, or to competitors, or to sellers."[48]

In remaking antitrust, the agencies should revive this older ideology in which consumers, sellers, and even competitors are entitled to protection of the antitrust. This philosophy prizes the broad dispersal of power in the economy.[49] The protection of sellers would not be a radical expansion of the law and has been endorsed by mainstream antitrust scholars.[50] Yet, treating sellers of goods and services, including workers, as equally deserving of antitrust protection as consumers would be a departure from present doctrine[51] and enforcement practice[52] in which sellers' interests have been subordinated to consumers' interests or ignored entirely. The DOJ's enforcement actions against employer collusion and suit against a merger solely on buyer power grounds *vis-à-vis* workers are important initial steps.

For antitrust law to explicitly protect competitors (from certain forms of competition) would be a major break with the *status quo*. The familiar mantra that antitrust law is concerned with "the protection of competition, not competitors"[53] disclaims competitors as a protect class of antitrust. Yet, in practice, the courts do protect competitors from unfair methods of competition and award them treble damages and injunctive relief if they are injured by, and lose profits due to, a monopolistic rival's exclusive dealing[54] or predatory pricing.[55] They, however, are not entitled to relief if harmed by a rival's superior products or better terms. The law, under the surface, already distinguishes among different forms of competition, proscribing some while permitting others. The agencies, building on the DOJ's amicus brief in *Atlanta Opera*, should recognize these existing norms of fair competition expressly and acknowledge that competitors are entitled to antitrust protection from unfair methods of competition.[56]

A new antitrust should be based on bright-line rules as opposed to the open-ended rule of reason. Many forms of business conduct should be subject to per se rules and presumptions of illegality. The DOJ and the FTC should break with the rule of reason that often demands that enforcers and courts engage in broad social cost-benefit analysis and make quasi-legislative judgments.[57] Under a rules-based approach, the DOJ and the FTC would not have to demonstrate future or past harm to consumers or other groups to establish the illegality of a merger or monopolistic practice. They would instead establish illegality based on bright-line rules similar to speed limits, instead of an effects-based approach akin to evaluating a totality of the circumstances to decide whether a driver was going "too fast."

If the agencies adopt this rules-based vision, their new merger guidelines should feature bright-line rules tied to market share and market concentration figures. Rather than determining the legality of a merger based on forecasting future price and non-price effects, the agencies in their new guidelines should identify illegal mergers based on market shares and market concentration numbers, heeding the Supreme Court's warning to "be alert to the danger of subverting congressional intent [in enacting Section 7 of the Clayton Act] by permitting a too-broad economic investigation."[58] The DOJ announced such bright-line rules in the 1968 Merger Guidelines[59]

47 *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

48 *Mandeville Island Farms, Inc., v. American Sugar Crystal Co.*, 334 U.S. 219, 236 (1948) (emphasis added).

49 Sanjukta Paul & Sandeep Vaheesan, *Make Antitrust Democratic Again!*, Nation, Nov. 19, 2019, https://www.thenation.com/article/economy/antitrust-monopoly-economy/.

50 *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018).

51 For instance, the Supreme Court, at least implicitly, weighing injuries to workers from a restraint of trade against the purported benefits of the restraint to consumers. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

52 Eric A. Posner, How Antitrust Failed Workers 32-33 (2021).

53 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

54 ZF *Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

55 *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

56 Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 Wm. & Mary L. Rev. (forthcoming 2022).

57 The Supreme Court recognized the challenges of the rule of reason 50 years ago. The Court wrote: If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611-12 (1972).

58 *Philadelphia National Bank*, 374 U.S. at 362.

59 See e.g. U.S. Dep't of Justice, 1968 Merger Guidelines §§ 5-6 (laying out market share and concentration tests used to determine whether a horizontal merger would be challenged).

A rules-based approach would put companies on notice about what mergers would be challenged and channel their growth strategy in a different direction. Anti-merger law would have a deterrent effect that it has sorely lacked in recent decades. Bright-line merger rules would, moreover, encourage companies to pursue growth through internal expansion in lieu of growth through mergers and acquisitions.

In addition to bright-line rules for mergers, the agencies should revive and establish per se rules and presumptions for a range of exclusionary and predatory competitive practices. For instance, they should vigorously enforce the per se rule against tying by firms with "market power," a modified per se rule that the Supreme Court has repeatedly affirmed,[60] but the agencies have hardly used in practice.[61]

Critically, the FTC is not confined by judicial interpretations of the Sherman and Clayton Acts and has broad latitude to institute bright-line rules for a range of competitive practices. Using its Section 5 "unfair methods of competition" authority,[62] it can prohibit practices that do not necessarily violate the two principal federal antitrust statutes.[63] For instance, the FTC should prohibit non-compete clauses for all workers and exclusionary contracting by dominant firms and restrict below-cost pricing. As with strong anti-merger policy, these rules would channel business strategy toward fair treatment of trading partners, investment, and research and development.

The Robinson-Patman Act should be revived under a new antitrust regime that protects sellers and competitors. The FTC and the DOJ effectively stopped enforcing the law in the 1970s.[64] The extended non-enforcement of this New Deal statute reflects the consumerist orientation of antitrust. Critics have alleged that Robinson-Patman protects competitors (not competition) and is out of sync with prevailing antitrust thinking that centers consumer interests.[65]

Yet, under a fair competition philosophy, the Robinson-Patman Act is a sensible and sound statute that restricts certain methods of competition.[66] A clear analog can be drawn between the DOJ's position in the *Atlanta Opera* case and the Robinson-Patman Act: Just as firms should not be allowed to gain a competitive advantage by misclassifying their workers, they should not be permitted to gain an edge by squeezing their suppliers and obtaining special concessions from them. While the Robinson-Patman Act requires clarification through agency guidance or legislation, the DOJ and the FTC should start resurrecting it — and an important bright-line rule — by enforcing the old *Morton Salt* inference of illegality against price discrimination.[67]

VI. CONCLUSION

The DOJ and the FTC have increased anti-merger enforcement and targeted more than just mergers among competing sellers, which comprised the conventional focus of antitrust enforcement against mergers. On conduct, the DOJ has made criminal prosecution of employer collusion a priority. The monopolization front, however, has been largely quiet and not seen any new court cases under the Biden administration. What the agencies have done so far does not constitute a clean break with the antitrust orthodoxy of the past 40 years. They have much more to do to enact "new rules of monopoly."[68]

Yet, the DOJ's enforcement and advocacy suggest fundamental reform may be afoot. In making the protection of workers and other sellers of goods and services a priority, speaking in the language of fair competition, and calling for greater reliance on per se rules and presumptions of illegality, the DOJ may be laying the groundwork for a qualitatively new antitrust.

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60 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42-43 (2006); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)

61 Max M. Miller, *Untying the Knots of the Digital Economy: It's Time for Enforcers to Resurrect a Pillar of Antitrust*, 19 Price Point 3 (2019).

62 15 U.S.C. § 45.

63 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

64 Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 Mgmt. Sci., 2123, 2125-26 (2010).

65 See generally Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125 (2000).

66 Brian Callaci & Sandeep Vaheesan, *How an Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, Harv. Bus. Rev., Feb. 9, 2022, https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector.

67 *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948).

68 Leah Nylen, *The New Rules of Monopoly*, Politico, Dec. 27, 2021, https://www.politico.com/news/2021/12/27/monopoly-antitrust-new-rules-tech-525161.

SEVEN MYTHS OF MARKET DEFINITION

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Roughly a year into control of the federal antitrust agencies, President Biden's antitrust team is turning from lofty goals and aspirations to the honest work of converting those objectives into practicable policies and enforcement practices. They seem poised to start, as antitrust so often does, with market definition.

The DOJ's and FTC's recent *Request for Information on Merger Enforcement* asks sixteen questions about whether and how the Agencies should revise market definition.[2] It implies interest in revising market definition under other headings as well.[3] Individual remarks by Assistant Attorney General Kanter highlight market definition as a special target of reform efforts.[4] And market definition and market structure analysis are among the subjects addressed in a recent wave of proposed antitrust legislation in Congress.[5]

Market definition is an appropriate focus of review. Improvements to how the Agencies and the courts approach market definition could enhance not just the clarity of antitrust analysis but also the impact and efficiency of enforcement efforts. By the same token, however, changes to market definition should not be undertaken lightly. The negative consequences of even slight missteps could quickly overwhelm every other benefit the administration seeks to unlock. Market definition is that important.

It is thus alarming to see some old points of confusion swirling about in the current discussion. Several examples of confused thinking are apparent in the Agencies' *Request for Information*. Others will undoubtedly be introduced by responsive commentary. Still others lurk in the background context from which the current push for policy reform emerges. To help policy work start from a solid foundation, the following identifies seven common myths of market definition and explains how to avoid them.

I. MYTH #1 - MARKET DEFINITION IS A NECESSARY STEP IN RULE OF REASON ANALYSIS

Decades of briefs and court opinions have peddled the shopworn claim that "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act."[6] Not one has ever offered a plausible explanation *why* legality is unknowable outside the context of a relevant market. It is sometimes suggested that the language of Section 7 justifies this supposed requirement.[7] The statute does not support this reading.[8] It is also sometimes suggested that a market context is needed to establish substantiality of injury.[9] The illogic of that suggestion becomes clear, however, upon even a moment's reflection.[10] A pound of flour is a pound of flour, whether placed in a small bowl or a large one. So, too, substantiality of injury is the same however relevant markets are defined.

As merger law is understood and enforced today, *market definition is not a necessary step in analysis*. This is nearly a truism given the primacy of proof of antitrust injury in proving illegality.[11] Yet, the lesson still eludes some courts and advocates, resulting in flawed reasoning like the rejection of claims for no reason other than failure to define a relevant market.[12] Interest in establishing the non-necessity of market definition

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2 U.S. Dept. of Justice & Federal Trade Comm'n, Request for Information on Merger Enforcement 5–6 (Jan. 18, 2022) [hereinafter Request for Information].

3 E.g. *id.* at 3 (asking "should the guidelines make it clearer that the tests for an antitrust market can often be satisfied using direct evidence of likely effects . . . or qualitative evidence about substitution?").

4 Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines 4–5 (2022).

5 See e.g. Competition and Antitrust Law Enforcement Reform Act, S. 225 117th Cong. §§ 4(b), 9(a), 13 (2021).

6 *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

7 E.g. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) ("The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').").

8 See Herbert Hovenkamp, *Markets in Merger Analysis*, 50 Antitrust Bull. 887, 890–93 (2012) (providing a better reading of the statutory language); Louis Kaplow, *Replacing the Structural Presumption* § III.B.1 (working paper, Dec 14, 2021) (similar).

9 E.g. *Brown Shoe Co.*, 370 U.S. at 324 ("Substantiality can be determined only in terms of the market affected").

10 See David Glasner & Sean P. Sullivan, *Logic of Market Definition*, 83 Antitrust L.J. 293, 339–40 (2020).

11 See e.g. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549–50 (1966) ("Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question . . . whether a merger may substantially lessen competition anywhere in the United States.").

12 E.g. *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011) ("To state a claim under § 7 of the Clayton Act, §§ 1 or 2 of the Sherman Act . . . a plaintiff must allege a plausible relevant market in which competition will be impaired.").

is thus encouraging.[13] Agency guidance or legislation that clarified that market definition is not a necessary step in rule of reason analysis could improve and focus antitrust analysis.

It would be a grave mistake, however, to go too far and imply that market definition was not a helpful step in analysis. In some cases, market definition can become necessary, as when market shares and other structural considerations are used to draw competitive inferences. And even when it is not necessary, market definition can still help to clarify and direct analysis. Market definition can focus attention; it can identify important actors for understanding challenged conduct; it can contextualize inquiries about future conduct (like the future entry of potential competitors); and it can provide other benefits besides these.[14] In short, while market definition is not always necessary, it is often useful and important in analysis, and it should be omitted only when there are good reasons for doing so.

II. MYTH #2 - RELEVANT MARKETS ARE FREESTANDING ENTITIES

How many times have proposed relevant markets been criticized as unrealistic? How many times have markets been described as gerrymandered — not for failing to fit a recognized test but for being selected, from among valid options, as the choice that best matches the plaintiff's theory of the case?[15] How many times have plaintiffs marched into court with nothing but casual intuition to justify their definition of a relevant market? How many times have markets been defined in terms of industry classifications or abstract inquiries divorced from a particular theory of harm?[16]

All of these arguments fail for the same reason: relevant markets are not things that exist in the world, but merely analytical lenses through which we think about particular theories of harm.[17] The market that is relevant for considering a merger's ability to encourage anticompetitive coordination is not typically the market that is relevant to considering the same merger's tendency to stifle head-to-head competition between the merging parties.[18] Neither of these markets is the same as the "industry" in which casual speakers might place the firms or perceive anything about trends in consolidation.[19] The emphatic word in "relevant market" is not market but relevant. The point of market definition is to identify a scope of trade that is helpful for assessing a particular theory of harm.

Several reform opportunities flow from this observation. First, since relevant markets cannot be defined in the abstract, market definition should not be described or attempted outside the context of a specific theory of harm. In a merger context, market definition should not be performed before deciding what concerns need to be evaluated. Market definition should be both described and conducted within analysis of a specific theory of harm: one market definition process for coordinated effects analysis, another market definition process for unilateral effects analysis. Second, because confusion about this subject is prevalent, it would be helpful to clearly and unambiguously refute the idea that all relevant markets should align with casual ideas about industry boundaries. Third, because there is not some freestanding "correct" market waiting to be discovered, courts should not approach market definition as presenting a choice between the plaintiff's and the defendant's conflicting proposals of market boundaries. So long as plaintiffs' proposed markets are consistent with appropriate tests, those are the relevant markets that should guide analysis.

III. MYTH #3 - THERE IS ONE RELEVANT MARKET PER CASE

One question stands out in the *Request for Information*: "Are the guidelines sufficiently clear that the same product or service may be in multiple relevant antitrust markets depending on the competitive effects being evaluated?"[20] The answer is, of course, "No." Despite their many strengths,

13 E.g. Request for Information, *supra* note 2, at 5 ("Is it necessary to precisely define the market in every case?"); Competition and Antitrust Law Enforcement Reform Act, S. 225 117th Cong. § 13 (2021) ("Establishing liability under the antitrust laws does not require the definition of a relevant market . . . .").

14 See Sean P. Sullivan, *Modular Market Definition*, 55 U.C. Davis L. Rev. 1091, 1117–29 (2021) (discussing various purposes of market definition); Gregory Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 Antitrust L.J. 729 (2013) (similar).

15 See Glasner & Sullivan, *supra* note 10, at 299 n.29 (collecting examples of this argument).

16 E.g. Subcomm. on Antitrust, Commc'n. & Admin. L. of the Comm. on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 12, 15, 17 (2020) (declaring properties of "the market for social networking," "the U.S. online retail market," and "the mobile operating system market").

17 Glasner & Sullivan, *supra* note 10, at 308–09; Magali Eben, *The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process*, 17 J. Comp. L. & Econ. 586 (2021).

18 See Sullivan, *supra* note 14, at 1114–17 (observing the unhelpfulness of HMT markets in unilateral effects analysis).

19 See *id*. at 1108–09 (observing the unhelpfulness of industry concepts in coordinated effects analysis); see also *id*. at 1124, 1126–27 (discussing how industry concepts did respond to Warren-Court era concerns about industrial concentration as it was popularly perceived).

20 Request for Information, *supra* note 2, at 5.

the 2010 Horizontal Merger Guidelines do not adequately discredit the common misperception that market definition is a discrete step in analysis that produces one relevant market per case.[21]

A simple example illustrates the problem with that thinking. Suppose that a horizontal merger is being evaluated for two separate competitive concerns. First, the elimination of a previously fierce competitor could embolden coordination among a group of five remaining firms. Second, the elimination of head-to-head competition with the acquired company could result in unilateral harm for a subset of consumers. Suppose, also, that the Hypothetical Monopolist Test would validate as relevant markets either the broad group of five firms or the narrow group of just the merging firms (an implication of a substantial unilateral effect, at least in a differentiated-product space).[22] Which of these is the "right" choice of relevant market? The answer is "both" and "neither." The broad market is the appropriate choice for assessing coordination concerns; the narrow market is the appropriate choice for assessing unilateral effect concerns. Neither is appropriate for assessing the other concern.[23] Unless one or the other of these two theories of harm is dropped, careful analysis of the merger requires two separate instances of market definition.

Agency guidance could helpfully clarify that *it is appropriate to define different relevant markets for different theories of harm*. The Agencies would have a solid foundation for this position not only in logic but in law. The Supreme Court adopted just such an approach in *Brown Shoe*.[24]

IV. MYTH #4 - THERE IS ONLY ONE TEST FOR DEFINING RELEVANT MARKETS

Sticking with the same *Request for Information* question addressed in Myth #3, two related misconceptions about tests for defining markets are also implicated by this question. The first is the false belief that there is just one test for defining markets. In some respects, the 2010 Horizontal Merger Guidelines appear to adopt this position.[25] AAG Kanter's remarks also seem to adopt the error in the claim that "the static formalism of market definition may not always be the most reliable tool for assessing the potential harms of mergers."[26] The second is the false belief that every test for defining markets is the same.[27] Modest examples of this error include anachronistic reinterpretation of old tests, like the *Request for Information's suggestion that Brown Shoe*'s practical indicia test is focused on "qualitative evidence about substitution."[28] More vivid examples emerge when language about practical indicia is mashed together with soundbites about cross-elasticity of demand and extracted portions of the HMT in constructing a sort of Frankenstein's monster of a test for defining relevant markets.[29]

Inherent in the idea that the same product or service may be in multiple relevant markets depending on the competitive effects being evaluated is the idea that *different tests are needed to define helpful relevant markets for different theories of harm*. By its terms, the HMT is a test for defining markets relevant to coordination concerns.[30] It also defines appropriate relevant markets for assessing output suppression theories of unilateral effects.[31] The HMT does not typically define relevant markets that are helpful for evaluating differentiated-product unilateral effects

21 See Glasner & Sullivan, *supra* note 10, at 331 ("Despite drawing a sharp distinction between the analysis of unilateral and coordinated effects, the 2010 Horizontal Merger Guidelines can be read to imply that the same relevant market should be used to assess both of these different theories of harm."); see also *id*. at 326–30 (describing the "single market fallacy").

22 Sullivan, *supra* note 14, at 1116.

23 See Glasner & Sullivan, *supra* note 10, at 333 (working through a similar thought experiment).

24 *Brown Shoe Co. v. United States*, 370 U.S. 294, 325–28 (1962) (defining the relevant market for analysis of the vertical aspects of the merger); *id*. at 336–39 (separately defining the relevant market for analysis of the horizontal aspects of the merger).

25 Compare U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (Aug. 19, 2010) (presenting the Agencies' approach to market definition in merger cases), with *id.* § 6.1 paras. 6–7 (describing unilateral effects analysis as not requiring market definition).

26 Kanter, *supra* note 4, at 4.

27 See Sullivan, *supra* note 14, at 1096–97 (labeling this thinking the "hammer analogy" of market definition).

28 *Compare* Request for Information, *supra* note 2, at 3; *with* Glasner & Sullivan, *supra* note 10, at 302 (noting that *Brown Shoe*'s discussion and test of market definition was "never meant to fit the focus of modern antitrust analysis"); Sullivan, *supra* note 14, at 1105 ("Only a few of the practical indicia have any plausible connection to antitrust's current focus on market power and constraints on that power.").

29 E.g. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017) (presenting multiple different tests for defining markets as though they were interchangeable).

30 See Sullivan, *supra* note 14, at 1107–11, 1130–33.

31 *Id*. at 1136–37.

theories.[32] This is not because market definition is unhelpful in evaluating these theories. It simply reflects the need for a different test of market definition in that context.[33] Perhaps something similar applies to AAG Kanter's concern that "potential harms of mergers" are going unaddressed by current market definition practices.[34] If so, the implication is not that market definition is unhelpful, but that new tests of market definition are needed to address these potential harms.

To correct deep-rooted confusion on this point, Agency guidance should acknowledge that different tests of market definition serve different purposes. Agency guidance should clarify that it is appropriate to define different relevant markets for different theories of harm *and* that it is appropriate to use different tests to define relevant markets for different theories of harm. Objections to the complexity of this approach do not withstand scrutiny. Nobody criticizes a doctor for using different medical tests to look for signs of different illnesses. Nobody should criticize the Agencies for using different market definition tests to look for signs of different competitive concerns.

V. MYTH #5 - MARKET DEFINITION IS NEEDLESSLY OVERCOMPLICATED

Another myth is the idea that complexity in market definition could be mitigated by simply changing the rules of market definition. This idea might motivate the *Request for Information* question that asks: "Do the guidelines imply that precision is necessary or possible in defining relevant markets?"[35] Qualitative reasoning is acceptable and usually necessary in market definition. There is also room to streamline the process — for example, by addressing Myths #3 and #4. But much of market definition's complexity is derivative of complexity in the underlying theory of harm being evaluated. To simplify market definition, while leaving the underlying theory of harm unchanged, would be to mutilate the connection between relevant markets and the purposes they are meant to serve.

As a concrete example, suppose a merger is being investigated for its potential to lead to anticompetitive coordination. Relevant markets defined by the HMT are useful for this investigation. The test articulated by the HMT could be restated (not simplified) as this: a relevant market is a group of competitors with the joint market power to successfully undertake anticompetitive actions if they were able to perfectly coordinate their conduct.[36] True, this is a complicated inquiry, but the payoff is a market with special relevance to the coordination concern. By construction, participants in the HMT market are a group of competitors with the potential to engage in anticompetitive coordination.[37] By construction, market structure in an HMT market provides relevant information for assessing coordination prospects and incentives.[38] By construction, historic information about the behavior of participants in this market is relevant to assessing coordination concerns.[39]

Now suppose that, instead of using the HMT, we had defined the relevant market using some convenient test like intuition, industry recognition, or a similarly simplistic rule of decision. Effort would be saved, but the resulting market would no longer serve the functions that the HMT market had served. Nothing would guarantee that participants in this new market would be potential colluders. Nothing would relate market structure in this new market to the risk of coordinated conduct. And nothing in the history of this new market would be of obvious relevance to coordination concerns. The market would be just as likely to miss coordination by being too broad (gathering too much competition to reveal important patterns) as too narrow (failing to capture enough competition to see important patterns).

In short, when appropriately conducted, *the complexity of market definition reflects the complexity of the underlying theory of harm*. Attempting to suppress the complexity of market definition by defining casually intuitive or arbitrary markets with no connection to the underlying theory of harm will only confuse investigations and frustrate enforcement efforts. To state the obvious, the Agencies should not pursue this option.

32 *Id.* at 1111–17.

33 *Id.*

34 See *supra* note 26 and accompanying text.

35 Request for Information, *supra* note 2, at 5.

36 Sullivan, *supra* note 14, at 1110 ("At base, the HMT defined a market as a group of competitors who could, at least under ideal circumstances, collude to jointly raise their prices.").

37 *Id.* at 1111.

38 *Id.* at 1123–24.

39 *Id.* at 1125–26.

VI. MYTH #6 – DIRECT EVIDENCE OF MARKET POWER OBVIATES MARKET DEFINITION

Imprecise thinking and language can lead discussions of direct evidence down dangerous paths. The *Request for Information* toes this line in asking whether the guidelines should "make it clearer that the tests for an antitrust market can often be satisfied using direct evidence of likely effects."[40] Individual remarks by Chair Khan ask an apparently similar, but importantly different, question: "Are there certain markets where the guidelines should provide a framework to assess direct evidence of market power?"[41]

Direct evidence can be very valuable in antitrust analysis, but there is a tendency to overstate the frequency with which this happens. In merger cases, direct evidence of prospective mergers is unavailable. Merger simulations and other economic models offer qualitative predictions, not "direct" evidence of competitive effects.[42] Consummated mergers may allow for empirical proof of a merger's effects, though establishing causality can be challenging.[43] Direct evidence of market power is generally not the same as direct evidence of likely effects. Where the worry is that a merger will increase market power, for example, proof of current market power does little to advance analysis. The error in thinking otherwise could be seen as a reverse *Cellophane* fallacy: proof of existing market power does not prove ability to gain market power.[44]

In short, *direct evidence is often informative for market definition but not often dispositive of it*. Proof of past competition can be an important factor in market definition, but mere proof of past competition is rarely enough.

VII. MYTH #7 – MARKET CONCENTRATION HAS MEANING INDEPENDENT OF HOW THE MARKET IS DEFINED

Concerns about concentration motivate the current push for policy reform. The executive order that encouraged the Agencies to review the merger guidelines suggested that they do so "[t]o address the consolidation of industry in many markets across the economy."[45] Referencing the executive order, but changing its language, AAG Kanter asserts a connection between "concentrated market structures" and harm to trading partners, possibly related to coordination or exclusion.[46] The various ideas reflected in even these two statements reflect a background tendency to treat concentration as though it has significance independent of how the market is defined.

Assuming, for sake of argument, that consolidation means concentration, and that industry means market, it is not true that concentration has the same meaning in every market. Forty years ago, Landes and Posner illustrated this point by showing how the same market share could have different competitive implications as the size of the market and elasticity of demand varied.[47] The economic significance of market concentration also depends on the way that a relevant market is defined. HMT markets are defined in such a way that greater concentration says something about the prospects of coordination. The process of defining the HMT market is what gives concentration this meaning.[48] In a market defined by NAICS code, for example, concentration is not an economically defensible predictor of coordinated effects.

The Agencies have much to gain by leaning into the insight that *market concentration gets its meaning from market definition.* One implication of this insight is that market concentration thresholds should be applied contextually. High concentration in an HMT market supports an

40 Request for Information, *supra* note 2, at 3.

41 Fed. Trade Comm'n, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement 3 (Jan. 18, 2022); see also *id.* ("What types of indicia of market power should the guidelines consider?").

42 See Sullivan, *supra* note 14, at 1116–17, 1127–28.

43 See 5 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1205 at 310–11 (4th ed. 2014) (noting difficulty of proving causality of post-merger price increases).

44 *Cf.* Luke M. Froeb & Gregory J. Werden, *The Reverse Cellophane Fallacy in Market Delineation*, 7 Rev. Indus. Org. 241 (1992) (describing a different but related reverse *Cellophane* fallacy).

45 Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 5(c) (July 14, 2021).

46 Kanter, *supra* note 4, at 2.

47 See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 954–55 (1981).

48 Sullivan, *supra* note 14, at 1123 ("[M]arket definition really is where this translation [of market features into economic significance] takes place.").

inference that a merger could have coordinated effects. Low concentration suggests it could not. But what low concentration in that HMT market *does not* do is suggest that the merger is unlikely to have other effects: it could well risk unilateral effects or other harms. The Agencies would both strengthen and clarify merger enforcement by building this reasoning into their use of market concentration thresholds. At a minimum, the triggering of a safe harbor provision in one relevant market should not preclude continued investigation of competitive harms that would arise in other relevant markets.[49]

49 *Id.* at 1145–47 (making this point in greater detail).