



Interview with David Vladeck, Consumer Advocate

In this wide-ranging conversation, **David Vladeck**, Professor of Law at Georgetown University Law Center and the former Director of the FTC Bureau of Consumer Protection, discusses consumer protection during the agency's first 100 years and future challenges.

Big Mistakes Regarding Big Data

Darren Tucker and **Hill Wellford** explore the significant benefits to both individuals and businesses from the modern phenomenon of big data and respond to concerns that the need for big data may create barriers to entry in certain online markets. The authors contend that big data does not pose antitrust issues and that regulating big data may ultimately harm competition and consumers.

Considering the Unique Aspects of the Merger Review Process in China

Gregory Leonard and **Yizhe Zhang** highlight key considerations for practitioners seeking to obtain clearance from MOFCOM. They caution that parties should assume they have the burden of proof and that MOFCOM has shown a heightened sensitivity to vertical concerns and high-tech industries in recent investigations.

Price Maintenance in Canada—Guidance from the Competition Bureau

John Bodrug and **Jim Dinning** look at recent guidelines from the Canadian Competition Bureau regarding the application of the resale price maintenance amendments to the 2009 Canadian Competition Act. They argue that the current climate creates a generally permissive regime for suppliers that do not possess market power, notwithstanding some potential uncertainties.

Book Review: Microsoft's Antitrust Travails

In his review of **Andrew Gavil** and **Harry First**'s new book on the annals of the Microsoft antitrust cases, **Keith Hylton** praises the authors' detailed roadmap and history of perhaps the most epic antitrust case of the last decade but wishes there were more economic analysis addressing whether the government's case was based on sound antitrust policy.

Paper Trail: Working Papers and Recent Scholarship

John Woodbury reviews an empirical research paper by **José Azar**, **Martin Schmalz**, and **Isabel Tecu** on the competitive effects resulting from simultaneous investments by institutional investors in multiple firms within the airline industry. In their paper, the authors find that such investors use their influence over the airline carriers to soften downstream airline competition.

Interview with David Vladeck, Consumer Advocate

Editor's Note: David C. Vladeck is a Professor of Law at Georgetown University Law Center, where he teaches federal courts, civil procedure, administrative law, and a seminar on First Amendment litigation. He also serves as faculty director for the law school's Center on Privacy and Technology. Professor Vladeck recently returned to the law school after serving for nearly four years as the Director of the Federal Trade Commission's Bureau of Consumer Protection.

Before joining the law school faculty full-time in 2002, Professor Vladeck spent over 25 years with Public Citizen Litigation Group, a national public interest law firm, supervising and handling complex litigation. He has briefed and argued a number of cases before the U.S. Supreme Court and more than 60 cases before federal courts of appeal and state courts of last resort.

In this interview with The Antitrust Source, Professor Vladeck discusses the highlights of his time at the FTC as well as the FTC's first 100 years, challenges the agency faces in coming years, the importance of the agency having a credible litigation threat and strategy, and recent debates concerning the substantiation standard for health claims and Operation Choke Point.

Editor Randy Shaheen conducted this interview for The Antitrust Source on November 11, 2014.

THE ANTITRUST SOURCE: You've had some time now to reflect back a bit on your tenure at the FTC. Have you given any thought to what your biggest accomplishments were during your time there?



DAVID VLADECK: I would say these three things, all with the caveat that none of these accomplishments were “mine,” they were the FTC’s and the Bureau of Consumer Protection’s accomplishments. My good fortune is that I get to take some credit for the hard work of the Bureau’s peerless staff.

First, the Bureau did a great deal of pathbreaking work on privacy. From the outset it was clear that we needed to build an in-house technology infrastructure to do this work because so much of privacy policy today depends on technology. And at the time, the agency did not have staff technologists. The agency did not have a Chief Technology Officer. It did not have a unit dedicated to mobile devices. And although the agency had a top-notch Internet lab, we had no ability to do forensic work on mobile devices, nor, I should add, did any other civil law enforcement agency.

So, in 2009 we started bringing in technologists to work hand-in-hand with lawyers and other staff on investigations and policy formation. We began a tradition that Chairwoman Ramirez has continued—bringing in highly credentialed Chief Technology Officers. At the same time, we brought in law scholars with technological expertise, like Tim Wu and Paul Ohm, both of whom played important roles in policy formation. And we built a fully operational lab to do forensic work on mobile devices.

That forensic capability enabled the agency to bring many cases—for instance, those involving mobile apps, malware infected smartphones, mobile device file-sharing apps, mobile cramming, and others—that might have been impossible to bring without the forensic capacity to produce evidence that could be used at trial. And it enabled the agency to do a great deal of work on the policy side as well—particularly on mobile apps for kids and geolocation tracking.

More generally, though, we got an enormous amount done in both the enforcement and policy sides of our work. We brought a slew of privacy cases, starting with Sears¹ (a case that was pending before the Bureau when I arrived) and running through Google² (twice), Facebook,³ and many others. These cases were challenging and posed issues of first impression for the agency. We also continued the tradition set by Tim Muris of bringing data security cases. And we ramped up enforcement of the Children's Online Privacy Protection Act (COPPA).⁴

On the policy side, we first surfaced the idea of regulating data brokers in our 2010 draft privacy report⁵—an idea repeated in the 2012 final report,⁶ reaffirmed with the agency's issuance of 6(b) orders to nine data brokers in 2012, and then followed by the agency's 2014 Data Broker Report.⁷

The 2012 final Commission privacy report was especially important because it enabled the Commission to lay out a new, comprehensive framework for privacy protection. It also put the agency on record as supporting baseline privacy legislation. The report also continued the agency's push on Do Not Track, though we never did get across the finish line there. And we held workshops and issued detailed reports on a range of policy issues—from facial recognition to “dot.com” disclosures.

Finally, we worked hard to forge relationships with our EU counterparts on privacy. I think that was especially important. We needed to build a bridge to the EU, our largest trading partner, but relationships were frayed. I spent a good deal of time in Brussels trying to persuade EU data protection officials that even though the U.S. approach to privacy regulation is different than the EU's, the U.S. does have meaningful privacy protections and that there is no daylight between the U.S. and EU in terms of aspirational goals.

ANTITRUST SOURCE: That's quite an impressive list of accomplishments. But it sounds like you have two more in mind.

DAVID VLADECK: Sure. Second, I would say the work we did on what we call “last dollar frauds”—frauds aimed at taking the last dollar out of a victim's pocketbook—was critically important and generally successful. I joined the agency just when the economic downturn was at its worst.

¹ Decision and Order, Sears Holdings Mgmt. Corp., FTC File No. C-4264 (Aug. 31, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2009/09/090604searsdo.pdf>.

² Stipulated Order, United States v. Google, Inc., No. 512-cv-04177-HRL (N.D. Cal. Aug. 9, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120809googlestip.pdf>; Decision and Order, Google Inc., FTC File No. C-4499 (Dec. 2, 2014), available at <http://www.ftc.gov/system/files/documents/cases/141205googleplaydo.pdf>.

³ Decision and Order, Facebook, Inc., FTC File No. C-4365, (July 27, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

⁴ 15 U.S.C. §§6501–6508.

⁵ PRELIMINARY STAFF REPORT, FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (Dec. 2010), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf>.

⁶ FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (Mar. 2012), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

⁷ FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (May 2014), available at <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

The most important predictor of when someone is susceptible to fraud is economic vulnerability, and the high unemployment and under-employment triggered by the downturn put millions of Americans squarely in the sights of fraudsters. To the credit of the staff of the Bureau, we were able to mobilize the Bureau's resources, and brought literally dozens of cases against mortgage foreclosure scams, debt settlement scams, job and business opportunity scams, federal grant scams, and precious metal scams. To curb the worst abuses, we also quickly issued rules regulating debt settlement companies and mortgage advertising. And we ratcheted up the relief we sought in enforcement cases; we insisted on stripping whatever assets we could find, and we often insisted on occupational bans to ensure we didn't see these fraudsters again.

I think we made an impact. After a year or so of relentless enforcement, we saw a sharp decline in targets in what was, just a few months earlier, a target-rich environment. While some of these scams morphed into new forms, I think that the comprehensive relief we obtained in these cases, coupled with the occupational bans, took many of the fraudsters off the field.

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And third, and you know as well or better than anyone, we also sharpened the focus of our advertising work in a number of ways. We deliberately targeted national brand companies that were making health claims that they couldn't substantiate, or in some cases, were making claims that were contradicted by the company's own evidence. Big companies shouldn't get a pass from enforcement cases simply because they are otherwise "reputable" companies. We also insisted on comprehensive consumer redress in the same way the agency has historically insisted on full redress in other deception cases. And we also tried to address a longstanding problem with the "competent and reliable" evidence orders that the agency routinely used in cases where the claim made conveyed the impression that it was backed by scientific evidence. Too often the agency confronted arguments that the standard order language was too vague to be enforced, and that in a contempt case, the agency had to re-litigate the standards needed to substantiate the claim. As a litigator, it made no sense to me to litigate a case to get an order that might not be enforced.

ANTITRUST SOURCE: Yes. I think for a while the bigger brands felt like they were being given a pass. I don't think they're feeling that way anymore.

DAVID VLADECK: Yes, I think that's right. And certainly Chairwoman Ramirez has made clear that this remains an agency priority.

ANTITRUST SOURCE: When you look at the litigation the Commission is active with right now, a lot of it involves some pretty big brand names. And, what about the flip side, are there other things that you wanted to accomplish or felt like you wanted to do that you just weren't able to quite get done?

DAVID VLADECK: Well, part of the frustration about an interview like this is that some of those things I would like to talk about remain confidential.

One example, though, of something I very much wanted to get done was to finish the work of the Inter Agency Working Group (IWG) on Child Nutrition and Advertising. As you know, Congress imposed a mandate that it knew we couldn't meet—namely, the preparation of a full-scale cost/benefit analysis on *voluntary* guidelines before we could move forward—and that doomed the project.

My frustration was, and remains, that the IWG was doing important work and was shut down at the wrong time for the wrong reason. We need to have a national conversation about what lim-

its, if any, should be placed on marketers selling food products directly to children to shield children—particularly the very young—from being bombarded with ads for foods that are nutritionally wastelands. Childhood obesity is a real problem and government needs to be able to at least propose policy solutions.

But that conversation was drowned out by segments of the food and advertising industries that wanted to put this genie back in the bottle and pretend that there is no problem here. And they won. I found that really frustrating. It wasn't that I minded being a piñata for a couple of months. That comes with the territory and I have a thick skin. But this was an issue that demands public debate. And to be fair, many responsible food companies wanted to continue that conversation. But, at the urging of broad segments of the food and advertising industries, Congress shut the process down, meaningful debate stopped, and rhetoric ruled, and I think we're all poorer for that result.

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ANTITRUST SOURCE: There have been some efforts made toward self-regulation. Do you feel like that's at least made some headway on the issue?

DAVID VLADECK: Some progress has been made, but not as much as is needed. The process is taking too long; too many unhealthy products are still being marketed directly to young kids; and too many in industry take the position that they bear no responsibility here—it is the parents who are to be blamed.

Part of the difficulty in making real progress is that there is a vexing collective action problem that impedes moving ahead. Even for the companies most committed to moving to healthier offerings, no company wants to be far ahead of its competitors, particularly when they're engaging in marketing efforts that may be risky. And that is part of the reason why a serious debate on this might have led to swifter, surer, and more sensible policy here. It just didn't happen.

ANTITRUST SOURCE: The Commission is involved in a fair amount of litigation right now. I haven't gone back to tabulate whether it's at historic levels, but there are certainly a number of high profile cases.

DAVID VLADECK: A lot of cases, right.

ANTITRUST SOURCE: I think I'm recalling correctly that, one of the things you brought to the job was an attitude of not being afraid to litigate cases, especially if the Commission felt like it was right on the law. Do you feel like that philosophy has borne fruit? Has the Commission done well by itself in court?

DAVID VLADECK: I think that the agency has done well by flexing its litigation muscles. We tried a lot of cases while I was at the Bureau and won most. But more than anything else, I wanted to bolster our litigation infrastructure—from more training for our litigators to better litigation support. Unless an enforcement target believes an agency when it says we're going to court, the agency can't get reasonable settlements or promote general deterrence. Agencies need sticks. An ability and willingness to litigate is a pretty big stick.

An ability to litigate also gives the agency the freedom to throw down the gauntlet when it is trying to move the law. Sometimes we got what we wanted without litigation. For instance, we took

some very aggressive stands on debt collection. *Asset Acceptance*,⁸ as an example, was a case to rein in the collection practices of one of the largest debt buyers in the nation. Debt buyers are companies that buy old debt, generally past the statute of limitations, and try to collect on that debt. We were worried that in so doing these companies were making threats to sue to collect on debt that had passed the statute of limitations, or deceiving consumers into making a token payment that might “revive” the debt and restart the statute of limitations clock. I thought we would have to litigate *Asset Acceptance*. The legal issues were novel, and the relief the agency wanted was far-reaching. But top notch lawyering on both sides brought about a settlement that satisfied the Commission’s concerns and permitted the company to move on.

ANTITRUST SOURCE: Were there any cases that you were surprised ended up in litigation?

DAVID VLADECK: *Wyndham*⁹ is one example that comes to mind. If the agency could have designed the model test-case for its long-standing data security work, *Wyndham* would have been it. *Wyndham* suffered multiple failures of basic security practices and three breaches in 18 months with the loss of a half-million credit card files. Where did those files end up? In the hands of Russian organized crime. And this is a case the company wants to litigate? You know, sometimes, as a litigator, you just don’t understand the other side. The FTC will win this case and put an end to any argument that it lacks authority over data security matters.

But what’s more baffling about this case is why *Wyndham* would want to win. Let’s suppose the company wins—it isn’t going to, but suppose it does—then what? That outcome seems clearly worse for *Wyndham* and other companies that suffer a data breach.

For one thing, state regulators will step in to fill the void. Instead of having a single FTC investigation, there will likely be multiple state investigations, conducted by regulators with perhaps less experience in handling data breach investigations, and perhaps a quicker enforcement trigger. And remember, most of the states have initial civil penalty authority, raising the stakes considerably. Instead of the FTC, we will probably see state attorneys general in California, Massachusetts, Illinois, or Minnesota take the lead. Why that is preferable to the status quo is hard for me to understand.

ANTITRUST SOURCE: What about the *POM*¹⁰ case that is currently pending in the D.C. Circuit. Did that one surprise you?

DAVID VLADECK: It did. *POM* is a fascinating case with an even more fascinating cast of characters. To start, Stewart and Linda Resnick, *POM*’s owners, are extraordinarily inventive and gifted marketers. But even though they have said that they have no interest in renewing the marketing the FTC objected to, they have fought tooth and nail against the FTC’s order. Don’t get me wrong—although the litigation was unexpected, I think it was great for the Bureau. The trial before the ALJ

⁸ Consent Decree, *FTC v. Asset Acceptance*, Case No. 8:12-CV-DO182-T-27EAJ (M.D. Fla. 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf>.

⁹ *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d. 602 (D.N.J. 2014).

¹⁰ *POM Wonderful, LLC v. FTC*, No. 13-1060 (D.C. Cir. filed Aug. 8, 2013), appealing Opinion of the Commission, *POM Wonderful LLC*, FTC Docket No. 9344 (Jan. 10, 2013), available at http://www.ftc.gov/system/files/documents/public_statements/568951/130116pom_opinion.pdf.

was a great proving ground for the staff. And the case provided the Commission with an important opportunity to stake out its views on many important issues relating to advertising substantiation cases and fencing-in relief.

ANTITRUST SOURCE: The Bureau entered into a number of consent orders in the privacy area, including against some industry giants. Were you surprised that those matters were resolved without litigation?

DAVID VLADECK: It did surprise me to some degree, yes. The privacy orders in Google and Facebook and the generation of cases that succeeded them were new—there really wasn't a template we could draw on while drafting them. And that was a challenge. On the one hand, the agency needed to guarantee that the companies live up to their promises and respect consumer choice. On the other hand, the agency does not want its orders to impede responsible innovation. I would have been relieved if we had to litigate one of these cases. The litigation process sharpens everyone's thinking in a way that settlement sometimes does not.

I felt that most keenly with the Google Safari case,¹¹ which was our first privacy case involving an order violation. No matter what the agency did, we were going to get criticized. \$22.5 million was the largest civil penalty awarded to the Commission and the largest penalty imposed ever in a privacy case. For Google that amount is probably not even an accounting error. But under the Commission's civil penalty framework, it was the highest penalty we could reasonably claim was warranted. It would have been much easier for me (and perhaps the Commission) to have the court determine an appropriate penalty. But I couldn't insist that Google litigate a case it was willing to settle simply to satisfy my own self-interest.

There was one other case I would have liked to litigate, *DesignerWare*,¹² which was an unfairness case. The company sold software to companies offering "rent-to-own" computers that not only allowed the tracking and disabling of a computer, but also permitted the company to monitor surreptitiously the activities of the computer's user, including by using the computer's webcam.

This was an important unfairness case because the claim was not that the unsuspecting consumers suffered economic harm, but rather that the harm was an unauthorized, secret, and highly intrusive invasion of the consumer's homes. I think that one reason why the company settled was that Commissioner Ohlhausen voted in favor of the complaint, making it clear that there was bipartisan support for this reading of "unfairness" in the Commission.

ANTITRUST SOURCE: I think you're seeing in the sweepstakes area that now sometimes having to divulge sensitive, personal information is being classified as consideration under state lottery laws. It's somewhat the same idea.

DAVID VLADECK: It is. But we also now know that personal information is a commodity that has a market value, and that value depends on how detailed or "granular" that information is. Now that the market has commodified personal information and set a price, it will be easier to make the argument that collection and use of personal data without affirmative, express consent is unfair.

¹¹ Stipulated Order, *United States v. Google, Inc.*, (N.D. Cal. Aug. 9, 2012),

¹² Decision and Order, *DesignerWare, LLC*, FTC File No. C-4390 (Apr. 15, 2013), available at <http://www.ftc.gov/enforcement/cases-proceedings/112-3151/designerware-llc-matter>.

After all, the argument would go, it is an expropriation of someone's property, and little is more sacred in U.S. law than property rights.

ANTITRUST SOURCE: Well, there are so many different things to follow up on there. Let me ask you about *POM*. In some ways you're the father of the new substantiation standard that got rolled out in the *Iovate*¹³ and *Nestle*¹⁴ cases.

DAVID VLADECK: Yes. I don't think it's a new standard, by the way, but for these purposes I'll accept paternity.

*If you go back and look
at the history of FTC*

ANTITRUST SOURCE: Let me change that to new language. But it seems like, at least to some of us on the outside, the Commission has waffled a little bit about whether the new language applies to a class of claims or is just fencing in, which seems to be one of the arguments the FTC is making in *POM*.

*substantiation cases,
courts have long been*

DAVID VLADECK: I think we've always made it clear that the order provisions are fencing-in relief, and nothing more.

unhappy with the

ANTITRUST SOURCE: It seemed like early on there was some discussion, at least for certain types of claims, this wasn't just fencing-in language, but was the standard the industry should look to.

competent and reliable

DAVID VLADECK: I don't know where that perception comes from. My Advertising Practices colleagues and I have always been careful when we talked about this to be explicit that the order language was fencing-in relief, period. Let me tell you the origin of this revision to our order language, which drives home that the standard is intended to be order language and nothing else. If you go back and look at the history of FTC substantiation cases, courts have long been unhappy with the competent and reliable evidence standard. The Court in *Colgate-Palmolive*¹⁵ observed that the language could be problematic, and Judge Adams in the Third Circuit's *American Home Products*¹⁶ case set it aside on vagueness grounds.

evidence standard.

ANTITRUST SOURCE: Right.

DAVID VLADECK: So, I read these cases before coming to the agency, and as soon as I start every lawyer who comes in on cases where there is a prior order in place tells me that the prior orders are unenforceable, that "competent and reliable" evidence doesn't mean anything, and that in a contempt case, the agency is going to have to re-prove what the standard means. Although I don't agree with this argument, I also don't think it is a frivolous argument.

¹³ Stipulated Final Judgment, *FTC v. Iovate Health Sciences USA, Inc.*, Case No. 10 CV 587 (W.D.N.Y. July 29, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf>.

¹⁴ Decision and Order, *Nestle Healthcare Nutrition, Inc.*, 151 F.T.C. 1 (Jan. 12, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/01/110118nestledo.pdf>.

¹⁵ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

¹⁶ *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982).

So, the question becomes, what's the point of winning an unenforceable order? I've litigated a lot of injunction cases and a few contempt cases; the lack of specificity in an order is nothing but a trap for the winner.

And it is not just that lawyers tell me that the order is unenforceable, they argue that in fighting order enforcement cases. The issue is pending in *Basic Research*,¹⁷ it was front and center in *Lane Labs*,¹⁸ and it sowed the seeds of the agency's loss (kudos to your law firm) in *Garden of Life*.¹⁹

The question was then what should a revised order look like. Some claim that the new order language is new, made from whole cloth, or too closely drawn from the FDA. All of that is just wrong. In formulating our new orders, we went back to bedrock FTC law, and the longstanding rule that to substantiate a claim that a product treats, mitigates, cures, or prevents a disease or serious illness, the agency has almost always required two random controlled trials. *Bristol-Myers-Squibb*, *Sterling Drug*, *American Home Products*²⁰ are just a few of the many cases imposing similar order requirements. So there's nothing new here; just new application of old agency policy.

ANTITRUST SOURCE: To your point earlier about being careful what you wish for, a client might say, "This standard is too vague. I don't know what it means, it needs to be more defined." But now, they may not like the specific requirements that are being spelled out.

DAVID VLADECK: Yes. It is like the industry's argument about data security. On one hand they argue that the FTC needs to set standards in this area, but if the agency were to do so, the industry would savage the agency for being overly prescriptive and advocating one-size-fits-all solutions to widely varying companies and industry practices. From an agency's standpoint, there is nothing new about being whipsawed.

ANTITRUST SOURCE: Let me ask about the CFPB. Before, you mentioned some of the debt collection cases the Commission has brought. I think when the CFPB was first born there was some angst over whether they were going to conflict with the FTC. How were the agencies going to get along, and so forth? The CFPB has now established itself. How do you think the two agencies have done?

DAVID VLADECK: Let me start by showing you what I understand to be the CFPB's first ever "Partnership Award," which Rich Cordray gave me to commemorate the FTC's constructive and cordial collaboration with the CFPB.

I give great credit to Rich Cordray. Rich was as eager as I was to ensure that the agencies displayed reciprocal respect. We do have overlapping jurisdiction in a number of areas. But that hardly means that we need to be tripping over one another, double-teaming targets in enforcement matters, or going our own way on policy issues.

Under Dodd-Frank the agencies had to draft a Memorandum of Understanding by January 2012. Before we sat down to put pen to paper, Rich and I met with stakeholders of all stripes and learned that industry had two major concerns, both of which were entirely legitimate. First, there

¹⁷ *Basic Research, LLC v. FTC*, 807 F. Supp. 2d 1078 (C.D. Utah 2011).

¹⁸ *FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575 (3d Cir. 2010).

¹⁹ *FTC v. Garden of Life, Inc.* 845 F. Supp.2d. 1328 (S.D. Fla. 2012).

²⁰ *See, e.g., Sterling Drug v. FTC*, 450 F.2d 698 (D.C. Cir. 1971).

was concern that companies would be “double-teamed.” For instance, they might get CIDs from both agencies. Second, they were concerned that they would get inconsistent guidance from the agencies and be put to a Hobson’s choice.

The Memorandum of Understanding²¹ we eventually drafted and formalized is unlike any other MOU. It is not simply a recitation of each agency’s job and expectations about coordination. Rather, it is a charter of collaboration, cooperation, and collegial working relations. The “double teaming” issue is addressed in detailed consultation rules about starting investigations, and I know of only one slip up in more than two years. The guidance issue is addressed by extensive coordination on policy questions, which to the agencies’ credit, is also working well.

ANTITRUST SOURCE: There’s a case pending now where the CFPB is making an argument that their interpretation of advertising claims should be deferred to in much the same manner as the FTC.

DAVID VLADECK: Right. That makes sense. In many areas, the CFPB is piggybacking on FTC precedent. And that’s to the good. To the extent possible, consistency between the two agencies should be fostered, not criticized.

ANTITRUST SOURCE: Yes. I think when people saw that similar language they wondered how it would be applied.

DAVID VLADECK: Well, I suppose the key question is what does “abusive” mean? Until there is a case brought under that theory and there is judicial review of the CFPB’s interpretation, I am not sure we’ll know.

Let me ask you—it didn’t have a fancy name back when you were at the Bureau—about Operation Choke Point. I think the FTC has to some extent long gone after parties who were less directly involved in advertising or marketing directly to consumers. What’s your view on the current debate? At some point does the effort to impose liability on parties other than the advertiser go too far?

DAVID VLADECK: I know there’s a lot of dissatisfaction with Operation Choke Point, but I find that mystifying. I understand that there are reports that some banks may be reacting in ways not mandated by the Department of Justice, but perhaps are harming some consumers. My point here, though, is I don’t see what the FTC has to do with any of that. The FTC’s role is to go after payment processors who know or should know that they are helping fraudsters cheat consumers and get paid for doing so. Going after these payment processors is critical in the fight against fraud. The FTC has had real success in doing just that. Congress and the public ought to applaud the FTC’s efforts. And while there has been criticism of the Justice Department, I have yet to see anyone who has defended any of the payment processors the FTC has sued.

ANTITRUST SOURCE: We’ve talked about your time at the FTC. The FTC itself just celebrated a great milestone.

²¹ Memorandum of Understanding Between the Consumer Financial Protection Board and the Federal Trade Commission (Jan. 20, 2012), available at <http://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf>.

DAVID VLADECK: Right, there was a lot of cake but no singing.

ANTITRUST SOURCE: Their 100th anniversary. Do you have any thoughts on what should be on the FTC's greatest hits list for consumer protection from the last 100 years?

DAVID VLADECK: Well, I am just not that old! There are people who know the agency's history far better than I do. Here are a few quick thoughts.

One is the Holder in Due Course Rule.²² Ralph Nader is on record that that is the agency's most significant accomplishment, and the indomitable Jodie Bernstein has said something to the same effect. If Ralph and Jodie agree about something, I defer.

One of the reasons why

we crafted the orders

in the privacy cases to

be non-prescriptive

was to avoid impeding

innovation and

technological growth.

Another is the rise of the use of 13(b) on Tim Muris's watch. As a litigator, I can't imagine the FTC without the ability to go to federal court on a moment's notice and seek injunctive relief. Of the several hundred cases the Bureau filed on my watch, only a handful were brought administratively. Access to the federal district courts has increased dramatically the agency's capacity to protect consumers and get prompt redress.

The advertising substantiation cases brought by Bob Pitofsky, Jodie Bernstein, and their crew were also critically important. These high visibility cases helped put the FTC on the map, they did a great service to consumers by ensuring that consumers got what they paid for, and they made a large body of law on substantiation that strongly infuses much of the Bureau's work today.

And I would say the privacy work that started years ago, but really took shape under Jon Leibowitz's leadership, will be a critical part of the agency's mission in the coming decades.

To me, the more interesting question isn't where has the agency been, it is where it is headed? I think the challenges going forward are really interesting. What will the agency look like 20 years from now? That's really an interesting question. That was part of my job as Bureau Director, and now the job of Chairwoman Ramirez and Bureau Director Jessica Rich.

Here is one thought that I have borrowed from FTC veteran Tom Krattenmaker: Within 20 years, the agency will have a deep bench of technologists. It wouldn't surprise me if 20 years from now (or sooner) that in addition to the BCP, BC, and BE, there will be a Bureau of Technology.

ANTITRUST SOURCE: In terms of technology and the fact that the technology does change so quickly, does the Commission need to be a little more nimble, if you will. For example, there's a lot of discussion about native advertising right now. But, if and when the Commission comes out with guidance on it, we may all have moved on to the next great thing.

DAVID VLADECK: I think that one of the questions for the agency, and this is not just an FTC question, is how do you regulate rapidly changing technology, or what administrative law scholars call "disruptive" technologies? The imperative for the agency is to protect consumers without needlessly stifling innovation. One of the reasons why we crafted the orders in the privacy cases to be non-prescriptive was to avoid impeding innovation and technological growth.

The FTC needs to protect consumers from abuses. I often describe the FTC's role as the job of the gym teacher at the high school prom. He doesn't really want to be there; the students don't want him there, but his job, and the FTC's job, is to make sure that nothing really bad happens. That's the challenge with rapidly evolving technology.

²² 16 C.F.R. § 433.

The agency is right not to regulate at the drop of the hat. Act too early and the agency might stifle innovation. Unless the new technology poses clear and urgent dangers to consumers, it is important for a regulator to let technology take its course until the pace of change slows down a bit. At that point, as the technology matures, as conventions set in, guidance, or, if need be, regulation, can be better calibrated to address the harms but not hamper further responsible innovation. And if the industry has moved on and the technology didn't take root, better that the agency did not waste its resources on a short-lived fad than rushing to regulate.

ANTITRUST SOURCE: Talking about the FTC's challenges ahead seems like a great place to end. Thank you. Your insights and perspectives are always very thought provoking. ●

Big Mistakes Regarding Big Data

Darren S. Tucker and Hill B. Wellford

The ability to store and analyze enormous quantities of data—so-called big data—offers tremendous benefits to both individuals and businesses. Big data analysis has helped increase economic output, reduce crime, improve public health and safety, increase voter turnout, boost energy efficiency, improve weather forecasts, and enhance agricultural yields. The use of big data has become widespread. Once the province of big businesses and governments, analysis of large datasets has become so inexpensive as to be an option even for the prototypical garage-based start-up company. Relevant data are widely available and often free.

Recently, there have been calls for antitrust intervention to address concerns related to big data, particularly big data consisting of personal information.¹ Some privacy regulators, policy organizations, and businesses claim that big data presents a significant and durable entry barrier for online services that has led to entrenchment of large firms. According to these proponents of heightened antitrust scrutiny, large online firms should face antitrust liability for refusing to provide user data in their possession to rivals or for collecting additional user data by expanding into new product lines (whether through acquisition or organic growth). The appropriate remedy for these alleged antitrust violations, they say, is to ensure that incumbents do not have advantages over entrants in terms of access to consumer data. Some also have urged the competition agencies to expand the concept of a relevant antitrust market to include data markets, even when that data is not marketed to customers. Implicit in many of these claims is the belief that a few large companies control most big data or have significant market power due to their possession of vast data collections.

Contrary to the views of these advocates for antitrust enforcement, the acquisition and use of big data by online firms is not the type of conduct captured by the antitrust laws. Online markets are notable for their low entry barriers and typically do not require big data for entry. Instead, most online service providers, including social media, search, and retail, use big data to improve their services once a customer base is established. As a result, the collection and analysis of big data have enhanced competition and improved product offerings. In addition, the notion of a relevant

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¹ See, e.g., EUR. DATA PROT. SUPERVISOR, *PRIVACY AND COMPETITIVENESS IN THE AGE OF BIG DATA: THE INTERPLAY BETWEEN DATA PROTECTION, COMPETITION LAW AND CONSUMER PROTECTION IN THE DIGITAL ECONOMY* (preliminary opinion Mar. 2014) [hereinafter EDPS REPORT]; Nathan Newman, *Search, Antitrust and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401 (2014); Letter from Jeff Chester, Exec. Dir., Ctr. for Digital Democracy & Edward Mierzwinski, Dir., U.S. PIRG Educ. Fund, to Edith Ramirez, Chairwoman, Fed. Trade Comm'n (Nov. 5, 2014); FairSearch, *Nest Acquisition: Another Brick in Google's Great Wall of Data* (Jan. 22, 2014). In addition, in its November 27, 2014 resolution calling on the European "Commission to enforce EU competition rules decisively" with respect to online search, the European Parliament cited "the possibility [search engines] have of commercialising secondary exploitation of information obtained" as one basis for its concerns. *Resolution on Supporting Consumer Rights in the Digital Single Market*, EUR. PARL. DOC. 2014/2973(RSP) (2014).

market consisting of internally used data is inconsistent with longstanding precedent that recognizes a market only where a product or service is sold to consumers. Furthermore, remedies that have been proposed to limit incumbents' collection or use of big data or to require forced sharing with rivals are likely to harm competition and raise privacy concerns.

What Is Big Data?

Generally, "big data" refers to a collection of data sets so large and complex that traditional database systems cannot effectively manage or process the information.² Information technology research company Gartner defines big data as "high-volume, high-velocity and high-variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making."³ As this widely-adopted "3V" definition suggests, big data is not defined only by volume, but also by the complexity of the data (e.g., different types of structured or unstructured data, including text, image, audio, and video files) and the need for the data to be collected and analyzed rapidly.⁴

There are significant benefits to consumers, businesses, and government agencies from collection and analysis of big data.

There are significant benefits to consumers, businesses, and government agencies from collection and analysis of big data. Companies have been able to offer entirely new products and services (e.g., real-time traffic information), enhance existing products and services (e.g., personalized music or video recommendations), and better market their products to consumers (e.g., targeted promotions). Targeted advertising subsidizes free services and content on the Internet, as well as many free mobile apps, and has helped fund the meteoric growth of and innovation on the Internet.

Big data is everywhere. As a 2014 White House report noted, "We live in a world of near-ubiquitous data collection."⁵ The sources of data continue to grow, with more recent examples including networked sensors, "wearables," smart appliances, and geospatial technologies. The number of firms with extensive data collection and processing capabilities is vast, including online and offline retailers, grocery stores, online advertising networks, search engines, social networking sites, Internet service providers (ISPs) and cable companies, financial institutions, insurance companies, and data brokers. Nearly all online providers collect data from their users; one online privacy company claims that the typical Internet user is tracked over 100 times during each browsing session.⁶

Big data is used by organizations of all sizes. Small businesses, entrepreneurs, and government agencies, in addition to large companies, are avid users of big data.⁷ As FTC Chairwoman

² See JAMES MANYIKA ET AL., MCKINSEY GLOBAL INST., **BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY** 1 (June 2011) [hereinafter MCKINSEY REPORT] ("Big data" refers to datasets whose size is beyond the ability of typical database software tools to capture, store, manage, and analyze.").

³ **Big Data Definition**, IT GLOSSARY, GARTNER. Some add a fourth V for "veracity."

⁴ EXECUTIVE OFFICE OF THE PRESIDENT, **BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES** 2 (2014) [hereinafter WHITE HOUSE REPORT] ("Most definitions reflect the growing technological ability to capture, aggregate, and process an ever-greater volume, velocity, and variety of data.").

⁵ *Id.* at 4; see also MCKINSEY REPORT, *supra* note 2, at 2 ("Digital data is now everywhere—in every sector, in every economy, in every organization and user of digital technology.").

⁶ **DoNotTrackMe: How It Works**, ABINE (last visited Dec. 7, 2014).

⁷ WHITE HOUSE REPORT, *supra* note 4, at 5–6, 22–38 (governments), 39 (small firms), 48 (entrepreneurs); MCKINSEY REPORT, *supra* note 2, at 106 (individuals and SMEs); FED. TRADE COMM'N, **DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY** 47–48 (2014) [hereinafter FTC DATA BROKER REPORT] (observing that data brokers facilitate small businesses reaching consumers with innovative products, leading to "increased competition").

Edith Ramirez observed, “[B]ig data is no longer the province of a few giant companies.”⁸ As a result, innovative uses of big data by smaller firms have the potential to introduce new forms of competition and disrupt established industries.⁹

The cost of collecting big data is very low and continues to decline.¹⁰ Most companies generate a tremendous volume of “exhaust data,” i.e., data created as a by-product of their usual activities, such as sales transactions and interactions with customers.¹¹ The cost of collecting this data is virtually zero. Storing and analyzing data are also inexpensive,¹² and the ability to derive useful insights from big datasets continues to improve with the development of increasingly sophisticated software. There is even widely used, free, open-source software available to analyze (Hadoop) or host (Cassandra, HBase) big datasets.

Big data is widely available for purchase and is inexpensive. There is a “near-continuous collection, transfer, and re-purposing of information in a big data world.”¹³ Consumer data and other information can be purchased from an array of companies, including data brokers. One data broker alone has “multi-sourced insight into approximately 700 million consumers worldwide.”¹⁴ These profiles can contain “thousands of pieces of data” on an individual.¹⁵ Basic demographic information sells for about \$0.0005 (5 one-hundredths of a cent) per person; even a detailed profile of an individual about to make a purchase—and therefore very valuable to advertisers—typically costs well under one dollar.¹⁶

Big data is non-rivalrous. In other words, collecting a particular piece of data does not prevent other companies from collecting identical data by similar or other means. Using multiple providers for the same service (user multi-homing) and the common practice of website operators using multiple ad networks and analytic firms make it easier for multiple providers to collect relevant user

⁸ Edith Ramirez, Chairwoman, Fed. Trade Comm’n, *The Privacy Challenges of Big Data: A View from the Lifeguard’s Chair* 3 (Aug. 19, 2013). See also Edd Dumbill, *Volume, Velocity, Variety: What You Need to Know About Big Data*, FORBES, Jan. 19, 2012 (“Big data processing is eminently feasible for even the small garage startups, who can cheaply rent server time in the cloud.”).

⁹ MCKINSEY REPORT, *supra* note 2, at 6 (“[E]stablished competitors and new entrants alike will leverage data-driven strategies to innovate, compete, and capture value. Indeed, we found early examples of such use of data in every sector we examined.”).

¹⁰ WHITE HOUSE REPORT, *supra* note 4, at 1 (explaining that the growth of big data is fueled by “the cratering costs of computation and storage”); Ramirez, *supra* note 8, at 3 (observing that the “phenomenal growth in storage and analytic power” has been accompanied by an equally dramatic drop in costs).

¹¹ MCKINSEY REPORT, *supra* note 2, at 1; Edith Ramirez, Chairwoman, Fed. Trade Comm’n, *Big Data: A Tool for Inclusion or Exclusion?* 3 (Sept. 15, 2014) (“The proliferation of connected devices, the plummeting cost of collecting, storing, and processing information, and the ability of data brokers and others to combine offline and online data mean that companies can accumulate virtually unlimited amounts of consumer information and store it indefinitely.”).

¹² MCKINSEY REPORT, *supra* note 2, at 2 (“The ability to store, aggregate, and combine data and then use the results to perform deep analyses has become ever more accessible as trends such as Moore’s Law in computing, its equivalent in digital storage, and cloud computing continue to lower costs and other technology barriers.”).

¹³ WHITE HOUSE REPORT, *supra* note 4, at 39. See also *id.* at 50 (“[Big data] is bought, bartered, traded, and sold. An entire industry now exists to commoditize the conclusions drawn from that data.”).

¹⁴ STAFF OF S. COMM. ON COMMERCE, SCI., AND TRANSP., OFFICE OF OVERSIGHT & INVESTIGATIONS, *A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES* 12 [hereinafter SENATE COMMITTEE REPORT] (quoting Acxiom Corp., Annual Report (Form 10-K) (May 29, 2013)).

¹⁵ WHITE HOUSE REPORT, *supra* note 4, at 44. See also FTC DATA BROKER REPORT, *supra* note 7, at 47 (“[O]ne of the nine data brokers has 3000 data segments for nearly every U.S. consumer.”); SENATE COMMITTEE REPORT, *supra* note 14, at 12 (“Some of the companies maintain thousands of data points on individual consumers, with one providing the Committee a list of approximately 75,000 individual data elements that are in its system.”).

¹⁶ Emily Steel, *Financial Worth of Data Comes in at Under a Penny a Piece*, FIN. TIMES, July 12, 2013.

data. For example, if one ad network determined that the user of a particular mobile device lived in Connecticut, liked to travel, and owned a dog, there is nothing to prevent another ad network from learning the same information—indeed, for a frequent Internet user, it is likely that dozens of firms will create a similar profile. Redundant data are so common as to cause problems for data brokers.¹⁷

Big data can become stale quickly. Historical data can be analyzed for trends but has comparatively little value when used for real-time decisions, such as which ad to serve. As one study found, “90% of the data in the world today has been created in the last two years. . . . 70% of unstructured data is stale after only 90 days.”¹⁸ Data collection and analysis is increasingly occurring on a real-time or near-real-time basis.¹⁹

These characteristics—ubiquity, low cost, wide availability, and fleeting value—make big data different from the industry structures typically seen as conducive to competition problems. That, of course, does not preclude a violation of the antitrust laws due to conduct involving big data, but it does suggest that courts and regulators should proceed cautiously when presented with claims that big data is the source of a competition problem.

Can Data Be Its Own Product Market?

Some privacy regulators and other writers have asserted that personal information collected in connection with the provision of online services should be considered an intangible asset for antitrust purposes and have called for markets to be defined around personal data, even when that information is not marketed to customers.²⁰ Such a view lacks support under U.S. and EU competition law.²¹ Personal data used as an input to another product cannot constitute a relevant product market because a product market presupposes that a product or service is available to customers. Only where data is sold to customers could providing that information potentially constitute a relevant market.

In both the United States and Europe, market definition turns primarily on demand substitution, i.e., the degree to which customers will substitute one product for another. This is because relative to other considerations, such as supply substitutability and potential competition, demand substitution offers the most immediate and effective disciplinary force on suppliers of a given product, particularly in relation to their pricing decisions. The FTC, DOJ, and EC apply the “hypothetical monopolist” test, which asks whether customers would switch to substitutes in response

¹⁷ See generally FTC DATA BROKER REPORT, *supra* note 7, at 14 (“[E]ach data broker utilizes multiple sources for similar data. For example, one of the data brokers in this study obtains consumers’ contact information from twenty different sources.”).

¹⁸ RIS, *ANALYTICS INSIGHTS DELIVER COMPETITIVE DIFFERENTIATION 2* (July 2013) (quoting Citi Research 2013 Retail Technology Deep Dive). See also *Big Data, for Better or Worse: 90% of World’s Data Generated over Last Two Years*, SCIENCEAILY (May 22, 2013) (“A full 90% of all the data in the world has been generated over the last two years.”).

¹⁹ WHITE HOUSE REPORT, *supra* note 4, at 5. As one author aptly illustrated, an insurer determining that a claim is fraudulent three months after paying out the claim offers little value compared to identifying the fraud while processing the claim. See Nick Millman, *The Need for Speed with Big Data*, BLOOMBERG BUSINESSWEEK, Aug. 6, 2013.

²⁰ EDPS REPORT, *supra* note 1, § 4.1; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 773 (2010) (“[W]e suggest the definition of markets for data, separate and apart from markets for the services fueled by these data.”).

²¹ One proponent of this approach acknowledges that “[d]efining a market for user data may be unusual under traditional market definition principles.” Pamela Jones Harbour, *Competition & Privacy in Markets of Data*, Comments to European Parliament 5 (Nov. 26, 2012).

to a hypothetical small relative price increase in the products and areas under investigation.²² The U.S. federal courts often apply the *Brown Shoe* test, under which “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”²³ Thus, under accepted market definition tests, prerequisites for defining a relevant market include the sale of a product or service to customers and a means of determining substitution among products by customers.

Personal information collected by a producer but not sold to customers cannot satisfy the hypothetical monopolist test or the *Brown Shoe* test: there is no sale, no customers, and no product substitution. To our knowledge, none of the FTC, DOJ, EC, General Court, European Court of Justice, or U.S. federal courts has ever defined a separate market for internally generated and used (i.e., captive) personal data.

If the courts or antitrust agencies were to define relevant markets around inputs like consumer data, antitrust analysis would become more complex, less accurate, and less predictable.

In the absence of sales, the rationale for defining a relevant market consisting of personal information is unclear. Why define a product market if there is neither a “product” nor a “market”? The principal goal of market definition is to draw a line between products that substantially compete and those that do not.²⁴ By definition, there can be no competition where there are and will be no sales.

If the courts or antitrust agencies were to define relevant markets around inputs like consumer data, antitrust analysis would become more complex, less accurate, and less predictable. There would be almost no end to the number of relevant markets that would require analysis in most mergers.

The FTC’s review of Nielsen’s acquisition of Arbitron illustrates how markets should be defined where personal data are not for sale—that is, as a key input but not as a separate relevant market. In that case, the FTC found that the merging companies had “the most accurate and preferred sources of individual-level demographic data for [television and radio] audience measurement purposes.”²⁵ This information was alleged to be a critical requirement for the development of a service to measure audiences across multiple media platforms. The FTC did not define a market around the audience data or find a competitive issue related to the data, but instead concluded that the competitive concern was in the downstream market for national syndicated cross-platform audience measurement services. The agency observed that the demographic data were used internally by the two firms and were not sold to third parties.

²² U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4.1.1 (2010) [hereinafter U.S. Merger Guidelines]; Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, ¶ 17 [hereinafter EC Market Definition Guidelines].

²³ United States v. Brown Shoe Co., 370 U.S. 294, 325 (1962). See also Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 469 (1992) (defining the relevant market by reference to “the extent to which consumers will change their consumption of one product in response to a price change in another”); United States v. E.I du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) (explaining that the relevant market consists of “commodities reasonably interchangeable by consumers for the same purposes”); U.S. Merger Guidelines, *supra* note 22, § 4 (“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another . . .”); EC Market Definition Guidelines, *supra* note 22, ¶ 7 (“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.”).

²⁴ Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961) (explaining that the relevant market is “the area of effective competition”); Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004) (“The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.”); Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989) (“For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.”).

²⁵ [Analysis of Agreement Containing Consent Order to Aid Public Comment 2](#), Nielsen Holdings N.V. & Arbitron, Inc., FTC File No. 131-0058 (Sept. 20, 2013).

The European Commission's review of the Facebook/WhatsApp transaction is another example of properly defined markets where data are not for sale. Despite concerns raised by some third parties that the transaction would bolster Facebook's access to data, the Commission declined to define a market for data because the parties did not sell any of the data they collected to advertisers or other third parties. The Commission explained that it "has not investigated any possible market definition with respect to the provision of data or data analytics services, since . . . neither of the Parties is currently active in any such potential markets."²⁶

In contrast, personal data could constitute a relevant market if sold to customers. Although not involving personal data, examples of recent FTC and DOJ cases with data-related relevant markets include CoreLogic/DataQuick (assessor and recorder data),²⁷ Dun & Bradstreet/QED (educational marketing data),²⁸ and Thomson/Reuters (financial information).²⁹ The U.S. courts have done so as well: in CCC/Mitchell, the district court defined the relevant market as automobile damage estimating software, a key part of which was a proprietary parts and labor database.³⁰ The EC also has reviewed several mergers between firms providing data or data-related services, including Thomson/Reuters,³¹ Oracle/Sun (database software systems),³² WPP/TNS (TAM services to measure media audiences),³³ Telefónica UK/Vodafone UK/Everything Everywhere JV (data analytics services for online and offline advertising),³⁴ and IBM Italia/UBIS (provision of data center services).³⁵

Thus, there is no shortage of precedent in the United States and Europe for defining a market around data sold to customers, but there is no legal support in either region for defining a relevant market around data that firms generate and use solely as an input.

Is Data a Barrier to Entry?

Recently, a number of writers and advocacy groups in the United States and Europe have asserted that big data—in particular, user data—is a critical requirement for offering online services.³⁶ They argue that extensive user information is needed to sell advertising and improve online serv-

²⁶ **Case COMP/M.7217**—Facebook/WhatsApp, Comm'n Decision, ¶ 72 (Mar. 10, 2014).

²⁷ **Complaint** ¶ 5, CoreLogic, Inc., FTC Docket No. C-4458 (2014). Darren Tucker represented the divestiture buyer in the CoreLogic case.

²⁸ **Complaint** ¶ 11, Dun & Bradstreet Corp., FTC Docket No. 9342 (2010).

²⁹ **Complaint** ¶¶ 14, 20, United States v. Thomson Corp., Case No. 1:08-cv-00262 (D.D.C. 2008).

³⁰ *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 38–39 (D.D.C. 2009). Darren Tucker represented Mitchell in this matter.

³¹ **Case COMP/M.4726**—Thomson Corp./Reuters Grp., Comm'n Decision (Feb. 19, 2008).

³² **Case COMP/M.5529**—Oracle/Sun Microsystems, Comm'n Decision (Jan. 21, 2010).

³³ **Case COMP/M.5232**—WPP/TNS, Comm'n Decision (Sept. 23, 2008).

³⁴ **Case COMP/M.6314**—Telefónica UK/Vodafone UK/Everything Everywhere/JV, Comm'n Decision (Sept. 4, 2012).

³⁵ **Case COMP/M.6921**—IBM Italia/UBIS, Comm'n Decision (June 19, 2013).

³⁶ *See, e.g.*, EDPS REPORT, *supra* note 1, ¶¶ 66–68 ("Powerful or dominant undertakings are able to . . . create barriers to entry through their control of huge personal datasets . . . [which] could prevent the development of competing products from competitors."); Newman, *supra* note 1, at 401 ("Google's ever expanding control of user personal data and its critical value to online advertisers creates an insurmountable barrier to entry for new competition."); Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1679 (2013) ("[C]ustomer data can be a strategic asset that allows a platform to maintain a lead over rivals and to limit entry into its market."); Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, HARV. J. L. & TECH., July 2013 (Occasional Paper Series) ("Google itself controls the chief input into better search services: the data that engineers need in order to better personalize results."); Damien Geradin & Monika Kuschewsky, **Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue** 2 (Feb. 12, 2013) ("The acquisition of large volumes of data by 'first mover' providers may, however, raise barriers to entry and thus deprive users from the benefits of competition.")

ices, with search and social media the most frequently cited examples. As a result, existing big data providers allegedly have an entrenched position that cannot be disrupted because new entrants are at a severe disadvantage in accessing data.

This view reflects a fundamental misunderstanding of the role of consumer data and other types of data in developing and commercializing online services. The fact that some established online firms collect a large volume of data from their customers or other sources does not mean that new entrants must have the same quantity or type of data in order to enter and compete effectively. To the contrary, little if any consumer data is needed to begin offering most online services, and new entrants are unlikely to be at any significant disadvantage relative to incumbents in terms of data collection or analysis. Relevant data are widely available and inexpensive. In addition, history has shown that entry barriers generally—not just those related to data requirements—are low in the online space, as evidenced by the tremendous amount of entry and rapid gains often enjoyed by innovative new challengers.

The fact that some established online firms collect a large volume of data from their customers or other sources does not mean that new entrants must have the same quantity or type of data in order to enter and compete effectively.

As an initial matter, the idea that an input like data could be a barrier to entry because entrants do not have the same amount of that input seems questionable—particularly where, as here, that input is ubiquitous, low cost, and widely available. We would not say, for example, that labor is a barrier to entry because an incumbent has more workers than an entrant, or that a factory is a barrier to entry just because an incumbent has more square footage than an entrant's factory. In other words, lack of asset equivalence should not be a sufficient basis to define a barrier to entry.

An entrant that needs personal data can collect relevant information from its users once the service is operational. Data collected in this manner is free or nearly so. Entering the market and then collecting and analyzing user data is not a theoretical approach but rather the very model followed by many of the leading online firms when they were startups or virtual unknowns, including Google, Facebook, Yelp, Amazon, eBay, Pinterest, and Twitter. For example, Google replaced Yahoo as the leading general search engine within a few years of its entry despite Yahoo having user data on several hundred million users and offering personalized search results prior to Google.³⁷ Likewise, Facebook rapidly displaced MySpace as the leading social media service, despite the latter company's extensive user data. We are aware of no principled explanation for why this approach is infeasible today.

Entrants can also acquire relevant data from third parties. As previously noted, possession of big data is widespread, and third-party sourcing options, including other online providers or data brokers, continue to expand and fall in cost.³⁸ For example, search engine DuckDuckGo claims to base its results on over 100 sources, including "crowd-sourced sites (like Wikipedia, which are stored in our own index), Yahoo! (through BOSS), Yandex, Yelp, and Bing."³⁹ Similarly, Apple's Siri service relies on information provided by Yelp, Yahoo Local, and Rotten Tomatoes, among others.⁴⁰ Data brokers source most of their data from other data brokers.⁴¹

The fact that incumbents may collect a large volume of data says little about the data needs of

³⁷ See Chris Sherman, *Google My Search History Personalizes the Web*, SEARCH ENGINE WATCH (Apr. 19, 2005) (observing that other search engines had "offered personalized search for some time" at the time Google introduced its personalized search feature).

³⁸ WHITE HOUSE REPORT, *supra* note 4, at 39 ("[A]ccess to data and the tools for processing it are [becoming] further democratized.").

³⁹ *Sources*, DUCKDUCKGO (last visited Dec. 7, 2014).

⁴⁰ *Siri*, WIKIPEDIA (last visited Dec. 7, 2014).

⁴¹ FTC DATA BROKER REPORT, *supra* note 7, at 46.

new entrants because entrants need not follow the same business model as incumbents. In fact, new entrants in established online product areas tend to focus on particular functionality, customer segments, or user interests. For example, there has been a proliferation of dating sites focused on particular religions, ethnicities, or locations, rather than replicating the across-the-board approaches of Match and eHarmony. Likewise, in social networking, new entrants have tended to focus on particular types of content (Instagram, Twitter, Pinterest) or interests (Reddit, LinkedIn), rather than offering a broader Facebook-like approach. New search engines have differentiated themselves from Google, Bing, and Yahoo by focusing on particular features (DuckDuckGo, Blekko) or verticals (shopping, local information, travel). As a result, the data requirements of new online competitors, if they exist at all, will frequently be far more modest, and qualitatively different, than for established firms. And to the extent that new entrants eventually expand into the space of the larger, more broadly focused firms, they are likely to do so gradually, in which case any data they need can be self-generated.

The antitrust agencies and courts, to our knowledge, have never found user data to be a barrier to entry for online services. In its Google/DoubleClick investigation, the FTC concluded that incumbents' user information is not a barrier to entry for online advertising. The agency explained that "neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product."⁴² Likewise, in connection with closing its investigation into Facebook's acquisition of WhatsApp, the European Commission explained that "there are currently a significant number of market participants that collect user data alongside Facebook," including Google, Apple, Amazon, eBay, Microsoft, AOL, Yahoo, Twitter, IAC, LinkedIn, Adobe and Yelp.⁴³ In addition, "there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control."⁴⁴

Competition agencies and courts have, to be sure, concluded that data-related entry barriers may exist for the sale of data that cannot be sourced from consumers or big data marketplaces. In the FTC, DOJ, and EC cases identified in the prior section, there were sizeable costs to collect the data at issue. Notably however, none of those cases involved data collected from consumers over the Internet.

The fact that there has been—and continues to be—so much entry in online services suggests that entry barriers, in general, are low for these areas and that users are not locked into current providers. Even in more "mature" online categories where incumbents may have significant stores of consumer data, there are a large number of suppliers and entry continues apace:

- **Social Media:** The number of social media sites has exploded, with many focusing on specific interests or certain types of content. Wikipedia lists over 200 active social networking sites.⁴⁵ Some have achieved considerable success in little time: within three years of its entry in 2011, Pinterest became the twelfth most visited website in the United States.
- **Search:** Established suppliers include Google, Baidu (the fifth most popular website in the world), Microsoft, Amazon, Yelp, and Travelocity. Examples of recent entry include Duck-

⁴² [Statement of Federal Trade Commission](#) 12, Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007).

⁴³ [Case COMP/M.7217—Facebook/WhatsApp](#), Comm'n Decision, ¶ 188 (Mar. 10, 2014).

⁴⁴ *Id.* ¶ 189.

⁴⁵ This does not include the hundreds of other social collaborative projects (e.g., Wikipedia), video and photo sharing sites (e.g., YouTube), and virtual social and game worlds (e.g., World of Warcraft, Second Life).

There are many factors in an online firm's success, including investment in engineering resources, an attractive user interface, speed, ease of use, quality of content, marketing, distribution arrangements, and complementary services—not to mention having a good idea.

DuckGo (2008), Blekko (2010), Yandex (2010; now the largest search engine in Russia), Apple's Siri (2011), and Facebook's Graph Search (2013).

- **Online advertising:** The Network Advertising Institute, a self-regulatory association for third-party online and mobile advertising, has 96 members that serve interest-based ads or collect similar data for marketing purposes.
- **Data Brokers:** The number of data brokers is unknown but believed to be in the thousands, with new entrants continually offering new types of data and data-derived products.⁴⁶
- **Retail:** Alexa lists over 50,000 online retailers, and six of the top ten lack a brick-and-mortar operation.⁴⁷

A related claim made by some writers is that the volume of data is the key factor determining an online firm's success.⁴⁸ This, too, is incorrect. There are many factors in an online firm's success, including investment in engineering resources, an attractive user interface, speed, ease of use, quality of content, marketing, distribution arrangements, and complementary services—not to mention having a good idea.⁴⁹ Even extensive stores of data will provide little benefit for a firm unless it has a means of monetizing and innovating based on the data, i.e., talent. In addition, as DuckDuckGo and Apple illustrate, there are many sources of relevant data that can be used as inputs for online services. In short, online firms—whether big or small—can compete through investments in service quality, marketing, or distribution without employing user data.

Proposed Remedies to Address Alleged Dominance in Big Data Will Harm Competition and Consumers

According to some proponents, competition agencies should impose a variety of restrictions on dominant online firms to reduce the supposedly large advantages they have in terms of access to big data.⁵⁰ The proposed restrictions include requiring opt-in consent for collection of data from

⁴⁶ *60 Minutes: The Data Brokers: Selling Your Personal Information* (CBS News television broadcast Mar. 9, 2014).

⁴⁷ *Shopping Category*, ALEXA (last visited Dec. 7, 2014).

⁴⁸ See, e.g., Newman, *supra* note 1, at 403, 407 (referring to big data as “the ‘new oil’ of the information economy” and stating that “entrenched knowledge of consumers’ personal information makes it nearly impossible for any rival or potential rival to woo online advertisers away”); Letter from Mathias Döpfner, Chairman and CEO, Axel Springer SE, to Eric Schmidt, Exec. Chairman, Google Inc. (Apr. 17, 2014) (“If fossil fuels were the fuels of the 20th century, then those of the 21st century are surely data and user profiles.”); Pasquale, *supra* note 36, at 7 (“As long as Google’s search data is secret, no would-be rival will have access to this critical ‘raw material’ for search innovation.”).

⁴⁹ Andres V. Lerner, *The Role of “Big Data” in Online Platform Competition* 27–35 (Aug. 26, 2014) (working paper) (“[T]he firm with the most data does not necessarily win, and often does not win.”). See also Lesley Chiou & Catherine Tucker, *Search Engines and Data Retention: Implications for Privacy and Antitrust* (MIT Sloan School Working Paper No. 5094-14) (finding no evidence that larger quantities of historical data confer a competitive advantage for Internet search firms).

⁵⁰ See, e.g., European Parliament resolution, *supra* note 1 (calling on the European Commission “to consider proposals aimed at unbundling search engines from other commercial services”); EDPS REPORT, *supra* note 1, ¶¶ 66–68, 72, 80 (outlining proposed remedies); Newman, *supra* note 1, at 446–50 (same); Samuel Miller, *If Google Is a ‘Bad’ Monopoly, What Should Be Done?*, LAW360 (Oct. 22, 2013) (subscription required) (“One remedy that could address this problem is to require Google to enable rivals to access the data that Google has collected about users’ digital interactions for a specified time period (i.e., five years.)”); Cédric Argenton & Jens Prüfer, *Search Engine Competition with Network Externalities* 13 (Apr. 13, 2011) (TILEC Discussion Paper No. 2011-024) (“All search engines should be required to share their (anonymized) data on clicking behavior of users following previous search queries among each other and among new entrants[.]”); Martin Cave & Howard Williams, Initiative for a Competitive Online Marketplace, *The Perils of Dominance: Exploring the Economics of Search in the Information Society* (2011) (“[P]ublic policy interventions [could] . . . limit the period over which search data is kept and so narrow the difference in information asymmetries between firms.”).

consumers, providing greater transparency as to the value of collected user data, prohibiting or limiting the collection of user data, divestiture of product lines, and forced sharing of data. Although premised on alleged antitrust violations,⁵¹ most of the proposed remedies appear to be based on a desire to regulate big data or to address perceived shortcomings in the privacy laws.

The antitrust laws were not intended to offer a solution to regulatory- and privacy-based agendas.⁵² Instead, the antitrust laws were designed to prevent anticompetitive conduct and to restore competitive conditions when a violation occurs. As the Supreme Court explained, “No court should . . . assume the day-to-day controls characteristic of a regulatory agency.”⁵³

In addition, the proposed interventions are in tension with the usual requirements for antitrust remedies. All of the proposed remedies would degrade the user experience or service quality and, as a result, would harm consumers—precisely the opposite of what an antitrust remedy is intended to achieve. For example, requiring affirmative user consent before a website may collect data would detract from the user experience by requiring additional user prompts. (This was a principal criticism of Microsoft’s Vista operating system.) Prohibiting or restricting the collection of user data likewise would make it more difficult for firms to improve their services. Divestiture of other product lines would prevent firms from offering personalized services across product lines.⁵⁴ The proposed remedies also would disregard the choices of millions of consumers who have opted into the collection of their personal information or who want to obtain multiple services, e.g., social media and email, from a single online company.

Some of the proposed remedies also present significant administrative challenges. Requiring greater transparency as to the value of a user’s data to the service provider would necessitate determining what information must be shared, when it should be shared, how prominently it must be disclosed, and to whom. This information may confuse or mislead consumers and often will not be known to the provider in advance. For example, personal information often is used to sell advertising in near-instantaneous online auctions. Firms do not necessarily know the value of delivering an ad to a particular consumer ahead of time, and the value of personal information can vary widely by user and over time.

There are also difficult administrative issues with the suggestion that dominant online firms should share their user data. For example, with whom should data be shared, how long should this obligation last, how far back must the company go in providing data, under what conditions (e.g.,

The antitrust laws were not intended to offer a solution to regulatory- and privacy-based agendas.

⁵¹ These restrictions allegedly are needed to address antitrust violations premised on refusals to provide user data to rivals, collecting additional user data by expanding into new product areas through organic growth, or collecting additional user data through corporate acquisitions.

⁵² *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 371 (1963) (stating that because Congress determined that the effect upon competition is the sole criteria to determine whether a merger violates Section 7, an evaluation of other social or economic factors is improper); **Statement of Federal Trade Commission 2**, Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007) (“Not only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.”); **Case COMP/M.7217—Facebook/WhatsApp**, Comm’n Decision, ¶ 164 (Mar. 10, 2014) (“Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.”).

⁵³ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

⁵⁴ The Supreme Court has held that divestiture, the “most drastic” antitrust remedy, is best suited for remedying illegal mergers or acquisitions, not for unilateral conduct. See *United States v. Ford Motor Co.*, 405 U.S. 562, 573 (1972). Divestiture is particularly inappropriate for firms that came by their market position legitimately. See *United States v. Microsoft Corp.*, 253 F.3d 34, 106–07 (D.C. Cir. 2001) (en banc).

price, format) should the sharing take place, what restrictions on the use of the data will be placed on the recipients, and who will enforce these obligations?

Another problem with the proposed restrictions is that they duplicate existing options available to consumers. To prevent or limit collection of their personal information, consumers can adjust their privacy settings, use a browser in “private” mode, or sign out of many online services. Consumers also have numerous ways to opt out of targeted advertising. For consumers who want more data sharing, a number of firms already allow users to export their data to rivals.⁵⁵ Consumers who want to be better informed about how their information is being collected and used can consult online privacy policies and guidance from privacy and consumer organizations. Consumers who wish to better understand the value of their data to online providers can access this information from numerous publicly available news articles, as well as financial reports from public companies involved in online advertising. In short, consumers already have options.

Some of the proposed restrictions present additional problems. Requiring greater transparency as to an incumbent’s income or costs related to user data may *reduce* competition. As the FTC noted in response to a proposal to require pharmacy benefit managers to provide certain financial information to its customers, “[M]andated disclosures may actually increase prices. . . . Whenever competitors know the actual prices charged by other firms, tacit collusion—and thus higher prices—may be more likely.”⁵⁶

Another problem with requiring firms to share their data is that this will lessen the incentives of rivals to develop their own sources of data. As the Supreme Court observed in *Trinko*, compelling firms “to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”⁵⁷ This remedy also raises serious privacy concerns. Many consumers would be upset to learn that a regulator was forcing a company to share their personal information with companies with whom the consumers have no relationship. Ironically, forced sharing of user data could violate company privacy policies or consent decrees that several major online firms have entered into with the FTC.

Conclusion

Some seem to believe that big data is the next big thing in antitrust law. Proponents of this view are destined for disappointment. To those with only a passing knowledge of antitrust law, the possession of big data by large online firms may sound sinister, but this is in large part because proponents of this view mischaracterize its use and because policy makers and the general public do not yet have a firm understanding of big data. In reality, big data is one of many information inputs into the services that online businesses provide. Since the most important companies in the online world tend to self-generate this information, use it internally to improve the very services that generate it in the first place, and do not disseminate it to others, big data usually is neither a “product” in the antitrust sense nor the type of input that businesses need to obtain from others in order to compete.

⁵⁵ For example, Google’s Data Liberation Front has developed means for users to export their data using Google Takeout. LinkedIn lets users export all their activity and posts, including profiles, with its “Data Archive” feature.

⁵⁶ Press Release, Fed. Trade Comm’n, [FTC Staff: California Bill May Raise Prices for Pharmaceuticals](#) (Sept. 10, 2004). See also ABA SECTION OF ANTITRUST LAW, *PREMERGER COORDINATION: THE EMERGING LAW OF GUN JUMPING AND INFORMATION EXCHANGE* (2006) (describing how antitrust law restricts the sharing of competitively valuable information).

⁵⁷ *Trinko*, 540 U.S. at 407–08.

Big data only rarely has anything to do with market definition or competitive effects and regardless of how much critics attempt to drum up excitement about it, this fact is unlikely to change. Big data usually is not a market because the most important online businesses are not data brokers, do not sell big data, and therefore cannot create a market capable of antitrust analysis. Big data will rarely create anticompetitive effects for the same reasons. The notion that a company could monopolize or even have “market power” with respect to user data is implausible, given the ubiquitous and non-rivalrous nature of such information. Any competition affected by the use of big data occurs almost entirely according to how well companies *analyze* information, not according to whether and how much they *obtain* it. Thus the only competitive advantage the typical business can obtain through the use of big data is an advantage based on business acumen, which is not an antitrust concern. To the contrary, business acumen is the core of competition itself.

The recent pace of entry in the online world shows that big data creates no durable barriers to entry or any other significant competitive threat. There is no problem in need of a remedy, and just as importantly, the purported remedies suggested by critics would harm or at least alarm consumers: Some would reduce the amount of data that can be used to improve services, while others would expand the sharing of data beyond consumers’ consent. For these reasons, big data as a topic for competition experts is likely to fade in significance, even as—and perhaps, due to the fact that—the amount of data continues to explode and to become a tool used by ever more firms. ●

Considering the Unique Aspects of the Merger Review Process in China

Gregory K. Leonard and Yizhe Zhang

Since China's Anti-Monopoly Law (AML) went into effect in August 2008, the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) has been active in the review of merger filings. Over the subsequent six years, along with the European Union and the United States, China has become one of the primary jurisdictions that merging parties must consider when seeking clearance. MOFCOM is not hesitant to impose remedies on global transactions that antitrust regulators in other jurisdictions have cleared unconditionally,¹ and MOFCOM clearance is important for deal planning, including the timing of closing.

MOFCOM has gained substantial experience in the first six years of the AML, as reflected in the increasing sophistication of its analysis and the length of its published decisions. In general, the ratio of conditional approvals to filings is consistent with that of other jurisdictions. For example, in 2013, MOFCOM received 224 merger filings, accepted 212, and reached a decision on 207, of which four were conditional approvals.² However, merging parties and practitioners should consider a few aspects unique to China's substantive merger review when navigating the MOFCOM merger review process.

MOFCOM's Broad Mandate

The AML specifically identifies a set of goals broader than the effect on competition and consumer welfare, including the public interest and the impact on the Chinese national economy.³ Thus, MOFCOM appears to have the discretion, and perhaps the duty, to analyze effects of a proposed deal, such as the impact on the national economy, that generally would not be considered in other jurisdictions.⁴ Moreover, as part of its review, MOFCOM regularly consults with other Chinese agencies, as well as with trade associations, competitors, customers, and suppliers.

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¹ Examples include Marubeni/Gavilon, Google/Motorola Mobility, Microsoft/Nokia Devices and Services, and Merck/AZ Electronic Materials. MOFCOM also blocked one transaction, the Maersk P3 shipping alliance, which was not challenged in other jurisdictions. MOFCOM's published decisions (in Chinese) can be accessed from its website, <http://fldj.mofcom.gov.cn/>.

² Press Release, Ministry of Commerce, People's Republic of China, MOFCOM Holds a Special Press Conference on Anti-Monopoly (Mar. 4, 2014), available at <http://english.mofcom.gov.cn/article/newsrelease/press/201403/20140300507466.shtml>.

³ China's AML has the broad goals of "preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy," as defined in Article 1. See http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm (English translation of AML). Others have commented that, in China, when industrial policy and antitrust policy collide, industrial policy is likely to prevail. See Nate Bush & Yue Bo, *Disentangling Industrial Policy and Competition Policy in China*, ANTITRUST SOURCE, Feb. 2011, http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_bush2_23f.authcheckdam.pdf.

⁴ See Fei Deng & Gregory K. Leonard, *The Role of China's Unique Economic Characteristics in Antitrust Enforcement*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 59 (Adrian Emch & David Stallibrass eds., 2013).

Merging parties may be well advised to consider these other issues in advance. Doing so, however, may require conducting analyses beyond the type that merging parties usually conduct in other jurisdictions. For example, merging parties may want to evaluate the deal's effect on their suppliers and customers. If the transaction may affect a large local upstream or downstream industry, MOFCOM likely will take that into account. For example, in the GM/Delphi deal, MOFCOM seemed particularly concerned about Chinese auto manufacturers. The remedy in that case, which focused on nondiscriminatory and stable supply to auto manufacturers, reflected this concern. In the Google/Motorola Mobility deal, MOFCOM appeared to be concerned that, post-transaction, Google might be able to harm Chinese handset manufacturers, which rely heavily on Android.

Because MOFCOM would be expected to consult the agency with regulatory responsibility for the industry at issue, the merging parties should consider how that agency would view the deal's impact on the local Chinese industry or on the Chinese national economy.

Because MOFCOM would be expected to consult the agency with regulatory responsibility for the industry at issue, the merging parties should consider how that agency would view the deal's impact on the local Chinese industry or on the Chinese national economy. MOFCOM's decisions in the Silvinit/Uralkali, Glencore/Xstrata, and Marubeni/Gavilon deals reflect MOFCOM's and the industry regulator's concerns about a transaction's impact on imported commodities on which China relies heavily, even if the market shares of the combined parties are not high according to the antitrust standards applied in the United States.

Similar issues may arise for deals involving or affecting state-owned enterprises (SOEs). While SOEs are not exempt from the AML and MOFCOM has reviewed proposed deals involving SOEs, such as the GE/Shenhua joint venture, the Chinese government typically views the industries in which SOEs participate as having strategic importance. Thus, a proposed transaction in such an industry would be subject to both a higher degree of scrutiny by MOFCOM and more interest from the industry regulator. Both of these factors might further shape the analyses that the merging parties should undertake. If a transaction involves two or more SOEs, however, the decision on the transaction likely will be a political and strategic one by the state or the agency in charge of the SOEs. Whether and to what extent MOFCOM may challenge such mergers based on competition grounds is unclear.

Burden of Proof of Anticompetitive Harm

The AML does not specify the burden of proof of anticompetitive harm that must be shown to result from a transaction, other than listing a few competition and noncompetition-related factors that MOFCOM should consider in its analysis. One of the most significant challenges faced by merging parties during a MOFCOM investigation is the lack of detail about MOFCOM's concerns, including about its theory of competitive harm and the underlying evidence of anticompetitive effects. In practice, MOFCOM is not required to issue a "statement of objections" and usually only orally tells the parties that it has concerns about certain markets due to high market shares, third-party complaints, or industrial policy issues. This is also reflected in MOFCOM's decisions, in which the analysis often focuses on market shares and market structure, while having only limited discussions of unilateral or coordinated effects and market entry. Moreover, there is no appellate procedure under the AML unless the parties choose to challenge MOFCOM's decision in court. Such a challenge has not occurred in the first six years of enforcement, and a successful challenge would be unlikely due to the overall deference to governmental decisions in China.

Given the ambiguities in MOFCOM's treatment of substantive analyses and the burden of proof of anticompetitive harm that will apply, in practice, merging parties should assume that they have the burden of proof to demonstrate that the deal is not anticompetitive and they should assume that the burden of proof will be relatively stringent. Such assumptions would give merging parties

additional incentives to provide substantive analyses that would rebut any concerns raised by MOFCOM and support the position that the merger is not anticompetitive.

For proposed transactions that are likely to be subject to a remedy in China, another type of analysis may be advisable. In principle, a remedy should address the particular theory of merger-specific competitive harm at issue. Thus, when merging parties propose a remedy to MOFCOM, they also should provide an analysis that demonstrates that the proposed remedy will resolve the specific competitive concerns, at least as far as the merging parties understand those concerns. This may help avoid a broader remedy that is less closely tied to the competitive concerns.

Heightened Sensitivity to Vertical Concerns

MOFCOM has demonstrated a greater concern than other jurisdictions regarding potential vertical and conglomerate effects of mergers. For example, in its decision blocking Coca-Cola's proposed acquisition of Huiyuan, MOFCOM focused on conglomerate effects that might arise from Coca-Cola, which had a significant share of colas, also controlling Huiyuan, which was a leading supplier of juice products. According to a MOFCOM press release:

Coca-Cola may use its dominant position in the carbonated soft drinks market to tie or bundle with fruit juices or impose other exclusionary trading conditions, [with the result that] the concentration restricts competition in the fruit juice market, causing consumers to be subject to higher prices or reduced product variety.

The press release does not describe the substantive analysis, if any, that supported this theory of anticompetitive harm.

MOFCOM also has expressed concern about vertical effects in cases in which it has given conditional approval subject to remedies. Examples are GM/Delphi, GE/Shenhua (JV), Henkel HK/Tiande (JV), Google/Motorola Mobility, and ARM/G&D/Gemalto.⁵ For example, the proposed GE/Shenhua joint venture was formed to license GE's technology related to the gasification of liquefied coal slurry. Shenhua was a major supplier of coal used as an input in the gasification process. MOFCOM was concerned that Shenhua would discriminate in coal sales against purchasers that chose to use a technology that competed with that of the joint venture. The remedy imposed by MOFCOM involved commitments not to engage in such discrimination. Similarly, in Henkel/Tiande, the parties entered into a joint venture where Henkel produced a particular chemical and Tiande was a supplier of the input chemical. MOFCOM was concerned that Tiande would discriminate against other buyers of its input chemical. Thus, it imposed the condition that Tiande not discriminate in its sales of the input.

MOFCOM's vertical concerns often appear to be prompted by lower share thresholds than those that raise concerns in other major jurisdictions. For example, in Henkel/Tiande, Tiande's share of the input chemical was 45 to 50 percent, which is below levels that would trigger foreclosure concerns in other jurisdictions. Similarly, in GM/Delphi, GM's worldwide share of automotive sales was less than 10 percent, and Delphi's worldwide share of automotive part sales to OEMs was less than 5 percent.⁶

⁵ See Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, ANTITRUST SOURCE, Oct. 2013, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_deng_10_29f.authcheckdam.pdf.

⁶ STATISTA, <http://www.statista.com/statistics/277070/global-market-share-of-passenger-cars-produced-by-general-motors/> (chart showing General Motors global market share from 1999 to 2014, based on number of cars produced); U.S. DEP'T OF COMMERCE, ON THE ROAD: U.S. AUTOMOTIVE PARTS INDUSTRY ANNUAL ASSESSMENT tbl. 7 (2011), available at <http://trade.gov/static/2011Parts.pdf>.

MOFCOM might be less experienced with vertical analysis and thus more conservative and concerned about potential issues. Due to lack of visibility into the evidence that MOFCOM relied on for its decisions, MOFCOM appears to have assumed, without much substantive analysis, the combined firm's ability and incentive to foreclose competition in a vertical merger. For example, MOFCOM's decision on Google/Motorola Mobility provides little explanation regarding Google's ability and incentives to foreclose competition post-transaction. Given this lack of visibility, parties to a transaction with potential vertical or conglomerate effects should consider providing analyses that address these issues.

Close Attention to High-Technology Industries

A considerable number of MOFCOM's most intensive merger reviews have involved technology markets, and several of its conditional approvals imposed conditions relating to the licensing of technologies, fair, reasonable, and non-discriminatory (FRAND) obligations, or open-source commitments. Examples are Merck/AZ Electronic Materials, Microsoft/Nokia Devices and Services, Thermo Fisher/Life Technologies, Google/Motorola Mobility, ARM/G&D/Gemalto, and GE/Shenhua. In general, if entry is easy and a sufficient number of local Chinese competitors are present, MOFCOM may tolerate a merger in which the parties have relatively high shares. If, however, the merger involves high-technology products or patents and the industry has only a few international competitors, MOFCOM may find that entry barriers are high. The likelihood that MOFCOM will require a remedy may increase if other factors also are present, such as when a local industry is at stake. In both the Microsoft/Nokia Devices and Services and Google/Motorola Mobility cases, the combined companies had inputs (patents or an operating system) on which local mobile device manufacturers relied.

In such a situation, the merging parties should identify reasons why the merger likely would have no significant impact on competition in technology-licensing markets, particularly with respect to local companies that seek patent licenses from the merged firm. For example, the parties might demonstrate that their respective patented technologies are complements (rather than substitutes) for each other, in order to persuade MOFCOM that the merged firm would have an incentive to offer better licensing terms to local companies. They might show that local companies could turn to other patent owners that offer substitute technologies. With respect to patents for which they have made FRAND or open-source commitments, the merging parties should demonstrate that they have abided by such commitments, especially with respect to local companies.

Conclusion

The unique aspects of MOFCOM's merger review process add additional challenges to obtaining successful review. Thus, merging parties filing in China may benefit from proactively identifying and addressing issues related to the transaction in China that typically would fall outside the scope of competition analysis in other jurisdictions. While this may require some original thinking, it may both shorten the review and increase the likelihood of approval. ●

Price Maintenance in Canada— Guidance from the Competition Bureau

John Bodrug and Jim Dinning

In 2009, Canada's Competition Act¹ (the Act) was amended to decriminalize price maintenance and to introduce a competitive effects criterion. These amendments responded to the 2008 Competition Policy Review Panel report,² which noted that Canada's criminal offense for price maintenance was more restrictive than comparable U.S. law as reflected in the *Leegin* decision,³ and that earlier studies had recommended changes to the price maintenance provision.⁴ These amendments significantly expanded the scope for permissible price maintenance in Canada.

Although the general intent was to more closely harmonize Canadian and U.S. price maintenance law, the Canadian amendments are quite detailed and include express elements that may both expand and limit the law's application relative to U.S. federal antitrust law. Guidelines from the Canadian Competition Bureau (the Bureau) released in September 2014 seek to clarify the Canadian provision and identify price maintenance practices that may still be at risk of challenge.⁵

In this article, we review the price maintenance provision in the Act, discuss concerns raised by the Bureau in some recent cases, and note key aspects of the Guidelines that may point to the Bureau's future enforcement priorities. We conclude that the current climate creates a generally permissive regime for suppliers that do not possess market power, with some potential uncertainties resulting from possible expansive applications of the price maintenance provision suggested by the 2014 Guidelines.

¹ Competition Act, R.S.C. 1985, c. C-34 (2014) (Can.).

² COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN, FINAL REPORT 58–61 (2008), available at [https://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](https://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf).

³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (retail price maintenance agreement subject to rule of reason), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (retail price maintenance per se unlawful). Notably, the Competition Policy Review Panel Final Report, *supra* note 2, did not reference the different (and sometimes more restrictive) legislation in many U.S. states. See Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, ANTITRUST SOURCE, Feb. 2014, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_lindsay_2_20f.authcheckdam.pdf.

⁴ See J. ANTHONY VANDUZER & GILLES PAQUET, UNIV. OF OTTAWA, ANTICOMPETITIVE PRICING PRACTICES AND THE COMPETITION ACT: THEORY, LAW AND PRACTICE (1999), available at http://www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=46; CAN. HOUSE OF COMMONS, STANDING COMM. ON INDUS., SCI. AND TECH., A PLAN TO MODERNIZE CANADA'S COMPETITION REGIME (2002), available at <http://www.parl.gc.ca/content/hoc/Committee/371/INST/Reports/RP1032077/indurp08/indurp08-e.pdf>.

⁵ Competition Bureau Canada, Enforcement Guidelines, Price Maintenance (Section 76 of the Competition Act) (2014) [hereinafter Guidelines], available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/cb-eg-price-maintenance-e.pdf/\\$file/cb-eg-price-maintenance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/cb-eg-price-maintenance-e.pdf/$file/cb-eg-price-maintenance-e.pdf). Comments were filed pursuant to the Bureau's public consultation on a draft of the Guidelines by The American Bar Association's Section of Antitrust Law and Section of International Law, The National Competition Law Section of the Canadian Bar Association, Food & Consumer Products of Canada, and Wal-Mart Canada Corp. Responses to the Consultation on the Price Maintenance (Section 76 of the Competition Act) COMPETITION BUREAU, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03745.html> (last visited Dec. 2, 2014).

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Background

The price maintenance provision in Canada's competition legislation is and has been principally directed at three types of practices:

- (1) a supplier influencing a reseller's prices (including advertised prices) upward or discouraging their reduction by agreement, threat, promise, or any like means;
- (2) a supplier refusing to supply or otherwise discriminating against a person because of that person's low pricing policy; and
- (3) a reseller inducing a supplier to refuse to supply another person because of that other person's low pricing policy.

The 2009 Amendments

limit the Tribunal's

remedial powers to

issuing an order that

(1) prohibits the

challenged price

maintenance practices,

or (2) where a person

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because of a low

pricing policy, requires

the supplier to accept

that person as a

customer on usual

trade terms.

Between 1951 and 2009, Canada had a criminal per se price maintenance offense that prohibited even unilateral minimum advertised price (MAP) policies permitted under the U.S. *Colgate* doctrine.⁶ Both criminal charges and private civil actions for damages could result from conduct that violated the prior criminal offense.

The 2009 amendments to the Act replaced the criminal per se price maintenance offense with a provision (now in Section 76 of the Act) that applies only if the Competition Tribunal—a quasi-judicial body comprised of Federal Court judges and lay members—finds a likely adverse effect on competition. Either the Commissioner of Competition, the head of the Bureau, or a directly affected private party may initiate a Section 76 proceeding before the Tribunal.

The 2009 Amendments limit the Tribunal's remedial powers to issuing an order that (1) prohibits the challenged price maintenance practices, or (2) where a person was refused supply because of a low pricing policy, requires the supplier to accept that person as a customer on usual trade terms.⁷ Conduct within the scope of Section 76 would not appear to provide grounds for a private action for damages on the basis of common law tort liability for an unlawful act.⁸

Section 76 includes some qualified exemptions for (1) conduct involving principals and their agents, or conduct between affiliates,⁹ (2) suggested retail prices in which the absence of adverse consequences for failing to follow the suggestion is made clear,¹⁰ (3) advertising that expressly indicates that dealers may sell for less,¹¹ and (4) refusals to supply because of a reseller's practice of using the relevant products as loss leaders, below cost selling, misleading advertising, or failing to provide adequate levels of servicing.¹²

⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (holding that in the absence of an agreement between a manufacturer and a distributor, the manufacturer may unilaterally identify its wishes concerning resale prices and decline further dealings with distributors who fail to observe them).

⁷ Competition Act, R.S.C. 1985, c. C-34, § 76(2) (Can.).

⁸ *See Novus Entm't Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030 (Can.) (striking a claim that conduct alleged to be an abuse of dominant position under Section 79 of the Act was an unlawful interference with the plaintiff's business interests, where the Tribunal had not issued any order in respect of the alleged conduct). Section 36 of the Act establishes a private right of action for violations of certain offenses under the Act, but not in respect of civil reviewable matters such as Section 76. A breach of a Tribunal order under Section 76, however, would be an offense under Section 66 and grounds for a damages claim in a private action pursuant to Section 36 of the Act.

⁹ Competition Act, R.S.C. 1985, c. C-34, § 76(4) (Can.).

¹⁰ *Id.* § 76(5).

¹¹ *Id.* § 76(6).

¹² *Id.* § 76(9).

Enforcement Action Under the 2009 Provision

No private party has yet commenced a Tribunal proceeding under Section 76. A government enforcement action and an investigation, however, provide some insight into its application.

First, the Commissioner made an application to the Tribunal under the 2009 price maintenance provision challenging the imposition by the Visa and MasterCard credit card networks of rules that prevented participating retailers from (i) surcharging for credit card payments, (ii) not accepting all the network's cards or (iii) discriminating in their treatment of cards from different networks (the Merchant Rules). Some retailers argued that the surcharges or selective acceptance of credit cards were necessary in light of increasing fees Visa and MasterCard indirectly charged to retailers for sales transactions involving a credit card.¹³ The Commissioner argued that the Merchant Rules constrained retailers from encouraging customers to use lower cost methods of payment, which in turn limited the ability of retailers to negotiate lower fees with credit card companies. More specifically, these fees, known as card acceptance fees, are paid by retailers to entities known as Acquirers. Acquirers provide services to retailers that allow retailers to accept credit card payments.¹⁴ Because both Visa and MasterCard establish their respective Merchant Rules in their agreements with Acquirers, the Commissioner argued that the imposition of these rules had the effect of "influencing upward or discouraging the reduction of" card acceptance fees in violation of Section 76.¹⁵

Although Section 76 expressly applies to persons engaged in a business relating to credit cards¹⁶ and the Tribunal found that the challenged restrictions led to higher prices for credit card services and had an adverse effect on competition, the Tribunal held that the price maintenance provision did not apply to the challenged policies because the credit card services supplied by Visa and MasterCard were not "resold" to the affected merchants because the services supplied by Visa and MasterCard to Acquirers are different than the services supplied by Acquirers to retailers.¹⁷ In other words, a "resale" of the respondent's product is required for the price maintenance provisions to apply.¹⁸

After the Visa/MasterCard decision, some major consumer product suppliers in Canada, particularly in the grocery and pharmacy sectors, reportedly began to impose new limits on the ability of retailers to advertise or sell certain products below specified retail prices.¹⁹

The second significant government development started with the Bureau's review under the Act's merger provisions of a proposed acquisition by Loblaw, a major Canadian grocery chain, of Shoppers Drug Mart, a major pharmacy chain. In the course of its review, the Bureau considered,

¹³ Comm'r of Competition v. Visa Canada Corp. and MasterCard Int'l Inc., 2013 Comp. Trib. 10, ¶ 56 (Can.) [hereinafter Visa/MasterCard].

¹⁴ *Id.* ¶ 142.

¹⁵ *Id.* ¶ 159.

¹⁶ Competition Act, R.S.C. 1985, c. C-34, § 76(3)(b) (Can.).

¹⁷ Visa/MasterCard, *supra* note 13, ¶¶ 391–392.

¹⁸ *Id.* ¶ 134. Similarly, the Act also expressly provides that Section 76 applies to persons that have exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered integrated circuit topography. However, on the basis of Visa/MasterCard, Section 76 may not apply to minimum resale prices imposed on a licensee if the licensee is not re-selling the licensed patent, trademark or other intellectual property.

¹⁹ See Marina Strauss, *Canadian Grocery Suppliers Strike Back Against Heavy Discounting*, GLOBE AND MAIL (Mar. 8, 2014), <http://www.theglobeandmail.com/report-on-business/canadian-grocery-suppliers-strike-back-against-heavy-discounting/article17360748/>; see also WAL-MART CAN. CORP., COMMENTS ON DRAFT COMPETITION BUREAU ENFORCEMENT GUIDELINES FOR PRICE MAINTENANCE (SECTION 76 OF THE COMPETITION ACT) 5 (2014), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Wal-Mart-Canada-Price-Maintenance.pdf/\\$file/Wal-Mart-Canada-Price-Maintenance.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Wal-Mart-Canada-Price-Maintenance.pdf/$file/Wal-Mart-Canada-Price-Maintenance.pdf).

among other things, restrictions imposed by Loblaw on its suppliers to compensate Loblaw for discounts that Loblaw provided on the suppliers' products to match other grocery stores' lower advertised prices.²⁰ The Bureau was concerned that these policies created incentives for Loblaw's suppliers to impose price maintenance restrictions on Loblaw's competitors, thereby preventing those competing retailers from offering lower prices.²¹ The Bureau ultimately obtained commitments from Loblaw directed at these policies.²² In a public statement on its clearance of the merger, the Bureau stated that, while a consent agreement with Loblaw addressed merger-specific issues, the Bureau would continue to investigate Loblaw's policies, agreements and conduct related to pricing strategies and programs that reference rivals' prices.²³

Key Points from the 2014 Enforcement Guidelines

[S]ome aspects of the Guidelines suggest the Bureau takes a relatively more activist approach to the price maintenance provision than had previously been evident under the 2009 amendments.

The credit cards case and the Loblaw investigation are somewhat atypical examples of conduct that could raise issues under the price maintenance provisions of the Act. For more typical resale price maintenance policies, such as MAPs, the September 2014 Guidelines represent the most significant guidance to date from the Bureau on the 2009 price maintenance legislation.

The Guidelines provide several key takeaways. Also, as noted below, some aspects of the Guidelines suggest the Bureau takes a relatively more activist approach to the price maintenance provision than had previously been evident under the 2009 amendments.

Price maintenance is often procompetitive. The Guidelines recognize that price maintenance is common in many markets, and, depending on the nature of the product, can be procompetitive in many circumstances, such as by enhancing service and inventory levels among competing retailers of the same brand of product and addressing free-riding among retailers. Price maintenance may also facilitate entry by encouraging retailers to stock and promote a supplier's products or engage in marketing efforts to promote a particular product.²⁴

Multi-supplier challenges. The Guidelines state that the Bureau may consider enforcement action against more than one supplier in an industry or sector to address an adverse competitive effect in a market resulting from price maintenance practices.²⁵ However, the Guidelines do not amplify how or whether the Bureau would frame such an application to the Tribunal in instances where (i) the various suppliers had each independently and unilaterally adopted a price maintenance policy and (ii) no one of them alone has market power sufficient to have an adverse effect

²⁰ Competition Bureau Position Statement, Competition Bureau Review of the Proposed Acquisition of Shoppers Drug Mart Corp. by Loblaw Cos. Ltd. (Mar. 21, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03703.html> [hereinafter Position Statement].

²¹ *Id.*

²² Consent Agreement, Comm'r of Competition and Loblaw Cos. Ltd., Mar. 21, 2014, available at http://www.ct-tc.gc.ca/CMFiles/CT-2014-003_Registered%20Consent%20Agreement_1_38_3-21-2014_1159.pdf. Under paragraph 53 of the agreement, Loblaw cannot enter into any "Threshold Deals" with any suppliers of specified categories of products for five years. A "Threshold Deal" is an agreement between Loblaw and a supplier that requires the supplier to compensate Loblaw to ensure that Loblaw achieves a stated margin when Loblaw lowers its price to match an advertised price of another retailer.

²³ Position Statement, *supra* note 20. In November 2014, pursuant to its continued investigation into Loblaw's policies, agreements and conduct, the Bureau applied for court orders compelling 12 major grocery suppliers to produce records and information relevant to the Bureau's continuing investigation of Loblaw's pricing policies. See Jeff Gray & Marina Strauss, *Watchdog Probes Alleged 'Restrictive Trade Practices' at Loblaw*, GLOBE AND MAIL (Nov. 17, 2014), <http://www.theglobeandmail.com/report-on-business/loblaw-faces-competition-bureau-probe-over-pricing-strategies/article21613053/>, and e.g., Application Record, Comm'r of Competition v. S.C. Johnson and Son, Ltd., No. T-2342-14 (Can. Ont. Fed. Ct., Nov. 12, 2014).

²⁴ Guidelines, *supra* note 5, § 1.

²⁵ *Id.* § 2.1.1.

on competition. As the FCPC Comments on the Draft Guidelines pointed out, Section 76 lacks express statutory language to permit an application on this basis.²⁶ In contrast, some of the Act's other provisions clearly permit the Tribunal to, for example, issue an order directed to all or any suppliers engaged in exclusive dealing that is "widespread in the market" if the practice is likely to lessen competition substantially.

Indirect influence on resale price. Section 76 applies to agreements or other specified types of conduct that influence prices upward either directly or indirectly. While minimum resale price or MAP policies, for example, may constitute a direct upward influence on price, it is less clear what might constitute an "indirect" upward influence on price. The Guidelines state that even though an increase by a supplier of the wholesale price of a product may lead to an increase in the retailer's price, such a price increase is insufficient, in and of itself, to warrant enforcement action under Section 76.²⁷ The Tribunal made a similar but broader observation in *Visa/MasterCard*:

We agree with the Respondents that the "influencing-upward" condition must mean something other than the consequences that flow from a company's exercise of market power which results in adverse effects on competition in the form of an increase in prices in the downstream market. If not, Section 76 would turn into an open-ended provision. There is no support, in the legislative history, other decisions, or commentary, for such an interpretation.²⁸

The Guidelines then assert that the Tribunal considers that a supplier's influence on a retailer's selling or advertised prices could represent something more than the mere exercise of market power (and presumably constitute indirect price maintenance) where, for example, the supplier's conduct results in a retailer setting the price of its product at a level higher than it would otherwise sell the product.²⁹ This, however, goes beyond the cited portion of the *Visa/MasterCard* decision, where the Tribunal stated more generally that "Under some circumstances . . . resale price maintenance can reduce both intra-brand and inter-brand competition and is demand-restricting as a consequence. In this case there would be both an upward influence on price and an adverse effect on competition."³⁰ By citing this passage, the Bureau may be suggesting that a policy which reduces inter-brand competition by encouraging higher prices of other manufacturers' products has a distinct indirect upward influence on resale prices that the Bureau may investigate under Section 76.

The Guidelines further suggest that the Bureau may consider a supplier's terms and conditions of sale to indirectly influence upward a reseller's prices if they "may reduce or eliminate downstream competitive forces that would otherwise discipline the supplier's upstream pricing, such that the supplier's price for the product supplied, and by extension the price of the retailer's product, is higher than would be the case absent the price maintenance conduct."³¹ Here, the Bureau cites the Tribunal's *Visa/MasterCard* decision to the effect that the card networks' no-surcharge rules effectively required merchants to pass on the cost of higher card acceptance fees to all cus-

²⁶ FOOD & CONSUMER PRODUCTS OF CAN. FCPC SUBMISSION ON THE DRAFT PRICE MAINTENANCE GUIDELINES 2 (2014), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Food-Consumer-Products-Canada-Price-Maintenance.pdf/\\$file/Food-Consumer-Products-Canada-Price-Maintenance.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Food-Consumer-Products-Canada-Price-Maintenance.pdf/$file/Food-Consumer-Products-Canada-Price-Maintenance.pdf).

²⁷ Guidelines, *supra* note 5, § 2.1.3.

²⁸ *Visa/MasterCard*, *supra* note 13, ¶ 162.

²⁹ Guidelines, *supra* note 5, § 2.1.3 (citing *Visa/MasterCard*, *supra* note 13, ¶¶ 162 and 269).

³⁰ *Visa/MasterCard*, *supra* note 13, ¶ 269.

³¹ Guidelines, *supra* note 5, § 2.1.3 (citing *Visa/MasterCard*, *supra* note 13, ¶¶ 321–322).

tomers, regardless of their method of payment. In contrast, surcharging by merchants for use of cards with higher merchant fees would provide a competitive constraint on those acceptance fees, resulting in lower fees for merchants to access credit card network services.

The CBA Comments on the Draft Guidelines argued that this interpretation is inconsistent with *Visa/MasterCard* because it conflates the “influence upward” and the “adverse effect on competition” elements in Section 76.³² In other words, in accordance with the decision of the Canadian Federal Court of Appeal in *Canada Pipe*, each element of Section 76 should have a distinct and non-overlapping meaning.³³ The CBA Comments also asserted that, in a price maintenance case, terms and conditions that may influence a *supplier’s* pricing (rather than a reseller’s) should not be relevant.

In any event, if Section 76 prohibited supplier policies merely because they indirectly cause prices to be higher than they otherwise would, that would seem to capture a supplier policy of requiring retailers to provide minimum levels of service or minimum standards of store quality, which would not traditionally have been considered to constitute challengeable price maintenance under the Act. Indeed, it would be difficult to understand why such a policy could be prohibited simply because it causes prices to be higher than they otherwise would, while a supplier’s direct price increase to its resellers would not.

While the Guidelines are not entirely clear on this point, a possible reading is that a price increase or other policy that simply raises a reseller’s costs without restricting the reseller’s pricing strategy or impairing inter-brand competition would not be sufficient to invoke Section 76 whereas a restraint related to the reseller’s pricing policies, although not expressly setting a minimum resale price, could be an indirect upward influence on price challengeable under Section 76, if the other elements of Section 76 are met.

In *Visa/MasterCard*, the Tribunal found that the respondents’ no-surcharge rules indirectly influenced upward the price at which Acquirers sold credit card network services to merchants.³⁴ However, the Tribunal did not find sufficient evidence to support the Commissioner’s allegation that rules requiring merchants to honor all cards or prohibiting discrimination among a network’s cards had influenced prices upward.³⁵ In any event, the Tribunal’s comments in this regard were obiter dicta given that the Tribunal’s principal finding was that Section 76 did not apply because of the absence of a resale.

Parity agreements. In discussing Section 76’s application to “indirect” influences on reseller prices, the Guidelines also cite the example of price parity agreements.³⁶ Those agreements involve commitments by retailers to the supplier to charge the same resale price as other retailers charge for the supplier’s products, or to charge the same resale price as that retailer charges for products sourced from the supplier’s competitors. In recent years, parity agreements have

³² CAN. BAR ASS’N, COMPETITION BUREAU’S DRAFT PRICE MAINTENANCE GUIDELINES 4–5 (June 2014) [hereinafter CBA Comments], <http://www.cba.org/CBA/submissions/pdf/14-36-eng.pdf>; see also *Visa/MasterCard*, *supra* note 13, ¶ 163.

³³ *Comm’r of Competition v. Canada Pipe Co.*, 2006 FCA 233 (Can.).

³⁴ *Visa/MasterCard*, *supra* note 13, ¶ 322.

³⁵ *Id.* ¶¶ 333, 339.

³⁶ Guidelines, *supra* note 5, § 2.1.3.

come under increased scrutiny by other competition agencies because of concerns that they may reduce price competition between retailers or suppliers.³⁷

“Any like means.” As noted above, Section 76 applies to attempts by a supplier to influence prices upwards by agreement, threat, promise “or any like means.” The Guidelines comment that any conduct that implicitly or explicitly purports to confer a benefit or impose a penalty on a reseller could be subject to Section 76, but do not expand on this point or comment further on the concept of “like means.”³⁸ An example of “like means” from the case law under the prior price maintenance offense is deliberately filling orders with wrong and unordered goods.³⁹

“Resale.” As noted above, in its *Visa/MasterCard* decision, the Tribunal found that a resale of a product is required for Section 76 to apply. The Tribunal stated that the resold product need not be identical, although in many instances it would be identical or “substantially similar on the important aspects of the product.”⁴⁰ The Guidelines suggest that a product that is repackaged, reapportioned, processed or transformed from the product supplied, or is bundled with other products, could be considered “substantially similar.”⁴¹ The Tribunal noted, but did not find it necessary to rule on, the respondents’ position that the resold product should be in the same antitrust product market as the product supplied.⁴²

Scope of exemptions. While a supplier may refuse to supply a reseller that engages in a practice of loss leader selling, false advertising, bait and switch, or inadequate servicing, the Guidelines state that the Bureau may, in that case, still establish that the supplier’s minimum resale pricing or MAP pricing practices have in fact influenced a retailer’s pricing upwards.⁴³ However, it is not clear how or in what circumstances that scenario could arise when the reseller has been refused supply, or whether the Tribunal would sustain a challenge on that basis.

Constructive refusals to supply. According to the Guidelines, constructive refusals to supply involving price or non-price conduct can provide grounds for a challenge under Section 76. For example, the Guidelines state that a wholesale price for a product that is patently in excess of any price that could reasonably be expected to be obtained for the product in a downstream market could constitute a constructive refusal to supply.⁴⁴ Case law under the prior price maintenance offense provides some qualified support for this proposition. In the *Sunoco* case, the Crown unsuccessfully argued that Sunoco had effectively or indirectly refused to supply one of its deal-

³⁷ For example, the Competition and Markets Authority (UK) has proposed changes to the private motor insurance (PMI) market to increase competition and reduce the cost of premiums for motorists, including a ban on price parity agreements between price comparison websites (PCWs) and insurers which prohibit insurers from making their products available to consumers elsewhere at lower rates. The Competition and Markets Authority found that some price parity clauses in contracts between PCWs and insurers had the effect of suppressing competition on price and were likely to lead to higher PMI prices overall. See Press Release, Competition and Markets Authority, CMA Sets Out Changes for Private Motor Insurance (June 12, 2014), <https://www.gov.uk/government/news/cma-sets-out-changes-for-private-motor-insurance>.

³⁸ Guidelines, *supra* note 5, § 2.1.2; CBA Comments, *supra* note 32, at 3–4.

³⁹ *R. v. Levi Strauss of Canada Inc.* (1979), 45 C.P.R. (2d) 215 (Can. Ont. Co. Ct.).

⁴⁰ *Visa/MasterCard*, *supra* note 13, ¶ 115.

⁴¹ Guidelines, *supra* note 5, § 2.1.4.

⁴² *Visa/MasterCard*, *supra* note 13, ¶ 134.

⁴³ See COMPETITION LAW OF CANADA 25TH ED. § 4.06[4] (Calvin S. Goldman & John D. Bodrug eds., 2013) (discussion of other aspects of these exemptions).

⁴⁴ Guidelines, *supra* note 5, § 3.1.1.

ers by “freezing” that dealer’s pricing support at an uncompetitive level.⁴⁵ The court commented that it accepted the Crown’s position that “in some circumstances the refusal to sell at a price which allows the dealer to make a profit might amount to indirect refusal to supply,” but in that case there was no restriction on the amount of gas that the dealer’s station could obtain and other financial incentives were available to the dealer with increased purchases.⁴⁶

The Guidelines add that non-price constructive refusals to supply could include, for example, delays in filling orders or shipping incomplete orders. However, these examples might also be viewed as actual refusals to supply and perhaps illustrate better a position that a partial refusal to supply because of a person’s low pricing policy could provide grounds for an order under Section 76.⁴⁷

Single incident. The Guidelines state that a single incidence of a refusal to supply or discrimination is sufficient to engage the price maintenance provision if the other elements are present.⁴⁸ It may, however, be difficult to establish that a single occurrence has the anticompetitive effect required for the Tribunal to issue an order.

Prospective customers. The Guidelines state that the refusal to supply branch of the price maintenance provision can apply with respect to a prospective reseller even if that person is not an existing or previous customer of the supplier.⁴⁹ Accordingly, refusing to supply a new customer because of its low pricing policy could provide grounds for an order under Section 76.

“Because of a low pricing policy.” Consistent with some case law under the prior price maintenance offense, Section 3.1.3 of the Guidelines states that the Bureau considers that a refusal to supply, or discrimination in the supply of, a product will have occurred “because of the low pricing policy” of a person where the low pricing policy is the “proximate cause” of the supplier’s refusal or discrimination.⁵⁰ The Guidelines go further in stating that, in the Bureau’s view, a person’s low pricing policy need not be the only or even the primary reason for the refusal or discrimination, but it is sufficient that it be “a factor informing the supplier’s decision.”⁵¹ However, hypothetical example 2 in Section 7.2 of the Guidelines seems to imply that the “low pricing policy” must have made a difference in the determination not to supply, e.g., if poor service would have led to refused supply regardless of the reseller’s pricing policy or good service would have restored supply regardless of the pricing policy, the refusal is not “because of” the low pricing policy. Thus, in contrast to the discussion in Section 3.1.1 of the Guidelines, the example suggests that it is not sufficient for the reseller’s low pricing policy to simply be one non-determinative factor in the supplier’s decision making.

Safe Harbor: Assurance of pricing freedom. The Guidelines state that the price maintenance provision will not apply where a person (e.g., retailer “A”) induces a supplier to refuse supply to

⁴⁵ R. v. Sunoco (1986), 11 C.P.R. (3d) 557 (Can. Ont. Dist. Ct.).

⁴⁶ *Id.* at 568.

⁴⁷ One court has held that a refusal to supply a person with a specific brand of an item because of that person’s low pricing policy violated the prior price maintenance offense. *See* R. v. Grange (1979), 40 C.P.R. (2d) 214 (Can. B.C. Co. Ct.).

⁴⁸ Guidelines, *supra* note 5, § 3.1.1.

⁴⁹ *Id.* § 3.1.3.

⁵⁰ *Id.*; *see* Reasons for Judgment, R. v. 41813 Alberta Ltd., No. 9201-1336c6 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Feb. 4, 1993); Sentencing, R. v. 41813 Alberta Ltd., No. 9201-1336-C6 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Mar. 24, 1993); Reasons for Judgment, R. v. Royal Lepage Real Estate Servs. Ltd., No. 8201-14125 ¶¶ 95–106 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Oct. 28, 1994); Sentencing, R. v. Royal Lepage Real Estate Servs. Ltd., No. 8201-14125 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Dec. 20, 1994).

⁵¹ Guidelines, *supra* note 5, § 3.1.3.

[T]he Tribunal cannot issue an order under the Act's price maintenance provision unless the challenged practice has an "adverse effect" on competition. This is a lower threshold than the "substantial lessening or prevention of competition" test that applies in many other provisions of the Act . . .

another person (e.g., competing retailer "B") if retailer "A" would have done business with the supplier regardless of the success of the inducement.⁵² Accordingly, a retailer who wishes to discuss product prices with a supplier could reduce its risk under the price maintenance provision by making it clear to its supplier that it will continue to purchase from the supplier on the same terms whether or not the supplier continues to sell to other retailers. Similarly, the Act expressly provides that a suggestion by a supplier of a resale or minimum resale price to a reseller is deemed to influence the reseller unless the supplier made clear that the reseller is under no obligation to accept the suggestion and would in no way suffer in its business relations if it refuses to accept the suggestion.⁵³ (Of course, even if a suggestion is made and resale prices are influenced upwards, the other elements of the provisions, including an adverse effect on competition, must also be established before the Tribunal can issue an order under Section 76.)

Adverse effect on competition. As noted above, the Tribunal cannot issue an order under the Act's price maintenance provision unless the challenged practice has an "adverse effect" on competition. This is a lower threshold than the "substantial lessening or prevention of competition" test that applies in many other provisions of the Act, such as the provisions with respect to mergers and abuse of dominance. The Tribunal has said that "without market power there can be no adverse effect in a market."⁵⁴ As a result, the Bureau will be concerned with price maintenance conduct only where it is likely to create, preserve or enhance market power—namely, the ability to behave relatively independently of the market.

A market share of less than 35 percent typically will not prompt further Bureau examination of whether a firm possesses market power. However, the Guidelines point out that, consistent with the Tribunal's findings in *Visa/MasterCard*, a firm with a market share of less than 35 percent could have a degree of unilateral market power in some instances, depending on the relevant market's characteristics.⁵⁵ In that case, the Tribunal found the market to consist of the supply of certain credit card network services provided by only two suppliers. While Visa had two-thirds of the market and MasterCard accounted for the balance, given the highly concentrated market, MasterCard's pricing discretion, its margins, and the very high barriers to entry, the Tribunal found that both Visa and MasterCard had market power.

The Guidelines identify the following circumstances in which price maintenance may be demand-restricting, thereby adversely affecting competition in a market and serving to create, preserve or enhance market power:

- **Inhibiting competition between suppliers:** Price maintenance may be used by suppliers to facilitate less vigorous price competition among them, or to help police a price-fixing arrangement among them. (Of course, in the latter case, it may be expected that the Bureau would pursue a criminal cartel charge, rather than an order under Section 76.)⁵⁶
- **Inhibiting competition between retailers:** One or more retailers may compel a supplier to adopt price maintenance to facilitate less vigorous price competition among the retailers, or to help police a price-fixing arrangement among the retailers.⁵⁷

⁵² *Id.* § 4.1.1.

⁵³ Competition Act, R.S.C. 1985, c. C-34, § 76(5) (2014) (Can.).

⁵⁴ *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, ¶ 369 (Can.).

⁵⁵ Guidelines, *supra* note 5, § 5.2.

⁵⁶ Competition Act, R.S.C. 1985, c. C-34, § 45 (2014) (Can.).

⁵⁷ Guidelines, *supra* note 5, § 5.3.

- **Supplier exclusion:** An incumbent supplier may use price maintenance to guarantee margins for retailers to cause them to be unwilling to carry the products of existing or new entrant competitors of the supplier. To the extent that such a policy results in the foreclosure of downstream distribution channels to competing suppliers, it may limit or reduce the ability of such suppliers to discipline the incumbent's wholesale pricing, enabling the incumbent to charge a price that is higher than it could sustain absent such conduct. (However, the abuse of dominance provisions in Section 79 of the Act may provide a clearer basis for challenging such exclusionary conduct if it is likely to prevent or lessen competition substantially.)⁵⁸
- **Retailer exclusion:** A retailer may compel a supplier to engage in price maintenance with a view to excluding competition to the retailer from discount or more efficient retailers.⁵⁹

After-the-fact analysis. The Guidelines include an example of the application of Section 76 to co-operative advertising agreements that appears to focus on an after-the-fact analysis of whether a MAP policy in fact had the effect of increasing prices.⁶⁰ As a practical matter, however, a supplier must make a determination of whether a proposed policy complies with the price maintenance provisions before it proceeds to implement the policy. Nevertheless, to minimize risks of Bureau investigations, suppliers may wish to attempt to monitor the impact on market prices of any price maintenance policies they may adopt from time to time.

Case resolutions. The Guidelines state that, before commencing formal proceedings with the Tribunal under the price maintenance provision of the Act, the Commissioner will generally afford parties an opportunity to respond to the Bureau's concerns and to propose an appropriate resolution to address them. The Guidelines note that possible resolutions could range from discontinuance of an inquiry to a consent agreement registered with the Tribunal.⁶¹

Other considerations. Notably, the Guidelines do not discuss any factors that might cause the Commissioner to exercise his discretion not to pursue a case that satisfies the elements of the Act's price maintenance provision. In *Visa/MasterCard*, the Tribunal observed that its power to issue an order under this provision is discretionary and, having regard to the complexity of the credit card market and likely "technical hitches, unforeseen consequences [and] a need for ongoing adjustment and stakeholder consultation," the Tribunal would not have issued an order in that case even if the Commissioner had established all of the elements of the price maintenance provision.⁶² Presumably, the Commissioner is entitled to, and will, exercise discretion in deciding which price maintenance cases he will pursue.

⁵⁸ The abuse of dominance provisions in Section 79 of the Act provide that where "(a) one or more persons substantially or completely control, throughout Canada or any [part of Canada], a class or species of business, (b) that person or persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market," the anti-competitive practice may be prohibited or subjected to a remedial order or monetary penalty. The Bureau's Abuse of Dominance Enforcement Guidelines assert that a group of unaffiliated firms may collectively or jointly hold market power if the firms do not compete with one another to a sufficient degree. See Competition Bureau Canada, Enforcement Guidelines, The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act § 2.4 (2012), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/\\$FILE/cb-abuse-of-dominance-provisions-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf). While the Bureau states that similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider two or more firms to hold a jointly dominant position, it remains to be seen whether the Tribunal would hold that independent firms could jointly "control" a market in the absence of an agreement or understanding between them. See John D. Bodrug, *Joint Dominance*, 21 CAN. COMPETITION REC. 104 (2003).

⁵⁹ Guidelines, *supra* note 5, § 5.3.

⁶⁰ *Id.* § 7.1.

⁶¹ *Id.* § 6.

⁶² *Visa/MasterCard*, *supra* note 13, ¶ 395.

Policies directed at resale policies of only the supplier's own products (or some of them), ought to carry relatively less risk of challenge than a policy purporting to restrict prices of competing products, given that the latter appear to have attracted Bureau scrutiny.

In designing a Canadian pricing and distribution policy, companies should keep in mind that even a unilateral policy that complies with the price maintenance provision might still raise issues under other provisions of the Act. Notably, a recent Federal Court of Appeal decision in respect of proceedings against the Toronto Real Estate Board under the abuse of dominance provisions of the Act held that Section 79 can apply to a firm that is dominant in one market but whose conduct has exclusionary effects in another market.⁶³ For example, the Bureau might challenge a refusal to supply by a dominant supplier under the Act's abuse of dominance provisions (which allow the Tribunal to impose significant monetary penalties) if the Bureau concludes that the conduct excludes downstream distributors or retailers from a market and substantially prevents or lessens competition in that market.

Similarly, even if a reseller's termination does not provide grounds for challenge under the price maintenance provisions, consideration should also be given to separate refusal to deal provisions in Section 75 of the Act. In some circumstances, Section 75 allows the Tribunal to order supply on usual trade terms to a person who is substantially affected in his business, or is precluded from carrying on business, due to his inability to obtain adequate supplies of the product anywhere in a market on usual trade terms. For such an order to be made, the customer or prospective customer must show that (1) its inability to obtain adequate supplies of the product is because of insufficient competition among suppliers for a product that is in ample supply, and (2) the refusal is having or is likely to have an adverse effect on competition in a market.

Implications

Undoubtedly, by adding a competitive effects element and de-criminalizing the provision, the 2009 amendments to the Competition Act provided significantly greater scope for suppliers to engage in price maintenance practices in Canada. A supplier that clearly lacks market power has the greatest flexibility, subject only to potential concerns if price maintenance is engaged in by some of its competitors and has a cumulative anticompetitive effect.

Suppliers that may be found to possess market power will need to assess the potential competitive effects of a proposed price maintenance practice in Canada, and should document any efficiency enhancing rationales for adopting a price maintenance policy. Policies directed at resale policies of only the supplier's own products (or some of them), ought to carry relatively less risk of challenge than a policy purporting to restrict prices of competing products, given that the latter appear to have attracted Bureau scrutiny. Having said that, it remains to be seen what types of non-traditional price maintenance practices the Bureau will challenge, and in what circumstances the Tribunal will be prepared to issue a remedial order. In particular, an aggressive approach to what constitutes an "indirect" upward influence on price, constructive refusals to supply, or low pricing as a "proximate cause" for a refusal to supply, could create new trip wires for companies that distribute their products in Canada. ●

⁶³ Comm'r of Competition v. Toronto Real Estate Bd., [2014] F.C.A. 29 (Can. Ont. Fed. Ct.).

Book Review

Microsoft's Antitrust Travails

Andrew I. Gavil and Harry First

The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century

MIT Press 2014

Reviewed by Keith N. Hylton

Andrew Gavil and Harry First's book on the Department of Justice's litigation against Microsoft will undoubtedly become one of the standard references for anyone who studies these cases in the future. This litigation has been a big enterprise in the courts, especially the landmark D.C. Circuit opinion in 2001.¹ Repercussions continue today, with new raids on Microsoft's operations in China to investigate vaguely described concerns of the Chinese government over product bundling and interoperability, issues at the core of the Microsoft litigation from the start.

Gavil and First have two goals: to provide a road map and history of the Microsoft litigation, and, more ambitiously, to determine whether the litigation achieved its aim of constraining Microsoft and whether antitrust law is up to the task of constraining similarly dominant firms in the technology industry.

This book accomplishes its narrower goal of providing a road map and history of the litigation. However, its degree of success toward the greater goal of assessing whether the litigation achieved its aim is somewhat more difficult to analyze, largely because this more distant aim depends on counterfactuals that no one will ever be able to determine. Would the world have been worse off if the DOJ had never launched its series of prosecutions against Microsoft? Anyone who claims to know the answer to this question shouldn't be listened to.

Although Gavil and First provide an excellent road map and history, from a book that focuses so heavily on the litigation process, I would have preferred to see more of the drama. For a long time I have thought that there should be a movie about the Microsoft litigation—no, not that movie called *Antitrust*, but a real movie about the litigation process. It would be an enormously useful way of teaching antitrust law and the lawyering business in general. If anyone ever gets around to writing the movie, they could rely on Gavil and First for the historically accurate account.

The movie would hopefully emphasize the funny, interesting, and dramatic moments throughout the litigation. Perhaps the first of these is the "Sporkin moment," ably if drily reviewed by Gavil and First, where District Judge Stanley Sporkin erupts with his own theory about how the DOJ should have managed its case against Microsoft and what sorts of bad acts they should have sought to punish, all in the course of a Tunney Act review of a settlement. This scene should come early in the movie as a signal to the viewer that strange events were sure to follow. For even at this opening stage of the story, the viewer would see that there was something unusual about the

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¹ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

Microsoft litigation; that it got under the skin of judges, a group one would think hardened to every set of facts imaginable.

The Posner mediation—a process arranged by the judge presiding over the Microsoft trial, Thomas Penfield Jackson, to bring about a settlement, in which Judge Richard Posner served as mediator—is also described somewhat drily by Gavil and First, though with enough detail to allow the reader to infer that it must have been intense at times. Gavil and First explain that the mediation failed after Posner concluded that the state attorneys general were making demands that were too far from the common ground staked out by Microsoft and the DOJ. Surprisingly, Gavil and First suggest that Posner was too quick to declare the mediation failed and too harsh on the AGs. My impression is just the opposite. The AGs treated Posner disrespectfully, not the other way around. They acted as if Posner had no legal authority and that the mediation process was entirely a matter of getting what you can through bluster and brinkmanship. Posner was fed up with them by the end of the mediation, and for good reasons.

[T]here was something unusual about the Microsoft litigation—it got under the skin of judges, a group one would think hardened to every set of facts imaginable.

As I have suggested, Gavil and First missed an opportunity with this book because the most colorful aspects of the litigation are either left out or presented in a matter-of-fact way. They do not discuss the “gotcha” moments in the trial conducted by David Boies for the DOJ. Anyone who remembers the news coverage will recall the Bill Gates deposition, which did not go well at all for Bill. The world’s richest man, treated harshly, responded with exasperation and a seeming inability to understand what the lawyers were pestering him about. It was a scene that damaged Gates’s reputation, and empowered the newspapers to go after him, which they did with glee. His reputation bounced back, but it took years. And there was also the famous incident of a seemingly doctored videotape exposed theatrically by Boies.

Other dramatic scenes would convey the rapid-fire pace of the litigation, the sense that the Microsoft lawyers had that they were being bombarded with legal theories they hadn’t even considered. Yet the missiles came in, exploding silently without the defense lawyers realizing the damage. Judge Jackson, near the end of the trial, talked unguardedly to reporters about his feelings, comparing the demeanor of Microsoft executives to that of drug dealers he had recently sentenced—both groups equally certain that they had done nothing wrong and that the fault lay in the legal system rather than in their own actions.² Unsurprisingly, he ruled that the company should be split into two units, an operating system company and an applications company. That remedial order did not survive appeal.

This is not the first book on a long-running antitrust case in the technology sector, nor even the first on the Microsoft litigation. The book by Franklin M. Fisher, John J. McGowan, and Joen E. Greenwood on *United States v. IBM* tells the story of a comparably long-running litigation raising many of the same fundamental issues as the Microsoft cases.³ William H. Page and John Lopatka’s *The Microsoft Case*⁴ covers much of the same ground as Gavil and First, though only up to 2007, thus missing the follow-on litigation in the United States and in the European Union, both of which are thoroughly discussed by Gavil and First.

Compared to Gavil and First, Fisher, McGowan and Greenwood’s book is a far more rigorous look at the economics of antitrust and industrial organization, though not nearly as detailed on the

² Ken Auletta, *Final Offer*, NEW YORKER, Jan. 15, 2001, available at <http://www.kenauletta.com/finaloffer.html>.

³ FRANKLIN M. FISHER, JOHN J. MCGOWAN & JOEN E. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. v. IBM* (1983).

⁴ WILLIAM H. PAGE & JOHN LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007).

litigation process. Fisher, McGowan and Greenwood is a tough and overly technical read at times, unlike Gavil and First, but in the end the reader walks away with a methodical exposure to applied antitrust economics and to some high-level theoretical issues generated by the IBM litigation, such as the economically appropriate method of measuring depreciation or of accounting for economic profits.

Page and Lopatka's discussion of the Microsoft litigation is somewhere between the approaches in Fisher, McGowan and Greenwood and in Gavil and First, combining in-depth discussions of the economics, though not at the level of depth in Fisher, McGowan and Greenwood, with a critical analysis of the antitrust doctrines examined in the Microsoft litigation. While Gavil and First focus more on the mechanics of the litigation, Page and Lopatka have more to say about the evolution of competing theories of the Sherman Act's scope, and the interplay between those theories and the litigation.

These comparisons lead to my only serious criticism of Gavil and First. I would have preferred above all to see a book that steps back from the government's case and asks whether it was based on sound economics. There is far too little of this in Gavil and First, who appear to take the government's case as entirely valid, and regard the only question to be considered as whether the litigation process worked, or was capable of working, sufficiently to help the government reach its goals in suppressing monopolization. This is a popular view in government and academia today, but serious antitrust analysis should reach beyond such a narrow perspective.

Despite this criticism, I recommend Gavil and First to anyone who wants to understand what happened in the Microsoft litigation, and how it happened. Whether one is really interested in an account of the dramatic moments, or a deep analysis of the economics, a straightforward and reliable account of how and why the litigation progressed and how it was resolved, as Gavil and First deliver, should be of great value. ●

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: Editor John Woodbury comments on a working paper that examines the effect institutional investors may have on competition downstream.

Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, (Ross School of Business Working Paper 1235, Oct. 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345

In this paper, José Azar, Martin C. Schmalz, and Isabel Tecu (Azar et al.) provide evidence on the competitive effects in downstream products markets resulting from the acquisition of financial interests by large diversified institutional investors upstream.¹ As is apparent in the references of the paper, there is a large finance literature on the role that institutional investors play in the management of those firms in which they have a financial interest, notwithstanding that these investments may be “passive” in the legal sense.² In principle, it may be possible for those investors to persuade rivals in a downstream market to soften competition with each other. If so, the investors (and their clients) would gain from the higher profits resulting from their financial interest in these firms.³ These effects, it is argued, may be especially pronounced in industries where institutional investors make investments in multiple firms within the industry (e.g., airlines).

Background

Before discussing Azar et al., it is instructive to first understand its theoretical forebearers. The framework for Azar et al.'s analysis is the theoretical model developed by Bresnahan and Salop and the later extension by O'Brien and Salop.⁴ Both papers show that partial ownership interests by one firm in a rival firm can generate more substantial anticompetitive outcomes than might be

¹ Azar and Tecu are colleagues of mine at Charles River Associates. Schmalz is an Assistant Professor of Finance at the University of Michigan's Stephen M. Ross School of Business.

² See, for example, the discussion in Azar et al., pp. 10–11.

³ In addition to considering the antitrust implications of the patterns of financial interests held by institutional investors, the paper also assesses the implications for evaluating frictions in corporate governance that might allow managers to deviate from maximizing the profits of the firm, concluding that they may not be as significant as indicated in the finance literature. Here I focus only on the antitrust implications of the paper's results.

⁴ Timothy F. Bresnahan & Steven C. Salop, *Quantifying the Competitive Effects of Production Joint Ventures*, 4 INT'L J. INDUS. ORG. 155 (1986); Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559 (2000).

indicated by the conventional Herfindahl-Hirschman Index (HHI) of concentration.⁵ This antitrust concern is reflected in Section 13 of the current Horizontal Merger Guidelines.⁶

To illustrate the effect with a simple example, suppose that firm A acquires a partial financial interest in rival firm B, entitling it to share in B's profits. Suppose as well that with the financial interest comes some measure of control over the management of firm B. To avoid being targeted for removal by A, the management of firm B might now account for the profits of firm A when maximizing its profits. In other words, firm B's management now has the objective of maximizing its own profits plus the profits of A, to the extent that A possesses control over B. As a result, B may price less aggressively against A, i.e., B may charge a price higher than would be the case if B maximized only its own profits.

Similarly, since A now possesses an interest in B, it will price less aggressively against B. Prior to A's acquisition of a financial interest in B, the price charged by A maximized firm A's profits. Any increase in price would cause A to lose sales to its rivals, including B, the lost profits of which would not be offset by the higher prices A would charge to those consumers remaining with A. But after A's acquisition of the financial interest in B, some of the profits lost from the reduced sales are "recovered" via A's share of the profits in B. Because ownership in B introduces this new revenue source for A, A has an incentive to raise its price when competing against B.

In this case, even if the HHI were unchanged by A's acquisition of the financial interest in rival B, post-acquisition prices would increase, other things equal. So, suppose the HHI was 2000 prior to A's acquisition of the financial interest in B, suggesting some degree of competition in the industry. After A's acquisition of the financial interest in B, the HHI remains unchanged, but the industry has become less competitive as A and B now have reduced incentives to compete against each other. It is in this sense that the HHI alone can overstate the actual degree of rivalry (to the extent that the HHI can be used as such an indicator). In response, O'Brien and Salop (building on Bresnahan and Salop) construct a modified HHI (MHHI) that takes into account partial ownership interests directly and varying levels of control or influence that the acquiring firm (i.e., the firm acquiring the financial interest in a rival) might have over the acquired firm and how that transforms the profit-maximizing calculus of the acquired firm.⁷

⁵ Of course, the HHI calculations are only the starting point for the competitive effects analysis.

⁶ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

⁷ In particular, in the spirit of Azar et al. (equation (2), p.13), suppose institutional investor *i* acquires a financial interest in firm *j* and some resulting degree of control over firm *j*. Investor *i* earns its profits from investments in its *k*-firm portfolio (which depend on the profits of each firm *k*, all in the same downstream market as *j*) in addition to its share of the profits from *j*. For the acquired firm *j* and the investor *i* in *j*, the profit objective for *j* is:

$$\max_{x_j} \Pi_j = \pi_j + \sum_{(k \neq j)} \frac{\sum_i \gamma_{ij} \beta_{ik}}{\sum_i \gamma_{ij} \beta_{ij}} \pi_k$$

where β_{ik} is the profit share of investor *i* in all other firms *k*, γ_{ij} is the control parameter of acquiring firm *i* in acquired firm *j*, π_k are the profits earned by each firm *k* (other than *j*) in which the investor has a financial interest. Thus, firm *j* maximizes its standalone profits π_j and a linear combination of the profits earned by institutional investor *i* derived from the profits of those other *k* firms in which it has a financial interest.

Azar et al. note that "The weight that firm *j* puts on the profits of firm *k* in its objective function relative to its own profits is given by $\frac{\sum_i \gamma_{ij} \beta_{ik}}{\sum_i \gamma_{ij} \beta_{ij}}$." (p. 13.) As indicated below, some further intuitive clarification of this weight might prove useful to the non-technical reader.

Note as well that the weight attached to π_k depends in part on the magnitude of the control parameter γ_{ij} , i.e., the degree of control or "influence" that firm *i* has over firm *j*.

Relying on a Cournot model of (quantity) competition, O'Brien and Salop identify the MHHI as consisting of two components: the usual HHI and what O'Brien and Salop call the MHHI delta—the factor reflecting the extent of control or influence that investing firms possess over the acquired firm. Roughly speaking, there are two elements to the MHHI delta. First is the product of the weighted shares of each pair of firms commonly owned, summed over all such products. The higher is the product of those shares, the higher is the MHHI delta.⁸

The second component is the weight to be attached to each of those share cross-products.⁹ Roughly speaking, this weight is measured as the extent of cross-ownership by each of the acquired firm's investors in all other firms in the market relative to the extent of ownership of the acquired firm by the investor. The greater is the magnitude of cross-ownership relative to the within-firm ownership, the greater the weights and the higher the MHHI delta will be. If each of the acquiring firms' financial interests tends to be concentrated in a single or small subset of firms in the industry, the MHHI delta will be lower than otherwise because the extent of cross-ownership is relatively small, other things being equal.¹⁰

Most of the components of the MHHI delta are, in principle, available—market shares, the identity of the holder of the financial interest, and the magnitude of the financial interest. The measurability of the “control” parameter (γ_{ij}) is more difficult to pin down and typically requires difficult-to-confirm assumptions.

Detailed Summary of Azar et al.

The Azar et al. paper builds on this MHHI framework to consider the price effects of cross ownership in the airline industry.¹¹ However, unlike the examples above, the focus is not on whether one airline carrier has a financial interest in one or more rival carriers. Rather, it focuses on the price effects of cross ownership resulting from the stock holdings of large institutional investors in the airline industry. That is, institutional investors will have financial interests in multiple airlines operating on any particular route. One statistic that I found striking (but buried in the middle of the paper at p. 18) is that institutional investors account for nearly 80 percent of the airline carrier stock on the average route (an origin and destination, or O&D, pair).¹² The authors note as well that this pattern of significant financial interests in downstream rivals is common. For example, the same four institutional investors are among the top six shareholders in three of the largest banks (JP Morgan Chase, Bank of America, and Citigroup) and the leading five shareholders of CVS and Walgreens are identical (pp. 7–8).

⁸ This is similar to the calculation of the HHI delta from a merger as twice the product of the shares of the merging firms. Using the same notation as earlier (see *supra* note 7), the MHHI calculation is as follows:

$$MHHI = HHI + \sum_{k \neq j} S_j S_k \frac{\sum_i \gamma_{ij} \beta_{ik}}{\sum_i \gamma_{ij} \beta_{ij}},$$

where that last sum is the MHHI delta and S_j and S_k are the downstream shares of Firms j and k . See Azar et al., equation (7), p.14.

⁹ This weight is the same as that which weights the profits of firm k by firm j when j maximizes its profits. See *supra* notes 7 and 8.

¹⁰ I am drawing heavily from the O'Brien and Salop paper to explain the intuition behind these weights. See O'Brien & Salop, *supra* note 4, at 612. Azar et al. might consider offering a similar description to render the results more useful and intuitive to the non-economist practitioner.

¹¹ Azar et al. use the term “common ownership” rather than cross-ownership. I use cross-ownership instead, given the intuition behind the “weight” component of the MHHI delta just discussed.

¹² It appears that this share may include large non-institutional owners as well (defined as those holding greater than 5% of the shares outstanding) (p. 18).

Thus, a key motivation for the paper is whether holdings like these—particularly given their ubiquity—have anticompetitive effects notwithstanding the fact that these institutional investors are regarded as “passive” investors.¹³ If the holdings were truly silent (i.e., the investors had no control or influence over the acquired firm), there would be no MHHI delta effect.

But as the paper points out, these passive investors are not silent.¹⁴ As one example, Azar et al. cite an executive of an institutional investor (State Street Global Advisors) as stating that “the option of exercising our substantial voting rights in opposition to management provides us with sufficient leverage and ensures our views and client interests are given due consideration.” (pp. 8–9.) Based on this kind of anecdotal evidence and extensive references to the finance literature on corporate governance, the authors conclude that these investors may talk softly to management but carry a big stick. Azar et al. note that “the evidence suggests that frequent and active communication, explicitly about product market strategy, does take place between the largest investors and their portfolio firms.” (p. 12.)

This activism by institutional investors is the basis for assuming that they have some influence over the airline carriers in which they have acquired a financial interest, influence that may be used to soften downstream airline competition in particular. Disturbingly, perhaps, Azar et al. report that one former legal counsel to a large investor noted that engagements with corporate management can be used to “throw the switch from developing market share to instead exercise market power to get margins up.” (p. 10.)

Azar et al. assume that the influence by an institutional investor over the decisions of the carrier in which it has acquired a financial interest is proportional to the share of the carrier’s voting stock held by the investor.¹⁵ In that case, one can think of the manager of any particular carrier (say, American) maximizing American’s profits and the profits of the institutional investors in American. As noted above, the weight that the manager would place on profits of the institutional investor (earned via its share of profits in the other carriers in which it invests) would depend (very roughly speaking) on the extent of the investor’s influence on the decisions of American’s management (measured by the share of voting stock held by the investor), and the size of the investor’s financial interest (measured by the share of voting plus non-voting stock) in other carriers vs. its financial interest in and degree of influence over American.¹⁶

After collecting the data on the institutional ownership of the airline carriers and data on carrier passenger shares on O&D pairs (over 7,000 such pairs), Azar et al. first construct the MHHI delta for each O&D pair in each quarter Q1 2001–Q1 2013. Across routes, the average MHHI is about 7,000, while the average HHI is about 5200. The average MHHI delta in these city pairs is over 1,600. (See Table 1 in Azar et al. for the market-level statistics.) This would seem to suggest that ignoring the effects of cross-ownership by institutional investors can create substantial

¹³ Azar et al. describe what they see as the current legal definition of a “passive” investor, pp. 10–11.

¹⁴ This discussion, contained on pp. 7–12, is worth reading in and of itself.

¹⁵ This is one of the control scenarios considered by Salop and O’Brien, *supra* note 4, at 583.

¹⁶ See *supra* note 7. In passing, let me note that while mentioning investor “influence,” O’Brien and Salop most often focus on some form of direct control exercised by the acquiring firm. That control may be a result of being a larger stockholder when other shareholders have very small shares or result from “super-majority” decisions that can be blocked by a minority shareholder. Exercising “influence” over carrier management is a more vague and less “testable” concept. As I note below, it would be useful if at some point the mechanism by which this “influence” can translate into anticompetitive outcomes could be modeled explicitly, although doing so is likely far beyond the scope of this particular paper even if at all do-able. This is particularly true with respect to institutional investors, many of whom have relatively small financial stakes in the carrier. See, in particular, Azar et al., Appendix D.

“false negatives” in using the HHI alone to gauge the likelihood of adverse competitive effects of (say) a merger. Put differently, suppose initially the carriers were separately owned (i.e., no cross ownership) and the average HHI was 5,200—a highly concentrated market under the Horizontal Merger Guidelines. If institutional investors then adopted the current average pattern of ownership, and the Guidelines thresholds were applicable, the MHHI delta would be about 1,600, well above the 200 point increase in the HHI that would result in the agencies presuming that the increase would be “likely to enhance market power.” (Section 5.3)

The calculation of the MHHI and the MHHI delta is mechanical, given the requisite data and the assumption of proportional control. The more direct test of the competitive impact of this cross ownership is the MHHI delta effect on prices. To that end, Azar et al. regress the log of the average fare of each carrier in each quarter on the HHI, the MHHI delta, and a number of control (right-hand side) variables. In an alternative specification, the log of the average fare on the city-pair is used as the dependent (left-hand side) variable. The approach taken is similar to other price-HHI studies in the airline industry.¹⁷

In comparing the effects of the HHI vs. the MHHI delta on the average fare at the carrier level, using the basic ordinary least squares (OLS) specification with no additional controls (other than some fixed effects), Azar et al. use the following thought experiment. If the MHHI delta were to increase from 0 (no cross ownership) to 10,000, then the predicted fare increase would be 22 percent, about the same effect for an HHI increasing from 0 to 10,000. (p. 24.)¹⁸ In the specification with full controls, the effects are somewhat smaller but still substantial. Using the same thought experiment as before, the predicted fare increase associated with an increase in the MHHI delta from 0 to 10,000 is 13 percent. (p. 24.) However, using the average fare across carriers in a route as the variable of interest instead of the fare of the specific carrier, the effect of the MHHI delta using the same thought experiment is a fare increase of 5 percent. (p. 25.)

These results seem generally robust to specification changes. Alternative specifications include limiting the MHHI delta calculations to only the larger investors, running separate regressions for each quarter, including different control variables, running a quantity rather than price version of the analysis, and using instrumental variables to account for possible endogeneity issues. In particular, after accounting for possible endogeneity issues,¹⁹ Azar et al. conclude that “ticket prices are at least 10% higher because of common ownership alone, compared to a counterfactual world in which firms are separately owned [i.e., no cross ownership].” (p. 30.)

Azar et al. argue that based on the paper’s results, “empirical measures of market concentration should take [institutional investor] ownership into account. This can be accomplished by calculating MHHIs” (pp. 35–36).²⁰ If the agencies were to follow this prescription, the way mergers are evaluated would undergo significant changes. However, Azar et al. wisely (in my view) note that further study is required to determine whether the MHHI delta effect in airlines is present in

¹⁷ See the references cited in Azar et al., including, notably, Severin Borenstein, *Airline Mergers, Airport Dominance, and Market Power*, 80 AM. ECON. REV. (PAPERS AND PROCEEDINGS) 400 (1990), and Jan K. Brueckner, Darin Lee & Ethan S. Singer, *Airline Competition and Domestic US Airfares: A Comprehensive Reappraisal*, 2 ECON. TRANSP. 1 (2013).

¹⁸ While there is nothing wrong in principle with this experiment, it is a stumbling block for a reader. After all, most mergers involve something less than a HHI going from zero to 10,000. A more revealing approach would be to begin with some level of the MHHI and compare the fare effect of an increase in the HHI component of (say) 500 with an increase in the MHHI delta by 500.

¹⁹ That is, it is possible that increases in the ownership shares of the institutional investors result from fare increases rather than fare increases resulting from increases in the ownership shares.

²⁰ Again, even if the MHHI replaced the HHI as the gauge of market rivalry, this would only be the start of the competitive analysis.

other industries as well before implementing substantial changes to merger policy specifically and antitrust policy generally.

Final Comments

I believe that Azar et. al. have uncovered an empirical regularity worth pursuing further, one that may raise substantial questions regarding the competitive effects of the “passive” financial interests of institutional investors. This is all the more significant given the ubiquity of institutional investments. The paper certainly raises the issue of whether communications between institutional investors and the firms in which they have a financial interest have crossed an antitrust line. Nonetheless, I remain cautious about the interpretation and policy implications of the paper’s results.

For example, the premise of the MHHI delta is that the firm managers will maximize their own profits and the profits earned by (in this case) the institutional investors across all of their financial interests in the airline industry. But the airlines component of the portfolios of institutional investors may be quite small. Suppose that institutional investors also have interests in complementary inputs (such as airline-related services—e.g., maintenance, baggage, and food services—and online travel agencies). Then increases in airline fares are likely to result in reduced demands for these complementary inputs and so reduce the profits of the institutional investors. To me that would suggest that *ex ante*, I would likely find little in the way of significant results on an MHHI delta focused solely on the airline interests. Of course, the results of the paper show my prediction to be inaccurate. But given the broader set of investor interests, the possibility of spurious correlation remains.²¹ In any event, it would be useful to account for the investor’s other share holdings or for Azar et al. to explain why such an accounting is unnecessary, even though the airline shareholdings may account for a relatively small share of the institutional investor portfolio.²²

In a somewhat related vein, the paper does not address constraints on the management’s ability to maximize something other than its own standalone profits. As noted earlier, on average, nearly 80 percent of airline stock is held by institutional investors. It is possible that the remaining stockholdings are concentrated in a single airline. Suppose that absent the influence of institutional investors, the standalone profits of the carrier would be maximized by behaving as a maverick. Instead, with such influence, the carrier cedes some profits to other carriers by not being a maverick. As a result, the non-institutional shareholders may be harmed, leaving management possibly exposed to shareholder suits for violation of fiduciary obligations.²³ Still, that might mean only that the estimated MHHI delta effect is lower than it might otherwise be and so is not necessarily inconsistent with the results of Azar et al. And, of course, the likelihood of winning such a suit may be small.

I would also have predicted that the shares of any single institutional investor were sometimes too small to expect that those shares would lead the managers of the airline carriers to pay attention to these shareholders. Put differently, the amount of influence exerted by at least some of these stockholders would seem to be non-existent even if “influential” shareholders were limited to the top 10.²⁴ For example, for Delta, Wellington Management’s share of Delta’s stock was about

²¹ Perhaps due to limited imagination, I have not identified candidates for an omitted variable that might generate a spurious correlation.

²² See, for example, the discussion of the BGI portfolio in Azar et al. at p. 26.

²³ See the discussion in O’Brien & Salop, *supra* note 4, at 580–81.

²⁴ I note that Azar et al. suggest (based on other results) that “the control rights of the largest five to ten shareholders are most relevant for the implementation of the anti-competitive effects of common ownership regarding product pricing.” (p. 34.)

6.3 percent while that of Winslow Capital Management was about 1.6 percent. (Appendix D.) While the Delta airline manager might have an incentive to pay attention to the shareholdings of Wellington, why be concerned about the views of Winslow Capital?

While the paper's robust statistical results are impressive, the model estimated by Azar et al. is effectively a reduced-form model. The mechanism by which the financial interest of an institutional investor in an airline carrier translates into some measure of control or influence of the carrier is not modeled. Given the relatively small shares of many of the institutional investors in airlines in particular, a better understanding of how relatively small shares translate into sizeable influence would help push the paper's results closer to the center of the table of merger policy discussion.²⁵

To be sure, the assumption of proportional control made by Azar et al. seems to "work" in terms of empirical results. But before developing a merger policy that accounts for the portfolio composition of institutional investors, it would be very helpful to better understand both conceptually and empirically how that financial interest translates into control. That is, a structural model may prove more useful than a reduced form. That analysis might be able to highlight issues in the translation of ownership to control that suggest that the MHHI delta is not as predictive as one might think.²⁶ Alternatively, it may highlight why relatively small financial interests by institutional investors can lead to influence over the acquired firm.

One reason why even the smaller institutional investors "count" in terms of influence or control could be that if these smaller investors were to reduce their ownership stake in any particular airline, that might be viewed as a signal that at least some institutional investors have lost confidence in the airline management, leading to other stock sales. That may be one approach to considering a structural model of how small financial shares can result in significant influence by the investor, although it would not necessarily suggest that influence proportional to stockholdings is the appropriate control parameter. It may suggest instead that the degree of influence is more than proportional to those holdings but that may also suggest that the results of Azar et al. understate the effect of institutional ownership on fares.²⁷ I am not suggesting that this paper should develop that structural model but rather this is one possible, albeit complex, avenue for future research.

The empirical analysis includes the presence of Southwest as a separate route-specific control, one that consistently has a statistically-significant negative effect on fares. While this may be a standard outcome for these kinds of analyses, one wonders how this is consistent with the paper's conclusion that cross ownership by institutional investors results reduces airline competition. The top 10 institutional investors account for 46 percent of Southwest's voting shares, higher than the 39 percent share in Delta. (See Appendix D.) So, why haven't institutional investors in

²⁵ Azar et al. observe (at n.7) that their "results may be less surprising to that part of the literature that has documented the power of relatively small, 'activist' institutional shareholders to implement changes in executive compensation and turnover and other corporate decisions." While Azar et al. do not explicitly cite papers in this literature thread, but a discussion of that literature would have been helpful.

²⁶ The vagueness of this control mechanism is suggested by Azar et al. in an earlier version of this paper (on file with author) but not carried through to this version. In that version, Azar et al. note that "[i]f shareholders *find a way to implement the anti-competitive incentives* implied by common ownership and measured by the MHHI delta, we should see a price impact . . ." (emphasis added). Of course, it goes without saying that any enforcement policy would have to weigh the benefits from the policy against the costs, which would likely be in the form of reduced efficiency in the capital markets.

²⁷ Azar et al. observe that the estimated effect of the MHHI delta may be biased towards zero "in part because we work under the assumption that control is strictly proportional to vote shares To the extent that de facto control differs . . . we will obtain attenuated estimates [of the MHHI delta effect]." (p. 24.)

Southwest tempered Southwest's rivalry with other airlines? Of course, it is possible that the indicator variable for Southwest simply identifies Southwest as a lower quality (hence, lower price) carrier. But that would suggest that the Azar et al. analysis might consider more quality controls, such as on-time performance, lost baggage rates, etc. to ensure that the MHHI delta is not capturing differential quality effects.

While the paper suggests that it would be premature (i.e., without further research) to overhaul the agencies' current merger and antitrust practices, one might be surprised with the lack of discussion of the efficiency losses in the event of false positives. Presumably, the engagements of institutional investors in prodding the downstream firms to reduce costs, explore alternative markets, and engage in new product development can serve both consumers and the competitive process. In other words, these engagements perfect corporate governance by better aligning corporate management with shareholder interests.²⁸ Along these lines, Azar et al. point to a paper (co-authored by Azar), describing results "consistent with increased efficiency due to common ownership . . ." (See n. 6). Further, one control variable included in the econometric analyses is the overall fraction of shares held by institutional investors. That variable is consistently negative, i.e., the greater the ownership interests of institutional investors, the lower the airfares. This too would be consistent with an efficiency story. It would have been helpful if the authors had considered the potential efficiency consequences of using (e.g.) an MHHI screen rather than the HHI screen.²⁹

I noted earlier that Azar et al. might consider looking at the price effects of increases in the HHI v. MHHI delta by showing how, beginning from a given MHHI, the price effects of specific increases in the HHI (e.g., a delta of 500) differ from equivalent increases in the MHHI delta, and how those more modest changes affect prices. A change of 10,000 in the HHI and MHHI delta does not convey how more realistic changes in the two would affect average fares.

Relatedly, it would have been interesting to see what the estimated fare effects would be if the paper had used just the MHHI rather than the HHI and MHHI delta. For purposes of the paper, of course, it is the decomposition of the MHHI into its HHI and MHHI delta components that matters. But one would like to think that using just the MHHI would generate similar results.³⁰

Finally, as suggested above, the role of some of the "control" variables is unclear. For example, Azar et al. include the top 5 holdings as a percentage of total institutional investments and the concentration of institutional investors' ownership shares in the carriers in an O&D pair. It is not apparent why these variables should be expected to have an effect over and above the MHHI

²⁸ Of course, the paper suggests that this better alignment may come at the cost of higher downstream prices for consumers. As Azar et al note that "the benefits of diversification, good governance, and competitive product markets can therefore not be studied in isolation." (p.5.)

²⁹ Azar et al. allude to another policy implication in stating that "only shareholders with undiversified portfolios have an incentive" to "push their firms to aggressively compete." (p. 4.)

In an earlier version of the paper, Azar et al. more directly suggest a possible policy response of restricting institutional investment to a single downstream firm in a market. (To be complete, the paper notes that it is unclear whether such a policy would increase net welfare, although whether the reference is to total or consumer welfare is unspecified.) That would permit the efficiencies of institutional investment to be realized for the firm in question and eliminate the anticompetitive potential associated with investments in multiple rivals within a market. Of course, whether the single-firm restriction should instead be an n-firm restriction depends on the efficiencies that the investor brings to the table. Investing in one firm in a market may enable the institutional investor to more easily (i.e., at lower marginal cost) identify efficiency-enhancing possibilities in other firms in the same market, offsetting any incremental anticompetitive risk (assuming the results of Azar et al. prove to be widely robust across different markets).

³⁰ Using the MHHI alone assumes that the price effects of the HHI and the MHHI delta are the same. I don't believe that Azar et al. tested whether the effects are statistically different, although Azar et al. report that the HHI and MHHI delta effects are similar.

delta, or more generally, why they are included as controls.

Expositional issues aside, my most significant reservations remain the failure to account for all of the holdings (or at least the complementary-input holdings) of the institutional investors, an omission that raises the possibility of spurious correlation, and the omission of any real efficiency discussion. At worst, Azar et al. have uncovered an empirical regularity that is worth pursuing, one with potentially significant ramifications for merger policy specifically and antitrust generally. For these reasons, the paper is well worth the read. Whether that regularity should lead to broader competitive concerns and significant policy changes requires more research and a careful weighing of the efficiency losses that could be associated with such policy changes. But Azar et al. is clearly an interesting start to that process. ●

—JRW