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In This Issue

Editor's Note: *This issue covers global competition and regulatory law developments impacting multinational companies, featuring the Enforcers' Roundtable and interviews with agency leaders from Brazil, Switzerland, and Ukraine. In addition, read about practical implications for multinational companies stemming from the latest regulatory changes in China and Europe. This issue also includes articles about venture capital markets and innovation, vertical labor market relationships, and the economics of intellectual property rights.*

Enforcers' Roundtable

A highlight of the ABA Antitrust Spring Meeting, agency heads from the United States, the United Kingdom, and Europe, along with a representative of the National Association of Attorneys General, discuss antitrust enforcement updates and developments from their respective organizations.

Interview with Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE)

Alexandre Cordeiro Macedo speaks about the evolution of competition law in Brazil, the political independence of the agency, the digital economy, the debate about the consumer welfare standard, and the importance of international cooperation.

Interview with Olha Pishchanska, Chair, Antimonopoly Committee of Ukraine

Olha Pishchanska discusses competition law in Ukraine, including mergers, unilateral conduct, the digital economy, the impact of the Russian invasion, and international cooperation.

Interview with Laura Melusine Baudenbacher, President, and Patrik Ducrey, Director of the Secretariat, Swiss Competition Commission

Laura Melusine Baudenbacher and **Patrik Ducrey** speak about their respective roles in the Swiss competition agency, mergers, cartels, competition advocacy, and the role of Swiss competition enforcement in the European context.

Merger Enforcement Considerations: Implications for Venture Capital Markets and Innovation

Acquisitions of firms financed by venture capital have increasingly been scrutinized by regulators. **Ravi Sinha, Brendan Rudolph,** and **Alex Vasaly** argue that not all mergers and acquisitions of VC-backed firms, even those backed by large incumbent firms, are necessarily anticompetitive, and that presuming otherwise would have adverse consequences for future innovation.

Accounting for the Employee-Employer Relationship in Antitrust Analysis

Recent enforcement trends have elevated concerns about antitrust issues in labor markets. **Justin McCrary** and **Bryan Ricchetti** explain why the vertical nature of employer-employee relationships are important to account for when analyzing antitrust issues in labor markets. They also discuss how the incentives for both workers and firms to invest in long-run relationships have important implications for non-compete clauses, no-poach agreements, and empirical analysis of labor-market power.

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A Primer on the Economics of Intellectual Property Antitrust Claims

Since IP rights are by nature exclusionary, antitrust claims are a natural place for practitioners to look, but some of the economics involved can be counterintuitive. **Allan Shampine** identifies economic issues that may be mishandled or misunderstood in an intellectual property antitrust claim.

Antitrust v2.0—What Multinational Companies Should Know About China's Amended Anti-monopoly Law

Frank Jiang, John Jiang, and **Scott Yu** highlight recent changes to China's Anti-monopoly Law, survey China's antitrust enforcement trends, and discuss the potential implications of the new rules for multinational companies doing business in China. Changes include significant increases in fines, changes to merger control rules, a new "safe harbor" mechanism, assisting "hub-and-spoke" cartels as antitrust violation, and fine-tuned IP provisions.

The EU Foreign Subsidies Regulation: What Antitrust Lawyers Should Know About the New Instrument

The Foreign Subsidies Regulation ("FSR") introduces a new costly and time-consuming notification requirement for certain M&A deals with significant consequences for companies active both in and outside the European Union. **Christian v. Köckritz, Harald Weiss,** and **Kristina Winkelmann** provide an overview of the most important aspects and practical consequences of the FSR that lawyers involved in the preparation of M&A deals should be aware of.

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Enforcers' Roundtable

ABA Antitrust Law Section 71st Annual Spring Meeting
Washington, DC, Friday, March 31, 2023

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Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Washington, DC

Hon. Lina Khan
Chair, Federal Trade Commission, Washington, DC

Margrethe Vestager
Vice President & Commissioner, European Commission, Brussels

THOMAS ZYCH: Good morning, everyone. Welcome to the concluding session of the 71st Annual Antitrust Law Section Spring Meeting. As I mentioned last night, we're stressing the word "annual." Because of the pandemic, we went two consecutive years without gathering. We returned last year, and the declaration today is we are here to stay, that if the pandemic could not stop us nothing will, and we will continue to gather as we have for so long. Our thanks to the over 3700 folks who have convened for this year's meeting.

We've come almost to the end, and this is intentionally our last session of the Spring Meeting. As many of you have, I have the benefit of a lot of wisdom passed down to me by my mother. My mother often said that, "at the end of the day, it is better to talk *with* people than to talk *about* them." Certainly, there has been much discussion about antitrust, consumer protection, and data privacy law, policy, and practice at this meeting, but we want to hear, as we always conclude, from the

principal enforcers directly as to what it is we should be paying attention to and looking for and working with. So, we are thrilled to conclude with this panel. I am, as always, all ears as we proceed today, and we hope you all enjoy this as much as I know I am going to.

I will turn it over to my Co-Moderator Ninette Dodoo who will introduce the speakers and kick us off.

NINETTE DODOO: Thank you very much, Tom. I'm delighted to have you all here today.

We thought we would begin our session by giving each of our panelists an opportunity to share with us their priorities certainly for this year but also looking ahead, talking to us about some of the policy changes that we as antitrust counsel, enforcers in other regions, and academics are actually seeing.

What I thought I might do is start in the order in which I introduced our guests, making sure that everyone gets an opportunity. So perhaps, Sarah, you would like to begin, please.

SARAH CARDELL: Thank you so much, and thank you very much for the invitation to speak today. It is fantastic to have the opportunity to speak with this great audience.

What I thought I'd start off with is a little bit of background and context because I am conscious that perhaps there are varying degrees of familiarity with the work of the UK CMA in the audience.

The first point is just to say that the CMA is an integrated competition and consumer protection authority. That is really important for us in the way that we work because we do take a really joined-up approach to thinking across both competition and consumer enforcement when we are looking at the particular issues that we are seeking to tackle.

But many of you, I suspect, will be most familiar with the CMA from an international perspective because of our role in relation to merger control.

I think it is fair to say that at an international level the role of the CMA has gained greater prominence and greater interest in recent years, and there are two principal reasons for that. The first is obviously the impact of the United Kingdom's exit from the European Union, which has meant that the CMA has greater competence in terms of looking particularly at the impact of many more global transactions and the impact of those deals on UK markets. The second reason I think that the CMA's work in merger control has gained particular interest internationally is that there is at least a perception that the CMA is a particularly tough merger control authority. I want to spend a few minutes exploring those a little bit and then I will come on to some of our broader priorities and areas of activity.

When it comes to merger control, I think from a jurisdictional perspective it is absolutely right and not at all surprising that the CMA is now looking at a greater number of global deals. Obviously, previously many global transactions that have an impact on the United Kingdom would have been considered by the European Commission, but now it is the role of the CMA to look at mergers and to protect UK consumers and UK businesses from anticompetitive mergers, and that is a responsibility that the CMA takes very, very seriously.

When it comes to jurisdiction, you may or may not be familiar with the particular jurisdictional tests that we have. Essentially, the CMA has the ability to look at transactions either where the target company has UK turnover of more than £70 million or where the deal hits our share-of-supply test.

I think for international parties and businesses perhaps there has been some surprise about the jurisdictional reach of UK merger control, but I really don't think this should be a surprise. If we boil

it down to basics, what we are doing is looking closely at transactions that may have a material impact on competition in the United Kingdom, and that is our responsibility.

We apply the share-of-supply test in a fairly broad way, and it has been upheld by our UK courts that there is a deliberate intent by the UK Parliament to make sure that the CMA can use that jurisdictional provision to give close scrutiny to deals that may impact competition in the United Kingdom.

Sometimes I am asked, "Why is it the case that the UK merger control authority is looking at deals between non-UK businesses, two U.S. companies merging? Why is it the case that the CMA has jurisdiction to look at that deal?"

The answer is quite simple: If the transaction is hitting our jurisdictional thresholds, if the transaction has an impact on UK markets, then it is clear that we are empowered to look at that deal, and that applies to deals that may have a center of gravity that sits outside the United Kingdom. So I don't think that approach should come as a surprise.

What it doesn't mean, though, is that our approach to jurisdiction is unpredictable or arbitrary. We have very clear guidance about how we apply our jurisdictional tests.

One thing I think that is particularly important to emphasize perhaps for this audience is that there is a very clear and accessible process where businesses and parties that are unsure whether or not the CMA will look at a particular deal can put in a short briefing paper to our Merger Intelligence Committee and can get a quick and early view from us on whether this is the kind of deal that we are likely to review.

I hope that gives some clarity about our approach to jurisdiction and the way that we look at deals.

When it comes to substance, I think we will probably come on later in the discussion to a little bit more discussion around our substantive approach to assessing mergers, but I did just want to touch on this point about the reputation of the CMA as a particularly tough—or, as it has been put to me this week, a particularly aggressive—merger control authority.

Again, I think it is really important to take this back to basics a little bit. The CMA does not have a sort of predetermined anti-merger agenda, but as I said, we have a very clear statutory responsibility to look closely at mergers that may have an adverse impact on competition in the United Kingdom, and we will do that thoroughly and carefully. We will undertake a careful, considered, objective, and evidence-based approach to reviewing each and every one of those deals and we will reach a conclusion on the basis of the facts and the evidence before us about whether or not in a particular case it gives rise to in our assessment a substantive lessening of competition.

But that doesn't mean that we are fundamentally anti-merger. We recognize that very many mergers do not create competition concerns, and indeed some can well improve competition, but we will look very closely at those deals.

One of the benefits actually of the UK regime that is quite unusual is that, because we do not have a mandatory notification threshold, we also do not have to review many, many deals that do not have an adverse impact on competition. That enables us to be actually, I think, a very efficient merger control authority. If you look at the number of transactions we review year on year, they are proportionately perhaps quite a lot smaller than in other jurisdictions that have mandatory thresholds, but that does mean that we tend to focus in on those deals where we can see potential competition concerns.

What does that mean overall? If you look at the stats over the last few years, it varies year on year, but on average we have either prohibited or required divestments in around, say, five-to-six

deals a year. Now, I think that is a sign of a robust and effective merger control authority, but I don't think it is a signal that we are excessively aggressive.

Just to give a bit of a framing perspective on our approach to mergers.

Moving away from mergers for a minute, Brexit has actually had a big impact on a number of other areas of our work as well.

To give an example, we have some entirely new functions. We have a Subsidy Advice Unit, which to some extent replicates the State-aid regime that we used to be under when we were part of the European Union.

Also, in antitrust, a little bit similar to merger control, we now have an enhanced jurisdiction. Obviously, historically we used to have a shared competence with the European Commission when it came to antitrust cases. Again, the CMA now has sole responsibility for pursuing antitrust enforcement where that impacts on the United Kingdom. Actually, what I should say is that I think you will see many parallels in terms of the types of cases and the issues that we are taking on across the United Kingdom, across the European Commission, and indeed with the United States as well.

When we look at our antitrust portfolio over the last year, we have continued to have, and I think will continue to have, a very substantial focus on cases in digital markets. That is not surprising given the competition concerns that we see in those markets.

To give a few examples of our current cases, we are looking at both Amazon's and Meta's use of data; we have cases involving both Google's and Apple's approach to their in-app payment systems; we have a case where we are looking at Google's position in the Ad Tech stack—I think all well understood issues in digital markets.

Our focus on digital markets isn't just limited to antitrust cases. In the United Kingdom we have the ability to undertake broader market reviews as well, and those have been a really, really important tool for us to be able to do quite a deep and thorough investigation of the competition dynamics and the competition concerns that we see in a number of digital markets. A couple of years back we completed a market study in relation to digital advertising. Last year we completed one looking at mobile ecosystems.

But in the United Kingdom, like in a number of other jurisdictions, whilst we are using our full toolkit to furnish the facts in seeking to tackle issues in digital markets, there is also a recognition that there are limits to that toolkit.

The government has proposed the introduction of a new regulatory regime focused on digital markets. That will be more of an *ex-ante* regulatory regime, and it will give the CMA the ability to both designate and then regulate major platforms that have Strategic Market Status (SMS) in relation to digital markets. That requires a somewhat different approach to historic antitrust enforcement, so we will have the power there to designate specific companies where they have an entrenched position of market power in relation to specific digital activities; and once those designations are complete, we will be able to do two things: first of all, we will be able to impose conduct requirements, which are really about managing the exercise of market power in those digital markets; and then, secondly, we will be able to introduce what we term "procompetitive interventions," and that is about tackling the underlying causes of market power, so for example introducing interoperability provisions.

That gives a little bit of a favor of our key focus on digital markets.

Finally, I want to close by taking a little bit of a step back and talking a bit more broadly about some of our priorities as an agency.

I think it is important in this kind of environment because whilst it is always fascinating to have really interesting discussions with antitrust practitioners, at the end of the day what really matters to us as a competition agency is that we deliver impactful, beneficial outcomes for the people and the businesses that we are here to serve. In the United Kingdom for the CMA that is about us serving UK people, UK consumers, and UK businesses, and playing our part to support the wider economy.

We have actually spent quite a bit of time over the last six months looking at how to frame our strategy with those objectives in mind and really looking at the outcomes that we are seeking to deliver across those groups, and we framed that in a broad ambition to promote competitive markets and to tackle unfair behavior. I thought I would just give a little snapshot of some of the examples of how we see that playing through in some of our cases.

When we are looking at the benefits that we are looking to deliver for people we focus particularly on areas of activity of core consumer need or core consumer harm and really making sure that we are lasering in and focusing our efforts and activities in that space.

For example, we have continued a very substantial portfolio of work on the antitrust side taking action against companies engaged in excessive pricing in core pharmaceutical products. That has been a key priority for the CMA for the last few years. We have continued to complete and are now defending some of those cases in court.

We have also taken action. We are investigating at the moment a case in relation to collusive wage fixing, which I think is really important particularly in the current climate where household budgets are under so much pressure, and we want to send a clear signal to businesses that they should not be colluding to suppress wages.

And we are using our consumer enforcement powers, as I mentioned, in particular tackling online pricing practices, things like fake urgency claims, and using consumer protection to tackle that.

When we focus on businesses, I think sometimes there is a bit of a perception that as a competition agency you have to choose whether you are pro-consumer or pro-business, and I don't think that's the case at all. I think that there is no tension between the two. So we have made it very clear that as well as supporting consumers our objective is to support fair dealing, competitive businesses, making sure that they can really innovate and thrive in the markets where they are active. I think you can see that very clearly in a lot of the digital markets work that we are pursuing.

Finally, we do think that the CMA has a really important role to play more broadly in supporting the UK economy, particularly again at a time of economic pressures that we all see and recognize at the moment.

One of things that we have done is establish a new Microeconomics Unit, which is focused on producing some very deep and thoughtful research looking at the connections between competition, innovation, investment, productivity, and growth, to try to take forward that agenda and understand both how we can advise the UK government but also inform our own work in that space.

We have also focused on other themes, including supporting the United Kingdom's transition to the Net Zero economy and what we can do there.

Hopefully, that gives you a little bit of a flavor of the scale and the scope of our priorities and the kind of work that we are taking forward.

NINETTE DODOO: Thank you very much, Sarah.

I would like to pick up on a few of the points you've made. There are others that I'm sure we will come to later on.

One key question, though, it seems to me at any rate, is that certainly post-Brexit the CMA has established itself as a major player. You used the term “aggressive.”

SARAH CARDELL: I didn’t use that myself. That term was put to me.

NINETTE DODOO: That is certainly true. But I think one of the questions that it seems to me a lot of observers will ask themselves is: To what extent is it a concern, if at all, that there are sometimes significant divergences in the approach that the CMA might take in comparison to, for example, the European Union or other jurisdictions? Perhaps you could answer that question in the context of mergers, but you also touched upon digital markets as well because there is a lot of focus on digital markets, so I would be interested in your thoughts around that particular topic.

SARAH CARDELL: My first point is that I think when I hear that argument it is usually overstated, to be honest. I mean you will hear from other colleagues across the panel, but what I see day to day is, first, a huge amount of close working across agencies, and that can happen in a number of forms. That can happen both on individual cases and through broader fora. It happens both bilaterally and multilaterally.

I think it is certainly not the case from the CMA perspective that we see ourselves as operating in an international bubble. We are acutely conscious that many, many of the issues that we are looking at – whether as you say it is in relation to mergers or whether it is in relation to broader issues across digital markets—are global issues, they are issues that cut across a number of different jurisdictions, and there are many reasons in many cases to strive for an outcome that is aligned across those jurisdictions.

I can talk about more detail in relation to mergers. We can cover that now or we can come back to that later. But the sort of headline point I would make is that when you look at the cases where there have been international dimensions to those cases, where you’ve had a number of different jurisdictions looking at the same mergers in parallel, I think (a) on process there is a lot of alignment and a lot of close working; and (b) on substance and the substantive outcomes in the vast majority of cases I think you will also see that alignment.

Of course there will be some cases that ultimately end up in different outcomes, and I think that’s only to be expected. I would suggest in the majority of those cases that will be driven by actually differences in the evidence across different jurisdictions. You may well have a transaction that is being reviewed in a number of different jurisdictions, but it doesn’t mean that the competition assessment is exactly the same in those different jurisdictions.

And of course the processes, the procedures, and the tests that we apply are slightly different in different jurisdictions, so at the margin in a small set of cases that may produce different outcomes. But I really don’t think that there is a fundamental difference and a fundamental divergence of outcomes.

NINETTE DODOO: Thank you for that.

Gwendolyn, closer to home, what are you seeing as priorities from the state attorneys general level, please?

GWENDOLYN COOLEY: We have a number of different priorities. Just to dial it back, actually I would say for those with even a passing awareness of U.S. politics, who have watched the news in the last twenty-four hours, the idea that vastly differing attorneys general from vastly different

states would band together to prosecute antitrust cases seems like an unlikely alliance. However, our Antitrust Task Force has shown that we are a resilient and formidable force in litigation and one that will be spending much of the next year doing that.

What are our priorities? At present count, we have four multistate cases—or five, depending on how you count—that are set for trial this year. In September we have the Google Search case, which is the joint DOJ case and the Colorado and Nebraska case. Also in September we have the case that I lead for the states, the Suboxone pharmaceutical product-hopping case. In October, we have the newly scheduled trial, again with my friend AAG Kanter, that attempts to block the merger of JetBlue and Spirit; and currently scheduled for November the Google in-app payments case led by Utah. So we should be quite busy this fall, though, my fellow AAGs around the country, litigation is what we do.

As we litigate in a variety of jurisdictions—even more now, as last winter Congress agreed that we should stand equal to my federal counterparts here on the stage with us in our choice of venue—we appreciate that both Chair Khan and AAG Kanter wrote letters of support in addition to the fifty-three attorneys general who successfully persuaded Congress to include the State Antitrust Enforcement Venue Act in the Omnibus Appropriations Bill.

The combination of again many diverse viewpoints coming together to support something for the common good is what makes the AGs and the NAAG Antitrust Task Force such a formidable force.

States have already put that law to good use.

First, earlier this month a Virginia federal court noted that Congress had expressed serious significant concerns about subjecting government enforcers to the delays caused by consolidation with private litigation and refused to let Google transfer the Justice Department and eight-state Google Ad Tech case to New York to join it to the similar Texas-plus-seventeen-state Ad Tech case.

In the Texas-led Ad Tech case just last week, the states filed a motion with the Judicial Panel on Multidistrict Litigation to send its case back to Texas, arguing that the Venue Act stripped the New York court of jurisdiction.

Another Google case—we have five—the Google in-app payments case, knows about the potential delays of being joined to private litigation. With trial currently set for November 6th of this year, the states' trial may be delayed because Google is challenging class certification before the Ninth Circuit. Those delays are why Judge Brinkema will likely be quoted endlessly for both her denial of the removal motion and her quip for counsel to "get their running shoes on."

State legislatures also have their running shoes on and, as I said before, they are fulfilling their role as laboratories of democracy.

They have been at the forefront of labor issues. In particular, many state legislatures have addressed the issue of non-competes. Labor has always concerned state attorneys general as workers and business owners navigate each other's varying laws. Enforcing non-compete violations has been a signature project of many offices, including New York and Washington State amongst others.

New York's successes last week included a settlement with two title insurers, AmTrust and First Nationwide, which allegedly engaged in no-poach violations. They recently settled that case for $1.25 million, and that builds on the million-dollar settlement that New York had negotiated with Old Republic. And then, only two days ago, New York—thank you very much, New York—settled with Fidelity National for $3.5 million for that same alleged no-poach conduct.

Washington State's leading efforts on no-poach agreements were shown in a study last year to have increased wages 3 percent nationwide at firms subject to a "no no-poach" order. During the no-poach initiative Washington's Attorney General prosecuted more than 185 chain franchises for agreeing not to poach from other franchisees.

States are not all of one mind on how to handle non-compete issues. Currently state statutes range from an outright ban on the enforcement of non-competes in California to states, like Wisconsin, whose courts consider only the geographic scope and time of a contract when considering the legality of a non-compete clause.

The proposed rulemaking by the FTC will preempt these varying state laws and move the enforcement regime to the federal government and away from these experienced state enforcers. As a result, I expect that you will see a variety of opinions from attorneys general in our various comments on the FTC's proposed rulemaking.

On an issue where I think there is much more unity states are not automatically notified about merger challenges under Hart-Scott-Rodino (HSR). While we have seen huge improvements from merging parties approaching AG offices earlier and expediting waivers with our federal counterparts, many state legislatures and attorneys general are troubled by notification failures and delays.

To address this—and you've heard this throughout the week from probably some of the seventeen state panelists we have had during this conference—the state legislatures are trying to make HSR notices more straightforward on healthcare-related transactions, and some states are even considering broad HSR notification statutes. So, until there is a federal rule or law, if you practice merger work, you need to pay attention to which states are affected by your transaction as the fines in some states for noncompliance are severe and calculated by day.

Prompt notice is important for us and for merging parties and, as we have just heard from Chief Executive Cardell, it can be also good for business because it will save your clients time and money when we effectively coordinate, and we do effectively coordinate on both mergers and conduct cases.

It is nice to be able to go first because then I can steal some of your thunder.

The Google Search case filed here in the DDC, both the USDOJ/Texas case—that's the one I'm on—and then the states-only case, as I said, are set for trial this fall. But while they are joined for the liability trial, the States filed a broader case than the DOJ complaint, and they believe that will reveal the full scope of Google's monopoly maintenance conduct and set the stage for effective remedies that both stop and erase harm to competition.

Fortunately, this case has been tremendously fast-moving for a conduct case. However, too often conduct cases may drag on for years. Lengthy proceedings mean that the relevance of trade secrets and documents under seal diminishes with time.

As was pointed out on a panel yesterday, not all inconvenient facts are trade secrets. Considering this, a handful of years ago now in the *Generic Drugs* case, the State of Connecticut was successful in unsealing the complaint in that case. More recently, we saw the U.S. Department of Justice and states avoid this issue altogether when they filed the Google Ad Tech case on the public docket with no redactions. I hope this is a trend that will continue. States as law enforcement officials need to ensure that the public have access to the allegations against alleged wrongdoers.

Another trend I expect to continue is single-state antitrust cases filed in state courts. (Before I hear from states around the country after this panel, they only gave me seven minutes, so this is just a sampling of cases.)

On January 12th of this year, California's Attorney General Office filed a lawsuit in state court against the nation's largest insulin makers Eli Lily, Novo Nordisk, and Sanofi, and pharmacy benefits managers (PBMs) CVS Caremark, Express Scripts, and OptumRx for allegedly driving up the cost of insulin. This lawsuit asserts a claim under California's Unfair Competition Law, which is broader than California's Cartwright Act. Both Mississippi and Louisiana also have cases against insulin manufacturers and PBMs, and I'm sure there are others. There are definitely announced investigations from Texas and Michigan, and I'm sure other states as well.

This week, Ohio filed suit in state court against PBMs owned by Cigna, Humana, and Prime Therapeutics and their affiliated group purchasing organization Ascent Health Services for rebate practices in violation of Ohio's Valentine Act, which Tom knows quite well. Uniquely, this suit includes the effects of PBM behavior on pharmacists' actions.

With all of these state antitrust enforcement actions underway, I want to close with a nod to a recent article in *Antitrust Magazine* by John Mayo and Mark Whitener that noted that agency budget levels—and they just studied your agencies—have a positive and statistically significant effect on enforcement intensity. It seems obvious that a larger enforcement staff means that antitrust enforcers bring more cases, and this is certainly true for the state AGs' Antitrust Task Force.

While our numbers have grown, we have room for more, so if you would like to join us as we continue litigating, commenting, and cementing our unlikely alliance, there are openings in many AGs' offices, so please come over to the right side. In view of the locations across the country from New England to Hawaii—I'm not kidding—we are interested in having you join us fight the good fight.

NINETTE DODOO: Thank you very much, Gwendolyn.

I am going to resist the temptation of asking you about particular cases, not least because some of my colleagues are challenging those cases before the courts, but I would like to ask you a follow-up question around labor issues. Certainly I am seeing that not only in the United States but in the European Union, and I also see snippets of labor issues cropping up in Asia as well. What do you put it down to, this focus on antitrust and labor issues? Is there a particular reason that is driving this interest certainly at the state level?

GWENDOLYN COOLEY: I think almost certainly—and again there's a variety of state views on this—because people who are workers are residents of our states, so we have a particular interest.

I have heard Trish Conners say many times that state AGs are not just antitrust enforcers. We have a broad array of concerns. Those concerns include things like: is there a factory in this town and is it going to close? I think there is a wide variety, but I think that is the real main reason.

NINETTE DODOO: That's really helpful.

In the interest of time, I would like to shift to Jonathan. What are you seeing in terms of your progress towards the priorities that you set yourself at the Department of Justice?

JONATHAN KANTER: It's a great question, but I'm still stuck on the job opening in Hawaii. I'd like to learn a little more about that. [Laughter]

GWENDOLYN COOLEY: I'm sure they'd give you consideration.

NINETTE DODOO: We might need to fight over that.

JONATHAN KANTER: Let me start, if you will indulge me. I did a lot of thinking this morning. Last year I had the pleasure of being on this panel; unfortunately, it was remotely, because, like many, I was down with Covid and I was recovering—with a very ill-advised Covid beard, I might add, which has been removed—so this is my first opportunity to be alongside my friends and colleagues in person. That is quite meaningful for me.

It caused me to think back to my very first ABA Spring Meeting, which—and I am going to date myself here—was at the Marriott Wardman in Woodley Park. I remember going to the enforcers' panel, and at the time it was in a room that seemed impossibly large, which is probably a quarter of the size of the room today, and two luminaries for me, Joel Klein and Bob Pitofsky, were on stage talking. It seemed so far away and they seemed so large in personality and importance. To be here today, sitting in this very comfortable seat, is a very meaningful moment for me personally.

There have been some other changes too. For starters, I am joined by colleagues from around the world and around the country, and I think that speaks volumes about the importance of competition policy and competition enforcement.

Additionally, I am proud to say I think I am the only male enforcer on the panel, and I think that is real progress. [Applause]

When I was talking to you all last year I was just a few months into my position and now I am a little over a year, and I am happy to share some observations about where we have gone and where we are going.

For starters, again if you will indulge me, I love going to work every day, I love my job, and I love the people I work with. The team at the Antitrust Division—we often use the word "family" because it feels that way and we are family—from start to finish work so hard, impossibly hard, on complex matters, and they do it with a deep sense of passion and urgency and dedication to the public.

The issues confronting us today are more complex, more burdensome, and more widespread perhaps than at any time in a hundred years in the antitrust world, and our team shows up from start to finish, all nearly 800 of them, with that passion and that dedication every day. I am just moved, sometimes nearly to tears, by how amazing, how talented, and how successful they are.

I want to point out that, notwithstanding the gravity of this moment, the importance of the moment that we are confronting, which I think is probably an inflection point in antitrust enforcement on par with a hundred years ago in the trust-buster era, we are doing it with more than 220 fewer people than the Antitrust Division had in 1979. Stop and think about that for a moment, that given the complexity of our economy, the size of the monopoly problems we are facing, the team at the Antitrust Division is more than 220 fewer people than we had in 1979. That is something else and something that is worth reflecting on.

Let me talk a little bit about the work that we are doing.

I will start with our civil program. First and foremost, we are enforcing the law. We follow the facts and the law wherever it takes us and we are bringing cases that are consistent with legal precedent and the facts.

On the merger front there is no success greater for us than deterrence. Deterrence comes in many forms, but when we are ready to file a case and a party abandons a merger, that is success. We have had six public abandonments, but I can tell you there are many more nonpublic abandonments, and that is because of the hard work of our team uncovering issues and demonstrating the willingness to bring strong, formidable, and winning cases.

We have succeeded in winning the first litigated merger victory at the Antitrust Division since 2017, the *Penguin Random House/Simon & Schuster* case. That case was not just a victory in a

standard merger matter. It was a victory in a merger matter, first, involving a product, in this case books and authors, that is vital to the public discourse and, thus, our democracy, but we did it on a theory of monopsony. It is essentially a labor theory: that the professional authors depend on advances to research and write books, often depending on that money for their livelihood, to support their families, to hire employees, to do the work, to bring the creativity necessary to bring our free speech to the masses. We protected competition, and we did so valiantly.

Section 8 of the Clayton Act has been the law since 1914, but never in our country has there been systematic enforcement of Section 8 of the Clayton Act until now. Now we have a vibrant Section 8 enforcement of interlocking directors. We have had nearly fifteen directors step off the boards of their companies due to Section 8 enforcement efforts. We have nearly twenty open investigations, and let me just say there are many additional opportunities out there for investigation and enforcement. It is the law, and we are going to enforce it, and in many respects it is probably the most effective way to deconcentrate the U.S. economy today.

Section 2: Until the Antitrust Division brought its case against Google along with our state AG counterparts in 2020, it had been over twenty years since the last filed standalone Section 2 litigation case, *United States v. Microsoft.* Now we have multiple Section 2 cases in litigation and we have many investigations underway.

Section 2 of the Sherman Act is the cornerstone of our antitrust laws—monopolization—and we are not going to hesitate to bring monopolization cases when supported by the facts and the law.

We are also recognizing that markets change and so do market realities, and so while many of our case precedents relate to poles and wires, many of our market realities today relate to ones and zeros. That changes the economics, that changes the market realities and the facts on the ground, and we are going to recognize those shifts, and we are going to bring cases again when the facts and the law support it.

On the criminal side we have more open grand jury investigations than at any time since 1989. We have brought for the first time, since I was probably this high, a criminal monopolization case. We had a sentencing hearing earlier this week.

Section 2 of the Sherman Act is both a civil statute and a criminal statute. Congress wrote it that way, Congress made it a felony, and when appropriate we are going to enforce the law when the facts and the law support it and consistent with the principles of criminal prosecution.

We have another criminal Section 2 case slated for litigation this summer. It is a vibrant, live area of the law.

When it comes to labor we are fighting for workers in both the civil and the criminal context. In the civil context I mentioned the *Penguin Random House* case on the merger side. We brought a major information-sharing case relating to workers in meatpacking processing plants. These are extremely important efforts.

On the criminal side we are fighting every day to protect workers from illegal behavior. This is extremely important. Let me pause on this for a moment.

We have now successfully litigated four motions to the courts, and those courts have said that as a matter of law, antitrust crimes dedicated to or focused on workers are just as important and just as actionable as antitrust crimes focused on consumers. That is extremely important.

When we think about labor antitrust cases we think about people. This is not an academic exercise. This is an exercise in criminal enforcement. Again, our cases are informed by the facts, they are informed by the law, and they are informed by the principles of federal criminal prosecution.

When companies engage in wage fixing or companies engage in agreements not to hire each other's employees, that affects the ability of hard-working people to find jobs, to earn a living wage,

to support their families, to save for retirement, to put their kids in school and save for college. Those are real harms and those are righteous cases, and we will continue when the facts and the law support it to bring those cases.

We are expanding our toolkit to improve detection of criminal and cartel behavior. We are modernizing the tools that we use to make sure that we are detecting, with or without leniency, antitrust crimes and bringing cases when appropriate, and we are doing so domestically and internationally alongside our international colleagues and enforcers.

But we are doing more than just that. On the policy front we have the wind in our sails with an Executive Order from President Biden that mandates a Whole-of-Government approach. That is exactly what we are doing.

In just this past year, we brought the first Antitrust Division Packers and Stockyards Act case perhaps ever. We have worked alongside our colleagues at the Department of Transportation, the Federal Communications Commission, the Federal Maritime Commission, and many others to make sure that we are enforcing the law effectively.

This Whole-of-Government approach is extremely important. We have signed MOUs with a number of key agency partners, including the Department of Labor and the National Labor Relations Board, and an extremely important historic MOU with our colleague, the Inspector General at the Department of Health and Human Services, that addresses exclusion orders when there are antitrust crimes committed by healthcare companies. This is extremely important.

We are filing more statements of interest and amicus briefs that help make sure that courts are aware of the Department of Justice's position regarding the law.

This is just the tip of the iceberg. This is the work that we are doing.

I will also add that we are doing it by expanding our expertise. We agree on labor competition, and so we are hiring as well. I can't compete with Hawaii, but I can say that we are hiring, and both the résumés and the talent at the Antitrust Division are off the charts, so you can join one of the finest antitrust enforcement teams ever assembled in the history of the world in my view.

We are also hiring experts. We have over fifty PhD economists in our Economic Analysis Group, and they are brilliant and they work extremely hard.

We are also recognizing that as market realities change so does the need for our expertise, and so we are expanding our expertise to include what we like to think of as a business school faculty that includes world-class economists, the best in the world, alongside data scientists, business strategy analysts, banking experts, and healthcare experts, because we need that expertise to make sure that we can understand the economics of the industries that we investigate and can bring our cases effectively. So I am extremely excited about the work we are doing on that front under the leadership of our Chief Economist Susan Athey.

With that, like I said, that was year one, and I am ready for year two.

NINETTE DODOO: Thank you very much, Jonathan.

You made a very interesting point that both on the criminal side and the civil side you only really take action when the facts and the law support it. Some may argue that the enforcement we are seeing is almost a step back—a slight step back, but a step back nonetheless—away from the Chicago School, or perhaps it also could be perceived as a departure from what was a specific or narrow interpretation of the consumer welfare standard. So my question to you: Is there a risk at all of overenforcement? Obviously, you have been very active, and that is to be welcomed, but again is there a risk of overenforcement?

JONATHAN KANTER: I think our job as law enforcers is to enforce the law when we see violations and we believe that is supported by the facts and the law.

There is a lot of doctrinal discussion, and that is healthy and fun, and I am sure reverberating through the halls of this great conference. You talk about the Chicago School; that was a radical departure from over a hundred years of antitrust enforcement when it came into being.

I think we need to be faithful to the intent of Congress, we need to be faithful to the text of the statute and we need to be faithful to a mandate from our legislators that competition matters. Why? Because they said so. Our Congress determined in its wisdom that a competitive economy and democracy go hand in hand. So we enforce the laws as written by Congress, we enforce the law as interpreted by courts, and then we follow the facts and the law, and if we see violations and we see harm to competition, we take action. I think that is entirely appropriate.

NINETTE DODOO: That is quite a strong statement there, which we will come to later on.

Perhaps I can turn to you, Lina, in terms of the priorities that you have set for the FTC and your progress towards achieving those priorities.

LINA KHAN: Thanks. It is terrific to be here and a really fantastic honor to share the stage with my fellow enforcers.

We at the FTC recognize that there are major competition problems across the U.S. economy and we are working with tremendous urgency to use all of our tools to make sure that we are protecting the American public from illegal business practices. There are a few key pillars of this work.

First of all, we are taking care to ensure that we are fully enforcing the laws that Congress has charged us with administering, and this means taking a close look at the Federal Trade Commission Act, it means taking a close look at the Clayton Act, again to make sure that we are being faithful to Congress's instructions and fully enforcing the law. There have been a few key parts of this already.

First is Section 5 of the FTC Act. Congress created the FTC to be a complement to the Antitrust Division, not a substitute for it, and Section 5 of the FTC Act is really the heart of the FTC's reason for being. Section 5 prohibits unfair methods of competition, and we take those words very seriously.

One of my first priorities once I joined the agency was to make sure that we were taking care to fully enforce Section 5. Last fall we were really pleased to be able to publish a Policy Statement that lays out our interpretation of Section 5. The Policy Statement is sixteen pages. It has eighty-nine footnotes. This document reflects a very deep study of sixty-plus years of jurisprudence and doctrine that lays out how the courts have applied standalone Section 5. We had a terrific cross-agency team that went through the case law, hundreds of cases across multiple decades, and laid out what courts have said about what Section 5 means.

The Policy Statement that we laid out reflects this research, and it is pretty straightforward: "Unfair methods of competition" means you have to be able to identify a method of competition that is unfair. The unfairness prong looks at a few dimensions, including whether the practice might be coercive, exploitative, predatory, as well as whether it may have certain exclusionary impacts. We also looked at whether there was a negative effect on competitive conditions. So the Policy Statement is the key pillar of our work.

I am really thrilled that we have been able to already move forward with enforcement on standalone Section 5, including some of our non-compete work. Several of the enforcement actions that we brought have been addressing illegal uses of non-competes. There are at least two instances that we have identified in which non-competes have been illegal in our enforcement.

The first is in the context of usage by Prudential Security. This was a security guard company that was applying non-competes with security guards who made pretty much little above minimum wage. The non-compete restricted them for a hundred miles and two years after they left, and the FTC determined that this was an unfair method of competition, required that these non-competes be voided, and that the company actually affirmatively tell the employees that these non-competes were no longer in effect.

We also brought an enforcement action addressing non-competes in the glass manufacturing industry. This is an industry that is tremendously concentrated, you have three big players, and the FTC found that all three of the players had been using non-competes. Unlike the security guard instance where our complaint noted that the use of the non-compete had been coercive, in the glass industry context it was really the aggregate effect on competition that our law enforcement was intended to address. We understood that you may have entrants that want to disrupt this concentrated industry, but if these entrants, even if they are able to secure financing and build factories, see that a lot of the talent—and this is highly skilled, technical talent—is locked up by non-competes, this was having an aggregate negative effect on competition market-wide.

We were thrilled that we were able to bring these four enforcement actions laying out one application of Section 5.

We have also been reactivating Section 6(g) of the FTC Act, which gives us the authority to promulgate rules under Section 5. In January we came out with our Non-compete Rule that would prohibit non-competes across the economy.

There are a few reasons we did this. Our economists undertook significant empirical research to understand what the net effects of non-compete clauses across the economy are.

As I am sure many of you know, non-competes over the last few years have no longer just been restricted to the boardroom, applied to highly paid executives, but have now proliferated across our economy in situations covering fast-food workers, gardeners, journalists, so the use of them has dramatically expanded across our economy, and the empirical literature shows that this is having a significantly negative effect on competition. It is impeding business dynamism, it is impeding new business formation, and economists calculated that eliminating non-competes would result in $300 billion back in the pockets of workers.

We have also seen the way that non-competes applied in some of the highly skilled workers, including some executives, is in fact impeding innovation and business dynamism, as the proposed Rule lays out, because it is oftentimes these workers who are best positioned to actually spin off and start their own new business. So we determined that there were economy-wide effects and it was really for the FTC to be addressing these through our rule.

Interestingly, there is a whole set of states that have already effectively prohibited the use of non-competes, including California and North Dakota. Interestingly, we saw—well, first of all, I think it would be difficult to argue that there has been a detrimental effect on innovation in California—but we have also seen how, even in states where non-competes are banned, non-competes are still included in contracts at roughly the same rate as they are in states where they are not. So there really is the role for a national federal rule here that would ensure that we are leveling the playing field and making sure that workers are free to take their talent where they wish and that this is going to have in the aggregate really beneficial effects on competition economy-wide.

In addition to Section 5, we have also been looking closely at the Clayton Act. One of the lawsuits that we brought last year was against Syngenta and Corteva, two massive pesticide manufacturers. The FTC's lawsuit alleged that these companies had been engaging in illegal pay-to-block

schemes where they were basically engaging in conduct that had blocked out generics from the market. We were really thrilled to sign on with ten state AGs on this lawsuit.

One of the counts in the complaint included Section 3 of the Clayton Act. The Clayton Act is distinct from the Sherman Act. In some instances they cover similar or the same conduct, but the legislative history shows and the Supreme Court's precedent has supported that the Clayton Act was really designed to stop illegal behavior in its incipiency. Lawmakers recognized that unlawful conduct and unlawful anti-competitive conduct can be extremely difficult to reverse. Oftentimes you are talking about many years or decades in some instances during which entire alternative futures have been foreclosed. This is competition that was squashed, this is innovation that was forgone, and it can be extremely difficult for us as enforcers, even if we are able to ultimately stop that conduct, to actually be able to provide relief or remedy that ever brings that innovation back, and for that reason Congress was adamant that we have to have tools that enable us to stop illegal behavior in its incipiency.

Consequently, the standards in Section 5 are distinct from the standards in the Sherman Act, so we think it is incredibly important for us as enforcers to be honoring that distinction. In our pesticides complaint we made sure to include a count under Section 3 of the Clayton Act, and that is an area we are looking to continue building out.

We have also been using our policy tools. The FTC was created not just as a law enforcer but also as a policy body. We were given market study authority. We have been using 6(b) of the FTC Act to deepen our understanding of business practices in particular markets.

Two studies that we have launched over the last year included one study looking at supply chain disruptions. As we are all very familiar, in the wake of the Covid-19 pandemic there were major supply chain disruptions. A whole set of factors contributed to that, but we were hearing from market participants that there may have been underlying market structures or potential business practices that were really exacerbating the effects of those supply chain disruptions and having a disparate impact potentially on rural areas and certain communities.

We launched a 6(b) where we basically sent out information orders to significant wholesalers, and retailers, and distributors to understand what are some of the underlying competition dynamics that may have contributed to supply disruptions and what are particular business practices that need to be on our radar.

We also launched a 6(b) looking at the business practices of pharmacy benefit managers. Pharmacy benefit managers are major middlemen in the pharmaceutical supply chain, and we heard significant feedback from patients as well as from independent pharmacists about some of the business practices of these PBMs and how these business practices may be hiking prices for consumers and patients beyond what a competitive market should be providing, as well as potentially squeezing independent pharmacies through a whole set of business practices that are really creating a detrimental impact on local communities. We have been moving forward with that 6(b) and we think it is an incredibly important part of our work.

In addition to fully activating the Clayton Act and Section 5 of the FTC Act, we have also been continuing to vigorously enforce the merger laws. Just over the last few months the Commission filed to block Microsoft's attempted acquisition of Activision as well as Intercontinental Exchange's attempted acquisition of Black Knight. Both of these cases have vertical dimensions, which builds on the phenomenal work the FTC staff has been doing to aggressively block not just illegal transactions that have horizontal components, but to also make sure we are putting the market on notice

about how we view vertical harm. This follows on our work earlier in *Nvidia/Arm* and *Lockheed/ Aerojet*. This will remain an important part of our work.

In addition to fully reactivating these authorities we are also making sure that our tools and frameworks are fit for purpose. Markets evolve, business realities evolve, and we need to make sure that as enforcers we are fully adept for the business strategies of today. There are a few projects that we have underway here.

One is our joint effort with the DOJ to revise our Merger Guidelines. A key pillar of this effort is to make sure that the Guidelines are fully reflecting commercial realities, are fully responsive to the types of business incentives and business strategies that companies today face, including in digital markets. We are excited about some of the internal progress we have made and we are excited in short order to be able to share a draft publicly.

We have also been making sure that we are fully skilled up. We have a fantastic set of lawyers, a fantastic set of economists, but many of the markets that we are investigating these days have a digital component. This is not just limited to what are considered tech markets, but as we see digitization across the economy, many of our healthcare cases, for example, may include a digital component, as well as many of our agriculture cases or retail cases. So as we see more and more digitization, we need to make sure that we as enforcers have the skills and tools to fully understand how these technologies are working.

Since I joined we have managed to double the number of technologists that we have onboard, and in the first year that I was onboard we piloted a program where technologists were embedded across the agency, embedded across investigations, and working hand-in-hand with our lawyers and economists to craft CIDs, to be contemplating what effective relief would look like.

Just last month we were able to officially launch a new Office of Technology, which I am tremendously excited about, and there is an enormous interest in joining. Just in a few days of having the posting up we got 300 applications from technologists, and so we are well underway to bringing more folks onboard.

We also have been using our market study authorities to make sure we are understanding how some of these newer markets are functioning.

Just a few weeks ago we launched an RFI that is looking at cloud computing, looking at both competition issues in cloud computing as well as some of the data security issues. It is no secret that cloud computing is primarily dominated by a relatively small number of companies, and we want to make sure that we are fully understanding what is contributing to that, whether that is contributing to business practices that might be exacerbating potential competition implications, and also what the potential resiliency effects are here.

We have all seen how when you are concentrating production you can also be concentrating risk such that a single point of disruption can have cascading effects and lead the entire system to seize up. As we have more economic activity reliant on cloud computing we need to make sure that we are being very vigilant about what some of the systemic implications of that could be. So this cloud computing RFI is going to be critical for building out deeper understanding there.

We are also vigorously enforcing the law including in nascent markets. Last year the FTC filed a lawsuit seeking to block Meta's acquisition of Within. Unfortunately, earlier this year we did not win the preliminary injunction, but the opinion set out a roadmap for the FTC to be continuing to build its work in this area.

The judge reaffirmed that potential competition is alive and well and that potential competition can apply in newer and nascent markets. The opinion is rife with explanations from the judge that

really went the FTC's way, including on market definition, including on affirming that it is entirely appropriate for the FTC to be using the practical indicia under *Brown Shoe* to be defining a relevant market, that we do not always have to be using qualitative as well as quantitative methods, and that in many instances qualitative methods may be best suited to actually explain what the state of competition is. The judge also adopted a reasonable probability standard for what governs under potential competition, which is a lower standard than what some other circuits have adopted.

So we saw this case as an important programmatic win that really lays out a path forward for us to be continuing to vigorously enforce not just in standard Industrial Age markets, but also in digital markets that provide so much opportunity for disruption and innovation, and we think it is critical that we as enforcers are safeguarding the potential for innovation.

NINETTE DODOO: Thank you very much.

I just wanted to pick up on your point about market studies. You said the focus has been very much on digital markets, and other studies you have done are well rehearsed in the media and so forth.

Are there particular other sectors that are of interest that you can foresee becoming priorities for market studies? And in answering the question perhaps you could also explain the underlying factors, the structures that you mentioned are informing whether or not you decide to conduct and launch a particular market study in a particular sector.

LINA KHAN: It's a good question. I view our policy function and market studies function as a complement to our enforcement function. These really go hand-in-hand and historically have for the FTC.

If you go back and look at some of the major market studies that the FTC did, it included a major study of the meatpackers back in 1920, it included a major study of the public utility companies back in the 1930s, and both of these studies ultimately led to either major enforcement actions or actually legislative action. In the case of the public utilities, the FTC study led to the Public Utility Company Holding Act, which effectively broke up and restructured the entire industry.

We recognize that these studies can play an incredibly important role informing us as enforcers but also informing more broadly the public and policymakers who, if we don't have the tools to address the problem, may be better suited to do so.

There are a few factors that go into how we decide whether to pursue a market study, one of which is: What are we hearing from the public?

One of the things that I am most proud of doing at the FTC since I have been there is starting open Commission meetings. These are Commission meetings where we are going through various agenda items that the Commission is voting on, but we also have a portion of the Commission meeting where anybody from the public can sign up and come speak to us.

Every time we have people sign up and come talk to us about a full variety of issues, be it hearing from franchisees about problems that they are facing with their franchisor; hearing from families about how their kids have had to ration insulin; we have heard from people about problems that they are facing in the retail markets; independent grocers; independent pharmacists. We have heard from farmers about problems that they are facing with right to repair where they haven't been able to repair their equipment, and in farming, where time is of the essence, this has led to massive economic devastation in some cases.

It is really partly what we are hearing from the public about where the problems are in the economy that we are identifying: Do we have enough of an understanding about what is going on here?

The other thing we look at is: What is the potential impact? It is no secret that there are many ways in which the current healthcare system is not working well for patients, and so we are looking closely at: What are the different components of that in our wheelhouse that we could be making sure to be moving forward, because in healthcare more than anywhere else, the effects of the lack of competition can really be life or death in some instances, and so we take that very seriously.

NINETTE DODOO: That is helpful. Thank you very much.

Margrethe, last but not least, I would be interested to hear your thoughts around the priories that you have set and perhaps a critical assessment from your perspective as to your progress towards achieving those objectives that you have set.

MARGRETHE VESTAGER: First and foremost, I never thought I would say this, but oh my God I'm glad to be back in a room without windows with hundreds of lawyers! [Laughter]

I am very, very proud to be part of this law-enforcing community because competition has never been more important. In these times when we discuss resilience and geopolitics, to have competitive, contestable markets where you can find a new supplier if you lose the one you have, you can find a new customer if you lose the one you have, and you have the drive from competition to innovate, competition is absolutely crucial. I am very honored and proud listening to colleagues talk about all the work being done to secure that citizens in their role as consumers have the benefit of competitive markets.

We have been busy as well. If you look at our merger work, since we saw each other the last time we have had sixteen interventions in merger cases, ten conditional clearances in Phase 1, two conditional clearances in Phase 2, two prohibition decisions, and four deals that were abandoned; so I think effectively six prohibitions.

I think the one that has attracted the most attention is the *Illumina/GRAIL* case, both for the question of jurisdiction, because here the *Illumina/GRAIL* case does not meet our thresholds, it is not notifiable in any Member State, so it was on the basis of Article 22 that we assessed this case. The question of jurisdiction was appealed, and we were of course very happy that the General Court sided with us to say, "Yes, you do have jurisdiction both in general but also in this case." That of course is under appeal before the European Court of Justice.

Also on substance I think it is an interesting case because it is the first purely vertical case that we have blocked on the basis of an innovation theory of harm. Illumina is the only credible supplier if you want to develop and test early-detection cancer tests, which is what GRAIL is doing. If Illumina is the only one to do that effectively, of course there is a really high risk that GRAIL's competitors would not be able to have access to the technology necessary to develop and to test their early-detection cancer tests. We saw that here there was a risk of a loss of competition in innovation and for those reasons we blocked the deal. That is now of course also in front of the Courts. And we are preparing the gun-jumping case as well, so it is a multifaceted animal that we are dealing with here.

This will probably not be the last case that we will assess, even though it does not meet the thresholds and is not notifiable in a Member State, because with the implementation of the Digital Markets Act we will have much more information about acquisitions where a larger company is buying a smaller company. Companies designated as gatekeepers will have to tell us, "We are now acquiring this smaller company," and we will assess this to see if there would be a loss of competition if that acquisition goes through.

A second thing that has given us direction this year is the judgment in the *Google Android* case. We were happy with the judgment of the General Court because I think it is a very important signal when it comes to tying practices. Google tried to protect its monopoly in search when we all went mobile by tying practices, preinstallation, anti-fragmentation clauses, to make sure there was basically no space for anyone else. We find this judgment to be very helpful in the direction that we are heading to.

Third, we have finalized our *Amazon* case with a settlement. This is a case where there are two sides, the Amazon Marketplace and Amazon Retail, with Amazon Retail having access to highly rich nonpublic data from all the many retailers that give it a huge competitive advantage. You also see that since Amazon Retail holds a majority of the products they take the lion's share of the turnover. Here we agreed to a data silo commitment so that the data of the small retailers will not anymore be available for Amazon Retail.

The second thing we took was a commitment on access to Prime. Prime customers, who are returning customers, the highest-spending customers, are really important to get access to. Here the question was whether or not to use Amazon Fulfillment to allow retailers to choose themselves who should deliver their goods to their customers; and, last but not least, a second buy box will appear so that you have two different promoted products to choose from. We pushed forward this case.

Some will say, "Oh, but listen, part of this will be solved once the Digital Markets Act starts to affect this market." But the thing is that we could change this market behavior now. As someone just told me, "Listen, one year in a digital market is like four years in the normal business cycle," so every month that we gain in order to make sure that the market is contestable, that you have your own data, that you can make your business, will serve the consumer very, very well.

This is also reflected in the new Statement of Objections that we sent in the *Apple App Store* case, where we focus on anti-steering and the direct consumer impact in that case. It is a high-priority case for us. Now we are waiting for Apple's responses to it.

And of course we have the *Meta/Facebook* case, where Facebook ties its social media to its Marketplace and combines them with unfair trading practices, which again is closing the market.

That will lead me to say just a few words about our policy priorities.

The main one is implementing the Digital Markets Act. Of course the Digital Markets Act is not a competition tool; it is a tool that will make the market open and contestable again. This is very important for us.

It was not easy to pass new legislation in Parliament and Council, but what you change by changing legislation is perception. What you change when you start implementing and enforcing is behavior. Picking up on what Lina just said about looking at legislation and how it is being used, that is still fresh, that is still out there, that is still useful in order to change behavior, and that of course is our focus.

We have very tight deadlines—first, to get the notification from potential gatekeepers, then to designate them, in order to have compliance early spring next year—and that is absolutely high priority because we need that change of behavior in the marketplace in order to get the benefits from competition to serve the consumer.

We have another new tool, which is the Foreign Subsidies Regulation. Again, we want to protect those who do business in the single market without subsidies on their books from foreign governments, in particular from non-market economies, so we are beefing up on that as well.

And then we have made a call for evidence in our Guidelines on Article 102 cases. It will take some time to get there, so we have also made a Communication to change our Guidance Paper from 2008 in order to reflect what have been the case practices.

All of this is just to say that we keep ourselves busy, but we do that whilst at the same time making our international cooperation a priority. We have different laws, we have different markets, we have different legal barriers to pass, but we are on the same mission: to make sure that we serve the citizens well in their role as consumers.

It is really important for us that we work well, that the teams have the time and priority to speak with one another, to share insights. I am very happy that we had the technology competition policy dialogue here yesterday because when we need the markets to serve us, we also need enforcers to work together, and this is why it is such a pleasure to be here.

NINETTE DODOO: Thank you very much, Margrethe.

At a recent conference I think you said—I am paraphrasing—that there are three challenges facing the world at large essentially: the geopolitical, the digital, and ESG (environmental, social, and governance). Perhaps we will touch on ESG later on, but it seems to me that the Digital Markets Act that you mentioned perhaps fits under the box of overseeing digital and maybe the foreign subsidies tool you mentioned also fits under the geopolitical tool.

You also mentioned you have been very busy. A question from my perspective is: Are there sufficient resources? Is the Commission fully prepared to be undertaking these quite radical changes and shifts in approach and in policy?

MARGRETHE VESTAGER: I only see them as "radical" in the original meaning of the word, which is going to the root causes of these problems. If you take the Digital Markets Act, the root cause of the problems we have is that the market is not contestable anymore, is not open.

Gwendolyn and Sarah took us through numerous cases, case after case after case. I admire what you say because as part of my speaking line I say, "I have not one, I have not two, I have three *Google* cases." And then we have some like the ones Gwendolyn has filed with the states, and what you are doing here I think is also pushing the right way. So I don't think that it is radical. I think it is completely in line with the mission that we have.

We will never have enough resources, never ever. Listen, you are literally on the dark side today—we can hardly see you [Laughter]—so the more who want to join, of course the better. But no matter the resources that we have, we have an obligation to use them in the best possible way.

I think what also was said previously is that we need to complement different approaches. We are now establishing the Office of the Chief Technology Officer to have more of those competences onboard. When we enforce the Digital Markets Act we can make common investigative teams with the national competition authorities who are also powering up with other competences. I think that is the trick for us to be as efficient as possible with the resources that we have.

The last thing is—they say it takes a village to raise a child—it takes a community to secure compliance, so we are talking with everyone and his sister to make sure that they will watch out for compliance with the Digital Markets Act—data protection agencies, consumer protection agencies, NGOs, business associations, unions—in order to make sure that we can use our enforcer resources in the best possible way.

THOMAS ZYCH: My takeaway right now is going to be that I think for the first time someone said I am sitting on the side of light as opposed to the dark side, so I feel good about that.

Let me pick up, if I can, on a word you used, Jonathan, and a concept you mentioned, Lina. It is going to sound very U.S.-federal-centric, but I would like to get everyone's view.

You talked early on about deterrence, and one of the examples was abandoned transactions as opposed to litigated enforcement actions. In a sense, if I can oversimplify, at the retail level there is action and reaction.

Lina, you mentioned guidelines, or guidance more broadly, so I will start with you, but others may want to weigh in. Among the items in the toolbox that we look at in terms of advising businesses and helping them understand what they ought to be doing are agency guidelines and guidance. Your testimonial and endorsement guidelines are always at one's fingertips because they are helpful. The Green Guides are quite helpful as well.

I thought comparatively I would like to get your view, and then maybe others' as well, on the value of publishing guidelines and guidance to businesses so they can proactively say, "Here's how we are going to operate ourselves, here is how we are going to make judgments about what we do, and know where the lines are to keep our toes on the right side." Have you found those efficacious? Have you found those something in your toolbox where it is useful to maintain those and potentially increase their use?

LINA KHAN: The Federal Trade Commission has a long history of publishing guidelines and guidance on the competition side but especially on the consumer protection side. One initiative we have underway in a whole host of areas is to be revisiting some of those guidelines and updating the guidance where it is needed, including the Green Guides specifically.

In addition to the guidance documents, the FTC has also been making policy statements. The Commission since I joined has voted out several policy statements that articulate how a particular set of laws may apply in a particular context. In some instances they may highlight a particular legal provision that perhaps previously had been underappreciated.

One example of the latter is we published a Policy Statement noting that the Children's Online Privacy Protection Act actually prohibits firms from conditioning access to certain services on endless collection of data. Oftentimes COPPA is thought of as kind of a notice-and-consent regime where you just check the box, but there are actually upon closer inspection substantive limitations on when firms can be collecting data. That was one thing that we thought the market should be on notice.

One thing that we are doing across our digital privacy work is making sure that we are fully enforcing the law including in areas where there are substantive protections, because I think we have all lived the reality of how in many cases you are forced to just kind of check the box and not really be expressing consent in the way that you think about what that word should be meaning. So we have been taking a closer look in particular at the privacy side.

We also issued a Policy Statement looking at some of the rebate practices that we have been hearing about between PBMs and drug manufacturers. As I mentioned, this is an area where we have received a lot of public input both at our open Commission meetings as well as some of the public dockets that we have opened. We set out in the Policy Statement a few ways that some of our existing legal authorities might apply to some of these practices. One provision that we highlighted included Section 2(c) of the Robinson-Patman Act, which prohibits commercial bribery and illegal kickbacks.

The policy statement tool has been one that we have also been activating to make sure that where needed we are putting the market on notice about how the law applies in a particular

context or it gives them renewed appreciation for certain legal provisions that may not have been recently enforced.

THOMAS ZYCH: Any others? In other jurisdictions it may be less obvious, but how do you view the use of business guidance to industry in addition to individual enforcement actions.

MARGRETHE VESTAGER: Maybe not in individual enforcement actions, but we have had a very long discussion about sustainability and competition law enforcement. Here I think it is important that we give guidance.

On the one hand, we would like businesses to come to us if they have something that they think, *Would this work; can we do something?* Here I think it is important to give the guidance that we want to see cooperation that can enable sustainability, but we do not want the in-market consumers to be left completely without the benefits of that.

I think the discussion that we have had among competition law enforcers in Europe has been very helpful, first and foremost for ourselves to be clear in our head, but hopefully also to the business community to say, "There are things that we can do working together where they will not see collusion left, right, and center." We are in a situation where it is really, really important that everyone who has just the slightest contribution to fight climate change gets onboard for that mission.

SARAH CARDELL: Very similar in the United Kingdom to both the EU and U.S. positions, we use guidance quite extensively I think for two reasons: one is to encourage the good behaviors that we want to see; and also to provide clarity about the way that we work.

Very similar to the European Commission, we have recently issued draft guidance on sustainability, again for exactly the same reasons. We have gone a bit further than in our usual practice in, exactly as Margrethe said, having a really open door here. We hear a lot of claims from businesses that competition law has a chilling effect on sustainability initiatives, so we want businesses to come to us and talk to us, give us those examples, and we will talk that through.

There is also reality. A number of us have talked about being resource constrained. We need to use guidance and we need to use advocacy as complements to effective enforcement so that we can really focus in on the areas where we need to take direct enforcement action. We see that quite a lot. Similar to the FTC, we see that both on the competition and on the consumer side.

To give an example on the consumer side, we put out a lot of guidance in the environmental space on misleading green claims and what you should expect good business practice to be when giving green credentials on products and services. We very much then followed that up with a very clear program of enforcement action where that guidance was not being followed to take action against specific companies. I think that worked in a very complementary way.

NINETTE DODOO: If I may, I would like to pick you up on the question of the sustainability guidelines that you recently published for public comment. I think one of the points that the consultation paper makes is that this is to ensure that businesses are not unnecessarily or mistakenly deterred from lawfully cooperating or collaborating to promote sustainability.

The European Commission has also published some draft guidelines for public comment. Japan has also done the same. There is talk of other jurisdictions doing the same. But I think amongst all the guidelines published there is a sense that it is really the Dutch competition authority that is sort of out there when it comes to assessing consumer benefits, when it comes to assessing whether there should or shouldn't be full compensation.

We also talked briefly about international cooperation. To what extent is there the possibility to see greater convergence in terms of how one assesses consumer benefits? Granted this is perhaps more a debate in Europe, but I would be interested in the views from the United States as well.

How can we ensure that you are trying to give businesses a sense of direction so they can be assured that whatever works for the United Kingdom might also work in other parts of the European Union, certainly post-Brexit?

SARAH CARDELL: Maybe just a few thoughts from me and I am sure others will have comments.

I think there is quite a bit of parallel here when you look at the approach on environmental sustainability and when you look at the approach on digital markets.

In both cases the fundamental underlying issue that we are seeking to tackle is one that is of huge societal importance. One is about climate change and achieving Net Zero. The other is about ensuring that digital markets work in a positive way for society and are not dominated by companies that can distort the way that competition is working effectively. So I think there is an absolute commonality of objectives and recognition of the underlying concerns.

And then there is a process of working through jurisdiction by jurisdiction the best way to devise a toolkit and utilize a toolkit to address those issues. In some cases there will be entire alignment and in other cases there will be a degree of difference in approach, a degree of experimentation and learning.

I have no problem at all with saying as an agency, "We want to learn from other experiences across jurisdictions." I think it is absolutely essential that we work in that way.

When I look at the approach that we have taken in relation to our guidance on environmental sustainability, we looked very closely at what the Dutch have done, we have looked obviously at the ongoing process for the European Union, and we thought very carefully about where we should strike the right balance in terms of looking in particular at this issue, which I think is more of a European one in terms of the analytical framework, but looking at how you trade off the potential harms from a restriction of competition against the wider benefits that may be derived in that case in terms of improving environmental sustainability.

The approach that we decided to take in the United Kingdom is specifically in relation to climate change agreements because of the enormity of that challenge that faces us. Because of the quite specific legislative commitments that the UK government has entered into, we felt that it was important to look at the broader benefit that could be derived from agreements that are legitimately entered into to seek to achieve Net Zero obligations.

But I don't think there is a fundamental difference of approach there. We will learn from the cases that we take. One of the things that we said in the guidance is we want to be able to publish the case studies where we have people coming in so that we can share that learning not only for ourselves but for the wider community.

NINETTE DODOO: I think at a Senate hearing, Lina, last year you made it very clear there are no exemptions, there are no carve-outs, special rules as it were, for sustainability agreements. Do you anticipate that the FTC might at some point publish guidelines, or what sort of guidance in the absence of guidelines would you give companies in the United States or elsewhere seeking to promote sustainability through sustainability agreements? I would love to hear your thought as well, Jonathan, afterwards.

LINA KHAN: At the FTC we look squarely at our mandate, which Congress has said is "to prohibit unfair methods of competition and unfair or deceptive acts or practices," so we look at all of these practices through that prism.

I should also say we recognize that the FTC's tools are not going to be appropriate to solve all sorts of problems that other policymakers may want to fix; so we are very mindful of everything that our tools can do but also, critically, their limits.

One thing that we have shared publicly is instances in which firms come to us and say: "Hey, we are seeking to propose this merger. We understand it may raise traditional competition concerns and may be unlawful under the competition laws, but it has these certain sustainability benefits, it is going to permit us to engage in all sorts of ESG commitments."

Those are instances where we have had to establish very clearly that we look at these deals through a competition prism and any types of ESG commitments or other types of sustainability commitments are really not key to our inquiry. We thought it was important to put the market on notice about that.

Of course, if some of our traditional tools around unfairness or deception apply, we will be using those. If firms are making untruthful claims about the sustainability of their products, if they are overhyping sustainability, that is work that we do. We have been focused on some of our "Made in USA" enforcement that I think also sets a nice baseline for what some of that work could look like.

GWENDOLYN COOLEY: I just want to add the states have such varying views on this issue I can't not say something.

First of all, as a law enforcer, I am always skeptical of folks who need to collude in order to do something good. I wouldn't come to me with that one certainly.

On ESG the AGs have really had very divergent views, and I will try to articulate both sides to the best of my ability. There is a group who think essentially that consideration of ESG factors does a disservice to especially state pensions. If you think about you are investing in oil and the price of gas goes up, then theoretically there is going to be a better return for those folks who are invested in those non-ESG funds. Some states have taken on, for example, Blackrock and others with their concerns about that.

Conversely, a different group of AGs have said that ESG has the potential to get us to the next stage, it is important to have those considerations, and they argue that if you do not consider ESG then you will do a disservice to shareholders because, if you look recently, when the banks collapsed those ESG funds did better than the average funds.

The great thing about being me is those are both the sides and I don't have to take a position.

NINETTE DODOO: Jonathan, did you want to comment?

JONATHAN KANTER: It's a fascinating discussion.

NINETTE DODOO: Thank you.

THOMAS ZYCH: Switching a bit in the time we have left, we have a couple of topics. In addition to choosing which cases to litigate and providing agency guidance, the ability to obtain remedies is critical to all the work that you do, and the challenges are obviously vastly different given the structures under which you are working, so this will be more of a question.

I know in light of what the Supreme Court has done with a long-beloved statute, Section 13(b), in a wish list sense, in looking out and scoping how to achieve in a meaningful way the goals you have laid out, what would you like to see in terms of remedial powers, remedial abilities, that would help make real the enforcement actions and the policies you have? What would you advise and ask for to augment whatever remedial powers you may have currently?

JONATHAN KANTER: To start, I guess I have a very pragmatic approach here, which is I truly believe it is the job of our Congress to write the laws and it is our job at the Antitrust Division and the Department of Justice to enforce them. So I really think about what are the tools that Congress has provided and how can we use them to the greatest effect possible consistent with the laws as set forth by Congress.

When it comes to antitrust, there is a wide range of remedies depending on the type of violation. Obviously, in the most extreme sense in a criminal antitrust case prison time is a suitable remedy in many instances as well as fines. In a civil monopolization case it can be everything from a behavioral remedy to address anticompetitive conduct to structural remedies and breakup.

And then obviously in the merger context it is complex, but restoration of competition and making sure that issues concerning an illegal merger are adequately addressed. One area we have become more attuned to in recent years is that some trends in merger remedies have resulted in perhaps goalposts moving out and risk of failure being borne on the shoulders of the American public. For example, if you have a merger remedy and the year after the firm goes out of business, goes bankrupt, decides to change business strategy, in many instances you are left with a monopoly and there is nothing you can do about it.

And so we have to be very careful to make sure that when we are enforcing an incipiency statute that we are enforcing it appropriately. We just want to make sure that if there are remedies, they are adequate. That is our concern. That is our mission.

We provide technical assistance to Congress, sometimes we will weigh in on legislation with an official letter, but more often than not our mission and my focus is to keep our head down, review the laws that Congress has written for us, and figure out how we are going to enforce them.

THOMAS ZYCH: Lina?

LINA KHAN: At the Federal Trade Commission we suffered a setback in the *AMG* decision, which had been our main tool of getting restitution or monetary equitable relief in antitrust cases. The Commission has told Congress that this is a tool we need back. Basically overnight after *AMG* came down, billions of dollars were on the table that would have been back in the pockets of consumers, including in pharma cases, evaporated. This is a really important tool that has now been defanged.

We have been thinking hard about: What does it mean to fully be able to effectuate a remedy when you have illegal anticompetitive conduct? The goals of a remedy are to prevent the illegal conduct, to cure the underlying harm that resulted from the illegal conduct, and to prevent a recurrence. We look at remedies through that prism.

In the merger context, we have also been taking a very close look, making sure that we are learning from the experience of the last decade, instances where particular remedies failed and the effects of those were borne by the American public, and making sure that we are placing a high bar to make sure that if we are going to be accepting a remedy that it is fully achieving the

underlying goals and restoring the competition that would have occurred absent the acquisition. That is really what we are doing in the merger context.

In the consumer protection context, where the FTC had also heavily relied on 13(b) of the FTC Act, we have been reactivating other provisions of the FTC Act. This includes Section 19 of the FTC Act, which enables us after we have pursued a cease-and-desist order to go to court and get back money for consumers. We have been able to do that in several instances.

We have also activated our Notice of Penalty Offenses authority. Section 5(1)(m)(B) of the FTC Act basically establishes that in ordinary course there are no civil penalties that apply to first-time offenders. That said, if the FTC has condemned a particular business practice through a cease-and-desist order, it can then put companies on notice; and if companies then knowingly engage in a business practice that they know that the FTC has condemned, civil penalties can actually be activated.

We have been sending out these Notice of Penalty Offenses to put companies on notice, in particular around practices relating to false earnings claims. There has been a lot of fraud in the for-profit education sector where companies have overstated the opportunities that students would have. We have applied them in the context of false earnings claims, including gig companies that potentially may be overstating what drivers can be earning.

Those are all tools that we are using, but 13(g) no doubt was a big loss for the agency and one that we are hoping Congress will give back.

MARGRETHE VESTAGER: I think it is very good to have a discussion about remedies. I can fully echo what both Lina and Jon just said. We can only accept the remedy that is necessary in order to fix the concerns, so we don't have a policing of remedies one over the other, but of course it must be something that we can actually see, that is viable, that is sufficiently simple, very often structural, so that the loss of competition in a merger actually can come back. It is not easy, which is why we have fix-it-first, standalone—we don't very much like mix-and-match.

And of course we are very, very happy and thankful for the feedback from market participants when we market test, first when we do the market investigation, eventually if we do a market test, but even in the best of cases of results of market tests we do not shy away from our responsibility to assess whether a remedy will work or not. But of course if we have a very positive market test, then our arguments will have to be so much better if we do not accept it.

I think it is a crucial debate to have. I think in many recent mergers we have taken structural or quasi-structural remedies.

But we need also to discuss what is a remedy in a digitalized world; what does it look like if data is the thing in question? I said we have taken in the *Amazon* case a data remedy to have a data silo so that Amazon Retail does not anymore have access to other people's data. Is that a behavioral remedy or a structural remedy? I think it is worth discussing and keep following what it is that we actually have ahead of us.

A different issue, because I think we are approaching the end of this, if anyone has wondered what is this wonderful red star balloon that I have behind me is about—first of all, I think there ought to be balloons at any ABA meeting. It is a great thing.

Obviously, it is there, first and foremost, to celebrate the wonderful team that has set all this up because it doesn't come from nothing and it is really great that we can be here.

The second thing is that the color red signifies the need for more female leadership in law firms. [Applause] The legal community is so much more diverse than it was ten years ago, but if you look at the level of partners, oh my God you have a way to go. So red is to remind everyone to get it on.

THOMAS ZYCH: Margrethe, I will specifically take that message back to my managing partner Debbie Read, which will help her say that there is international support for everything we are trying to do.

MARGRETHE VESTAGER: Thank you, Tom. Good. You are on the bright side.

THOMAS ZYCH: Every now and then. Thank you.

LINA KHAN: Just quickly on the question of remedies, I would be remiss if I didn't note that this is where the FTC's partnership with the states is especially critical, because even though we are not able to get money back for consumers, the states can in many instances, and so some of those partnerships have been key.

We have also been pursuing industry bans where necessary, and we are really thrilled to get a court order that bans Martin Shkreli from the pharma industry. We are thinking about injunctive relief especially also when countering recidivists.

GWENDOLYN COOLEY: Yes. And I will just add in addition to our fabulous work with the FTC we have state disgorgement still available for us in many states and we have state civil penalties.

We also have criminal authority. This week in fact we formed a Criminal Enforcement Committee to help states work through those issues, and we will be working with your Procurement Collusion Strike Force to make sure that all that money that has gone out to the states to build those road contracts is actually spent properly and we don't waste that 20 percent overage.

JONATHAN KANTER: Thank you for mentioning our Procurement Collusion Strike Force because it didn't come up in my opening remarks, but it is in many respects a leading light and a gem of the Antitrust Division. With so much money being spent on infrastructure, so much money on government procurement, our Procurement Collusion Strike Force has been an innovative and extremely effective tool and we are really excited to work with the states.

I also would be remiss if I didn't mention that the relationship with the state AGs is so critical, and I think in front of this group it is really absolutely essential for you all to hear we are co-equals. State enforcement actually predates federal antitrust enforcement, and there are many states that have anti-monopoly principles built in as fundamental rights in state constitutions.

So when I think about state enforcement, to me it represents how the concept of antitrust, how the concept of anti-monopoly, is so fundamental to our existence as a country and to our democratic ideals and federalism. In so many ways state enforcement and our work with our state enforcement partners is really a representation of that ideal and the importance to our country, our democracy, and our core values.

GWENDOLYN COOLEY: Thank you. I will say we really enjoyed the Enforcement Summit earlier this week where we got to work with our international counterparts. We don't often get a chance to do it. Through our International Task Force subcommittee of our Legislative Committee we are, through our recent Rising Star Award winner Beatriz Marquez, monitoring what the CMA and the European Commission are doing and trying to get as many lessons from you as we can. There are abuse-of-dominance provisions in two states right now, again borrowing from the work that the European Commission has done.

We are all working well together, aren't we?

THOMAS ZYCH: As always, we are left with so much more that we could continue, which means when we reconvene next year—and we will reconvene next year—there will be a lot more progress to talk about.

Before we finish, there is one official piece of Section business, but before we do that I want to thank our speakers for being here, for taking the time, for traveling to be with us.

The last piece of business is to close the 71st Annual Spring Meeting of the Antitrust Law Section by announcing that later today the report of the Nominating Committee will be online, so you will all see decisions made about the future leadership of this Section.

Officially the last act is to thank everyone who has come together. This is a great conference simply because we are all together, so many of us, and there will be even more next year. Thank you all. Safe travels to those who travel. Thank you for coming together.

We will see you next year, if not before. ●

Interview with Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE)

Alexandre Cordeiro Macedo has been the President of Brazil's Administrative Council for Economic Defense (CADE) since July 2021. He was the Superintendent General of CADE for the four years previously. He also previously served as a Commissioner at CADE. He holds a PhD in Law from the University of Minas Gerais. He is a professor at several federal universities in Brazil and abroad, including as a Visiting Scholar and International Fellow of the Global Antitrust Institute of the Antonin Scalia Law School. He was interviewed for the Antitrust Magazine Online by Krisztian Katona on March 29, 2023.

ANTITRUST MAGAZINE ONLINE: Alexandre, thank you so much for accepting our invitation for an interview. Perhaps we could start with a little bit of an historical overview from the last decade. In 2012, there was a very significant landmark in the development of competition law and enforcement in Brazil, which is the new law that came into effect. Could you please tell us about the key results during this last decade and during your term with CADE.

ALEXANDRE CORDEIRO: Thank you very much for having me here. I want to thank the ABA as well.

In the past ten years, CADE has changed a lot. The new Law transformed the whole structure of CADE. For me, the most important change was the premerger notification system. These were the main things, the structure of CADE and the notification system.

In the Brazilian competition system, there used to be three different institutions spread around the country. One ministry, the Ministry of Economics, which incorporated the Secretariat for Economic Monitoring; the Ministry of Justice, which used to include what we call today the Office of the Superintendent-General; and CADE's Tribunal, an independent institution with a term of office for its Commissioners. Now, with the new law, everything was brought together.

The Secretariat for Economic Monitoring was not incorporated into CADE, but some of its functions were absorbed by CADE. They still have a little part of competition advocacy, but the main thing that they used to do, economic studies, is now a role of the Department of Economic Studies that we have inside CADE. Now it is much easier. We investigate and judge our cases when everybody is together.

If you ask me how the structure of CADE is now, I can say we have two completely independent institutions inside CADE. One is the Tribunal, which is formed by six Commissioners and one President, and the other one is the Superintendent-General. All of them have to be appointed by the Brazilian President and confirmed by the Senate. For the Commissioners and the President, the term is four years, and for the Superintendent-General, the term is two years. Tribunal members cannot be renewed, and the Superintendent-General can be renewed only once. This is a huge change because it gives CADE substantial power and independence.

The other main change that we can feel the results of right now is the premerger notification system. CADE used to take two to three and a half years to judge a case, to analyze a merger or acquisition, but when firms submitted a transaction, they had fifteen days to notify CADE, and

CADE had two yeas to review it. Back before, if CADE decided to block the case, the parties used to go to the judiciary and get an injunction to maintain the merger until the judiciary decided on the case. This would take ten years, so CADE would always lose. We lost so many cases because of that.

We had a very tricky and interesting case, *Nestle/Garoto*. The deal was notified to CADE in 2002, and CADE blocked it in 2004. They went to court, and the case has been pending in court, for twenty-one years! This is unbelievable.

You can see how this change was important. Since the new Law, there was no single case in which the parties got an injunction to stay together because they cannot come together before CADE's approval anymore. Before the Law, it was easy to get this injunction because they had already merged, and CADE took too long to analyze the case. But now, at CADE, our usual time-frame to review a transaction, if we are talking about our "fast-track" procedure, is fifteen days. A complex case takes around ninety days, and the average is twenty-eight days.

When they come to CADE and we say no, there is no one in the judiciary who looks at CADE and says, "Okay, you should get together in order to consummate your deal, and later we will see what happens." The structure of incentives offered to firms when a case is being reviewed by CADE and when the case is at the hands of the judiciary completely changed the way that we see things.

Usually, the Brazilian judiciary does many things, and antitrust issues are, as you know, just one small, very specialized thing. There is a decision from the Brazilian Supreme Court saying that the judiciary cannot touch the competitive merits of a decision of the Antitrust Authority—and not just the of the Antitrust Authority but usually of all the Executive branch. The judiciary can only change the decision if, for example, it finds procedural problems, such as a violation in due process.

So, if we look to the past and at what happened with mergers and acquisitions, we can really see that this change in our notification system was, I think, the most important one.

In terms of numbers, when the Law passed, the idea was that CADE would handle about 500 to 600 cases per year. But would CADE be able to analyze those deals in short timeframes? We proved that CADE was able to do it. But not just that; we did not just do it with mergers and acquisitions, but we took care of cartels, unilateral conduct, and advocacy programs.

ANTITRUST MAGAZINE ONLINE: July of this year will mark the halfway point of your four-year term as CADE President. What have been your priorities and main agenda items at the helm of the agency and what should we expect in the second half of your term.

ALEXANDRE CORDEIRO: I have been in CADE for the past eight years. I was a Commissioner, Superintendent-General, and now President. When I think of the future, I have to look back and see what happened and where we could not reach. We did many things, and CADE has developed and improved each day.

We just talked about the new Law, but the new Competition Law came in 2012. We are adding good things that we think can improve our enforcement.

For example, we believe that private lawsuits can help CADE with public enforcement. Private enforcement is growing. Why is it growing? We just passed a new law in the Congress that creates what we call "double damages." Thus, if the people who are not collaborating with CADE are convicted in a cartel case, they have to pay the damages, but double. Those who are collaborating will also pay the damages but just once. This is a change in the structure of incentives so that we preserve the Golden Rule, we preserve our settlement system, and also respond to the needs of

Thus, if the people who are not collaborating with CADE are convicted in a cartel case, they have to pay the damages, but double. Those who are collaborating will also pay the damages but just once.

society. This is one thing that I think is going to be on the top of my list, not just for me but for the antitrust community in general.

The other priority that is impossible to hide from and is growing a lot in CADE is unilateral conduct. When I took the Superintendent-General's office in 2017, I said publicly that we are very good dealing with cartels, especially with cartel investigations, but we were missing something as to unilateral conduct. So we started to bring more and more cases and put more effort in those issues.

Last year we created a specialized unit for unilateral conduct. As I told you, when we changed the system from post-merger notification to pre-merger notification, the law gave us a number of days to analyze merger cases: it is 240 days and can be extended for an additional ninety days. The law gives us time for a thorough analysis to issue a decision to clear with or without restrictions and also block a merger.

What happened inside CADE is that the unit that takes care of unilateral conduct was also responsible for mergers and acquisitions. When they were analyzing unilateral conduct and a merger or acquisition came in, they would stop the unilateral conduct case and work on the merger or acquisition. This would often put off unilateral conduct cases.

Thus, what we did was create a specific unit for just unilateral conduct, so they do not have to stop working when they see a merger or acquisition in front of them, and many cases are being solved faster and with more quality because we, the public servants, are getting specialized in the analysis of rule-of-reason cases.

Another priority is advocacy. We can see the results very clearly when we are engaged in improving our advocacy role with other Brazilian public institutions, for example, sectoral regulators. We have around eleven agencies in Brazil—gas, energy, telecom, data protection, health insurance, health protection, mining—so it is a lot.

They are creating regulations every day, creating a way to control the market, and sometimes they can make some mistakes in terms of competition. We are there to help them to see it is important to protect the issues they want to protect but also consider competition. Every day we talk to them and say: "Okay, listen, we have another idea. The thing that you want to do, you can do in *this* way. So you are going to do whatever you want to but also protect competition. What do you think?"

They are using CADE to help them to create their regulations, and this is just very nice. For example, Brazil was setting up a lot of infrastructure projects, with concessions for companies. CADE was helping them not just to make a contract, but to detail the whole structure of how this project will run in Brazil. For example, what kind of rules need to be implemented in the process to enforce competition in the result of the project. For instance, if they accepted consortia, like one, two, or three competing getting together to participate in this bid, does CADE allow this or not? We can help them to launch those biddings with the mindset of, "Okay, let's give some privilege for competition in this case because this project can receive more money and that will then ensure a better product and service at the end of the day."

Another important issue is that this year the term of four out of our six Commissioners will end in October. Now, people are starting to think about the profile of the people who are interested in running for these positions. We are worried about it as we need good people in CADE because of the relevance of the agency.

We have also to think about 2024, when the term of Superintendent-General Barreto ends. It is an important issue because I think that is the most important position in CADE. It is the top investigator, the guy who looks at all cases and decides what to investigate.

ANTITRUST MAGAZINE ONLINE: In recent years, CADE has signed a number of MOUs with sectoral regulators focusing on collaboration and cooperation on common issues.

One area that has been particularly in the spotlight in recent years is financial markets and CADE's relationship with Brazil's Central Bank. In 2018, CADE and the Central Bank signed an MOU providing for closer communication and cooperation regarding competition issues in financial markets, in particular merger reviews in that sector. What has been CADE's experience cooperating with sectoral regulators in general, and working together on merger review with the Central Bank in particular?

ALEXANDRE CORDEIRO: One of the most important settlements we made involved an agreement with the Central Bank. The discussion was: Who has the competence to analyze mergers and acquisitions in the financial market, the Brazilian Central Bank or CADE? This dispute went on for a long time.

Around three or four years ago, we made an agreement through an MOU saying that both authorities have to play a role, under the terms of which CADE has the jurisdiction to analyze mergers and acquisitions generally but if we have a system problem—for example, if a bank goes bankrupt and can cause damage to the whole country—the Central Bank has the jurisdiction over it. This is a big deal because it shows how we can work together.

CADE is mature enough to understand that sometimes competition is not the most important issue every time.

Competition is important, but if we want to maximize the welfare of the entire country, there are other issues that we must look at before competition. CADE is mature enough to understand that sometimes competition is not the most important issue every time.

This is a very good example. Can you imagine it? A bank goes bankrupt, and the Central Bank says, "Okay, this is going to cause harm to the whole system, to the whole economy, to the whole country." We cannot say: "Okay, there is a competition issue there and it is much more important." So, what CADE does is say: "Okay, do your job." That was the agreement that we reached, and it has been working out very well.

ANTITRUST MAGAZINE ONLINE: For the last few years, some Brazilian political developments have made headline news in the United States and other countries. What could you tell us about CADE's role within the Brazilian government?

Also, relying on your experience at the agency since 2015, how do you see CADE's role evolving in Brazil?

ALEXANDRE CORDEIRO: I have been in CADE for the past eight years, and I think I can say I am really open and transparent about this because I was appointed four times by three different Brazilian presidents and served four administrations. There was Dilma Rousseff, Michel Temer, Jair Bolsonaro, and now President Lula. I can say very clearly and transparently that CADE does not change. It does not change.

Do you know what helped us? Our issue is very technical, very specialized. For sure, we understand the necessities of the government and the Brazilian State. We are not on an isolated island; we are not like that. We adopt the big directives the government issues. That is important.

But the independence that we have is related to how we deal every day with our cases and our policy. If you look at CADE ten years ago and if you look at it now, you can see we have the same idea of everything—the same idea of the processes, how we analyze our cases, what is the goal of antitrust—and we have witnessed four different presidents. This gives to market stability and predictability. They look at CADE and say: "Okay, it does not matter who is going to be in the government. CADE will do its business—that is, protect competition."

For sure, in the gray area, we can go to different sides, but this does not change the predictability and transparency that CADE has had. I am saying ten years, but we can say twenty years—ten years since the new Law passed. CADE has been perceived like it is right now for twenty to twenty-five years. I think this conveys a very important message.

One thing that is good to highlight is that every time we have a radical political change, we think about how the agencies and independent institutions will act. What I can say about Brazil is that they will act completely independently. The government knows it and does not try to change it because the system was built to do that. If they want to change it, they must change the people inside these bodies. But there is a term of office— they must wait until people finish their terms to replace the people. Usually, those who go into agencies have independent, technical minds to judge a case how they are supposed to.

ANTITRUST MAGAZINE ONLINE: Cartel enforcement, has historically been the key focus of CADE's activity. In recent years, CADE signed numerous leniency agreements as a result of the so-called "Car Wash/*Lava Jato*" investigation; but also 2021 saw a very significant hike in cartel fines. Based on this and other recent investigations how would you evaluate CADE's cartel enforcement program?

ALEXANDRE CORDEIRO: It is still under development. Sure we had our "Car Wash" case,[1] the huge *Petrobras* case. I think today we still have about twenty-eight cases related to the Operation Car Wash, or *Operação Lava Jato* in Portuguese, within CADE, a lot of settlements, and the cases have started to be adjudicated by the Tribunal. Also, we are still signing leniency and cease and desist agreements. You just mentioned the government is trying to reach a considerable number of settlements; when a cease and desist agreement is signed, the signatories have to pay an amount of money to be dismissed from the case.

I think in 2017 we negotiated sixteen agreements that resulted in fines of approximately $1 billion reals, meaning over $200 million dollars. In 2021, I believe it was nineteen agreements, leading to about $275 million dollars in fines.

This is a very important issue that shows our agreement means are doing good and still growing. But we must separate Car Wash cases from others. Doing this, we see that in the past ten years, we had an average per year of ten to twelve leniency agreements and about thirty-five cease and desist agreements signed. If we include the Car Wash cases, the number increases; but if we disregard them and look back to ten years ago, it would be almost the same. In fact, during one year of the pandemic, we did not sign any agreement as it was hard to do so. But otherwise, it was similar. It is growing little by little, like ten percent—one case up, two cases up. We are still giving a lot of attention to cartel enforcement and investigations.

ANTITRUST MAGAZINE ONLINE: Digital antitrust issues are the topic du jour in the international antitrust debate. A key part of the debate has been whether the existing *ex-post* antitrust enforcement tools are sufficient to address potential competition issues in digital markets, or whether

[1] EDITOR'S NOTE: Operation Car Wash consisted of a set of investigations carried out in Brazil covering a wide range of topics that included corruption, money laundering and competition issues. It started in 2013 with a preliminary investigation of possible minor money laundering. It was named "Car Wash" because the investigation began focusing on a small office of foreign currency exchange and money transfer services located at a gas station in Brasilia, which also provided car wash services for its customers. The case did not concern competition issues at first, but eventually suggested that construction companies were colluding to divide markets and fix prices in several public procurements.

additional tools, including *ex-ante* regulation, is necessary. You have been the voice of caution about *ex-ante* regulation in this debate, strongly supporting the consumer welfare standard and noting that the existing antitrust framework is sufficient to address competition issues in this space.

I understand that a European Digital Market Act (DMA)-type regulatory proposal was also introduced in the Brazilian Congress just a few months ago. What are your views on the Brazilian debate about these issues?

The first thing I want to say is that CADE does not regulate any market. We are not a regulatory agency. We are enforcers.

ALEXANDRE CORDEIRO: The first thing I want to say is that CADE does not regulate any market. We are not a regulatory agency. We are enforcers. And I still believe in the enforcement of antitrust.

To regulate ex ante is to create presumptions, and there are costs and benefits to that. If you want to create presumptions, especially in digital markets, you must be sure of what you are doing because it can cause considerable harm to innovation. Imagine twenty years ago if you decided to regulate these practices and ended up forbidding many of them. Do you think that we would be in the stage of technological advance as we have right now? That is the question. What is the cost of that?

I understand that maybe market power, the economic power, especially of Big Techs, is a concern of every agency, but I still believe in antitrust enforcement. I do not know if ex ante regulation is the right solution. but as an antitrust agency, we could first think of a case-by-case analysis with interim measures. That could be a good idea because it is not a general regulation, but it is a specific determination for that case that you can revoke immediately if you think it is not a good thing. I consider we have been doing this successfully at CADE.

I am not against regulation. It is relevant. What I am saying is, let's be careful about it.

Sometimes strict regulations detailing every aspect of every case may create several economic problems, such as barriers to entry, transaction costs, and legal disputes since these matters are always uncertain.

The question is, should the regulation be very specific or broad and general, leaving those issues to the handling of the antitrust agency?

In some countries the antitrust agencies will also have the role to regulate the digital market. In other countries, is another institution that regulates the digital market.

Besides, the digital market is no longer regarded as a sector but a tool. Basically, every market is going to be digital. Every market will become digital.

So I think what happened is that people are more concerned about digital markets because they want to fight big companies. But there are many small companies already prepared to compete, full of technology—in agriculture, transportation, whatever sector it is. Nobody lives without technology.

My point is that it is important to think about how to control those things. We must decide which model to apply. If it is ex-ante regulation, what kind of regulation is that? If we choose a very specific narrow definition of the digital market, what does that definition really mean? Or, if we go for a more general regulation, will we leave the specific regulation to the agency that has jurisdiction over it to analyze case by case? This should be the main discussion for us to hold right now.

Right now, Brazil is considering how to regulate that. The discussion is growing, but we are still at the beginning, and we have not decided which model we want to follow. Also, we have not decided yet which body will have competence on that.

ANTITRUST MAGAZINE ONLINE: Continuing on the digital antitrust track but turning to merger enforcement, a number of recent mergers reviewed by CADE addressed issues in digital or

connected markets, including *StoneCo/Linx*, *Itau/TOTVS*, *Itau/XP*, and *Microsoft/Activision*. What can you tell us about CADE's experience reviewing mergers in digital markets? Also following up on some of the points you mentioned regarding smaller companies, what can you tell us about the competitive dynamics in the Brazilian digital sector, including the country's startup ecosystem?

ALEXANDRE CORDEIRO: As you mentioned, we have reviewed a lot of mergers and acquisitions in many sectors that are relevant to many digital markets—for example, *Itaú/Totvs* and *Microsoft/ Activision*.

We still use our old tools but we are considering if there is something we can implement as markets are changing. For example, the definition of a "relevant market" is not an end in itself for the competition analysis. We don't want to define the relevant market just because we need to but because it is a tool for assessment.

That is especially true in digital markets since we need to consider more than one side of the market, sometimes multiple sides.

We examine various scenarios—sometimes five, six, or seven definitions in the same case—and analyze how competition will be in these scenarios if the deal is approved with remedies. The decision is, "Let's get the most conservative scenario, and let's approve or block the case based on it." We have already analyzed many of those scenarios, and if somebody argues, "But this is not the reality," we will look back and see what we did.

What we do with the digital economy most of the time is to understand that it is very dynamic. Sometimes we do not mind only the number of transactions but also the value of the deal. Sometimes the value of the deal is not the amount of money the companies pay, but the reason behind the merger. That is the thing. Does a company want to buy another because there is a synergy and they just want to get a piece of market share? Do they want to buy it because there is a new relevant technology? Do they want to buy it because of the amount of data the other company has and it is relevant for them?

In digital cases, we look at every aspect to find the value of the deal. Why is the deal worthy for the buying company? Usually when we ask this question, we can find the really important issues under discussion for those mergers and acquisitions, which also leads to a better decision on the remedy that will work in our market.

With the merger the share may increase considerably; but the problem is not the share. It can go to rivals, maybe there are two or three companies that compete for this market share. But the thing that they are acquiring for their company, the amount of data, will in one year or two change the whole market because of the dynamic that the other companies will not have.

That is just a little general flavor of how we treat this.

ANTITRUST MAGAZINE ONLINE: CADE has had a particularly active international agenda, including participation in multilateral and regional organizations and bilateral cooperation with counterpart agencies. How do you see CADE's role in the international antitrust dialogue? Also, based on recent developments and trends, do you see more convergence or divergence in global antitrust enforcement and policy?

ALEXANDRE CORDEIRO: This is a very important issue for CADE. Our international cooperation brought us here, where we are. We learn about antitrust with the United States, Europe, Japan, and Australia. We are always looking for best practices from countries that are more experienced, but also from younger agencies that propose new ideas and new things. Brazil is completely open to

discussion, to exchange of information and experience with other jurisdictions. And this question of whether there is more convergence or divergence comes up in every event we go to.

I think that today there is more divergence especially regarding what we have been facing in terms of antitrust goals. Every time we talk about international cooperation, this issue comes, and it comes very strongly, because the views of the United States and Europe are very relevant internationally speaking. If they are going in one direction, everybody looks at them thinking "Okay, it is important to see what they are doing."

So the United States and Europe have a great responsibility in this regard. Brazil and other agencies are always looking to them and trying to get best practices. They have experience for a longer time.

Also, we understand that our market is different, our country is different, and we have to handle these differences as well. Now in Brazil we can see things happen as we look at the world and see that a lot of issues that were not in our discussions ten years ago are now a hot topic for debate.

And what do I think about this? I think that we have to be very careful not to change things suddenly. If you want change, let's discuss it extensively beforehand with everybody. Let's discuss it with other agencies. Let's discuss it with the OECD. Let's discuss it at ICN. Let's come to the ABA and discuss it. Let's talk to the private sector. Let's debate it with lawyers and economists.

Do you know why? Because four years from now we can change everything again if people currently holding those positions are not in such positions anymore. With the market we cannot play. It is people's lives. We are talking about the economy. We are talking about inflation. We are talking about the daily life of people.

I think the most important is for us to be cautious because damages can be high. If a company asks a lawyer right now, "What should I do in this situation?" the questions to be answered should be "does your lawyer know what to say to the client? Does your lawyer really understand your agency right now?"

If he is prepared to say, "The agency will follow this direction and that is what is going to happen", your lawyer and your economist can give the client predictability.

That is, if the antitrust community can answer these questions, the antitrust policy is predictable, so we are having more convergence. If responses to these questions cannot be assured, we are having more divergence.

ANTITRUST MAGAZINE ONLINE: These are interesting times, with antitrust being discussed more than perhaps ever before. Other jurisdictions are closely watching Brazilian antitrust enforcement and policy, and CADE has been a particularly strong voice among Latin American enforcers. Any final thoughts on suggestions for competition agencies around the world, but especially in Latin America? Do you have any particular message, for policymakers in emerging economies?

If we do not speak the same language, antitrust abroad will be a mess.

ALEXANDRE CORDEIRO: Yes, I do. I think that we should go back to speaking the same language again, the language of antitrust. That is what I think we should do.

The world is full of diversity. Countries are different. Even Latin America is completely different from Asia, which is completely different from Europe. We have other important issues.

For example, in the OECD, we are discussing poverty and competition. Imagine if we decide to put poverty as an issue for approving or blocking any merger or acquisition. This is not the language that the United States, Europe, and developing countries speak.

If we do not speak the same language, antitrust abroad will be a mess. That is what I think. ●

Interview with Olha Pishchanska, Chair, Antimonopoly Committee of Ukraine

Olha Pishchanska was appointed Chair of the Antimonopoly Committee of Ukraine (AMCU), in July 2020, having previously been the First Deputy Chair of the AMCU since September 2019. Previously, she was the Director of Zakupivelni Rishennia LLC, and was also the Commercial Director of STEM Engineering LLC. She graduated from Kryvyi Rih Technical University in 1997 with a degree in Industrial and Civil Engineering, and received a Master's degree in business economics from Kyiv National Economic University in 2001 and an MBA from the Edinburgh Business School (Heriot-Watt University). She was interviewed for the Antitrust Magazine Online by John Bodrug, with Natalia Nagach serving as interpreter, on March 30, 2023.

ANTITRUST MAGAZINE ONLINE: Thank you for taking the time to meet with us today.

We would like to talk about the structure, experience, and challenges of developing and enforcing competition law in the Ukraine. But I feel that I have to begin by acknowledging the ongoing war in the Ukraine and terrible conditions that the Ukrainian people are experiencing and express my hope that the war will end soon and that Ukraine will rebuild quickly.

OLHA PISHCHANSKA: I am also grateful to you for inviting me for an interview, for your interest in Ukraine and in our institution, the Antimonopoly Committee. We are also grateful to your country for its comprehensive support. Ukraine is fighting with all its might and will definitely win this unjust war. I fully share your hopes, as we have all the capabilities and resources to become a valuable player in the international arena after the recovery.

ANTITRUST MAGAZINE ONLINE: Perhaps you could start by summarizing the role and structure of the Antimonopoly Committee of Ukraine.

OLHA PISHCHANSKA: The Antimonopoly Committee of Ukraine was established right after Ukraine's independence. Ukrainian competition law was developed following the example of European legislation, mostly borrowing norms from German competition law. And for some time, it was really effective. However, over the decades, the economy, technology, and markets have gone through several periods of transformation, while Ukrainian competition law, to be honest, has changed only slightly. That is why we have now started to reform it.

Currently, the AMCU's structure is as follows: The core of the body is the AMCU's experts, who are directly involved in investigations and research. They bear the brunt of technical, bureaucratic and analytical work. The second half of the team is made up of the state commissioners of the AMCU, each of whom has equal authority and is responsible for a specific investigation together with a group of experts. The Chair of the AMCU is also a state commissioner.

The AMCU makes its decisions collectively, by voting of the state commissioners, each of whom is fully independent. They have equal rights and powers. During the voting process, the Chair of the AMCU performs only administrative functions, and her vote is considered on an equal level with the votes of her colleagues.

The ACMU has six territorial offices, each of which is responsible for certain regions of Ukraine. Territorial offices are separate legal entities, but they are subordinated to the Antimonopoly Committee. Previously, there were more than two dozen offices in each major city. But thanks to digitalization, there is no longer a need for such a large number of offices, and their number has been reduced to six. As a result, the level of bureaucracy has decreased and the efficiency of the branches has significantly increased.

ANTITRUST MAGAZINE ONLINE: I was surprised to see the scope of jurisdiction of the AMCU that extends not only to competition matters, plus misleading advertising, which may not be surprising, but also state aid and the public procurement field. I can imagine it would be challenging to deal with that broad a scope of responsibilities.

OLHA PISHCHANSKA: Yes, this is indeed a challenge for the Antimonopoly Committee of Ukraine. But we are managing well, constantly analyzing the entire process and improving it as much as possible. For example, we have recently reformed the public procurement appeal body. Now we have a separate team of commissioners who will deal exclusively with this area. The state commissioners previously involved in reviewing procurement complaints will focus on the AMCU's cases. This is a very important step, because before the war, the AMCU received thousands of complaints every year. For example, in 2021, there were about 14 thousand of them.

Similarly, the institution of state aid is a relatively new tool of the AMCU and a new approach to controlling the use of public funds in Ukraine. Over the past two years, we have made a real breakthrough in understanding and compliance with this legislation by aid providers. But it was not easy. This process can probably be compared to the five stages of acceptance of the inevitable in psychology. We went through them all. Because providers are used to using public funds at their own discretion, without a detailed calculation of the consequences. But we have to be sure that all public resources are spent without harming competition.

Our foreign partners also help us to cope with this workload and improve efficiency at the same time. For example, the EU SESAR Project helps us with state aid. We are also actively cooperating with the U.S. Federal Trade Commission and the European Twinning Program to improve competition law and share experience.

In general, we are actively discussing how the AMCU could prioritize its tasks and cases, how it could improve its structure. This is not to say that some of our functions are not needed. On the contrary, all of them are necessary to protect competition and develop markets in Ukraine.

[O]ur main function is to support and control fair competition in the markets.

We are looking for ways to fulfil our obligations efficiently, given the always limited resources, both human and financial. However, our main function is to support and control fair competition in the markets. This is what we would like to focus on more.

Priorities are one of the topics we are currently considering and striving to improve as part of the antitrust law reform. It involves three stages, and we are currently only at the first stage. At the same time, we hope to actively cooperate with the FTC/USAID project throughout the reform. This will allow us to use the best practical experience of American experts. It has already been tested by time, considers many nuances, and it helps us a lot.

ANTITRUST MAGAZINE ONLINE: I also found it surprising that the AMCU has an obligation to investigate and report on every complaint that it receives, which I can imagine makes it harder to prioritize, although I suppose that makes it a more open and public process.

OLHA PISHCHANSKA: Yes, you are right. In the current circumstances, it is difficult but necessary. We are open to all undertakings and citizens of Ukraine, and we respond to every request and application.

Ukrainian courts do not have the authority to independently establish a violation of competition rules at the request of undertakings. This is possible only after the AMCU has established, for example, the fact of abuse of a monopoly position. Only after that can damages be claimed in court.

For a general understanding of our workload: as of March 2023, 1,433 cases are under consideration by the AMCU's bodies.

As I have already mentioned, our competition authority does have limited resources, which is why we are now studying the capabilities and experience of our colleagues in prioritizing our work.

ANTITRUST MAGAZINE ONLINE: On top of everything else, I see that you are busy with market studies, and I noted that the 2013 United Nations' Peer Review of Ukraine's Competition Law and Policy said that, in 2012, the AMCU reviewed over 2000 regulations, decisions, and draft decisions of public authorities. That seems to be another very busy area for the AMCU.

OLHA PISHCHANSKA: Since then, the situation has changed a bit. The number of regulations has decreased, but they have become more complex. For example, in 2021, we reviewed and processed 1,243 draft legislative and other regulatory acts, draft decisions of local governments, etc. This is a heavy workload for our experts. However, we actively involve our territorial offices in this work, so despite all the difficulties, the AMCU properly fulfills its tasks.

As for research, given the significant labour intensity of this process, we strive to focus our resources on those that have a significant impact on the economy and pose risks to competition.

ANTITRUST MAGAZINE ONLINE: That fits well into talking a little bit about the historical context. Ukraine is still working to emerge from the Soviet era in moving from government ownership to privatization, but it still has very concentrated industries. Are there still some factors that are making it challenging to make that transition to a more modern competition law regime?

OLHA PISHCHANSKA: Thank you for this question. Given today's realities, it is now one of the most important for the competition authority of Ukraine. I would personally consider it also in a historical context, for example, where we are talking about highly concentrated markets. The difficult question we are looking for an answer to is how did we get to the point where large companies that once belonged to the state became the property of five or six private owners? And how did it end up, why was it allowed that these five or six owners gained great market power? Another typical situation is that there were a certain number of independent undertakings operating in the market, but over a certain period of time this market became highly concentrated.

There are many such examples in Ukraine's economic history. We analyze them to prevent these situations from happening again, because we see that these risks have been exacerbated by the war. Some markets suffered heavy losses due to rocket attacks, Russian occupation, etc. We are now working to understand how we can increase competition in these markets in the future. By the way, in this context, we are currently studying the experience of our colleagues from the United Kingdom in applying the market investigation tool.

To summarize, I would say that the market power of some large companies is still there, but we also do not rule out that it will become even greater in some markets due to the war.

ANTITRUST MAGAZINE ONLINE: I understand that initially the AMCU's focus was on the Law on the Protection of Economic Competition, focusing on monopolies, abuse of dominance, and excessive pricing, and it sounds like that might continue to be a focus in light of the factors you just described.

Even before the war, we paid a lot of attention to markets that showed signs of monopolization. Our task now is to prevent these processes from intensifying,

OLHA PISHCHANSKA: Even before the war, we paid a lot of attention to markets that showed signs of monopolization. Our task now is to prevent these processes from intensifying, to reduce the negative impact of the dominant position of undertakings and to anticipate possible problem situations.

We also react strongly to signs of cartels. After all, they can also have a negative impact on markets, in particular, making them, perhaps not monopolized, but more concentrated.

ANTITRUST MAGAZINE ONLINE: I presume that you will also be emphasizing cartel laws and, in particular, focus on bid-rigging laws in anticipation of rebuilding and trying to ensure that businesses or persons who participate in those processes are well aware of the laws in that area.

OLHA PISHCHANSKA: During the war, the public sector has become one of the largest players in the economy, and the volume of public procurement is now very high. Consequently, violations in this area can dramatically change markets and destroy the already fragile economic balance. Therefore, exposing bid rigging is one of our most important tasks. We have extensive experience in this area and many of our decisions in such cases have been upheld by Ukrainian courts.

At the same time, we are working with our international colleagues to improve our tools for detecting violations in this area. We are looking for cooperation with vendors that make the relevant software, discussing new tools that could be used in procurement collusion investigations. This is a topical issue, as undertakings that violate public procurement legislation are becoming smarter and more inventive in their approaches and ways to conceal violations and avoid responsibility. That is why we need to be one step ahead of them.

ANTITRUST MAGAZINE ONLINE: You mentioned that state-owned enterprises still represent a large part of the economy. Does the AMCU have authority to oversee any anticompetitive conduct by State-owned enterprises, or is that outside of your scope?

OLHA PISHCHANSKA: Yes, of course, we have such authority. When making decisions in an investigation, we do not consider whether the company is owned by a private individual or the state. They are equal for us. Therefore, if we find signs of a violation, we analyse the situation equally with respect to all defendants, investigate the case and make a decision. In addition to a fine, we can also impose obligations on the undertaking to cease the violation or eliminate the negative consequences. At the same time, the imposition of certain obligations should not interfere with the freedom of economic activity.

ANTITRUST MAGAZINE ONLINE: Conversely, on the private sector side, I think you mentioned difficulties in figuring out who owns what. I read about something called an Anti-Oligarch Bill that is requiring registration of ownership. Is that helping, or do you expect that to help?

OLHA PISHCHANSKA: The purpose of this new law was to reduce the influence of the so-called oligarchs on the markets, the economy of Ukraine, and our social life. After all, the purpose of such influence is to obtain excessive profits. If we are talking about the AMCU, our main function to

counteract this has remained unchanged—to control competition in the markets to prevent abuse of monopoly power. Based on our specialized legislation, we already have certain tools to counteract these practices.

At the same time, such cases often violate not only the legislation on protection of economic competition, but also other laws. Therefore, all authorities must work systematically to counter these violations.

ANTITRUST MAGAZINE ONLINE: Do you think that you have had enough enforcement and actual penalties to be establishing a competition compliance culture in Ukraine, or is that continuing to be a challenge? I know from earlier days in Canada when we adopted a more meaningful competition law in the 1980s, it took some time for business people to take it seriously. Is the Ukraine competition law evolving to the point where businesses in Ukraine feel there is a meaningful law with teeth to it?

OLHA PISHCHANSKA: Now all our actions are aimed at achieving the ideal situation when the vast majority of companies will comply with laws and regulations. For example, as I have already mentioned, we have launched a reform of the antimonopoly legislation, which should strengthen the AMCU's ability to detect violations and minimize the opportunities for violators to avoid liability. Also, certain contradictions in the legislation need to be resolved, so compliance with the rules is not perfect in all areas.

But lately, we have noticed that some undertakings have started analyzing our practice to calculate the consequences of their actions, what the AMCU's decision may be regarding certain actions, what the fine for violations may be, etc.

In my opinion, this is because in recent years we have made many decisions in quite complex cases against really large and strong market players, imposing significant liability measures, in particular, in cases of bid rigging. Many of our decisions are upheld by the courts, so large undertakings are increasingly "looking back" at the AMCU and weighing their every move. This is exactly as it should be in the civilized world.

In other words, now undertakings feel the consequences of our decisions physically and take the Antimonopoly Committee and its position into account. But this is only a starting point for us. We urgently need to develop and implement new investigation tools. There is also a significant need to improve the knowledge of our experts. We are on the right track, but this is just the beginning.

ANTITRUST MAGAZINE ONLINE: I earlier noted the high volume of cases you've dealt with, but I have also noted there were some very big ones as well. Do you want to highlight one or two of the most significant cases? I noticed there are some in the cigarette industry and in the gas sector.

OLHA PISHCHANSKA: Yes, I would probably include tobacco cases in the list of the most difficult ones. First, we spent a long time analysing the situation in these markets. And then we started several cases. We are most proud of the case in which the decision was delivered in 2016. It concerned abuse of dominance by Tedis, a distributor in the cigarette market. The company paid over 300 million Ukrainian hryvnia in fines to the AMCU, a huge sum at the time. But the AMCU's work did not stop there, because we monitored the implementation of our decision and found that it was not fully implemented. For this, Tedis was brought to justice again. We are now defending this case in the courts. There was another case that concerned all manufacturers and distributors associated with Tedis and the anticompetitive concerted actions they jointly committed. Unfortunately, our decision here was not upheld by the court. The main conclusion of the courts was that

it was impossible to use another decision as evidence, and this issue had not been raised in court before. We have drawn conclusions for the future on how to prove a violation in a similar situation.

If companies are planning to conduct any concerted actions, they have a statutory opportunity to obtain the AMCU's position on their plans in advance.

ANTITRUST MAGAZINE ONLINE: In the area of cartels, I have read that parallel conduct may be presumed to be an agreement in some contexts. Does that make it difficult for Ukrainian businesses to know where the line is between an agreement which is an offense and parallel conduct which is not?

OLHA PISHCHANSKA: If companies are planning to conduct any concerted actions, they have a statutory opportunity to obtain the AMCU's position on their plans in advance. They can submit an application to us and set out all the details of future cooperation. And we will inform them whether they can do so or not.

Determining the line between the agreement and merely parallel behaviour is a key topic of our investigations. The main thing here is to carry out a thorough analysis and clearly establish the consequences of these actions, the extent of each company's participation, and whether their behaviour was truly anticompetitive. If we see that their actions limit the opportunities of other market participants who are not involved in these events, then, of course, the necessary decisions will be made.

ANTITRUST MAGAZINE ONLINE: Is that a frequent exercise? Does the AMCU frequently issue authorizations for concerted practices, or is that a relatively rare occurrence?

OLHA PISHCHANSKA: I would say that these are very ad hoc situations, but they do not happen often. By the way, when we receive an application for concerted actions, we also ask for the opinion of other market participants on how these actions will affect their interests and economic activities. Of course, we take this information into account.

ANTITRUST MAGAZINE ONLINE: I noted that the merger notification regime was suspended in February of 2022 and reinstated in June of 2022. I also understand that there have been issues about whether the merger notification thresholds were too low, especially in capturing foreign-based transactions. Could you comment on the current status of and the thresholds in the merger regime?

OLHA PISHCHANSKA: The suspension of the review of merger notifications was solely for security reasons at the beginning of the large-scale Russian invasion. At that time, all confidential information about undertakings was stored directly at the Antimonopoly Committee of Ukraine in Kyiv. We ensured the complete safety of these documents, but for some time restrictive security measures were in place to access the central office premises.

However, we had to ensure the rights of the parties to the merger and consider their notifications. To this end, we decided to extend the deadlines for reviewing such notifications and granted the right to merger participants to submit them in a simplified form. I would like to emphasize that we did not change the thresholds and are now complying with the current legislation.

We followed the simplified procedure to make sure that the merger does not take place without prior approval of the Antimonopoly Committee of Ukraine. Now the situation has become safer, so we have continued our in-depth and comprehensive analysis of the notifications.

As of today, all merger notifications received during this period and renewed by the applicants have been responded to. Only a few notifications were withdrawn by the companies themselves.

By the way, we also provided the parties to the merger with the opportunity to amend or suspend the notifications submitted during this period.

ANTITRUST MAGAZINE ONLINE: I noted that in the context of mergers the Cabinet of Ministers has the authority to authorize mergers that might otherwise be a problem under the competition law. Is that a power that is used frequently or rarely or at all?

OLHA PISHCHANSKA: The Cabinet of Ministers of Ukraine does have this authority. If the Antimonopoly Committee of Ukraine prohibits a merger, the government can indeed authorize it if the positive effect on the public interest of the merger outweighs the negative effects on competition. But we have not yet had such a situation.

ANTITRUST MAGAZINE ONLINE: Let's switch to the international context. You talked about cooperation with the U.S. FTC, but apart from that, when you are conducting general enforcement activities, do you have regular cooperation and information sharing with other authorities like the EU or the U.S. agencies?

OLHA PISHCHANSKA: I would say that our contacts with foreign partners have become an integral part of our work routine. We constantly exchange with our foreign colleagues the experience of law enforcement and working with various investigation tools, etc. Regarding the exchange of information, I would like to emphasize that we exchange only non-confidential information, because the exchange of confidential information is possible only if there is an agreement between the two countries. By the way, we are planning to sign a Memorandum of Regional Cooperation with nine competition authorities from Central and Eastern Europe soon. This is a large joint platform through which we plan to implement important projects of various levels, including personnel development and exchange of experience and information.

As I have already mentioned, over the past three years we have been actively and quite fruitfully cooperating with the FTC/USAID program and the European Union Twinning project. As of now, these contacts have moved to the expert level. We are in contact with our European colleagues almost daily, in particular, on state aid issues. After all, Ukraine does not yet have all the necessary regulations for the full-fledged work of this institution, and if necessary, we use European legislation. Our colleagues from the EU also provide us with consultations and advice on the implementation of European rules.

We also conducted a study of the electricity market in Ukraine together with the OECD before the war started. As you can guess, the war has made its own adjustments to it, so the study can be divided into two parts—before and after February 24. The report is currently being finalized, and we hope to present it in June 2023.

ANTITRUST MAGAZINE ONLINE: We've talked a lot about the development of and the goals and aspirations for the competition law, but a law is implemented by people, and the war has obviously created a very difficult situation for the people at the AMCU. I wonder if you could tell us a little bit about how some of the people are doing and how the institution is faring during this very difficult time.

OLHA PISHCHANSKA: We are working, we did not stop working for a day during the large-scale invasion. Of course, at the beginning of the war, people's emotional state was difficult, especially for those who have children, whose loved ones were under occupation or at the front. But we

quickly regained our team spirit and focused on our work, on the functions of the body. This helped to restore the previous pace of work, and in some places to speed up certain processes. However, I must admit that we are currently experiencing a certain shortage of staff at the Antimonopoly Committee. Unfortunately, there are too few of us. We lack staff, we lack experts.

The implementation of the competition reform will make possible, among other things, to provide specialists with competitive salaries and modern technical support. So, I hope we will be able to strengthen our team in the future.

I would like to emphasize that I am already extremely proud of our people. Despite all the challenges, they have been working hard, delivering high-quality, efficient results, and are ready to learn, improve and adopt new experiences. And of course, we need the support of international experts.

By the way, I would like to thank European countries and colleagues from other countries for their humanitarian initiatives. At the beginning of the war, many of our employees had to go abroad for security reasons. Thanks to the assistance of our foreign partners, these experts were able to combine their temporary stay there with training and exchange of experience. They returned to Ukraine with a wealth of new knowledge and are now implementing this experience at the AMCU.

ANTITRUST MAGAZINE ONLINE: Is there anything that you would like to address that we haven't covered today?

OLHA PISHCHANSKA: First of all, I would like to say that I am extremely grateful to all Ukrainians, and in particular to business representatives, for their resilience, perseverance, and belief in victory. I would also like to express special gratitude to all our international partners for their support of Ukraine. This makes us feel that we are not fighting this war alone, but together with you.

In particular, with regard to our competition authority, we are all fully aware of the enormous responsibility that the AMCU will have during the post-war recovery period. After all, one of our main tasks will be not just to create acceptable conditions for undertakings. Our main goal, the highest goal, is to create a completely new, modern and competitive economic model. Not to rebuild the one of the post-Soviet era with the oligarchs in power. We will have a chance and we must use it to create an economy where fair competition will develop, where undertakings will have many opportunities for development. We need an economy that will work for the benefit of the entire society, because after the war, Ukraine will face a difficult and important period of restoring human potential.

We need an economy that will work for the benefit of the entire society, because after the war, Ukraine will face a difficult and important period of restoring human potential.

No other country of our time has faced such a tragedy and losses as Ukraine is experiencing now. We understand that cooperation in such conditions is a new experience not only for us, but for the whole world. An experience that I hope will never be needed again. But we support each other, we fight together, and together we will win. ●

Interview with Laura Melusine Baudenbacher, President, and Patrik Ducrey, Director of the Secretariat, Swiss Competition Commission

Laura Melusine Baudenbacher, is the President of the Swiss Competition Commission (ComCo) since January 1, 2023. She studied law at the University of Berne and earned her Ph.D from the University of Zurich. She clerked for the president of the Swiss Federal Administrative Court, and practiced with two international law firms before co-founding Baudenbacher Kvernberg, the first Swiss-Norwegian business law firm, where she continues to practice in addition to her duties at ComCo. Patrik Ducrey has been Director of the Secretariat of the Swiss Competition Commission (ComCo) since 2018. Prior to that, he was the Vice-Director and a Deputy Director, respectively since 1997. He is a titular professor for Swiss and European competition law at the University of Berne. They were interviewed for the Antitrust Magazine Online by Andreas Reindl on March 31, 2023.

ANTITRUST MAGAZINE ONLINE: Thank you very much for taking the time to talk with us about the Swiss competition law and Swiss competition law institutions. Perhaps you could first explain the organization, how the competition authority is set up, and why we have two interviewees with us today.

LAURA MELUSINE BAUDENBACHER: We have "two souls in one body," so to speak, in our authority. We have the professional, full-time Secretariat, of which Patrik is the Director, and they are the people who investigate the cases and prepare the decisions. They do the dawn raids, they are the ones who speak to the parties, receive all the briefs, analyze the evidence, and just generally handle the case.

Once that is done, they submit a proposal for a decision to the Commission. The Commission consists of twelve individuals, of whom seven are independent and five are representatives of the large trade associations in Switzerland. These twelve members, all of us, are a part-time Commission. I have a 50 percent role and the rest of the members a bit less.

The background of this approach is very Swiss. We generally do not have fully professional bodies, so even our Federal Parliament is a part-time Parliament. The idea behind this is that we want our authorities to have real-life experience, to have close ties to the people, to the economy, and to companies, and that decision-makers should not be issuing orders from an ivory tower. That is why in many areas we have this so-called "militia system", where individuals dedicate time aside from their regular job in private practice or academia to serve part-time in a public authority. To ensure that we do not have conflicts of interests, we have mechanisms in place to be transparent about that.

PATRIK DUCREY: The Swiss approach is indeed a bit special, as Laura mentioned, because of this militia system that I believe is quite unique in the world. It also leads to a separation between the investigation and decision-making process.

At the start of a case, the President of the Commission is involved in the opening of the proceedings because she has to sign the order initiating the investigation, but from there the Secretariat leads the investigation.

At the start of a case, the President of the Commission is involved in the opening of the proceedings because she has to sign the order initiating the investigation, but from there the Secretariat leads the investigation. At the end, we submit our proposal for a ruling to the Commission, which ultimately decides. So we have a separation between investigative and decision-making body already at first instance.

LAURA MELUSINE BAUDENBACHER: A type of checks and balances.

PATRIK DUCREY: Yes, checks and balances, and it works very well. We have a very good track record before the courts.

ANTITRUST MAGAZINE ONLINE: I want to follow up on this. Clearly the idea behind separating investigation and decision making is a good one. Other competition authorities sometimes are under criticism for combining too much of everything in one and the same body. But I understand that questions have been raised in Switzerland: Is the system really effective? Is the Commission sufficiently independent? Are there concerns from the business side or private practice? Are they justified? Are there ways you can think of improvements with the investigations or the thinking?

PATRIK DUCREY: Some lawyers and companies have concerns as to the length of proceedings. While we strive to do what we can on our end to accelerate cases, we are also very aware of respecting parties' procedural rights, which may in some cases drag out matters. However, I note that both our Supreme Court in particular as well as the European Court of Human Rights in general have deemed our system of enforcement of antitrust law to be in line with the rule of law.

While ideas may be floating around about changing or "improving" our system, we would first have to analyze whether there are points to improve, whether it is necessary to improve them, or whether it would just be nice to have.

LAURA MELUSINE BAUDENBACHER: I agree 100 percent with Patrik. Of course, you can always discuss whether there is a need to change something or where there are areas that you could improve, but again you would have to really look at whether there are such grave issues as are sometimes alleged.

Something that is perhaps not considered is when you start tinkering with a system that is well-established, it is hard to see what consequences could arise on the enforcement side. If you start playing with that system, you will need to be really sure that it does not weaken enforcement.

This is the debate we are currently having in Switzerland where, on one hand, there are a lot of claims without much basis that something should be changed and, on the other hand, we have a great track record before the courts. We typically win our cases.

As Patrik said, in 2011 there was a Europe-wide debate on whether the model that exists in most European countries, the administrative enforcement model—where, as you know, one body investigates, decides, and sanctions—is in line with the European Human Rights Convention, particularly Article 6 which guarantees a fair trial. In the famous *Menarini* decision, the European Court of Human Rights ruled that as long as at least one independent and impartial court of law reviews the decisions of an antitrust body on all points of fact and law, the right to a fair trial under Article 6 of the Human Rights Convention is respected.

We have two courts above us that you can appeal to, one on facts and law, and the Supreme Court on law. The Federal Administrative Court, which is the first-instance court, is decidedly

detailed in its analysis. It does not shy away from re-reviewing the facts and coming to a different conclusion, at times even striking down our decision or elevating the sanctions. They can certainly be described as being hands-on.

ANTITRUST MAGAZINE ONLINE: Let's talk quickly about ComCo. Clearly it is a competition authority. Are there other tasks beyond competition law enforcement that are within your remit?

LAURA MELUSINE BAUDENBACHER: Yes, the Internal Markets Act, because surprisingly we are a small country of 8.7 million citizens where internal market issues remain a thing. It is still sometimes a challenge to go from one state, or canton as they are called, to the next to be able to practice your job there. There are still unlawful barriers in place to practice in a job that you have learned in one state in another state. For example, one of our cases concerns a midwife trained in one state who has faced unreasonable barriers to entry to work in another state. This would be like moving from Washington D.C. to Virginia or Maryland and having to re-certify—at your own cost—that you are trained to practice as the certified professional that you already are. This is also part of our work.

PATRIK DUCREY: To add to that, we do not have any other tasks like unfair competition, consumer protection, or data protection, so we can really focus on the application of antitrust law.

ANTITRUST MAGAZINE ONLINE: Laura, you are a recent arrival at the Competition Commission. When you arrived, what were your thoughts?

LAURA MELUSINE BAUDENBACHER: My approach has from the start been to first understand the authority, get to know the people, and understand how it all functions. I never thought that I could come in and think I could improve things. First you have to figure out how well things are working.

I have to say that particularly the Secretariat is an extremely professional body. The team is very hard working, we have superb lawyers and economists who deliver top-notch work, and the drafts I have received so far have been of the highest quality. And on a personal level, it is a true pleasure to work with them, they are just really great people to be around. I have worked in various places on different sides of the bar, and I can confidently say that I have rarely met a better and kinder team of antitrust lawyers and economists to work with.

ANTITRUST MAGAZINE ONLINE: From your previous experience—and I know you have been in private practice also—do you see any particular experiences that you think you can bring to your new job, where you perhaps have a new perspective and have new ideas?

LAURA MELUSINE BAUDENBACHER: I hope I can perhaps bring a little bit of the international experience to the table. Again, we are twelve members in the Commission, so we have a very diverse set of opinions, and I hope my experience can add another piece in the mosaic to those discussions.

ANTITRUST MAGAZINE ONLINE: Patrik, you are the opposite. Laura is very new. You have a lot of experience with the authority. You have been with the authority in various positions for quite some time.

PATRIK DUCREY: About twenty-six years.

ANTITRUST MAGAZINE ONLINE: What do you see as the main things that have changed? What was the main development over these years in the way the authority works, the people work, and the qualifications of people?

PATRIK DUCREY: The law was fundamentally changed in 1995, modernized, so to speak. Since then, Swiss antitrust enforcement is focused on the trinity of antitrust law: anticompetitive agreements, abuses of dominant positions, and merger control. At the time, the authority started from scratch, so to speak. We had new personnel, we had a new law, everything was new. It took perhaps ten to fifteen years to have a sufficient amount of case law to develop a standing practice on our side.

In 2008 and 2009, we coordinated an external evaluation of our work where everything was on the table—our enforcement track record on anticompetitive agreements, abuses of dominance, and merger control, the duration of our proceedings, the structure of our authority, and the collaboration between the Secretariat and the Commission. Overall, the assessment was highly satisfactory. We have therefore continued on our path—which has repeatedly been confirmed by the highest courts of the country. We have also considerably benefitted from international networks of antitrust enforcement. Aside from the ABA, which is obviously a great place to learn from professionals from around the world, we participate in the the ECA (European Competition Authorities), the annual meetings of the UNCTAD Competition Committee, the OECD Competition Committee, the DACH-Competition Group, and the ICN (International Competition Network). This has allowed us to learn from more experienced authorities, to improve our investigative tools and our procedures, and has ultimately led to an authority that is highly professional today.

I always say to my colleagues who are on the other side, on the lawyers' side, "If you would be as professional as we are, you would also sometimes win a case before a court."

The Secretariat of ComCo has really done its homework in the past years, and has developed into an enforcer to reckon with.

LAURA MELUSINE BAUDENBACHER: Patrik is so right about that. The Secretariat of ComCo has really done its homework in the past years, and has developed into an enforcer to reckon with.

PATRIK DUCREY: We try to improve our proceedings on a continuous basis. To take an example, initially some cases were successfully challenged before the courts on procedural grounds, leading us to go over our books. In the meantime, we have professionalized and streamlined proceedings to a degree that we rarely lose a case on this.

On the other hand, an important value of our authority is transparency. We try to be as open as possible towards the public on our activities. On our website, you can find every decision we have ever taken, including references to any relevant rulings of the appeal courts; information on cases we have opened or closed; as well as guidelines on the interpretation of the most important statutory norms. We are also always open to discussing possible antitrust concerns of cooperation agreements or distribution agreements in an informal way.

ANTITRUST MAGAZINE ONLINE: There are authorities that are constructed in a similar way, so you have to hire civil servants and on top of it a Commission, sometimes a political person. For a person in your position sometimes you have to navigate a little bit between what in your case the Commission expects, sort of the higher decision-making body, and what your staff expects. Has that been an issue that you have seen, that sometimes you need to serve two interests or you need to balance interests?

PATRIK DUCREY: Not at all. We have a very good working relationship with the Presidency, which consists, aside from the President, of two Vice Presidents—one economist and one lawyer. We regularly have discussions on our policy, the focus of our investigations, and which sectors to consider. While we certainly have intense debates, we enjoy a close relationship between the heads of the Commission and the head of the Secretariat and we act as one authority.

ANTITRUST MAGAZINE ONLINE: Let's start with the big picture before we dive into more specific competition law issues. Switzerland is in a very unique position within Europe. It is a highly integrated economy, extraordinarily international, yet you are not in the European Union, you are not in the European Economic Area, and certain cooperation mechanisms that exist within the European Union are not directly available to you. How does this very peculiar position within Europe affect competition law enforcement? Do you find yourself fully integrated? Are there things that you do in Switzerland a little differently than in the neighboring countries because of the particular position you are in?

LAURA MELUSINE BAUDENBACHER: I would say generally competition law is a very international field, not just European but also worldwide. As mentioned by Patrik, we have definitely benefitted substantially from international forums, not just places like the ABA, but also networks such as the European Competition Authorities where Switzerland—alongside the fellow non-EU and/or EEA members UK, Iceland, Lichtenstein, and Norway—can learn from DG Competition and other European authorities. There are also the International Competition Network meetings, there is OECD, UNCTAD, and DACH. There are a lot of exchanges between antitrust authorities.

It goes back to the point that Patrik just made. I think we are more connected to international developments through these networks than people on the other side of the bar are, and they perhaps are not always aware of the newest best practices and developments because the legal market tends to be a bit foreclosed in Switzerland.

Something that has surprisingly been met with little awareness—also internationally—is that in 2012 we concluded a cooperation agreement with the European Union that enables us to enforce antitrust law more effectively in cross-border situations. The same type of agreement has recently been concluded with Germany, and there are discussions to also extend it to Austria. These agreements enable us to cooperate efficiently with the antitrust authorities of Germany and the European Union, to exchange information, to coordinate investigations, dawn raids, and so on. So I am not sure that our non-EU/EEA membership negatively impacts enforcement at all.

PATRIK DUCREY: The legislature decided in 1995 to draw up the new law in line with European competition law, so we have more or less the same rules, and our decisions and jurisdiction are really in line, with a few exceptions, with European competition law.

Even though we are not a Member of the European Union and are not a member of the European Competition Network, we have, as Laura mentioned, a cooperation agreement with the European Union. This is of paramount importance. We are like an external member of the ECN via the cooperation with the European Commission, and this is a very fruitful cooperation agreement.

ANTITRUST MAGAZINE ONLINE: You did mention there were a few exceptions now. Because of your position, are there "Swiss elements" in your competition law?

LAURA MELUSINE BAUDENBACHER: To put it very simply, anything that would be aimed at foreclosing the market would obviously be a problem, but that is not much different from other jurisdictions. There is nothing very exotic that would be different.

PATRIK DUCREY: Indeed, there are no fundamental differences between our system and the one in the EU. There is one area which some have described as a "Swiss finish".

Switzerland is still a "high-price island," so we act against agreements or behavior that forecloses Switzerland from international markets. Consequently, indirect parallel import restrictions aimed at foreclosing the Swiss market are considered anti-competitive. Some may say this is a Swiss peculiarity that would not be in the center of the European Commission's practice, but it is unclear how this would be handled in the EU. As far as we are aware, the European Commission has not yet had a comparable case, but it would be surprising should it accept a foreclosure of EU markets through indirect parallel import restrictions.

LAURA MELUSINE BAUDENBACHER: Perhaps one thing which is a bit peculiar—or a type of "Swiss finish"—is the statutory possibility to justify anti-competitive agreements based on efficiency-grounds which are considered as hard-core agreements in the EU for which a justification is per se ruled out. In that sense, we are—at least on paper—more generous than the European Union. Whether it will be successful is another question, but there is no automatic ban where certain clauses are per se prohibited.

ANTITRUST MAGAZINE ONLINE: For me this sounds very European Union. There is always the possibility of bringing efficiency justifications when we practice, but it is very difficult.

PATRIK DUCREY: It is rarely successful, but as Laura said, this option exists in theory and we do hear parties on this point. The EU Commission would not even do that.

ANTITRUST MAGAZINE ONLINE: But you raised a great topic now, the question of market integration and encouraging imports. As I understand it, there are in principle two tools: competition law, but you also have this regulatory regime trying to create a *Cassis de Dijon*-type rule that allows the marketing of products that have already been put on the market in the European Union, so this is not directly within your powers to implement the law. From your experience do you see that this type of law that tries also to encourage imports has an effect on the market? Has it changed things?

PATRIK DUCREY: Not really. There have been studies to measure the effect of these regulations of the *Cassis de Dijon*-type in Switzerland, and the studies showed no effect because the markets were already open.

ANTITRUST MAGAZINE ONLINE: On the competition law side you mentioned you have cases that try to prosecute arrangements that make imports more difficult. Is it your impression that there is awareness, that the degree of compliance has increased, that companies are more careful?

LAURA MELUSINE BAUDENBACHER: Yes, certainly since the *Elmex* and *BMW* decisions. Short background: Both cases concerned parallel import bans, one from Austria and one from the European Union, into Switzerland on toothpaste and cars. Toothpaste was the first one, not as sexy and not as expensive a product, so perhaps not registered as widely. But then came BMW, which

concerned products purchased by consumers, businesses, and public buyers. The fine was also one of the highest issued up until that point, nearly 160 million Swiss francs (about USD 180 million).

I think that drew a lot of attention in circles outside of Switzerland, and that is where I think practitioners outside of Switzerland realized: "Oh, there could be an issue. Switzerland is no longer this nice place where you can just foreclose as you wish. You will face consequences." I think that has definitely had an impact.

PATRIK DUCREY: *BMW* was a very important decision, so everybody took notice of this case and of the sanction of 156 million Swiss francs. For us it was a very important case to show that it is not possible to foreclose the Swiss market from European markets with vertical agreements, that we do not accept this.

Even if the companies are located in European countries, for us that is not a problem. We try to also involve them in the procedure. Normally they mandate a lawyer in Switzerland, so in fact this is not a problem.

LAURA MELUSINE BAUDENBACHER: Full disclosure at this point: I was back in the day involved in both the toothpaste case and the *BMW* judgment as a clerk at the Federal Administrative Court.

ANTITRUST MAGAZINE ONLINE: For both regimes that we just discussed, the regulatory regime and the very strict competition law enforcement, the driver is the idea that with more imports you can put pressure on prices.

LAURA MELUSINE BAUDENBACHER: Imports from low-price countries, that is the idea, yes.

ANTITRUST MAGAZINE ONLINE: At least from a Swiss perception every country around you is lower priced than Switzerland. [Laughter]

Is there any perception that this actually makes a difference? This is inherently very difficult to study, but does that make a difference or are there still other factors that perhaps explain the pricing structure?

PATRIK DUCREY: It is very difficult to say. We have our decisions, we try to open markets; but, on the other hand, the euro fell against the Swiss franc to a level that has never been reached before. We began 2010 with the euro being at 1.6 Swiss francs and at the end of 2010 it was at one franc. For Swiss customers, products in the European Union, especially in Germany, have become much cheaper than before without any change in the law and without any decisions of the Competition Commission. It has just been a fact.

But now with inflation we see prices in Germany and in other European countries have increased much more than in Switzerland, so this price difference is now being reduced also by an external effect. It is not a decision or the practice of the Competition Commission.

LAURA MELUSINE BAUDENBACHER: It is a very valid question because if you go back to the legislative materials regarding the first modern Cartel Act of 1995 and the revision of 2003, this is a recurring theme: How do we bring down prices in Switzerland?

Patrik mentioned that Switzerland is a "high-price island"—that is the term that is used—a little island in the sea of cheap consumer price countries.

Two years ago, in 2021, a revision was passed to the Cartel Act following a consumer-led initiative called the "Fair Price Initiative". It was based on the same thought and introduced the concept of relative market power. One goal was to aid smaller buyers or smaller companies in Switzerland who are faced by a large supplier who is not necessarily dominant per se on the relevant Swiss market, but in this relationship enjoys a relatively dominant position. This was also passed with the idea to enable companies in Switzerland to ask for the prices for that product from Germany, France, Italy, or Austria rather than the Swiss prices.

ANTITRUST MAGAZINE ONLINE: Have you any enforcement experience already with this?

LAURA MELUSINE BAUDENBACHER: We have two cases pending.

PATRIK DUCREY: We have two investigations that are open, one in the pharmaceutical sector regarding cross-border purchasing to Germany and the other in books regarding cross-border purchasing to France. The two Swiss companies who submitted complaints alleged that they tried to buy these products at lower prices in Germany and France, respectively, and that this was denied. We are now conducting the investigation and we cannot say much more about this at this moment.

ANTITRUST MAGAZINE ONLINE: But at least there is an experiment to see how it works.

Let's stay on the vertical issues. The debate in the EU on restrictions in vertical agreements has been dominated by questions of online sales, digital products, and so on. Enforcement has also focused on various kinds of online sales restrictions. How does this play out in Switzerland?

PATRIK DUCREY: We also have a Communication on Vertical Agreements available on our website, which we amended in December 2022 to introduce the same rules as in the new EU Block Exemption Regulations.

We do our best to create a level-playing field between Switzerland and the EU for market operators. In that sense, Switzerland is in the field of antitrust law quite integrated into the European Union.

We do our best to create a level-playing field between Switzerland and the EU for market operators. In that sense, Switzerland is in the field of antitrust law quite integrated into the European Union.

ANTITRUST MAGAZINE ONLINE: Does this also mean that the less-strict standards that now prevail in the European Union for certain restrictions concerning online sales would then equally apply to Swiss activities?

PATRIK DUCREY: Yes.

ANTITRUST MAGAZINE ONLINE: Patrik, when we talked about high prices you did mention inflationary pressures as a concern that exists across Europe and across the world. For some competition authorities this has become an issue because there is a high political expectation that in the face of not being able to do anything you turn to the competition authority and say, "Do something," without really specifying what it is that competition law or competition law enforcement could really change about inflation. How did this play out for you? Did you face pressure to do something?

PATRIK DUCREY: Not a general pressure. We had some questions from politicians in the energy sector, gas and other energies, but in all the other sectors inflation in Switzerland is much lower than in European countries. We are actually at the level of around 3 percent. In the European

Union, the Euro countries, it is at 10 percent or more. These questions were thus not as pressing in Switzerland as in other countries. We do not feel this pressure as, for example, other competition authorities within Europe are feeling.

ANTITRUST MAGAZINE ONLINE: So you were also not pushed to do investigations or sector inquiries where you know probably from the outset that you will not find anything—you would show activity, but very little result.

PATRIK DUCREY: The only branch was energy, and there we could show that the energy prices in Switzerland followed the international prices. We did not find any indications of collusion or cartels, so we did not see a need to follow-up.

ANTITRUST MAGAZINE ONLINE: This takes us a little bit into a different, although connected, area. Have you tried to use advocacy efforts to find areas where perhaps structural changes in the market could introduce more competition and facilitate consumer choice? Is that part of your role in this area to help markets to work better?

PATRIK DUCREY: Not in recent times. We issued a series of decisions around the year 2008 regarding bid rigging in the construction sector. Subsequently, we started a campaign with the cantons (the States) and the municipalities, with a special focus on public procurement units. We sensitized individuals through providing information and holding training sessions. Thanks to this dual-approach—strict enforcement paired with advocacy-efforts—bid rigging has become very rare in Switzerland. We are still pursuing some cases, but not on the same level as we did ten or fifteen years ago.

LAURA MELUSINE BAUDENBACHER: To add to Patrik's point, thanks to all of these efforts we now have a lot of awareness in public purchasers, and municipalities, and they will actively approach us, so they are aware that this is an issue.

We also—and this is actually pretty cool—developed a screening tool to identify patterns of bid rigging in offers submitted. People in the Secretariat discovered that there are certain patterns, a certain spread, a certain coefficient, and it is an indication that something is off. Creating awareness and providing this tool to public buyers has been essential in strengthening our enforcement activities.

ANTITRUST MAGAZINE ONLINE: It is great to have a conversation on competition law and use the word "cool." I love that.

PATRIK DUCREY: Just to mention this screening tool, some say that it is artificial intelligence. It is not. It is a statistical method to detect indications of whether bid rigging has occurred.

ANTITRUST MAGAZINE ONLINE: It goes back a little bit also to the OECD work in this area.

PATRIK DUCREY: We presented this screening tool on many occasions on the international level, at the OECD and ICN, we presented it also to the Department of Justice and the public procurement units in the United States. It is something that is now quite well-known.

LAURA MELUSINE BAUDENBACHER: I have to add, I am not generally very patriotic, but I have to say I am pretty proud of the Swiss antitrust authority, which has not only come a huge way since 1995 in developing into one of the most respected antitrust authorities in the world. When we started, we did so behind most modern nations and, as you said, we were not a member of any European integration project, so we could not from the start benefit from input from Brussels or Berlin. But the fact that we nevertheless caught up and are now even a bit avant-garde I think is cool, to use the term again.

ANTITRUST MAGAZINE ONLINE: Let's switch topics a little bit into another cool area of competition law: mergers. Internationally within Europe, obviously there have been huge debates about mergers, and it has actually two aspects: (1) there is a lot of thinking about how you can adjust your jurisdiction to catch mergers which perhaps under traditional thresholds are more difficult to reach; and (2) more on the substantive valuation side, do we need new theories of harm to reach potential problems that more traditional theories of harm do not capture?

How have these debates—and I really want to cover both topics—played out so far in Swiss merger control law? Especially also again with the position of Switzerland as a country that is very open and very international.

LAURA MELUSINE BAUDENBACHER: We have multiple very high thresholds for us to become active in the area of merger control.

First, we have very high turnover thresholds. Most practitioners of antitrust law have rarely notified a merger in Switzerland. Even some of the biggest ones in the world are sometimes not notifiable because our thresholds are so high.

It is hardly imaginable that a merger could create anticompetitive issues. The only exception could be stagnant markets, but such would likely be rare and not justify a strict merger control regime.

Once those thresholds are met, for our authority to block a merger there is another again quite strict three-prong test, which is: (1) does the merger create a dominant position; (2) does this dominant position eliminate competition—and "eliminate" is literal; it completely has to eliminate competition, so if there is one little bit of competition flying around somewhere, that is sufficient that this test is not met; and (3) you have to show that this elimination of competition through the dominant position created by the merger is not outweighed by benefits in another market. That is a very high test, which is why rarely become active in merger cases.

That being said, there are now discussions on a political level to introduce the "significant impediment to effective competition" test in Switzerland—we will see whether that will pass—but the status quo is that have very laid-back merger enforcement, and this is politically desired.

If you back into the legislative materials, it is quite interesting from a non-Swiss perspective to read the assessment of why we do not want strong merger control, which in a nutshell is: "It is hardly imaginable that a merger could create anticompetitive issues. The only exception could be stagnant markets, but such would likely be rare and not justify a strict merger control regime. Companies should be able to merge and do business freely. International enforcers were better placed to intervene, and additional enforcement in Switzerland would have little to no impact but just create additional burdens for businesses."

PATRIK DUCREY: While, as mentioned, the proposed amendment foresees to lower the intervention threshold by introducing the SIEC test, like in the European Union, there are no discussions on lowering the notification thresholds. As an authority, we are happy with this approach. We prefer to have fewer cases with a higher possibility to intervene, should this seem necessary.

We must also say that we have some highly concentrated markets in Switzerland, for example the retail or banking sectors. Any mergers in these markets have to be notified with the Swiss competition authority. If you lower the thresholds for notification, then you have many more international mergers, but these international mergers normally do not have an impact on competition in Switzerland. So you would have more notifications and fewer interventions.

ANTITRUST MAGAZINE ONLINE: Because you mentioned there are concentrated markets, these transactions must be notified because the parties are so large that they meet the thresholds or because there are special thresholds for particular markets?

PATRIK DUCREY: Normally they all meet the thresholds. Some have also been found to be dominant on certain markets in previous investigations, in which case a notification obligation typically arises.

ANTITRUST MAGAZINE ONLINE: Creating the link to the European Union, very recently there has been confirmation that even if a merger does not meet the thresholds, competition authorities can use traditional antitrust tools against the abuse of dominant position to prosecute the merger or go after the merger. Is that something you consider would be appropriate in Switzerland despite the political decision not to be too aggressive? Would that work under Swiss competition law?

LAURA MELUSINE BAUDENBACHER: We apply the abuse-of-dominance rules if we find that they are met, not necessarily with a perspective of trying to apply them to enforce merger control because we have quite high thresholds.

On the flip side, even if it becomes more concentrated and we have indications that companies would have a dominant position after a merger, that does give us the possibility to monitor these companies more closely and to ensure that their behavior is in line with the Cartel Act.

ANTITRUST MAGAZINE ONLINE: So intervene on the conduct side rather than on the transaction, the structural side?

LAURA MELUSINE BAUDENBACHER: Yes, you could put it like that.

ANTITRUST MAGAZINE ONLINE: Typically when we talk about mergers, especially in the European context, there are often questions about industrial policy and mergers. You are well aware of the debate in the European Union whether merger control makes industrial policy more difficult or not. It sounds like from your first description that there is a broad consensus in Switzerland that you limit the reach of merger control in part also because you accept the common industrial policy perspective that you accept that mergers happen.

LAURA MELUSINE BAUDENBACHER: Yes.

ANTITRUST MAGAZINE ONLINE: One merger that obviously raised very interesting questions and had a lot of international attention was *Credit Suisse/UBS*. I understand the law allows the parties to merge without Swiss merger control intervention.

LAURA MELUSINE BAUDENBACHER: There is a norm in the Cartel Act that stipulates that when creditors' interests are at risk in a merger situation, the Financial Market Supervisory Authority

FINMA steps into the place of the Competition Commission. They are the ones who are now holding the reins in this. They cleared the merger, and the law foresees that ComCo will submit an opinion on this transaction. But the decision-making power now lies with FINMA and any possible future decisions in relation to that transaction would have to be taken by them.

ANTITRUST MAGAZINE ONLINE: But at least you are involved in a consultative role?

PATRIK DUCREY: Yes.

ANTITRUST MAGAZINE ONLINE: Would that also then involve, for example, focusing on particular local markets where you could then say you are not against the merger but perhaps here is a branch that should be divested, or are you not getting into that type of detailed review?

PATRIK DUCREY: In fact, the merger control procedure will only take place when we get the complete notification from the parties. As Laura said, we are not competent to take a final decision, but we will be heard. The competition analysis of how this merger has an impact on local or regional markets and on which products, et cetera, will be done by us. Then we will give a recommendation to the Financial Market Authority, but in the end this authority will decide.

They will have our analysis, and they will likely have to balance competition considerations with other factors such as financial stability.

As mentioned, even if we should conclude that the new entity is dominant on a particular market and FINMA refrains from taking action, further transactions in this area will be notifiable and the new entity will then also be under closer scrutiny for possible abuses of dominance.

Of course, we expect companies to implement enforcement decisions by European and international enforcers also in Switzerland, and we will actively approach them to ensure this.

ANTITRUST MAGAZINE ONLINE: We have managed to speak for quite a while without talking about the digital economy, which is unusual because frequently this topic seems to be the only topic that is on people's minds.

How is the Swiss involvement in this debate? Are you bringing a case against Google tomorrow, or are you following the debate and trying to understand what is going on, but in more of an observer role?

PATRIK DUCREY: We created many years ago an internal working group that follows international developments in digitalization and competition law.

We also took a general decision to refrain from opening parallel investigations for example against Google when the European Commission is already doing so. We have limited resources and focus on cases that are Swiss-specific.

Of course, we expect companies to implement enforcement decisions by European and international enforcers also in Switzerland, and we will actively approach them to ensure this. In that sense, we are free-riding a bit on the practice of the European Commission and other enforcers.

Through this, the new regulations introduced by the Digital Markets Act and the Digital Services Act will also have an impact in Switzerland, as the companies will typically change their policies for the whole of Europe, also for Switzerland. We expect that many issues currently being discussed on European-level will also be solved in Switzerland.

ANTITRUST MAGAZINE ONLINE: Do you hear complaints? Are you getting pushed by local players, smaller digital players, that have concerns and then turn to you and say, "Do something?"

PATRIK DUCREY: Yes, regularly. But as mentioned, our cases are focused on Switzerland. One case concerned the mobile payment market. Swiss banks have developed a mobile payment solution called TWINT. Initially, this payment solution was overridden on iPhones through Apple Pay.

We intervened with Apple and they changed the suppression code so that now iPhone users in Switzerland can pay with TWINT and Apple Pay—whichever they prefer. That was a Swiss-specific case, and we solved it through a cooperative dialogue with Apple rather than pursuing a lengthy investigation and issuing a decision.

ANTITRUST MAGAZINE ONLINE: Do you see the flip side also? Obviously, the digital debate focuses very much on the very large American platforms, but then when you talk to competition authorities about their regional markets, it turns out that sometimes in regional markets you have very large players in that market that sometimes actually engage exactly in the same behavior that raises big concerns under the DMA or EU antitrust law.

Do you have a similar phenomenon in Switzerland where you have large platformsm that also raise concerns or lead to complaints?

PATRIK DUCREY: Sure. We have several actors in Switzerland that are only active in Switzerland, but within Switzerland they have a large market share, so they are under the control of the Swiss Competition Commission. While, for example, eBay and Amazon do not have online shops in Switzerland, there are other online trading or online retail platforms that keep us busy.

ANTITRUST MAGAZINE ONLINE: Then some of the similar concerns can come up about self-preferencing, data use, and so on.

PATRIK DUCREY: Yes.

LAURA MELUSINE BAUDENBACHER: With the Fair Price Initiative change that we mentioned earlier, a change was also introduced into the Unfair Competition Act, “UWG” in German, which prohibits geo-blocking. Should this become relevant in a B2B-relationship where one party may be relatively dominant, we could become active.

ANTITRUST MAGAZINE ONLINE: We did touch quickly on your advocacy role when we talked about procurement rules and strengthening the procurement process. Is the area of sector inquiries and market studies something that is also part of your remit that you see as an important tool to understand markets, change markets, or change market structures?

PATRIK DUCREY: No. In fact, we do not have enough resources for market sector inquiries. We focus our resources on investigations that lead to decisions and create legal certainty.

Where concerns arise in a certain market we, can, however, conduct a market observation. It is not as comprehensive as a sector inquiry with multiple rounds of questionnaires, we try to be more targeted in our investigation, focusing on those points which have been brought to our attention.

ANTITRUST MAGAZINE ONLINE: You say you focus mostly on investigations, what drives the sectors where you have investigations? Is it mostly reacting to complaints or do you also have tools to prioritize and to say, “Now we want to see what is going on in this sector or we will more proactively focus on particular concerns?”

PATRIK DUCREY: In fact, we are both proactive and reactive. The best example is the mentioned bid rigging cases, where we tackled the issue through strict enforcement coupled with considerable advocacy. Our intervention followed numerous complaints from various stakeholders. Because we are a fairly small authority with limited resources, we focus on areas where we have indications of problems.

Often, we can resolve competitive concerns by approaching the companies, laying out our concerns, and then in a cooperative manner try to find a solution that would be procompetitive and not significantly disrupt their business.

LAURA MELUSINE BAUDENBACHER: Perhaps to add a point, we try to be also proportionate in deciding whether we open an investigation at all. There are different tools available to us.

In the first step we can also seek a dialogue with the companies, as in the example that Patrik gave about *Apple Pay/TWINT*. We do not always have to immediately choose the harshest tools we have. Often, we can resolve competitive concerns by approaching the companies, laying out our concerns, and then in a cooperative manner try to find a solution that would be procompetitive and not significantly disrupt their business.

It's perhaps a bit of a more Swiss approach. It comes back to this militia idea as well, that you want to have authorities that are a bit closer to people—approachable, let's say.

ANTITRUST MAGAZINE ONLINE: Let us close off just with one or two questions again on procedure and the institution.

On the institution, within the European Union the structure and powers of competition authorities have been reshaped a lot by the ECN+ Directive.

Is that something that you follow? Are there areas where you find that your investigatory powers should be strengthened, things from the ECN+ Directive that inspire discussions?

PATRIK DUCREY: This is not an issue in the current discussions around the amendment of the Swiss competition law. And as we are not a member of the European Union, these developments have less of an impact on us.

LAURA MELUSINE BAUDENBACHER: In fact, some of the suggestions in the current revision would turn back the clock on the enforcement-side and create a regulatory gap between the European Union and us. We would take a step back to the "good old days of cartels."

ANTITRUST MAGAZINE ONLINE: If it works in Switzerland, that is the most important thing.

LAURA MELUSINE BAUDENBACHER: We are hoping it will not go through. Should it pass our authority would have to prove negative effects even for hardcore cartels. That would draw out proceedings considerably and render them more costly. It would make it more difficult to set precedents. It is even unclear whether you can prove down to the last dime what harm a bid-rigging cartel caused, so we would definitely be moving away from the European Union, from the OECD, and from UNCTAD—to name just a few.

What is disappointing is that this proposal has received considerable support from practicing attorneys. While it may on a personal level be attractive when proceedings are drawn out, I believe as attorneys we also have a higher responsibility as administrators of justice (in German: "Organ der Rechtspflege"). As such, I am convinced we have a duty to take on a statesman-like role in such discussions and to support the rule of law to the general benefit of antitrust enforcement in Switzerland and, thus, the Swiss economy.

ANTITRUST MAGAZINE ONLINE: One last question that has come up many, many times in past years. The legal profession thinks about diversity and realizes that diversity is not where it should be. This has also started to impact the discussions and organization of authorities.

How does this discussion play out in Switzerland? Are there concerns or efforts to increase diversity?

LAURA MELUSINE BAUDENBACHER: Well, define diversity first. I personally find it a very difficult term to define. In Switzerland, if we are talking about migratory diversity, we would likely need to include different groups than, say, Germany, France, or other surrounding countries. Historically, there has also always been an attempt to ensure a balance in public positions between representatives from Catholic and Protestant regions, although this has become less of a focus in recent times. Another question could be age diversity, or family-background. So the US-influenced diversity discussions are not really transferable to our country.

What we try to do is to ensure a balance between the four language regions in our country. We try to have people from every area because we need the language capabilities, but it is also a constitutional obligation to try to ensure that balance. That is, I think, the most essential for our country.

If we are talking about gender diversity, I am the President and we are currently at an even 50-50 male-female split, so I don't know if we have an issue. We are now in the process of renewing parts of the Commission, and one of the questions is whether diversity should be an issue. Personally, my focus is on two qualities: independence and competence.

ANTITRUST MAGAZINE ONLINE: And for you, Patrik, within the Secretariat, are there discussions about representation of women?

PATRIK DUCREY: Yes, federal laws stipulate diversity quotas on language, gender, and some other factors. We are a shining example that language and gender diversity for years have not been an issue in both our bodies. As noted by Laura, the Commission of twelve members is made up of six female and six male members, the presidency has two women and one man, and all the language regions from Switzerland are represented.

The same goes for the Secretariat: of the eighty-five people working there, 47 percent are women and 53 percent are men, the Executive Management is 40% female, and we have employees from all language regions.

We have done our homework, so current discussions are not that relevant for us. ●

Merger Enforcement Considerations:
Implications for Venture Capital Markets and Innovation

Ravi Sinha, Brendan Rudolph, and Alex Vasaly

Firms backed by venture capital ("VC") play a crucial role in driving innovation in the U.S. economy. Firms that were once backed by VC accounted for more than 92 percent of R&D spending and patent value generated by U.S. public companies founded over the past 50 years.[1] Furthermore, VC-backed firms experience growth rates 50 percent higher than the rest of the private sector and employment growth eight times higher than the average private company.[2]

Mergers and acquisitions ("M&A") involving VC-backed firms, most notably in the tech industry, have increasingly been scrutinized by regulators in recent years. When the proposed acquiror is an established incumbent, concerns over "killer acquisitions" have sometimes led to regulatory skepticism. However, as we document below, M&A is a critically important exit option for venture capitalists ("VCs") and the innovative firms that they fund, especially in light of the current stressed capital markets environment.

Thus, any broad, implicit assumption that acquisitions of VC-backed startups by incumbent tech platform firms are per se anticompetitive could have a chilling effect on future innovation. The review of any contemplated transaction calls for, among other things, a deep, situation-specific analysis of the target firm's financial situation (with particular attention to details related to its VC funding and capital structure). Only then can regulators begin to understand feasible counterfactual scenarios.

VC Financing and Exit Options for Startups

VC firms raise funds from investors and use those funds to invest in startup companies, typically in exchange for equity in the companies.[3] This is a critical role in the business ecosystem: because startups often have little or no revenue, they require outside financing to cover their costs. However, traditional lenders generally do not finance companies with the substantial risk profiles that

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[1] Will Gornall & Ilya Strebulaev, *The Economic Impact of Venture Capital: Evidence from Public Companies* (Jul. 8, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681841.

[2] Annaleena Parhankangas, *The Economic Impact of Venture Capital*, *in* 2 Handbook of Research on Venture Capital 124 (Hans Landström & Colin Mason ed., 2012).

[3] For the purposes of this discussion, VC funds are considered to be those private investment funds that invest in early-stage or startup firms. Traditional private equity funds have certain similarities with VC funds, but often invest in later-stage or mature companies. "Portfolio companies" herein refer to the individual operating companies owned by a VC or PE fund. Such private funds typically hold stakes in many different operating companies at the same time: a "portfolio" of companies. Venture capital firms also provide advice and diverse networks of experts to their portfolio companies. *See* Rebecca Baldridge, *Understanding Venture Capital*, Forbes (Sept. 6, 2022), https://www.forbes.com/advisor/investing/venture-capital.

startup companies often carry.[4] Instead, startups often turn to VCs to provide financing through the early stages of their development.

Investors who provide capital during the earliest stages are known as seed investors.[5] Because of the wide range of potential outcomes for early-stage companies, investors in these companies bear very high risks and therefore require very high expected rates of return on their investments. Vision, team, and product potential are often relatively more important to these early-stage VCs than existing monetization strategies or tangible financial metrics (e.g., demonstrated revenue growth profitability).

As a startup grows and develops scale, later-stage specialist VCs typically participate in the startup's financing by making relatively larger investments. These VCs often focus more on tangible financial metrics and monetization strategies. Later VC investment "rounds" (i.e., Series B, C, etc.) typically come with investor protections designed to mitigate some of the risk for later-stage investors. For example, later-stage VCs often negotiate liquidation preferences, whereby their investment typically must be at least fully paid back before earlier-stage investors or employee shareholders earn any return.[6]

Employees of VC-backed firms often receive common stock with none of these investor protections. In addition, employees may receive stock awards in the form of options or warrants, which allow employees to purchase shares at a predetermined price.[7] This equity would only have value if the company increases in value (relative to the value at which the stock awards were granted).

Because the shares of VC-backed firms are not traded on public exchanges, shareholders have limited options to sell, or "exit," their investment and realize returns. Such options include selling shares in an initial public offering ("IPO") or selling shares to an acquirer of the company (which often is another company in the same industry or a private equity firm).[8]

VCs tend to achieve the highest returns when their portfolio companies go public via an IPO and they will generally continue to fund additional rounds for later-stage companies that are perceived to have strong potential to ultimately go public.[9] However, IPO exits are rare (by deal count). Typically, VCs will quickly try to sell firms they perceive have little potential to go public and will not extend multiple additional funding rounds to such companies.[10]

On average, VC-backed firms raise between 1.60 and 3.89 rounds of venture financing.[11] According to data from Pitchbook, only ten percent of tech firms that raised initial VC funding

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[4] Venture debt has grown in prominence in recent years, largely led by niche financial firms that had familiarity with the VC ecosystem. However, the recent failure of Silicon Valley Bank, one of the largest providers of venture debt, garnered substantial media attention, and industry commenters have discussed implications of its failure on the outlook for venture-funded startups. As the *Financial Times* noted, for example: "Founders and investors fear that the demise of the tech sector's favourite bank will ripple through to lower valuations and hasten company collapses amid an already tough funding environment, according to more than a dozen interviewed by the Financial Times." George Hammond & Tim Bradshaw, *'A Devastating Impact': SVB's Collapse Leaves Start-Ups with A Funding Hole*, Fin. Times (Mar. 26, 2023), https://www.ft.com/content/9f8c506f-f01a-448e-ab4b-6c7fcd060422.

[5] Geoff Ralston, *A Guide to Seed Fundraising*, Y Combinator (2023), https://www.ycombinator.com/library/4A-a-guide-to-seed-fundraising.

[6] *See, e.g.*, Will Gornall & Ilya A. Strebulaev, *The Contracting and Valuation of Venture Capital-Backed Companies*, *in* 1 Handbook Econ. Corp. Fin. (forthcoming) (manuscript at 24-26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4038538.

[7] Swapnil Shinde, *Startup Employee Equity: What Every Founder Should Know,* Forbes (Aug. 5, 2021), https://www.forbes.com/sites/theyec/2021/08/05/startup-employee-equity-what-every-founder-should-know/?sh=693bc4de5af9.

[8] Patrick Vernon, Venture Capital Strategy (2nd ed. 2022). Private exchanges of shares between investors are relatively rare.

[9] Paul Gompers & Josh Lerner, The Venture Capital Cycle 196 (2nd ed. 2004) [hereinafter Gompers & Lerner (2004)].

[10] *Id.* at 172, 196.

[11] *Id.* at 184 (Table 8.4).

between 2011 and 2014 raised a fifth round of funding, and only two percent ultimately exited via an IPO or acquisition after the fourth round. Thus VCs should not be thought of as perpetual sources of capital for their portfolio companies.

VC investment is typically conducted via fund entities, usually limited partnerships that are sponsored and managed by VC firms. Most VC funds have ten-year lifecycles, meaning VC firms must exit their stake in a company in ten years or less, again highlighting that in many circumstances—particularly for later-stage VC-backed firms—institutional constraints on VC funds can limit the ability of VCs to provide additional financing, and indeed can put pressure on VCs to exit.[12]

In fact, as commentators Paul Gompers and Joshua Lerner note:

> [a]lmost all venture funds are designed to be self-liquidating, that is, they must dissolve after ten to twelve years. This scheduled termination imposes a healthy discipline on everyone involved in the fund. For one thing, it forces investors to take the necessary but painful step of "pulling the plug" on underperforming firms in their portfolios.[13]

VC investing is inherently risky, and VC-backed firms frequently fail even after successfully raising financing in early rounds.

Additionally, VC firms typically do not "cross-invest" (i.e., multiple funds raised by the same VC firm will not typically invest in the same company).[14]

Nevertheless, a VC fund will typically allocate some of its capital for future investments into its portfolio companies or into new opportunities, which is called "dry powder" in the VC world. When considering whether a given startup might attract additional funding from current VC backers, assessing the relevant VC fund's levels of dry powder and remaining fund life is crucial.[15]

VC investing is inherently risky, and VC-backed firms frequently fail even after successfully raising financing in early rounds. Among a sample of over 1,100 technology companies that raised initial VC financing between 2008 and 2010, "nearly 67% of startups stall[ed] at some point in the VC process and fail[ed] to exit or raise follow-on funding."[16]

In light of these aspects of the VC-startup ecosystem, assessments of potential counterfactual (or "but-for") alternatives to a proposed merger involving a venture-backed startup should include a deep financial analysis of the specific circumstances of the target firm, such as the VC investor base, the number of funding rounds the target firm has raised, and the level of dry powder and remaining fund horizon of the investing VC firms.

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[12] The possibility of up to two, two-year extensions in investment horizon is a somewhat common feature of certain contracts. Broadly speaking, startup companies have also stayed private for longer in recent years. Additionally, major VC firm Sequoia Capital has recently been developing funds with a more "permanent" fund structure. As a result of these dynamics, the typical VC fund lifecycle may increase in the future.

[13] Paul Gompers & Josh Lerner, The Money of Invention: How Venture Capital Creates New Wealth 99 (2001) [hereinafter Gompers & Lerner (2001)]. *See also*, *e.g.*, Paul Gompers, Will Gornall, Steven Kaplan & Ilya Strebulaev, *How Do Venture Capitalists Make Decisions?*, 135 J. Fin. Econ. 1, 169, 180, 185 (2020).

[14] Cross-fund investing (or "cross-investing") is the term of art for a subsequent fund run by a VC firm investing in a company that a sister fund had previously invested in. This is almost never done in the VC world.

[15] *See, e.g.*, Gornall & Strebulaev at 72. The authors also note: "For VC funds, which are constrained with respect to both time (because of a limited fund horizon imposed by limited partners) and capital (because of a limited fund size), the dry powder allocation decision is a critical consideration." *Id.*

[16] *Venture Capital Funnel Shows Odds of Becoming a Unicorn Are About 1%*, CB Insights (Sept. 6, 2018), https://www.cbinsights.com/research/venture-capital-funnel-2/#:~:text=Venture%20Capital%20Funnel%20Shows%20Odds%20Of%20Becoming%20A%20Unicorn%20Are%20About%201%25&text=The%20venture%20capital%20funnel%20highlights,in%20the%20venture%20capital%20process.

Legislative and Regulatory Focus on Merger Enforcement

Acquisitions of VC-backed startups—particularly by large, incumbent tech platform firms—have been a focus of recent debate among academics, regulators, and business commentators due to the possibility or threat of so-called “killer acquisitions” (defined for present purposes as acquisitions of a nascent or potential competitor by a large, incumbent firm).[17]

Ginger Zhe Jin, et al., provide a review of recent academic literature on this issue,[18] and we briefly summarize some of the relevant scholarship here. Salient considerations include (among others):

- Will the acquirer discontinue a product or forestall a nascent potential future competitor via a “killer acquisition”?
- Will incumbent acquisition activities create the broader perception of a “kill zone” that could stifle investor incentives to pursue future early-stage startups in a given space?[19]
- Will a vertical acquisition by one incumbent limit (or make more expensive) the ability of another large incumbent to use the target’s product/service? Or similarly, will the transaction forestall a laggard incumbent’s ability to “catch up” to a leader?

Legislation was introduced in the United States last year that would add new restrictions to M&A activity. Specifically, the Prohibiting Anticompetitive Mergers Act of 2022[20] would ostensibly simplify the merger review process, making it easier for the FTC and DOJ to block deals that: i) meet a certain size threshold, ii) result in the acquiring entity’s exceeding specific market share thresholds, or iii) result in market concentrations exceeding specific thresholds. While such legislation might reduce the costs of the merger review process,[21] blanket rules would also preclude nuanced consideration of the actual competitive effects of a given merger. Such legislation might also fail to allow for consideration of the possible negative effects that blocking a specific merger might have on the target firm’s ability to continue funding itself. More broadly, there could be downstream consequences for VCs’ appetite to fund future innovative startups.

Recent Activity and Trends in VC Financing Further Highlight the Importance of Strategic M&A Exits

The VC industry is not immune to changes in the broader capital markets, which have recently tightened in dramatic fashion. Following high inflation and low unemployment in recent years, the Federal Reserve increased the federal funds rate in 2023 at the highest pace since the 1980s.

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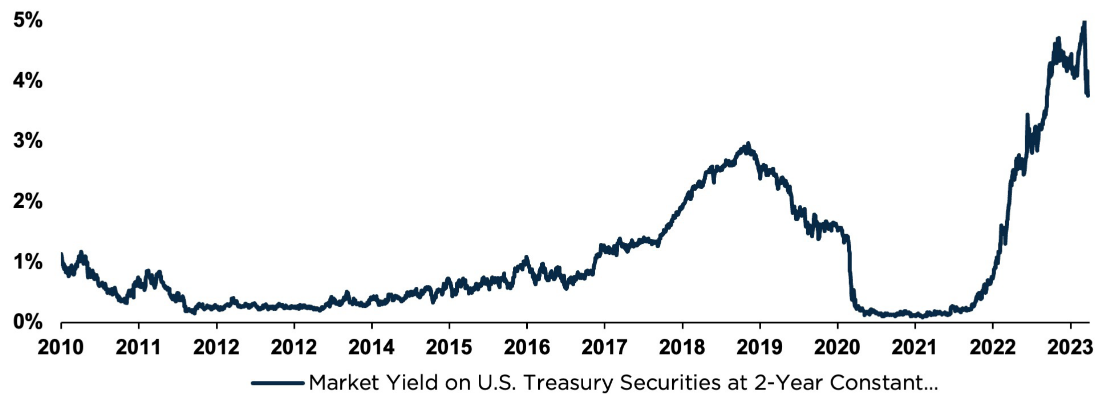
[17] *See*, *e.g.*, Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 3, 649-702 (2021); Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy* 2 (CESifo Working Paper No. 8056, Feb. 3, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012.

[18] Ginger Zhe Jin, Mario Leccese & Liad Wagman, *How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy* 6-11 (NBER Working Paper No. 29642, Nov. 2022), https://www.nber.org/papers/w29642 [hereinafter Jin, et al. (2022)].

[19] Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, *Kill Zone* (NBER Working Paper No. 27146, May 2020), https://www.nber.org/papers/w27146.

[20] S.3847, 117th Cong. (2021-22).

[21] Notably, while such rules may superficially look simple, in practice they may not be. Any rule that relies on market share thresholds and market concentrations relies on market definition, which routinely is the most complex point of debate in merger reviews that proceed to trial. *See*, *e.g.*, Adam Di Vincenzo, Brian Ryoo & Joshua Wade, *Refining, Not Redefining, Market Definition: A Decade Under the 2010 Horizontal Merger Guidelines* 10, Antitrust Source (Aug. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/august-2020/aug20_divincenzo_8_18f.pdf.



Source: *FRED*

The Federal Reserve's actions had follow-on effects in the broader debt and equity markets.[22] Importantly, in the startup world, the recent tightening in capital markets has impacted new investments into startups, which declined by 29 percent between 2021 ($346 billion) and 2022 ($246 billion).[23]

Exit activity similarly declined from 2021 to 2022. VC-backed companies created a total exit value of just $72.9 billion across 1,281 exits in 2022, compared to $768.2 billion across 1,951 exits in 2021, representing a 90 percent decline in total exit value.[24] As exit activity declined,[25] the share of exit value from M&A exits increased substantially (from 14 percent of total exit value in 2021 to forty-seven percent in 2022), while the share from IPOs declined (from 85 percent of exit value in 2021 to 48 percent in 2022).[26] Taken together, these data paint a picture that in weak markets, VC investment gets curtailed and M&A exits become even more important.

22 Jeanna Smialek, *Fed Chair Opens Door to Faster Rate Moves and a Higher Peak,* N.Y. Times (Mar. 7, 2023), https://www.nytimes.com/2023/03/07/business/economy/fed-powell-interest-rates.html. These market stresses were also reflected in the stock prices of publicly-traded companies. For example, the S&P 500 Index declined nineteen percent in 2022, and the tech-heavy Nasdaq Composite Index declined by 33 percent.

23 John Gabbert, Nizar Tarhuni, and Dylan Cox, *Q1 2023 PitchBook-NVCA Venture Monitor First Look*, PITCHBOOK (Apr. 12, 2023), https://pitchbook.com/news/reports/q1-2023-pitchbook-nvca-venture-monitor.

24 Gabbert, John, Nizar Tarhuni, and Dylan Cox, *Q1 2023 PitchBook-NVCA Venture Monitor First Look*, PITCHBOOK (Apr. 12, 2023), https://pitchbook.com/news/reports/q1-2023-pitchbook-nvca-venture-monitor.

25 Exit activity has continued to decline in 2023. Total exit value of $5.8 billion in the first quarter of 2023 represents an 82 percent decline from the $32.2 billion of total exit value in the first quarter of 2022 and a 93 percent decline from the $86.8 billion of total exit value in the first quarter of 2021. In addition, U.S. fundraising activity has declined substantially—the $11.7 billion raised in the first quarter of 2023 is less than seven percent of the $170.8 billion raised in 2022. *See* John Gabbert, Nizar Tarhuni, and Dylan Cox, *Q1 2023 PitchBook-NVCA Venture Monitor First Look*, PITCHBOOK (Apr. 12, 2023), https://pitchbook.com/news/reports/q1-2023-pitchbook-nvca-venture-monitor.

26 IPOs did remain a much more lucrative exit option on average; in 2022, the median IPO exit value was $214.0 million, more than three times larger than the median M&A exit value of $65.0 million in 2022. Pitchbook data also include a third category of exits in addition to M&A by an incumbent firm and IPO: sale to a private equity buyer. *See* John Gabbert, Nizar Tarhuni, and Dylan Cox, *Q4 2022 PitchBook-NVCA Venture Monitor*, PITCHBOOK (Jan. 11, 2023), https://pitchbook.com/news/reports/q4-2022-pitchbook-nvca-venture-monitor.

As a general matter of industry custom and practice, VCs will seek a corporate buyer for portfolio firms once they believe the firm has little potential to go public.[27] This is an even more salient consideration in currently stressed capital markets; all else equal, given the IPO pathway is challenged at the moment, VCs seeking to maximize the value of their investment will be looking more to corporate buyers—a trend already borne out in the 2022 data cited above.

In short, there are fewer IPO opportunities in the current capital markets environment, which means VCs must rely more on M&A as the means to exit their investments.

In short, there are fewer IPO opportunities in the current capital markets environment, which means VCs must rely more on M&A as the means to exit their investments. If regulators make such exits more difficult (e.g., by presuming that any acquisition of a startup by an incumbent is anticompetitive), VCs may invest less going forward, and more startups will either never get funded or will die on the vine at a higher rate. Given the important role VCs play in funding innovative startups, this could have a broader chilling effect on innovation in the economy.

Prohibiting Certain Mergers Would Worsen Expected Exit Outcomes

Devising a plausible "but for" scenario in the absence of a proposed merger is a particularly nuanced exercise when the target is a VC-backed startup. Absent a strategic merger, a VC-backed startup can: i) continue operating as an independent company, ii) go public via an IPO, iii) be acquired by a private equity firm,[28] or iv) fail. Predicting which of these paths a company will take, let alone estimating a company's counterfactual exit value, is exceedingly difficult.[29] However, removing the M&A option will only decrease expected exit values in our view.

In light of the industry customs and practices discussed in the first section above, it would be inappropriate to assume that, as a general matter, VC investors would continue to extend additional funding to a VC-backed startup if an M&A exit is blocked. There are a number of VC customs and practices that weigh on the likelihood and viability for a VC-backed startup to continue operating as a standalone entity. Specifically:

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[27] For example, as Gompers and Lerner note:

> Firms that go public receive more total financing and a greater number of rounds than other firms (those that go bankrupt or are acquired). . . . If venture capitalists receive favorable information about the firm and it has the potential to go public, the venture capitalist continues to fund the project. ***If the project is viable but has little potential to go public, the venture capitalist quickly searches for a corporate buyer***. Firms that have little potential are liquidated.

Gompers & Lerner (2004) at 172, 196 (emphasis added).

[28] Acquisitions by private equity firms differ from acquisitions by competitors in several respects. For example, acquisitions by private equity firms generally do not raise antitrust concerns (unless the company were subsequently merged with a competing portfolio company in a "roll up" deal). Additionally, private equity firms, like venture capital firms, do not hold portfolio companies indefinitely and typically exit their investment at some point, which is not the case for acquisitions by competitors.

[29] The focus of this article is on VC customs and practices and not transaction price. Although financial analysis of plausible alternative transactions also has an important place in assessing mergers involving a startup, that issue is beyond the scope of this article. Nevertheless, it is worth noting that—as a matter of financial economics—when an M&A transaction occurs following an open and competitive merger process, the agreed-upon price typically provides a reasonable estimate of firm value. A purportedly high transaction price is in itself insufficient evidence that a transaction is a "killer acquisition." The degree to which an observed transaction price reflects firm valuation can be nuanced and complex. An assessment of whether a transaction price is reasonable should consider that, for example, a certain buyer may have a unique ability to monetize a product that the standalone startup company or other bidders do not, or there may be significant cost synergies or efficiency gains from a combination with a certain buyer. When dealing with a product that might be complementary to the buyer's other offerings, in the but-for world the buyer could attempt to make such a product from scratch. However, it may be that it is cheaper to buy the product (via M&A) than to make a similar product from scratch, and thus such make-vs.-buy considerations should also be robustly assessed. As with monetization potential, not all potential buyers are necessarily situated similarly. For example, expertise in a certain area or a pre-existing set of complementary products could render certain firms better suited than others to integrate a complementary product into their existing offerings and/or monetize that product.

- VC investment time horizons are limited, and VC firms are not perpetual investors by design. As discussed above, they typically need to exit within ten years or less. Further, few venture-backed startups receive more than four rounds of funding, and it is rare to ultimately exit successfully after a fourth round.
- Early-stage VC firms are looking to hit "home runs," and their business model does not typically entail extending startup firms a long leash of multiple rounds of financing, nor does it typically entail getting intimately involved with running the business or trying to devise new monetization strategies.
- As noted above, it is rare for VC firms to cross-invest (i.e., if a specific VC fund that backs a startup has exhausted all its dry powder, the fund's parent firm would be unlikely to make further investments in the startup).
- The different structural preference terms typically associated with late-stage investments have important implications for hypothetical *additional* funding round(s). For example, liquidation preferences that would likely be associated with such additional investment might imply that the investors would need an *even higher* exit value down the road to earn positive returns.

In addition to these considerations, stagnant growth can deter investors. If a later-stage target firm has not received funding for many years, it suggests the VC firms that invested in it may not perceive the firm to be relatively successful or likely to go public.[30] For example, if a later-stage target firm has not been able to demonstrate a viable monetization strategy, it may not be a natural candidate for additional investment.

Highlighting the impact of stagnant growth, "down rounds" (rounds of financing in which a start-up's implied valuation is lower than it was as of the prior funding round) have severe implications and consequences. Common stock could potentially be wiped-out with extreme down rounds, and even if not, down rounds raise issues of employee morale and retention, and send negative signals to the market.[31]

In sum, there are several salient considerations regarding VC-backed target firms and the existing VC investment(s) in target firms when assessing what could feasibly happen absent a merger. Depending on the circumstances, it is entirely conceivable that a firm's VC backers would simply not extend any additional funding.

Absent the opportunity to continue operating as an independent company, VC-backed startups need to successfully exit in order to avoid failing. When assessing an M&A deal with a VC-backed target, one is already dealing with a conditional subset of all VC-backed firms—those that are *not* perceived to have strong potential to go public. Thus, assertions that an IPO is a possible

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[30] The time between funding rounds generally decreases as the company matures, dropping from an average of 1.63 years between rounds for the earliest-stage firms to less than one year between rounds for later-stage firms. *See* Gompers & Lerner (2004) at 186 (Table 8.5).

[31] For example, Steven Davidoff Solomon notes:

> [a] down round hits employees and founders hard, evaporating the worth of their hard-won shares. . . . Employees aren't going to stick around long if they see their equity stake wiped out. They will move on to the next start-up and take their chances there. The down round is a "lemon" signal to the market that the company's business plan is not working out. And one of the thorniest issues in dealing with down rounds is how a former unicorn keeps its employees after destroying the value of their shares.

Steven Davidoff Solomon, *Expect Some Unicorns to Lose Their Horns, and It Won't Be Pretty*, N.Y. Times (Jan. 19, 2016), https://www.nytimes.com/2016/01/20/business/dealbook/expect-some-unicorns-to-lose-their-horns-and-it-wont-be-pretty.html.

counterfactual alternative to the proposed merger should be carefully scrutinized.[32] Such concerns are even more salient when capital markets are stressed.

The most plausible counterfactual alternative may be a transaction rather than additional investment from existing investors or an IPO. Of course, every circumstance is unique, but some considerations to bear in mind with alternative transaction counterfactuals include:

- If a viable alternative offer exists, it would likely be at a lower valuation. VCs are interested in maximizing returns for their investors; if it were possible to achieve higher value via an alternative transaction, then profit-maximizing VCs would have taken it.
- Exit options—and the valuation at which exit can be achieved—are dictated by the market. Not all exits are "successful" (e.g., an investment can be sold at a loss or below the investor's *ex ante* expected return). There is no guarantee that if a deal falls through, an alternative deal would be able to generate a positive return to the target's investors/employees.
- A firm may not have other viable exit options and consequently might go out of business absent a challenged merger.

Foreclosing or reducing the likelihood of certain M&A exits, all else equal, would disincentivize VCs and other early-stage investors from backing future startups.

The Importance of VC-Backed Startups to Future Innovation

Foreclosing or reducing the likelihood of certain M&A exits, all else equal, would disincentivize VCs and other early-stage investors from backing future startups. This would make it more difficult for future startups to gain necessary early-stage funding, which in turn could lower employment at (and the number of) startup firms, thereby generally stifling future innovation. Insofar as a downstream effect of such a posture is an increase in "down round" financings for later-stage startups, this too would make working at a startup less attractive to skilled employees, and thereby chill future innovation. In fact, Tiago Prado and Johannes Bauer find empirical evidence of a positive relationship between acquisitions by "Big Tech" companies and VC activity.[33]

The reason for this is basic supply and demand dynamics and the associated incentives that actors in the market face. VCs supply the capital for firms to innovative and their willingness to supply future capital is inextricably tied to the returns they expect to receive upon exit. Supply necessarily varies with expected returns and limiting exit options will reduce expected future returns, thereby reducing the supply of VC capital *ex ante*.

This issue has been raised by scholars who have studied the VC industry. Gompers and Lerner succinctly summarize the point:

> [w]hile exiting is the last phase of the venture capital cycle … it is extremely important to the health of the other parts of the cycle. The need to ultimately exit investments shapes every aspect of the venture capital cycle, from the ability to raise capital to the types of investments that are made.[34]

The authors similarly note:

> [t]he long-run demand for venture capital is shaped by forces such as the pace of technological innovation and regulatory change, the presence of liquid and competitive markets (whether for stock offerings

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[32] Furthermore, the IPO market itself can be cyclical, with down periods in public listings associated with recessions or capital markets turmoil. Thus, the possibility of exit via IPO is also partially conditional on the broader health of public equity markets and level of IPO activity generally. A similar principle also applies to M&A deals—market conditions will, in part, dictate the appetite for M&A generally, given the tenor of the prevailing capital markets environment.

[33] Tiago Prado & Johannes Bauer, *Big Tech Platform Acquisitions of Start-Ups And Venture Capital Funding For Innovation*, 59 Info. Econ. & Pol'y. 100973 (2022).

[34] Gompers & Lerner (2004) at 345.

> or acquisitions) through which investors can exit their investments, and the willingness of highly skilled managers and engineers to work in entrepreneurial environments.[35]

Limiting exit options (or the perceived value of future exits) would also make employment at a VC-backed startup relatively less attractive for skilled employees and innovators. Innovation at tech startups is driven by talent and startups rely heavily on equity compensation (i.e., shares of ownership and stock options in the firm) to attract and retain skilled workers. "Cashing out" such equity requires an exit (e.g., selling shares in the stock market following an IPO or having shares acquired by another firm in an M&A transaction). Limiting future exit options, or increasing the uncertainty about future exit options, would reduce the expected value of equity compensation, which in turn would make it less attractive for skilled employees to join future startups and, all else equal, have a chilling effect on innovation.

In addition, positive efficiency and innovation impacts from a potential acquisition should be robustly assessed. Contrary to the "kill zone" argument advanced by certain commentators, the prospect of an acquisition by an incumbent firm could *increase* future startup activity, thereby fostering innovation (and potentially increasing competition).[36] For example, the acquisition of a startup by an incumbent firm could increase growth and development of the startup's product due to the new owner's greater ability to fund and finance rapid development or greater experience/expertise in a given space. Such an acquisition could also increase the startup's efficiency and potential profitability via synergies. Consumers could also potentially benefit from greater network effects. For example, while Massimo Motta and Martin Peitz find certain scenarios where acquisitions of startups by tech incumbents could be anticompetitive, the authors also document many scenarios where there are welfare-positive network effects from such acquisitions.[37]

Conclusions

In light of the media attention and regulatory scrutiny on acquisitions of startups, it is important to remember that not all acquisitions, even those by large incumbent firms, are necessarily anticompetitive. Implicitly (or explicitly) presuming otherwise would have adverse consequences for future innovation, as VC-backed firms have accounted for the vast majority of new U.S. public company R&D spending in recent decades, and M&A transactions are a critically important exit option for such firms.

Consequently, when focusing on a specific proposed transaction, deep financial analysis of the target firm and the capital structure of the various rounds of investment by its VC backers, as well as the relevant VC customs and practices and how they would impact purported counterfactual worlds absent a merger, is crucial to understanding all the implications of blocking the transaction. ●

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[35] Gompers & Lerner (2001) at 139.

[36] Jin, et al. (2022) at 9.

[37] Massimo Motta & Martin Peitz, *Big Tech Mergers*, 54 INFO. ECON. & POL'Y 100868 (Mar. 2021).

Accounting for the Employee-Employer Relationship in Antitrust Analysis

Justin McCrary and Bryan Ricchetti

In October 2016, the Obama administration called for policymakers and regulators to increase scrutiny of monopsony power in labor markets.[1] The administration released an "issue brief" from its Counsel of Economic Advisors, while, at the same time, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") released antitrust guidance for human-resource professionals.[2] The DOJ has also brought a string of criminal no-poach cases since 2016 as part of this shift in policy.[3] More recently, in an executive order issued in July 2021, President Biden expressed his administration's determination "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets."[4] Then, on March 7, 2022, the Treasury Department published a report on the "state of labor market competition" that included proposals for new legislation and antitrust enforcement meant to "improve competition for American workers."[5]

This policy focus has been accompanied by an increase in antitrust litigation that centers on labor-market restraints, including non-compete clauses and no-poach clauses. This includes the criminal no-poach cases noted above, a wave of private class-action lawsuits that challenge no-poach and/or non-solicitation clauses in franchise agreements,[6] and investigations by state

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1 Press Release, The White House, Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth (Oct. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.

2 *See generally*, Council of Econ. Advisers, Labor Market Monopsony: Trends, Consequences, and Policy Responses (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_labor_mrkt_monopsony_cea.pdf; U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (2016), https://www.justice.gov/atr/file/903511/download.

3 *See, e.g.*, Criminal Indictment, United States v. Hee, No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021), https://www.justice.gov/opa/press-release/file/1381556/download; First Superseding Indictment, United States v. Jindal, No. 4:20-cr-00358 (E.D. Tex. Apr. 15, 2021), https://www.justice.gov/opa/press-release/file/1387866/download; Indictment, United States v. Davita Inc., No. 1:21-cr-00229 (D. Colo. July 14, 2021), https://www.justice.gov/opa/press-release/file/1412606/download; Indictment, United States v. Patel, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021), https://www.justice.gov/opa/press-release/file/1457091/download; Superseding Indictment, United States v. Surgical Care Affiliates, No. 3:21-CR-011-L (N. Tex. July 8, 2021), https://www.justice.gov/atr/case-document/file/1411111/download.

4 Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36988 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

5 U.S. Dep't of the Treasury, The State of Labor Market Competition 52 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

6 *See, e.g.*, Class Action Complaint, Deslandes v. McDonald's USA, LLC, No. 1:17-cv-04857 (N.D. Ill. June 28, 2017); Class Action Complaint, Butler v. Jimmy John's Franchise, LLC, No. 3:18-cv-00133 (S.D. Ill. Jan. 24, 2018); Class Action Complaint, Davidow v. H&R Block, Inc., No. 4:18-cv-01022 (W.D. Mo. Dec. 31, 2018).

attorneys general.[7] More recently, the FTC has proposed a ban on non-compete clauses,[8] which President Biden highlighted in his 2023 State of the Union address.[9]

As these points show, courts and agencies are engaging deeply in antitrust analysis of labor-market restraints. In this paper, we discuss a defining feature of that analysis—a feature that differentiates it from antitrust analysis of product-market restraints. That feature is the employee-employer relationship.

[W]e can expect that worker to evaluate the anticipated long-term value that the employment relationship will generate. Unlike many product and input markets, labor markets can and typically do generate lasting relationships.

As we detail below, labor economists widely recognize that investments from each side of the employee-employer relationship can enhance the value of the relationship. For example, employers routinely invest in training workers because improvements in workers' skills increase their productivity, which benefits the firm. Workers, in turn, benefit from such investments in the form of higher compensation and a longer-run career path at the firm. In other words, the employee-employer relationship is one that benefits from relationship-specific investments. In that context, both parties generally lose when the relationship ends. This means that contractual restraints that protect the relationship can be economically rational for both parties and can make both parties better off. Further, from an antitrust perspective, the fact that employees and employers are in a vertical relationship has important implications for competitive analysis of such contractual restraints.

Next, we discuss how the incentives for both workers and firms to invest in a long-run relationship, and the vertical aspects of the relationship, have important implications for three antitrust topics of interest in labor markets today: non-compete clauses, no-poach agreements, and empirical analysis of labor-market power. As we explain within each topic, failing to account for the incentives and benefits that arise within long-term employee-employer relationships can lead to incomplete and incorrect economic analysis.

The Economics of Employee-Employer Relationships

When a worker makes an employment decision, we can expect that worker to evaluate the anticipated long-term value that the employment relationship will generate. Unlike many product and input markets, labor markets can and typically do generate lasting relationships.[10] According to the Bureau of Labor Statistics, in 2022, the median worker in the U.S. had a tenure of over four years with an employer.[11] Labor economists recognize that "matching the right firms to the right workers (as well as matching workers to the most appropriate jobs within the firms) creates economic value

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[7] *See, e.g.*, Press Release, Wash. State Off. of the Att'y Gen., AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (July 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate; Press Release, Ill. Att'y Gen., Attorney General Madigan Announces Investigation of No-Poach Agreements at National Fast Food Franchises (July 9, 2018), https://ag.state.il.us/pressroom/2018_07/20180709.html.

[8] Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[9] Address Before a Joint Session of the Congress on the State of the Union, 2023 Daily Comp. Pres. Doc. 10 (Feb. 7, 2023), https://www.govinfo.gov/content/pkg/DCPD-202300096/pdf/DCPD-202300096.pdf.

[10] Edward P. Lazear & Michael Gibbs, Personnel Economics in Practice 51 (3rd ed. 2014); Gary S. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education (3rd. ed. 1994); Daron Acemoglu & Jörn-Steffen Pischke, *Beyond Becker: Training in Imperfect Labour Markets*, 109 Econ. J. 112 (1999).

[11] Bureau of Lab. Stat., U.S. Dep't of Lab., Employee Tenure in 2022, at 1 (2022), https://www.bls.gov/news.release/pdf/tenure.pdf.

of a magnitude that few other economic processes can."[12] The value of the relationship depends on investments from both sides in training, work experience, education, and other types of skills. Some investments are firm-specific, meaning that the resulting skills are not transferable to other jobs.[13] To cite an example from Nobel Laureate Gary Becker's seminal work, the military offers some forms of training that are easily transferable to civilian occupations (*e.g.*, showing up to work on time), but specialized aspects of training (*e.g.*, how to be "fighter pilots or missile men") may be of less use outside of military occupations.[14]

The value created by a match between a worker and employer, and the relationship-specific investments that both parties make in the relationship, mean that, if the match is strong, the worker may prefer to keep an existing job rather than accept offers for other jobs with higher wages but with less attractive non-wage features. That is, there is a trade-off between job mobility and seeking higher wages, on one hand, and maximizing the value of the employment relationship with regard to all features of the job (including non-wage components), on the other. Moreover, the value of relationship-specific investments may increase with a worker's tenure.

Ensuring that both the worker and the firm have the incentive to engage in relationship-specific investments, however, can require careful calibration. While both the worker and firm can benefit from investments in workers' skills, those investments require the firm to pay upfront costs (typically monetary outlay) and the worker to do the same (typically effort). The firm and worker might hesitate to absorb these costs if either perceives a significant risk that the other party will terminate the relationship now or in the future. Economists widely recognize these types of incentive misalignments; indeed, a large sub-field of labor economics analyzes these problems.[15]

These economics highlight an important issue for the antitrust analysis of labor markets: the employer-employee relationship has many parallels with a vertical supplier relationship. As with any supplier relationship, the worker supplies skills, expertise, and time to the firm, and the firm and worker must agree to the terms of their relationship, which can include both monetary compensation and other elements. Importantly, contract provisions between employees and employers (*i.e.*, vertical restraints) that incentivize investments in the relationship that benefit both parties can help solve the incentive misalignment issues detailed above, unlock economic value, and strengthen labor-market competition.[16]

The Economics of Employee-Employer Relationships Can Be Critical to Antitrust Analysis in Labor Markets

In this section, we apply the economic framework outlined above to three antitrust topics of current interest for policymakers and regulatory agencies: (1) the use of non-compete clauses and their effects on labor market competition; (2) the conditions under which no-poach clauses can

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[12] Edward P. Lazear & Paul Oyer, *Personnel Economics*, *in* The Handbook of Organizational Economics 479, 492 (Robert Gibbons & John Roberts eds., 2012). The quality of a match can depend on a firm's comparative advantage in offering a compensation package (wages, benefits, flexibility, enjoyable work, etc.) that the worker values. *Id.* at 499.

[13] Becker, *supra* note 10.

[14] Becker, *supra* note 10.

[15] *See, e.g.*, Becker, *supra* note 10; William Chan, *External Recruitment versus Internal Promotion*, 14 J. Lab. Econ. 555, 556–57 (1996); George Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. Econ. 543 (1982).

[16] It is widely recognized by economists that the use of vertical restraints in supplier relationships, more generally, has the possibility to generate procompetitive benefits and strengthen competition. *See, e.g.*, Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization (4th ed. 2005) (providing a chapter on "Vertical Integration and Vertical Restraints").

have procompetitive rationales; and (3) a general concern expressed by some recently that labor markets are becoming more concentrated and diverging from a competitive paradigm such that monopsony power is more common.

In particular, we highlight several specific ways in which employers and employees alike would benefit if antitrust analysis and antitrust-enforcement efforts account for the incentives of both employees and employers to invest in the employment relationship to maximize the relationship's economic value.

Although these types of horizontal agreements may raise legitimate competition concerns, a complete analysis of the potential competitive effects of non-compete clauses (in either a labor market or a product market) must also analyze the vertical aspects of non-competes.

Antitrust Scrutiny of Non-Competes. As noted above, in January 2023, the FTC announced a proposal for a new rule to ban non-compete clauses because, in the FTC's view, these clauses constitute an "unfair method of competition." The DOJ has also expressed concerns recently about the potential effects of non-competes on labor-market competition. For example, in February 2022, the DOJ issued a Statement of Interest regarding a non-compete lawsuit involving Pickert Medical Group in Nevada. In that statement, the DOJ opined that the "principles of federal antitrust law" may be useful in analyzing non-compete clauses, and then laid out conditions under which non-competes can lead to antitrust harm.[17]

These antitrust concerns focus on "horizontal concerns" in two possible dimensions.[18]

First, by preventing workers from seeking employment at competing employers, non-competes can restrict labor-market mobility. If a firm with a large enough share of a relevant labor market uses non-competes to restrict mobility, the firm's conduct could potentially create anticompetitive effects in that market.

Second, if employees subject to non-competes are potential competitors in the product market to their employers, non-competes could potentially harm competition in the product market. This was the focus of the DOJ's concerns in the *Pickert* matter. There, Pickert Medical Group had non-compete clauses with its anesthesiologists, who together represented two thirds of all anesthesiologists in the local market. The DOJ argued that the non-competes restricted competition in the downstream market for anesthesiology services by eliminating as potential competitors to Pickert the vast majority of providers of those services. In short, the DOJ viewed the non-competes as agreements between horizontal competitors in the product market.[19]

Although these types of horizontal agreements may raise legitimate competition concerns, a complete analysis of the potential competitive effects of non-compete clauses (in either a labor market or a product market) must also analyze the *vertical* aspects of non-competes. In particular, non-compete clauses are generally part of a specific vertical supplier relationship between the worker and the firm. As detailed above, this type of contract clause can help align incentives and strengthen investments in the relationship. Indeed, the DOJ recognized these economic principles in its Statement of Interest in the Pickert case, stating that:

> "Where employees and employers are not actual or potential competitors, a post-employment non-compete agreement likely qualifies as a vertical restraint. The employee has agreed not to provide his or her labor as an input to certain direct competitors of the employer, who are not parties to the agreement.

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[17] Statement of Interest of the United States at 1, 12, Beck v. Pickert Medical Group, No. CV21-02092 (D. Nev. Feb. 25, 2022) [hereinafter Statement of Interest on Pickert Case], https://www.justice.gov/atr/case-document/file/1477091/download.

[18] We note that non-compete clauses also raise other legal questions beyond antitrust. The focus of our analysis in this paper is on the antitrust implications of non-competes.

[19] Statement of Interest on Pickert Case, *supra* note 17, at 6.

> In this context, the non-compete agreement is between parties 'at different levels of distribution' and governs matters over which they do not compete."[20]

The economic logic of how non-competes can generate procompetitive investments in employee-employer relationships is straightforward. Consider a firm interested in hiring a worker where the firm knows that the worker and the firm will need to make significant joint investments in the worker to make the relationship valuable—like training specific skills, sharing specialized knowledge, or sharing trade secrets or confidential business information. If the investments are costly to the firm and worker, then making the investments carries risk. Either the worker or firm can end the relationship at any time. As with any investment, the firm and worker will only make the investment if the expected returns outweigh the cost. Non-compete clauses can be a mechanism that helps incentivize the investments, which benefit both workers and employees. Again, the DOJ recognized these principles in the Statement of Interest in the Pickert matter.[21]

Of course, the existence of these principles does not mean that all non-competes achieve procompetitive benefits. If non-competes exist where there are not training benefits to be had, where the non-competes are overly broad relative to the incentive problem that they seek to resolve, or where the employer controls a large enough share of a relevant labor market to potentially exercise market power, any possible downward effect of non-competes on compensation might outweigh the potential benefits from training. Conversely, to the extent that non-competes are relatively narrow, apply to a subset of outside options, and have potential to encourage more training, the effects on compensation would be expected to be small or zero.

Academic research has sought to quantify the effects of non-competes by leveraging the fact that different states have different rules regarding them. This research is broadly consistent with two possibly competing effects of non-competes. On the one hand, non-competes might enhance efficiency. For example, a recent paper finds that firms that are more dependent on human capital spend more on physical capital investments in regions where non-competes are enforced.[22] That is, when there is complementarity between human capital and physical capital, enforceability of non-competes can support investment. Similarly, a 2019 paper found that firms spend more on firm-specific training in states with stronger enforceability of non-compete clauses.[23] On the other hand, these papers also find some evidence in some locations of lower wages where non-competes

[20] Statement of Interest on Pickert Case, *supra* note 17, at 7 n.7. We note that, even where employees and employers are potential horizontal competitors (as the DOJ argued in *Pickert*), there is still a vertical aspect to the employee-employer relationship that should be accounted for when assessing the competitive effects of a non-compete clause.

[21] Statement of Interest on Pickert Case, *supra* note 17, at 9 (discussing the need to "protect the employer's incentives to invest in their employees").

[22] *See* Jessica S. Jeffers, The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship 39 (April 2023) (unpublished manuscript), https://sites.google.com/view/jessicajeffers/research.

[23] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. RELS. REV. 783, 783 (2019).

are present.[24] These considerations underscore that non-competes have potential procompetitive benefits as well as potential anticompetitive effects.[25]

In summary, from an economic perspective, non-competes should generally be viewed as vertical restraints that have potential procompetitive effects in certain circumstances. As a result, outright bans of non-competes risk being an overcorrection.[26] More targeted regulations of non-competes that seek to limit their use in specific circumstances where anticompetitive effects are more likely would allow for the continued use of pro-competitive non-competes. For example, a federal ban on non-competes is more blunt than the current approach of allowing states to pursue different policy approaches. Further, from an antitrust-litigation perspective, the potential for non-competes to have procompetitive benefits raises the importance of economic analysis of (1) the business model and business rationale for the non-competes and (2) the size of the firm and the structure and nature of competition in the relevant labor market.

More targeted regulations of non-competes that seek to limit their use in specific circumstances where anticompetitive effects are more likely would allow for the continued use of pro-competitive non-competes.

Antitrust Scrutiny of No-Poach Clauses. The economic incentives in employee-employer relationships can also be important when analyzing no-poach cases. Prominent recent examples include the wave of no-poach cases involving business-format franchises.[27]

A defining feature of business-format franchises is the standardization and consistency of products and services. Consumers frequent popular fast food—or quick-service restaurants—like Burger King, Pizza Hut, Subway, and others because they value the consistency of the quality of the product across locations. This business model, however, creates a need for investment and training in workers in order to ensure consistency of brand standards and production processes across the locations within the franchise. Indeed, franchisors help ensure such consistency of brand standards and production processes through contractual rules in franchise agreements with each individual franchisee.

Labor market restraints *within* a franchise brand are thus part of the broader vertical relationship between a franchisor and franchisee, and they can incentivize individual franchisees to invest in employees by assuring franchisees that other franchisees will not usurp those investments by poaching the worker after the training investment has occurred. In the absence of restrictions on labor mobility, a franchisee would have the economic incentive to hire a worker after the worker had already been trained by another franchisee, *i.e.*, to "free ride" on the investment of the other franchisee. Labor-mobility restrictions that increase the franchisee's incentive to train employees can, in turn, benefit employees by increasing their skills and can create incentives for employee promotion within a franchisee's store. Those same restrictions can also strengthen the brand overall, which can strengthen interbrand competition in the product market.

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[24] *See* Starr, *supra* note 23 ("[A]n increase from non-enforcement of noncompetes to mean enforceability is associated with a 4% decrease in hourly wages.").

[25] The differing regulatory regimes in California and Washington have also been cited in the debate over the effect of non-competes. Ron Gilson argued in a 1999 paper that Silicon Valley flourished compared to other technology labor markets precisely because of California's long-standing view that non-competes are unenforceable. *See* Ron Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575 (1999). However, until 2019, Washington State had the opposite regime, enforcing non-competes, and also developed as one of the strongest technology labor markets in the country. These differing state regimes with similar success in technology labor markets are broadly consistent with the idea that the competitive effects of non-competes will differ across market circumstances.

[26] *See* Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Structure for Innovation*, 49 U.C. Davis L. Rev. 251, 252 (2015). Gomulkiewicz argues that Washington's approach—whereby non-competes are present, but rarely enforced, and only then if deemed reasonable by the trier of fact—is superior to California's "blunt instrument" ban.

[27] *See* cases cited *supra* note 6.

Importantly, the fact that these restraints are *intrabrand* ensures that franchisors and franchisees are not insulated from broader labor-market pressure imposed by other brands and other potential employers. For example, a within-franchise no-poach or non-solicitation agreement for, say, one fast food chain does not prevent workers at that chain from working in any other chain of restaurants, nor does it prevent those workers from moving to any other service job (retail stores, gig economy, Amazon warehouses, and so on). That is, the narrow scope of the clause backstops against concerns of wage suppression. In short, a single brand is unlikely to be a properly defined labor market, thereby limiting the risk of an exercise of market power by a single franchise.

This economic logic can also apply to no-poach cases brought as criminal cases. For example, in the recent *Patel* matter, the challenged no-poach clauses were clauses between Pratt & Whitney (a large aerospace engineering firm) and a set of outsourcing firms that Pratt & Whitney used to identify relevant talent for its projects.[28] Defendants argued that the challenged conduct was fundamentally vertical in nature because Pratt & Whitney was a customer of the outsourcing firms, who provided it with a service.[29]

From an economic perspective, this case raises two interesting considerations. First, the outsourcing firms are in a vertical relationship with the hiring firm. Second, the outsourcing firms' business model depends on the specific relationships that they have with their workers. The firm invests in those relationships by finding jobs that fit the workers' skills, and the workers increase their chances of finding job matches by maintaining and improving their skills. Given these investments, it can be risky for outsourcing firms to embed their best workers with another firm (in this case, Pratt & Whitney) that also employs workers with similar skills. Within this context, clauses between the outsourcing firm and its client that limit solicitation or poaching efforts are possibly ancillary to the broader vertical relationship, and can play the procompetitive role of ensuring that outsourcing firms are willing to supply their workers to firms like Pratt & Whitney in the first place. This approach helps expand labor-market opportunities for workers at the outsourcing firms. It is notable, that on April 28, 2023, U.S. District Court Judge Victor A. Bolden acquitted the defendants in the *Patel* matter (under Criminal Procedure Rule 29) citing, in part, to the plaintiffs' burden to establish the alleged agreement was in fact "naked [and] non-ancillary."[30]

In summary, as with non-compete clauses, any analysis of a no-poach clause must assess the broader economic context of the alleged agreement and the incentives of the employer-employee relationships at issue. In particular, when a no-poach clause is part of a vertical relationship (or of a broader collaboration), it can help align incentives for firms to invest in worker's skills and/or expand employment opportunities between firms. Recent rulings, including *Patel*, have recognized these complexities.

Antitrust Analysis of Market Concentration, Market Power, and Labor-Supply Elasticity Estimates. The existence of valuable relationship-specific investments between employers

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[28] Indictment, United States v. Patel, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021), https://www.justice.gov/opa/press-release/file/1457091/download; Consolidated Class Action Complaint, Borozny v. Ratheon Technologies, No. 3:21-cv-1657 (D. Conn. May 9, 2022).

[29] Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Indictment at 2–3, United States v. Patel, No. 3:21-cr-00220 (D. Conn. June 29, 2022), https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrjaddzve/patel-dismiss-2022-06-29.pdf.

[30] United States v. Patel, No. 3:21-cr-00220, 2023 WL 3143911, at *5 (D. Conn. Apr. 28, 2023) ("In reply, Defendants argue that the Government has not met its burden to prove the charged market allocation agreement existed because the evidence 'does not permit a reasonable juror to find that the alleged agreement amounted to a naked, non-ancillary restraint.' . . . Defendants also argue that 'even if the [G]overnment had presented evidence sufficient for the jury to find that Defendants entered into a market allocation agreement . . . , it still would not be entitled to present its case to the jury on a *per se* theory of liability without proving that the alleged agreement was in fact a naked, non-ancillary one.' The Court agrees.") (internal citations omitted).

and employees can also pose a methodological challenge for empirical assessments of market power and market definition in labor markets—in particular, for empirical analyses of the elasticity of labor supply, which often play a central role in economic analyses of monopsony power.

We begin with the definition of labor-supply elasticity and why it is important to monopsony analysis. The labor-supply elasticity for a firm measures how responsive its workers are to outside job opportunities when compensation changes. If a large number of workers would leave a firm when the firm lowers pay, the labor-supply elasticity is considered elastic. But if very few workers would leave the firm when the firm lowers pay, economists would say the labor supply is inelastic. This type of inelasticity is often viewed as evidence of potential monopsony power.

[R]ather than focusing on job-switching in response to changes in only salary or wages, analyses should focus on job switching in response to changes in the overall value of the relationship . . .

A fundamental challenge in trying to measure labor-supply elasticities is properly measuring the overall value to workers of their relationship with their employers. In many situations, data on wages and monetary compensation are available, while data on valuable non-wage factors do not exist (and might be difficult or impossible to measure).[31] As a result, many empirical estimates of labor-supply elasticities rely only on workers' propensity to change jobs in response to changes in *the monetary components of compensation*.

For this reason, such estimates should be used with caution when evaluating labor-market definition and market power. Whenever possible, rather than focusing on job-switching in response to changes in only salary or wages, analyses should focus on job switching in response to changes in the *overall value* of the relationship (including all forms of compensation and non-pecuniary benefits specific to the relationship).

For example, imagine a firm that pursues a "lifestyle firm" strategy with respect to its labor market. The firm might provide high value to its workers on a variety of non-wage dimensions of work, such as shorter and more predictable hours, work-life balance, valued amenities in the office (lunch, coffee, or nice offices), along with generous vacation packages, training, and mentoring. However, to make the array of non-wage amenities economical and profitable for the firm, it offers a slightly less-lucrative compensation package than competing non-lifestyle firms. One could readily imagine a lifestyle firm that would be unlikely to lose workers in response to real, or even nominal, wage reductions because its workers value the non-wage dimensions of the job so highly. An empirical analysis of this firm that does not properly measure and account for the overall value of the employee-employer relationship might incorrectly conclude that this firm faces an inelastic labor supply. In fact, from the perspective of overall value to workers, the firm might actually be facing a highly elastic labor supply–if the firm significantly reduced cherished non-wage dimensions of compensation, it might well see a wave of departures.

In short, when wage and non-wage compensation are bundled in a compensation package, as is particularly common for workers with high skills, observed worker responses to changes in wage compensation may understate actual responsiveness because those responses and changes are only part of the picture.

Even setting aside non-wage elements of compensation, firms often employ complex compensation schemes with regard to the monetary aspects of compensation to resolve incentive problems. For example, firms frequently design compensation programs with large increases in pay at senior levels. Part of the increase represents the higher productivity of senior employees. However, part of it may also be designed to incentivize junior employees to invest in a career in the firm so

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[31] For example, Chetty et al. (2011) find that adjustment costs and hours constraints can lead microeconometric methods to systematically underestimate labor supply elasticity. *See* Raj Chetty et al., *Adjustment Costs, Firm Responses, and Micro vs. Macro Labor Supply Elasticities: Evidence from Danish Tax Records*, 126 Q.J. Econ. 749, 749 (2011).

they can achieve the higher payoff in the long-run.[32] These payment schemes can mitigate incentive problems within the firm, such as providing motivation for worker effort when such effort may only be partially observable to the firm. When such payment schemes are in place, wages may not be a reliable measure of the "market value" of a worker at that point in time.[33] These realities can run the risk of making empirical analysis of labor-supply elasticities incomplete.

In academic work that has analyzed worker mobility in the context of market-power concerns, data that tracks non-pecuniary forms of pay (and/or all forms of compensation) is often not available. In litigation, or in the context of a possible merger, a wealth of proprietary data and documentary evidence are more likely to be available. That kind of enriched evidentiary basis can allow for a more robust and nuanced assessment of market definition and market power that accounts for the importance of non-wage factors—and the overall value of the employee-employer relationship—in labor-market competition.

Conclusion

An increased focus on labor-market antitrust issues in recent years has unearthed complex questions about how labor-market competition differs from product-markets competition, the role that labor-market restraints play in aligning incentives within the employee-employer relationship, and how to measure the many dimensions of economic value in the employer-employee relationship.

As we detail in this paper, courts and policymakers would benefit from using the vertical nature of employee-employer relationships as a key analytical lens for labor-market antitrust analysis. The existence of vertical relationships does not imply that labor markets are immune to anticompetitive effects of labor-market restraints. Rather, it implies that restraints that might otherwise appear to be horizontal in nature, and that might raise competition concerns in product markets, may have more nuanced economic motivations and effects within the employee-employer relationship.

These points also complicate empirical analyses in labor markets. Unlike analyses frequently used in product markets to analyze market power, the "price" that workers receive for their labor supply is rarely a single number that captures all relevant dimensions of compensation. Rather, the price that a worker receives for labor is the *overall* economic value that the employer gives the worker across all dimensions. Firms take very different strategies in how they design compensation and compete for workers. Analysis of labor-market competition issues, and the application of econometric methods to labor-market data, would be wise to account for these differences. ●

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[32] *See* Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261, 1264 (1979). The same logic applies to compensation based not on seniority, but on rank within an organization--even if rank fails to align fully with skill. *See* Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 841 (1981).

[33] Another example pertains to career considerations. Lawyers might consider clerking prior to joining a law firm, despite the much lower compensation, reasoning that it is an investment in their career. These kinds of lifecycle considerations mean that even when the labor market is competitive, a worker's wage at a point in time is not necessarily equal to the marginal revenue product of labor, *i.e.*, the wage is not the "market value" for that worker's labor supply.

A Primer on the Economics of Intellectual Property Antitrust Claims

Allan Shampine

Intellectual property (IP) rights are, by definition, rights to exclude others from the use of that intellectual property. Society grants those rights in the hopes of incentivizing innovation. There is a trade-off between the long-term benefit of increased innovation and the short-term cost of allowing the innovator to (potentially) exercise market power. In order to obtain the benefits of IP rights, innovators must follow certain associated restrictions. For example, patents are granted for a limited time period and in exchange for the knowledge of the innovation being made public. Society must also beware misuse of the system—attempts to obtain market power through the IP system without complying with the relevant rules. Since intellectual property rights are rights to exclude others from the use of intellectual property, it is not surprising that antitrust claims related to exclusionary activity are often asserted in IP litigation.

For example, one class of antitrust claims named after a Supreme Court decision referred to as *Walker Process* claims involves patents obtained through fraud on the patent office.[1] These claims involve showings of both fraud on the patent office and the standard elements of a Sherman Act Section 2 claim. Another class of claims—*Handgards* claims—involves sham or bad faith litigation of patents that the patent-holder knows to be invalid or unenforceable.[2] Again, these claims involve showings of both knowledge that the patent is invalid or unenforceable as well as the standard elements of a Sherman Act Section 2 claim. However, the fact that such antitrust claims spring readily to mind because of the inherently exclusionary nature of IP rights does not necessarily mean there is a sound economic basis for them in any particular case. Indeed, some of the economics involved in these matters can be counterintuitive. This article walks through a variety of economic issues that may be mishandled or misunderstood in an IP antitrust claim.

Intellectual Property Rights Need Not Grant Any Market Power

There is sometimes a perception that an IP holder must be a monopolist in an antitrust sense because they have a legal right to prevent others from using that IP, e.g., a patented technology. That perception is incorrect for at least two reasons. First, the IP rights may not cover anything of economic importance. Second, even if they do, attempts to assert the rights may be unsuccessful (e.g., a patent is found invalid or not infringed).

For example, Prof. Shapiro explains that a patent is a:

> bundle of uncertain and imperfect rights. . . . [that] are typically far less valuable than would be idealized "ironclad" patent rights. . . . Therefore, the patentholder is not "entitled" to negotiate a monopoly

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[1] Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

[2] Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984)

> outcome, just because the patentholder *asserts* that its patent is valid and infringed by a particular rival. Rather, the patentholder's rights are calibrated according to the likelihood that the patentholder would win the patent litigation, and the extent of exclusion that such a victory would permit.[3]

In this example, the extent of (potential) exclusion is the *patent scope* and the likelihood a patentholder would win the patent litigation is the *patent strength*.

With respect to scope, patents (or other IP rights) may cover only very limited aspects of a product that do not correspond to an antitrust market. In fact, IP rights may not cover a product at all—they might only pertain to one particular way of making one particular part of a product. Even if the rights cover a product, it may be one of many similar competing products. Only a small percentage of patents have economic significance.[4] As explained by the U.S. Department of Justice and Federal Trade Commission:

> The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.[5]

With respect to IP strength, IP rights are probabilistic. They are complicated and open to interpretation and debate, and disagreements about the validity and extent of those rights are common. That means, for example, every patent granted by the Patent and Trademark Office is still subject to uncertainty as to what it actually covers and whether it is valid or not. Profs. Lemley and Shapiro explain that in the patent context:

> The patent system does not grant an absolute right to inventors to exclude others from practicing their inventions[.] . . . Rather, the patent system gives the patent holder a right to *try* to exclude others by asserting its patent against them in court. The actual scope of a patent right, and even whether the right will withstand litigation at all, are uncertain and contingent questions. This uncertainty is not an accident or mistake. Rather, it is an inherent part of our patent system . . .[6]

The uncertain nature of IP rights has a number of important economic implications.

One implication of the uncertain nature of IP rights is that invalidity and fraud are not the same thing.

Invalidity and Fraud Are Not the Same Thing

One implication of the uncertain nature of IP rights is that invalidity and fraud are not the same thing. There may be a temptation to conclude that if a firm attempts to enforce an IP right and that right is subsequently held to be invalid, then the firm must have done something wrong (in the form of an illegal or fraudulent act) when obtaining the IP right initially. That is not the case. The uncertain nature of IP rights and the ability to test them in litigation are inherent to the IP system. A finding of invalidity, in whole or in part, does not mean that the IP holder necessarily did anything wrong. For example, a patent-holder is entitled to try and enforce their patent through litigation.

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[3] Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND Journal of Economics 2, at 395 (2003).

[4] See, e.g., Suzanne Scotchmer, Innovation and Incentives' 275 (2004). ("Despite these differences, the methodologies [investigating patent value] all turn up the following general themes: (1) the values of patent rights are very dispersed, (2) the distribution of values is very skewed, with most of the value provided by a few high-earning patents, and (3) the average value of patent rights is much lower than the average R&D cost of innovation.").

[5] U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, §2.2 (January 12, 2017), https://www.justice.gov/atr/IPguidelines/download.

[6] Mark Lemley and Carl Shapiro, *Probabilistic Patents*, 19 Journal of Economic Perspectives 2, 75-98, at 95 (2005).

The patent-holder may lose, but such a loss in and of itself does not retroactively make the patent-holder's enforcement effort anticompetitive.[7]

Inherent Uncertainty of IP Rights Also Has Implications for Evaluating Claims of Fraud

Antitrust claims involving IP rights often include claims of fraud in obtaining the IP right. Economic tensions can arise in claims about attempts to enforce fraudulently obtained IP rights. Committing fraud to obtain the IP right in the first place is a distinct act from enforcing that IP right to reduce competition (and, as discussed earlier, *Walker Process* and *Handgards* claims involve both showing a problem with the IP right itself as well as the standard elements of a Sherman Act Section 2 claim). Claims as to the first act can have implications with respect to the plausibility of claims as to the second act. Say that a firm commits fraud to obtain an IP right that it hopes to use to exclude rivals (or otherwise raise rivals' costs). Then what? The IP right is only useful to the extent it can be enforced. But if the fraud is discovered, the IP holder may not only fail in its enforcement attempt but may be subject to penalties such as paying the other parties' litigation costs and trebled antitrust damages. Any effort to enforce a fraudulently-obtained IP right runs the risk of the fraud being detected, which may result in significant costs to the IP holder.

Now, the IP holder may hope that the threat of litigation alone will be sufficient to achieve its goals. But as noted above, IP rights are inherently uncertain, and firms are well aware of this uncertainty. Any firms threatened by asserted IP rights have incentives to investigate the IP and test its strength, which will increase the chances of the IP holder's fraud being discovered. The greater the economic stakes for the firms threatened, the greater the incentives to investigate the asserted IP. If a threatened firm calls the IP holder's bluff and litigation commences (such as an enforcement effort by the IP holder or an Inter Partes Review initiated by the threatened firm), one would expect that the IP holder would be concerned about its fraud being exposed in the crucible of litigation, and so might be reluctant to press forward in that process.

Of course, IP fraud can and does occur, and the possibility should be taken seriously. However, consider an antitrust claim along the lines sketched above that includes purported evidence of clearcut fraud obtained through a Google search of key words from the patent claims. If evidence of fraud is so easily obtainable and the evidence is in fact clearcut, then why would the IP holder try to enforce the IP right at all since it would seem to be trivial to detect and reveal the fraud? That is, claims as to the existence of the fraud may be in tension with claims as to the plausibility of enforcing a fraudulent IP right. To understand the economic framework involved in an antitrust claim involving fraud, and whether that claim is economically plausible, it helps to ask why the IP holder might have expected to get away with the fraud, especially if the claim involves monopolizing a highly profitable industry where the other party potentially has a lot of money at stake, and why the IP holder might persist in litigation even after being confronted with evidence of the fraud.

Is the Tool Sufficient for the Job?

If an IP right is the alleged tool through which anticompetitive harm was inflicted, one must consider whether it is economically plausible that the tool would be sufficient to achieve the claimed harm, such as monopolization of a market. Here, it is helpful to understand the size of the alleged harm relative to the likelihood of detection of fraud, the likelihood of the IP rights being upheld even

[7] More generally, if losing when one asserts IP automatically led to antitrust liability, that would tend to reduce participation in the IP system.

if fraud is not detected, and the scope of the IP rights if they are upheld. Overall, is it economically plausible that the IP rights, in light of those three dimensions, could result in the claimed antitrust harm?

Beginning with the likelihood of detection of fraud, as noted in the prior section, the higher the economic stakes, the more likely a party against which the IP is asserted will dig into the IP and discover fraud. If billions of dollars are at stake, the other party would be incented to look really hard at the IP. The question is further complicated since evidence that can at least be characterized as indicating fraud presumably has been unearthed for an antitrust claim alleging fraud in the first place.

To be clear, plausible answers may exist for all these questions. Economically plausible reasons can explain how an IP holder might commit fraud and expect to get away with it. Gains to the IP holder might be large but potential gains to the party against which the IP is asserted are sufficiently small that it is simply not worth fighting over. Also, potential gains to excluded parties may be collectively large but diffused across many parties, such that no one party finds it worthwhile to devote resources sufficient for uncovering the fraud. It might also be the case that the fraud was well orchestrated such that the probability of finding fraud was small absent new information coming to light, e.g., a whistle-blower. Overall, IP fraud can certainly be used anticompetitively, but it is important to evaluate the internal economic consistency of claims of fraud and antitrust harm.

Next, even if actual fraud were not detected the assertion of the IP right still might not be upheld—it could be found invalid or inapplicable (e.g., not infringed), or both. If there were good reasons to expect that the IP right would be unlikely to be upheld on its own merits, it would be a less effective tool for anticompetitive purposes. IP challenges are often mounted specifically because the challengers believe they have good chances of prevailing. The practitioner can evaluate statements and actions of parties involved that might shed light on the perceived strength of the IP right in terms of likelihood of being upheld.

Finally, even if the IP right were upheld, is its scope sufficient for the job? That is, even if the IP holder managed to get an injunction concerning the IP right, would that be sufficient to result in significant antitrust harm? As previously discussed, there is no presumption that any given IP right is sufficient to provide market power. In order to demonstrate significant antitrust harm, an antitrust claimant would like to show that assertion of an IP right would be sufficient in scope to exclude rivals entirely, or at least to make them sufficiently less competitive so as to impact the overall market.

To summarize using a patent example, a narrowly defined patent widely perceived as both unlikely to be upheld and potentially fraudulently-obtained represents an unlikely tool for successfully monopolizing a market. Conversely, a broad patent that was widely feared in an industry until a whistle-blower later revealed it was fraudulently obtained might be a very plausible tool.

IP rights grant the right to exclude in a legal sense, but that does not indicate actual exclusion in an economic antitrust sense.

Has Any Firm Actually Been Excluded?

IP rights grant the right to exclude in a legal sense, but that does not indicate actual exclusion in an economic antitrust sense. If a firm has in fact been subject to an injunction or exclusionary order and believes it has a valid antitrust claim, then it can point to an actual exclusion of a competitor—itself (although that leaves open the question of whether such exclusion was sufficient to impact competition in a properly defined antitrust market). Similarly, a firm being sued over an allegedly fraudulent IP right may be able to point to prior instances where other firms exited after being challenged or faced significant competitive disadvantages.

On the other hand, if challenged firms continued to participate in the market either by settlements, by dropping challenged features, or by introducing non-infringing alternatives, and there was no obvious impact on market-wide output or price, then an antitrust claim should be prepared to explain why nonetheless there has been antitrust harm. Put another way, if no firm or product has ever actually been excluded, then an antitrust claim may have an uphill battle with respect to any claims of historical antitrust harm. Prospective claims need not worry about showing historical harm, but may also not have any actual antitrust harm to support damages claims.

Is Observed Market Behavior Consistent with Antitrust Harm?

In antitrust cases it is often useful to question whether actual outcomes have mapped to the theory of harm. For example, it is easier to claim a consummated merger was anticompetitive if it can be associated with increases in price and reductions in output in a properly defined antitrust market. The same is true with respect to IP-related antitrust claims. For example, exclusionary behavior is presumably motivated by the IP holder's desire to better its own position. Is there evidence that the IP holder actually benefited from the alleged exclusionary behavior? Put another way, where is the "pot of gold" that the IP holder is presumably chasing? Is there some obvious change in the IP holder's economic position that can be tied to the alleged exclusionary activity? If not, is there a plausible reason why one might not expect to see a change (e.g., was the IP holder preventing deterioration of an existing position rather than enhancing its position)?

In a similar vein, are there natural experiments that might shed light on the antitrust claim? For example, if a patent that is alleged to have been used to monopolize a market has expired, what has happened in the market since expiration? If we suddenly observe entry or the former IP holder's profits or market position markedly decline following patent expiration, that evidence is consistent with a finding of monopolization. Conversely, if there is no observable change in the market or market position of the former IP holder after the allegedly monopolizing patent expires, that suggests the patent had no significant impact on the market.

Practitioners may also wish to consider the degree to which interpretation of market evidence depends on findings of liability. In particular, if an IP right is legitimate and economically significant, the IP holder may expect to earn significant economic returns and may be harmed if its IP is stolen. Enforcing those rights is a normal operation within the IP system. On the other hand, if the IP right was fraudulently obtained, then those same returns may be pointed to as evidence of anticompetitive harm. For example, one firm might claim another has stolen its trade secrets and entered its market, resulting in price erosion and lost profits. The allegedly misappropriating firm might counter that the first firm is trying to eliminate a significant competitor and harm competition. Both parties might point to the same economic evidence of market impact from entry, agreeing that entry significantly impacted the market, but interpreting that evidence through very different lenses.

Are Litigation Costs a Plausible Economic Mechanism for Raising Rivals' Costs?

Antitrust harm is sometimes alleged to occur through sham litigation raising rivals' costs. Such claims should be clear about the economic mechanism allegedly leading to raising rivals' costs. In particular, how would litigation costs impact company operations and why would the rival be harmed relative to the IP holder given that they are both paying litigation costs?

First, economics is clear that marginal costs are the key determinants of prices, not fixed costs.[8] Costs incurred for a discrete lawsuit are likely to be fixed costs, not part of a firm's marginal costs of production. Therefore, as a matter of economic theory, one would not expect legal expenses unconnected to production decisions to cause a firm to increase its prices. The firm might be harmed by having to pay those costs, but harm to a competitor is not the same thing as harm to competition. However, in certain circumstances litigation costs might impact a firm's competitive position. For example, sufficiently large costs might bankrupt a firm.[9] An obvious question, then, is to evaluate the size of any legal costs relative to a firm's operations. While litigation costs are expensive in absolute terms, they are often small relative to firms' overall operations, and firms—particularly large firms—are often engaged in multiple litigations on a regular basis in the course of ordinary business.

Second, this sort of raising rivals' costs argument can contain an internal economic inconsistency. Because the IP holder has to pay legal costs as well, under this sort of theory of harm there is no reason to assume that the rival is at a greater disadvantage than the IP holder. For example, it could be economically irrational for an IP holder to seek to raise its rival's costs through anticompetitive litigation when the IP holder is exposed not only to equally high direct costs but the risk of even higher costs because of the possibilities of fee-shifting or trebled antitrust liability. The economic tension can be compounded when applied across multiple litigations. Sometimes IP holders are accused of using serial litigation to exclude rivals. But that would mean that while any individual rival to the IP holder has only had to pay the costs to defend a single lawsuit, the IP holder has had to pay the costs to prosecute all of the lawsuits. And if those lawsuits were all based on fraudulently obtained IP, the IP holder could face additional exposure through potential fee shifting and antitrust liability. Thus, if fixed legal costs did somehow make a firm a less effective competitor, then the IP holder might face higher total legal bills than any of its individual rivals, and so the rivals might actually have benefited as competitors relative to the IP holder.

Sometimes IP holders are accused of using serial litigation to exclude rivals. But that would mean that while any individual rival to the IP holder has only had to pay the costs to defend a single lawsuit, the IP holder has had to pay the costs to prosecute all of the lawsuits.

Does Harm to Competition Mean All Competitors Are Harmed?

Sometimes a firm against which an IP right is being asserted may claim that the IP holder has previously excluded other firms, gaining monopoly power in a market, and is now turning its attention to the firm bringing the antitrust claim. One counterintuitive phenomenon in this situation is that the firm making the antitrust claim actually might have benefitted from the alleged anticompetitive conduct. That is, if the firm making the claim has been participating in the market while other firms were excluded, that firm may actually have been better off than in a but-for world with no exclusion. This is a corollary of the antitrust axiom that harm to a particular competitor does not mean there is harm to competition—harm to competition does not necessarily mean harm to a particular competitor. In the antitrust merger context, the analogy is that a merger that reduces competition in an industry may harm consumers but benefit other firms in the industry.

To illustrate this issue in the IP context, assume that in the actual world three firms are competing. Further assume that in the but-for world with no exclusion five firms would have competed. Assume that the difference is due to exclusionary activity by one of the three firms. If there is less competition in the market due to the exclusionary activity, then, by definition, total unit sales would

[8] See, e.g., DENNIS CARLTON AND JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION, 58-61 (4th ed. 2005).

[9] Even in that case, bankruptcy does not necessarily mean a firm ceases to be a competitor, or that its assets would leave the market and cease to be of competitive significance. However, internal disruption from a bankruptcy could, for example, make a firm a less effective competitor.

be lower in the actual world than in the but-for world (output is lower) but per unit prices would be higher (price is higher). The excluding firm would be expected to be better off or it would not engage in the activity. The two firms excluded from the market are presumably worse off. However, the remaining two firms that are still in the market despite the exclusionary activity actually may be better off. They earn higher prices on their sales, which is a benefit to them relative to the but-for world. Whether they are net better or worse off hinges largely on how their unit sales differ (and, if raising rivals' costs claims are present, may also depend on how their costs are impacted). They might be better off even with lower unit sales if the increase in per unit price is high enough, but it is also possible that their unit sales could be higher than in the but-for world. That is, the exclusion of two firms will reduce *industry* output, but the unit sales of all three remaining firms *individually* may still be higher than in the but-for world.

Conclusion

Thinking through the economic incentives inherent in an IP antitrust case can help to focus the analyses to bring to bear on pertinent issues in a case. Not every economic point will be relevant in every case, but thinking about a case and working through the economic logic outlined in this article can help attorneys understand the claims more clearly, whatever the specifics. ●

Antitrust v2.0—What Multinational Companies Should Know About China's Amended Anti-monopoly Law

Frank Jiang, John Jiang, and Scott Yu

In recent years, China has reinforced its antitrust regime by enhancing the status of its antitrust authority, promoting new legislation and strengthening enforcement. This trend is consistent with similar efforts in other major antitrust jurisdictions such as the U.S. and the EU. One of the most significant changes took place on August 1, 2022, when China officially amended its Anti-monopoly Law (AML) for the first time since the AML was promulgated in 2008. On June 27, 2022, three days following adoption of the amended AML, the State Administration for Market Regulation (SAMR) released six exposure drafts of AML implementing rules for public comment. These drafts are designed to streamline and harmonize the existing operational rules with respect to merger filing thresholds, joint conduct, unilateral conduct, intellectual property abuse, and administrative monopolies, and four of them were officially issued in final form on March 24, 2023 and became effective on April 15, 2023.

We anticipate that the amended AML, alongside the relevant implementing rules, will have significant implications for multinational companies (MNCs) doing business in China. Of particular relevance are:

- the expanded scope of behavior subject to fines and the increased levels of fines applicable to both enterprises and individuals for failure to notify mergers, "hub-and-spoke" cartels, and other prohibited conduct;
- new merger notification thresholds which may reduce the number of notifiable transactions, but introduce so-called "killer acquisition" criteria that will create more regulatory uncertainties for industry leaders' expansions of business and closing timetables for their deals;
- new "safe harbor" rules which will likely provide greater flexibility for some MNCs' vertical distribution practices in China, although applicable market definition and market share calculations will require careful analysis;
- the codification of expanded liability for assisting in the formation of "hub-and-spoke" cartels, which will likely create risks for MNCs operating in two- or multi-sided markets, especially in data-intensive businesses; and
- fine-tuned intellectual property rights (IPR)-related provisions which could provide some clarity for MNCs' licensing practices, while also expanding the scope of potential liability in certain scenarios, such as standardization and patent pooling.

In this article, we will first survey China's antitrust enforcement trends, then discuss each of the above implications for MNCs, followed by some key takeaways.

Increased Enforcement Trends

In spite of the ongoing COVID-19 pandemic, China's top policymakers have consistently made antitrust enforcement one of their priorities in recent years. Throughout 2021, the SAMR and other

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antitrust authorities in China[1] focused their limited enforcement resources on price-related monopoly agreements (e.g., resale price maintenance, RPM), exclusive dealing and failure-to-notify cases in sectors of critical concern to public welfare and people's livelihood, such as digital platforms, healthcare, building materials and utilities. These trends continued into 2022.

According to the Annual Report of Anti-Monopoly Law Enforcement in China (2021)[2] issued by SAMR on June 8, 2022, SAMR dealt with a total of 175 monopoly cases in 2021 (a year-on-year increase of 61.5 percent). Total fines exceeded RMB 23 billion (approximately USD 3.6 billion). Among them, record fines were imposed on top digital players such as Alibaba (RMB 18.2 billion, the highest in China so far) and Meituan (RMB 3.4 billion), both for abuse of dominance (primarily exclusive dealing through so-called "pick-one-side" practices), on pharmaceutical suppliers such as Yangtze River (RMB 764 million) and electrical device suppliers such as Bull Group (RMB 294.81 million) for RPM, and on cement and concrete cartels in various regional markets (over RMB 500 million in two series of cases). SAMR also maintained its active enforcement stance in merger control in 2021 and 2022 by blocking the merger of two livestreaming gaming platforms controlled by Tencent (DouYu/HUYA), conditionally clearing nine deals (among them, eight concerned international transactions led by MNCs) and probing more than 150 failure-to-notify cases (including Tencent's acquisition of China Music in 2016, where for the first time remedies included the unwinding of existing business arrangements).

Foreign companies (or FIEs) were involved in all but one of the conditional clearances, and half of the failure-to-notify cases.

MNCs continue to be involved in a significant (albeit declining) portion of Chinese antitrust cases. Recent antitrust cases still involved an array of foreign companies (or foreign invested enterprises, FIEs),[3] including a number of record fines. For example, among the published vertical agreement cases[4] (all concerning RPM), roughly 1/3 involved FIEs (including a recent case involving a Swiss firm active in the healthcare sector), and in very exceptional circumstances, leniency was granted to the investigated companies (including MNCs). In merger control, almost half of the transactions reviewed by SAMR in the past twelve months involved at least one foreign company (or FIE). Foreign companies (or FIEs) were involved in all but one of the conditional clearances, and half of the failure-to-notify cases.

Key Highlights of the Amended AML and Implementing Rules

We set forth below certain key highlights which can impact the investments and operations of MNCs in China and beyond.

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[1] On November 18, 2021, the State Anti-Monopoly Bureau (SAMB) was officially announced as a new bureau within SAMR. SAMB shares the same office building with SAMR in Beijing and is led by a vice minister of SAMR. It is reported that SAMB is rapidly expanding its staffing to significantly strengthen the national antitrust enforcement task force. SAMB's creation and staffing signaled a response to the central government's repeated statements of an intent to "strengthen anti-monopoly [laws] to prevent the disorderly expansion of capital" (e.g., the Central Economic Work Conference in 2020 identified "strengthen[ing] anti-monopoly [laws] to prevent the disorderly expansion of capital" as one of eight key government tasks, http://www.gov.cn/xinwen/2020-12/27/content_5573663.htm). Also, Administrations for Market Regulation at the provincial level (e.g., Beijing, Shanghai, Zhejiang, Guangdong) are deemed local counterparts of SAMR and each has the power to enforce the AML against monopolistic behaviors within its jurisdiction (i.e., a province) under the guidance/coordination of SAMR.

[2] SAMR, *Annual Report of Anti-Monopoly Law Enforcement in China (2021)*, (March 24, 2023), https://www.samr.gov.cn/xw/zj/202206/t20220608_347582.html.

[3] An FIE is a company with foreign shareholders that is registered in China under Chinese law. In contrast, a foreign company generally refers to a company registered outside of China under a foreign law.

[4] Antitrust enforcement decisions are generally required to be published on SAMR's website. However, there are a number of unpublished cases, in particular before 2018 when SAMR was created to consolidate the antitrust enforcement powers of NDRC, SAIC and MOFCOM. The exact number of unpublished antitrust cases is not known, but is understood to be small.

Significant hikes in fines for various violations. The amended AML significantly increases legal liabilities for infringers, both at the enterprise and individual levels, by increasing the upper limits of base fines, establishing new punitive fines, and allowing for personal liability of management. For example, the upper limits of base fines are lifted to 10% of the entity-in-question's total turnover (from no more than RMB 0.5 million under the 2008 AML) for a failure-to-notify case with competitive concerns, and to 1% of a company's total turnover (from no more than RMB 1 million) for refusal to cooperate in or obstruction of an investigation. Such levels are comparable to fines for cartels and unilateral conduct. For violations which are particularly serious or have caused significant consequences, the amended AML allows for punitive fines of 2 to 5 times the base fines. This implies that the ceiling for serious violations could be as high as 50% of a company's turnover for the preceding year. Notably, in addition to the corporate-level fines, individuals who are personally liable could be fined up to RMB 0.5 million (for refusal to cooperate in or obstruction of an investigation) or RMB 1 million (for conclusion of a monopoly agreement). The specific amendments are as follows:

<table>
<tr><th rowspan="2">Violations</th><th rowspan="2">Previous Fine Level</th><th colspan="2">Fine Level under the Amended AML</th></tr>
<tr><th>Base Fines</th><th>Punitive Fines</th></tr>
<tr><td>Merger filing related non-compliance, including gun-jumping, failure to notify, violation of clearance conditions or prohibition decision</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>For deals with competition concerns: up to 10% of the merging parties' turnover in the preceding fiscal year

For deals without competition concerns: up to RMB 5 million (approx. USD 750,000)</td><td rowspan="6">For violations which are particularly serious or have caused significantly aggravated consequences: 2 to 5 times the base fine</td></tr>
<tr><td>Refusal to cooperate in or obstruction of an investigation or merger review, e.g., refusal to provide requested information, provision of false information, destroying or hiding evidence</td><td>For individuals: up to RMB 100,000 (approx. USD 15,000)

For entities: up to RMB 1 million (approx. USD 150,000)</td><td>For individuals: up to RMB 500,000 (approx. USD 75,000)

For companies: up to 1% of the turnover in the preceding fiscal year or RMB 5 million (approx. USD 750,000) if no turnover</td></tr>
<tr><td>Conclusion of cartel agreement but without implementation</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>For individuals: up to RMB 1 million (approx. USD 150,000)

For companies: up to RMB 3 million (approx. USD 450,000)</td></tr>
<tr><td>Conclusion and implementation of cartel agreement</td><td>Up to 10% of the turnover in the preceding fiscal year</td><td>For individuals: up to RMB 1 million (approx. USD 150,000)

For companies: up to 10% of the turnover in the preceding fiscal year or RMB 5 million (approx. USD 750,000) if no turnover</td></tr>
<tr><td>Trade associations organizing undertakings to conclude a monopoly agreement</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>Up to RMB 3 million (approx. USD 450,000)</td></tr>
<tr><td>Abuse of dominant position</td><td colspan="2">Up to 10% of turnover in the preceding fiscal year</td></tr>
</table>

In addition, the amended AML requires that antitrust violations be documented on an enterprise's social credit records,[5] which could impact not only such enterprise's goodwill and reputation but also its potential business opportunities, especially for public procurement. For example, a medical enterprise with an antitrust sanction record may be subject to a credit downgrade and restricted or prohibited from participating in centralized medicine procurement.

For certain investors (especially private equity and venture capital firms) that participate in a series of investments in portfolio companies, such a series of investments in a target company may meet the filing threshold even if no single acquisition in isolation would have required a filing. Therefore, it is important to plan early to assess potential filing obligations and avoid exposure to heightened sanctions for failure to notify. Due diligence should also include determining whether there were prior notifiable investments in a company which had not been notified, as that could expose the investors to significant fines.

For MNCs with a sound compliance framework, the increase of potential legal liability may provide a competitive edge against their competitors who have poor compliance standards . . .

For MNCs with leading or potentially dominant market positions or operating in sectors with relatively complex supply chains (e.g., a mechanism of multi-tiered suppliers), it is advisable to enhance compliance regimes, including adopting contingency plans to respond to any potential antitrust investigation. For MNCs with a sound compliance framework, the increase of potential legal liability may provide a competitive edge against their competitors who have poor compliance standards and become subject to antitrust investigations.

Changes to merger control rules. China's merger control regime remains a key regulatory factor for MNCs starting or expanding their businesses in China. The new draft AML implementing rules propose to significantly raise the filing thresholds (e.g., for a target business in a typical acquisition, the threshold revenue in China for a reportable transaction is increased to RMB 800 million from RMB 400 million), making it less likely to require notification of small and medium-sized deals without any competition concerns. This initiative will definitely be welcomed by MNCs (especially private equity and venture capital firms), as it can help to substantially expedite timing and save costs in closing such transactions.

However, one newly-added notification requirement in the draft implementing rules could impose new filing requirements on MNCs with significant operations in China.[6] The draft rules propose that an acquisition by an undertaking with Chinese turnover of RMB 100 billion or more may be required to notify a transaction if another party (usually the target) has a market capitalization (or valuation) of at least RMB 800 million and Chinese turnover accounts for more than one third of its global turnover, even if its turnover is minimal. That is, a large acquiring party may trigger notification requirements even for a relatively small acquisition.

This proposed new notification threshold based on a target's valuation rather than its turnover suggests that SAMR is on heightened alert regarding "killer acquisitions" of start-ups by large

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5 An enterprise's social credit records in China document such enterprise's records of administrative sanctions, litigation and similar events in the past few years and are generally displayed on the websites of the National Enterprise Credit Information Publicity System, https://www.gsxt.gov.cn/index.html,and of Credit China, https://www.creditchina.gov.cn/home/?navPage=0. Such records may impact an enterprise's normal operation of business in the country. For example, an enterprise with a record of an antitrust sanction may be disqualified from participating in a public procurement process.

6 Article 4 of Provisions on the Threshold for the Notification of Concentration of Undertakings (Exposure Draft) provides that where a concentration of undertakings fails to meet either of the notification thresholds specified in Article 3 hereof, but concurrently satisfies the following conditions, the concentration shall be notified in advance to the Anti-monopoly Law Enforcement Agency of the State Council, otherwise, the concentration shall not be implemented: (1) where the business turnover within China of one of the undertakings participating in the concentration exceeds RMB 100 billion in the previous accounting year; and (2) where the market capitalization (or valuation) of another merging party is not lower than RMB 800 million, and the turnover generated within China in the previous accounting year is more than one third of its turnover generated worldwide.

enterprises. However, it may be difficult to determine whether the valuation of a start-up meets the threshold, since valuation tends to fluctuate according to industry trends and market conditions. In any case, for a transaction involving a target firm with a valuation in the range of RMB 800 million and an acquirer/investor with RMB 100 billion in Chinese turnover, the parties should proactively and carefully design the transaction structure and assess merger filing obligations at an early stage.

In addition, the amended AML has introduced a "stop-the-clock" mechanism, which is expected to reduce (or even supersede) the need for "pull-and-refile" procedures for complex mergers. Triggers of the "stop-the-clock" mechanism include the notifying parties' failure to provide information requested by SAMR in a timely manner, new facts or circumstances requiring further verification, and the notifying parties' request to "stop the clock" to provide time for them to evaluate alternative remedies. Although the new mechanism is expected to optimize review schedules for complex cases, its use by SAMR in other contexts could create undesired extensions of the review period for ordinary or even simple cases.

The amended AML also introduces a "tiered" review system to prioritize the availability of skilled personnel for mergers in important sectors and to improve the efficiency of merger review. Correspondingly, SAMR announced that, from August 1, 2022, it would delegate five provincial competition authorities (Beijing, Shanghai, Guangdong, Chongqing and Shaanxi) to review a portion of simplified merger filing cases on a trial basis. In 2022, roughly 14% of the merger cases were handled by these local competition authorities. As to the focus of merger reviews, the amended AML provides that important sectors involving "national economy and people's livelihood" are key enforcement fields in respect of which it will strengthen the review of concentrations. While the amended AML does not further clarify the meaning of "national economy and people's livelihood", an earlier exposure draft of the amended AML suggested that antitrust enforcement in respect of finance, science, technology, and media businesses will likely be prioritized. Accordingly, MNCs active in such sectors should be particularly proactive in evaluating merger risks and following enforcement trends.

"Safe harbor" mechanism for vertical restraints. While the 2008 AML did allow for exemptions of certain types of agreements from the AML,[7] the bar was extremely high in practice and we are not aware of any published successful application of such provision. Nor did the 2008 AML even contemplate "safe harbors" until certain IPR-related implementing rules and antitrust guidelines introduced the concept in 2019 by proposing certain market share thresholds (20% for horizontal agreements and 30% for vertical agreements). The amended AML for the first time formalizes a "safe harbor" mechanism for vertical restraints in all sectors: a vertical agreement will not be prohibited if the relevant undertaking can show that its "share in the relevant market is lower than the threshold prescribed by [SAMR] and meets other conditions." SAMR's draft implementing rules proposed to prescribe a 15% market share threshold, although it was deleted in the officially issued version.

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[7] Article 15 of the 2008 AML (Article 20 of the amended AML) provides that a monopoly agreement (including cartels and vertical restraints) can be exempted where an undertaking can prove that the agreement is: (i) for the purpose of technological improvement or research and development of a new product; (ii) for the purpose of product quality improvement, cost reduction and efficiency enhancement, or product specifications, or standards unification, or specialization; (iii) for the purpose of enhancing operating efficiency of small or medium-sized undertakings or strengthening their competitiveness; (iv) for the purpose of furthering public interests such as energy conservation, environmental protection, disaster relief or assistance to the indigent; (v) for the purpose of relieving conditions resulting from serious sales decline or significant overproduction due to economic recession; (vi) for the purpose of safeguarding legitimate interests in the course of foreign trade and foreign economic cooperation; or (vii) within the scope of any other circumstance prescribed by the relevant law or stipulated by the State Council. The parties must also prove that the agreement will not seriously restrict competition in the relevant market, and will enable consumers to share in the benefits derived from the agreement.

The amended AML also attempts to reconcile a long-existing divergence between the Chinese enforcement authority's "per se illegal" approach (or so-called "prohibition in principle with exemptions as exceptions") and Chinese courts' "rule of reason" approach in addressing RPM issues.

Such "safe harbor" rules appear diverge from those in the EU. The EU's "safe harbor" rules cover so-called "minor agreements" from both horizontal (10%) and vertical (15%) perspectives.[8] In addition, the Vertical Block Exemption Regulation[9] provides a 30% market share as safe harbor exemption except for hardcore restrictions such as RPM, and the Horizontal Guidelines provide a safe harbor where parties have market shares below thresholds ranging from 15 to 20%.[10] In contrast, the amended AML limits the scope of "safe harbors" to vertical restraints, and does not appear to distinguish RPM from other provisions. In some respects, however, this difference could provide more space for vertical distribution practices by MNCs in China relative to the EU.

The amended AML also attempts to reconcile a long-existing divergence between the Chinese enforcement authority's "*per se* illegal" approach (or so-called "prohibition in principle with exemptions as exceptions") and Chinese courts' "rule of reason" approach in addressing RPM issues.[11] Under the courts' approach, RPM would not be prohibited unless it has anti-competitive effects, and an undertaking accused of RPM bears the burden to show the absence of anti-competitive effects.[12] The adoption of safe harbors is consistent with the goal stipulated in Article 11 of the amended AML of "improving the interconnection mechanism between administrative law enforcement and judicial practice". This appears to conform with the approach taken by the administrative and judicial authorities in EU.[13]

While the newly added "safe harbor" mechanism should be welcome for providing greater flexibility for MNCs to manage their distribution channels in China, it does not suggest that one can ignore the potential exposure and additional burden of proof in connection with vertical agreement issues. For example, the undertaking bears the burden to rebut the presumption of a vertical restraint's anti-competitive effect, and to demonstrate that its relevant market share does not cross the prescribed threshold, among fulfilling other conditions to be set by the SAMR. In practice, it could become challenging to (i) delineate a proper market definition (as there could exist a number of alternatives), (ii) evaluate a firm's market position and the competitive landscape (as there could exist conflicting market data), and (iii) show an absence of anti-competitive effects (as counterfactual analysis requires convincing hypothesis and evidence), in particular for sectors with relatively complex supply chains and/or an impactful bearing on consumers' livelihood (e.g., information and communications technology, healthcare, and automobiles) where an MNC has a leading position in a niche area (e.g., a premium segment). Accordingly, it may be advisable for

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8 See Article 8 and Article 9, Eur. Cmm'n Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014 O.J. (C 291) 1.

9 See Article 3, Eur. Cmm'n, Regulation No. 2022/720, 2022 O.J. (L 134) 4, (on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

10 See, Eur. Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1.

11 See, e.g., the Supreme People's Court's ruling in the Yutai case in (2017) Qing Xing Zhong No. 1180 Administrative Decision; also, see SAMR's sanction decision in the Yangtze River Pharmaceutical case in SAMR Administrative Punishment Decision (SAMR punishment [2021] No.29).

12 Article 18 of the amended AML provides that: "The agreements . . . will not be prohibited if the undertakings can prove that such agreements do not have effects of eliminating or restricting competition".

13 For example, para. 195 of the EU Guidelines for Vertical Restrictions, Eur. Comm'n 2022 (C 248) 1, recognizes that RPM may produce efficiencies, so an exemption can be claimed in accordance with Article 101, paragraph 3 of the *Treaty on the Functioning of the European Union*. In addition, the European Court of Justice has also ruled that "RPM will only fall into the prohibition scope . . . if all other conditions stipulated—the purpose or effect of the agreement obviously restricts competition in the common market . . . —are met" in C-260/07, Pedro IV Servicios SL v Total España SA., 2009 E.C.R. I-02437.

MNCs to adopt a conservative stance in utilizing the safe-harbor mechanism, and closely monitor the Chinese antitrust legislative and enforcement activities in this respect.

Assisting "hub-and-spoke" cartels expressly codified as antitrust violation. While "hub-and-spoke" cartels have been subject to enforcement in other jurisdictions such as the U.S. and the EU for years,[14] in a "hub-and-spoke" case in China, the enforcers were able to sanction only the "spoke" parties to the horizontal conspiracy and tackle trade associations which played a facilitating role. They were unable to directly sanction the "hub" entity due to a lack of legislative basis. The amended AML adds a specific provision to expand the scope of liable entities by subjecting any undertakings that play an organizing or substantial assisting role in a cartel to the same level of penalty as those directly participating in the cartel.

SAMR's implementing rules clarify the meaning of "organiz[ing]" and "substantial assist[ing]" as follows:

> "organiz[ing]" occurs where (i) the relevant undertaking is not a party to the cartel agreement, but has a decisive or leading role in the subject scope, substantive content and performance conditions of the agreement in the course of concluding or implementing the monopoly agreement; or (ii) the relevant undertaking signs an agreement with multiple trade counterparties, and intentionally causes the trade counterparties having competing relationships to communicate with each other or exchange information through such undertaking to conclude the monopoly agreement; and
>
> "substantial assist[ing]" may be found where the relevant undertaking provides substantial support for the conclusion of the monopoly agreement by other undertakings, including providing necessary support, creating key and necessary conditions or other significant assistance.

Hub-and-spoke arrangements can occur in sectors where downstream third-party distribution channels and/or trade associations are involved. For example, a car maker may organize its dealers to engage in horizontal coordination while taking measures to maintain dealers' resale prices.[15] In another cartel case, an insurance association in Hunan was accused of organizing a number of insurers to collude on vehicle insurance rates with the assistance and coordination of an insurance agent. Such trade associations and all the participating insurers other than the agent were sanctioned.[16] Were the above cases probed under the amended AML, the carmaker and the insurance agent would likely be held accountable for playing substantial assisting roles in the "hub-and-spoke" cartel.

The risk exposure of organizing or assisting a cartel could also be heightened for MNCs operating in two- or multi-sided markets, in particular if data security and digital activities are concerned. For example, the *Anti-monopoly Guidelines on Platform Economy Sector* issued by the State Council Anti-monopoly Commission expressly provide that "[c]ompeting in-platform operators may conclude a hub-and-spoke agreement which has the effect of horizontal agreements by utilizing their vertical relationship with a platform operator, or through organization and coordination by the platform operator".[17] Such practices have already been closely scrutinized outside of China (e.g., the

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[14] For example, hub-and-spoke cartels have been investigated in the US, Canada, Chile, UK, Belgium, and Poland dating back to 1956. See Luke Garrod, Joseph E. Harrington, Jr., and Matthew Olczak, Hub-and-Spoke Cartels: Why They Form, How They Operate, and How to Prosecute Them (2021).

[15] See, e.g., the price monopoly case of FAW-Volkswagen Automobile and 10 Audi dealers (October 8, 2022), http://www.gov.cn/xinwen/2014-09/11/content_2749003.htm (in Chinese).

[16] See the Hunan Insurance Industry Price Monopoly Case (October 8, 2022), http://www.gov.cn/jrzg/2012-12/28/content_2301393.htm (in Chinese).

[17] Article 8 of Anti-monopoly Guidelines on Platform Economy Sector.

Apple e-book case (2015)[18]). In the digital platform economy sector, concerted conduct may be organized and coordinated through information exchanges facilitated by data, algorithms, or platform rules, absent a written or verbal agreement or decision, raising the risk of exposure to a tacit or unspoken monopoly agreement, including hub-and-spoke agreements. With MNCs historically engaging in brick-and-mortar business transitioning to offering their products/services via digital platforms, the captured scope of such rules will undoubtedly continue to expand.[19] For example, if the platform participants are deemed to be indirectly exchanging competitively sensitive information through a platform operator's provision of vertical services, a hub-and-spoke agreement may occur. Accordingly, MNCs operating in the platform economy sector would be well advised to watch out for competitively sensitive information exchanges with other firms realized through data or other digital activities and manage the underlying risk exposure.

For antitrust compliance, it is key to assess the competitive effect of unilateral conduct involving the exercise of IPR, such as licensing and patent acquisitions.

Abuse of IPR to eliminate or restrict competition. As IPR by their very nature constitute the lawful right to exclude, IPR licensing arrangements, by granting access to their use, generally enhance competition. Therefore, Article 55 of the 2008 AML (Article 68 in the amended AML) provides that the AML does not apply to the lawful exercise of IPR, but only to abuses of IPR to eliminate or restrict competition.[20] For antitrust compliance, it is key to assess the competitive effect of unilateral conduct involving the exercise of IPR, such as licensing and patent acquisitions. To build an effective case, the positive impacts of IPR-related conduct on innovation and efficiency (including promoting the dissemination and utilization of technologies, and enhancing the utilization efficiency of resources) need to be fully explained.[21]

Similar to the EU and the U.S. competition authorities which have issued antitrust guidelines with respect to technology transfer or IPR, China has also formulated a set of implementing rules and antitrust guidelines with respect to IPR abuse. For AML purposes, typical IPR-abusive behavior includes excessive pricing, refusal to license, IPR tying and bundling, imposing unreasonable licensing terms (including restrictive clauses), and discriminatory licensing. SAMR's new draft antitrust rules on IPR abuse further clarify the factors to be considered when determining whether an IPR holder is dominant, such as the substitutability of IPR, the dependence of downstream customers on IPR derived commodities, and countervailing buyer power. SAMR's draft rules also propose that problematic IPR restrictive behaviors could include, among other things, prohibiting a licensee from dealing with another licensor, forcing licensees to accept portfolio licensing at the time of IPR licensing, and imposing unreasonable exclusive grant-backs (i.e., a licensee exclusively grants a licensor the right to any improvements or new IPRs obtained by using licensed IPRs) in addition to

[18] See United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013) and 791 F.3d 290 (2d Cir. 2015). In that case, several major book publishers adopted an agency supply arrangement with Apple in which the publishers set the retail sales prices of e-books on Apple's platform and included most favoured nation clauses to guarantee that the price on Apple's platform would not be higher than that on other platforms (such as Amazon). The publishers also moved Amazon to an agency model. The court found a conspiracy of publishers assembled by Apple to increase the retail sales prices of e-books.

[19] Frank Jiang, Scott Yu, John Jiang, *Platform Players Bracing for Tighter Antitrust Scrutiny in China*, Antitrust Magazine Online (Oct. 2021).

[20] Article 55 of the AML specifically provides that: "[t]his Law shall not apply to the exercise of its intellectual property rights by an undertaking in accordance with the relevant provisions of intellectual property laws or administrative regulations; provided that this Law shall apply to any conduct of an undertaking whereby intellectual property rights are abused to eliminate or restrict competition."

[21] For example, Article 25 of the Working Guidelines on Adjudicating Cases Concerning SEP Disputes issued by Guangdong High People's Court provides that, in adjudicating cases concerning standard essential patent (SEP) related monopoly disputes, the court shall assess the effect of the relevant conduct on market competition, with a focus on the impact of the conduct on innovation, efficiency and consumer welfare, on a case-by-case basis.

sole grant-back clauses (i.e., only a licensee and its designated parties can practice any improvements or new IPRs obtained by using licensed IPRs).[22]

To deal with an emerging trend, SAMR's new draft rules propose to improve the supervision of conduct involving standard essential patents (SEPs) and patent pools. For SEPs, potential abusive behavior includes excluding a specific undertaking from participation in standard setting or implementation, joint boycotting with competitors against another undertaking in standard setting or licensing, unfair excessive pricing and discrimination, and the use of injunctions to force the licensee to accept unfair excessive pricing or unreasonable trade conditions.[23] For patent pools, a "patent pool management entity" is flagged as having possible market dominance, and potential abusive behaviors by patent pool participants include unfair pricing in license fees and exclusive grant-backs.[24]

As an active participant in the dynamic global technology space and in response to the current delicate global geopolitical situations, China is making increasing efforts to encourage investment in innovation. One of its initiatives lies in the intersection of IPR licensing and antitrust, with China growing its antirust regulatory teeth to become one of the major jurisdictions, in line with the goal of transitioning to an innovation-driven economy—it is learning the art of balancing between IPR protection and antitrust regulation in a "glocal" field. IPR intensive industries have also become one of the antitrust enforcement priorities and spotlights in judicial practices in China.[25] For MNCs active in IPR licensing (especially those having significant IPR assets in license-in arrangements), the fine-tuned IPR-related rules could provide more guidance and greater guardrails, but also expand the scope of potential liability in scenarios such as product standardization and patent pooling.

Conclusion

In sum, the amended AML further codifies more instances of anticompetitive behavior to be regulated, while heightening the consequences for a number of violations, including failure-to-notify and refusal-to-cooperate during investigations, which will bring both more clarity and heightened exposure for MNCs' operations and investments in China. ●

[22] In contrast, see Eur. Comm'n Regulation No. 316/2014, 2014 O.J. (L93) 17 (on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements), which only provides sole grant-back as one of the exclusive licenses that cannot be directly exempted.

[23] For example, in the *OPPO v Sharp* case, OPPO claimed that Sharp violated an obligation to license its standard essential patents on fair, reasonable and non-discriminatory (FRAND) terms by forcing OPPO to accept unfair and excessive fees after Sharp threatened to seek an injunction. The court ruled that Sharp may not file new injunction applications in other jurisdictions before the court issues its decision on the merits of the claim. ((2020) Supreme Court Zhi Min Xia Zhong, No.517, Civil Ruling).

[24] The U.S. Antitrust Guidelines for the Licensing of Intellectual Property also provide that exclusion of participants from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. Those guidelines also state that a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development. (See Section 5.5 of U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf, at 30-31.) EU Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, Eur. Comm'n, 2014 O.J. (C) 3 also provide that a patent pool will be exempted from the application of Article 101 of TFEU when it is open to all the stakeholders, licensed based on FRAND principles and meets other requirements.

[25] See, e.g. Frank Jiang, John Jiang, *Antitrust Pitfalls In Global Licensing: Perspective From China—A "Glocal" Battleground,* Competition Policy International (Dec. 31, 2019), https://www.competitionpolicyinternational.com/antitrust-pitfalls-in-global-licensing-perspective-from-china-a-glocal-battleground/.

The EU Foreign Subsidies Regulation: What Antitrust Lawyers Should Know About the New Instrument

Christian v. Köckritz, Harald Weiss, and Kristina Winkelmann

The EU Foreign Subsidies Regulation ("FSR")[1] entered into force on January 12, 2023, and applies from July 12, 2023 onward. It introduces a new regulatory regime that allows the European Commission ("Commission") to investigate subsidies granted by non-EU countries to companies active in the European Union. For this purpose, companies will be, inter alia, required to notify certain M&A deals and may not implement such deals until they receive the Commission's clearance. If the Commission concludes that the deal involves foreign subsidies that distort the internal EU market, it may ultimately prohibit the transaction unless the parties propose commitments to remedy the identified distortions.

The new rules under the FSR will have significant consequences for companies active both inside and outside of the European Union and should form an important part of parties' planning of M&A deals. However, companies are, at this stage, exposed to significant legal uncertainty since important accompanying texts—such as the implementing regulation clarifying procedural aspects,[2] or guidelines on the substantive assessment of foreign subsidies—have either not yet been published by the Commission or are not yet available in final form.

The backdrop to the new FSR is the widespread perception that some foreign companies that are active in the European Union benefit from massive financial support from their governments. The typical example would be a Chinese company that buys European players with the help of Chinese state funding or which undercuts its European rivals by submitting subsidized bids in large-scale public tender proceedings.[3] It should be recalled in this context that EU Member States are not allowed to subsidize companies as they deem fit. Rather, to avoid a "subsidy race" and a distortion of competition resulting from state funding, EU Member States are generally prohibited from granting subsidies to individual companies or industries and may only do so within the strict boundaries of EU State Aid law.[4] Without control of subsidies granted by non-EU countries, the EU State Aid rules could thus put EU-based companies at a disadvantage vis-à-vis

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[1] European Parliament and Council Regulation No. 2022/2560, 2022 O.J. (L 330) 1, 45 (on foreign subsidies distorting the internal market) [hereinafter FSR].

[2] Draft Commission Implementing Regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, including Annex 1 and 2, Ref. Ares (2023) 842946 (Feb. 6 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_591 [hereinafter Draft Commission Implementing Regulation].

[3] Even though the FSR does not explicitly mention China, it seems clear that China has been the primary trigger for the adoption of the new instrument. See Eur. Comm'n, *Commission Staff Working Document -Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market*, SWD (2021) 99 final (May 5, 2021) [hereinafter Impact Assessment], which mentions China at least 176 times.

[4] Consolidated Version of the Treaty on the Functioning of the European Union art. 107 et seq, 2012 O.J. (C 326) 47 [hereinafter TFEU].

their foreign competitors. The FSR is intended to address this problem by closing the perceived "regulatory gap" in order to ensure a level playing field among all economic operators active in the internal market.[5]

The FSR constitutes a mix of traditional merger control, state aid law, and public procurement rules. It provides the Commission with three new tools to take action against distortive subsidies:

- First, a notification-based tool to investigate certain M&A transactions;[6]
- Second, another notification-based review procedure for bids in certain public procurement procedures;[7] and
- Third, an ex officio instrument which will allow the Commission to investigate all other market situations at its own initiative, including non-notifiable M&A transactions.[8]

A failure to notify or to respect the standstill obligation can be sanctioned with substantial financial penalties, with fines theoretically reaching up to 10% of the aggregate global revenues of the companies involved.

For M&A transactions, the new filing requirement[9] is certainly the most relevant instrument. However, the ex officio instrument[10] also needs to be taken into account when drafting and negotiating M&A contracts.

In terms of timing, most of the new rules will apply beginning July 12, 2023.[11] The new filing requirements and standstill obligations will start applying only three months later, i.e., beginning October 12, 2023.[12] However, the FSR does not cover only subsidies that are granted after the law comes into effect. Rather, the Commission will be able to scrutinize foreign subsidies granted three to five years prior to the date of application of the FSR.[13]

Overview of the new "merger control" regime

M&A transactions that qualify as "notifiable concentrations" (discussed *infra*) or that are subject to an ad hoc filing request of the Commission may not be closed before the Commission has concluded its foreign subsidies review.[14] A failure to notify or to respect the standstill obligation can be sanctioned with substantial financial penalties, with fines theoretically reaching up to 10% of the aggregate global revenues of the companies involved.[15]

Notifiable concentrations. The threshold-based notification obligation (and the corresponding standstill obligation) applies to M&A transactions that meet the following five cumulative criteria:

(1) Timing: The notification requirement applies starting from October 12, 2023 and covers all transactions signed on or after July 12, 2023 and not yet closed on October 12, 2023.[16]

(2) Type of transaction: Similar to the EU Merger Regulation ("EUMR"),[17] the new filing requirement only applies to transactions involving a change of control on a lasting basis and the

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5 FSR, *supra* note 1, recitals 1-6.

6 *Id.* arts. 19 et seq.

7 *Id.*, arts. 27 et seq.

8 *Id.* arts. 9 et seq.

9 *Id.* arts.19 et seq.

10 *Id.* arts. 9 et seq.

11 *Id.* art. 54(2).

12 *Id.* art. 54(4).

13 *Id.* art. 53(1).

14 *Id.* art.24(1).

15 *Id.* art. 26(3).

16 *Id.* arts.53(3), 54(4).

17 Council Regulation No. 139/2004, 2004 O.J. (L 24) 1, 22 (on the control of concentrations between undertakings).

creation of full-function joint ventures (so-called "concentrations").[18] Consequently, the new filing requirement covers true "mergers," direct or indirect acquisitions of sole or joint control in pre-existing undertakings, and the establishment of joint ventures ("JVs"), including "greenfield JVs", qualifying as "full function" (i.e. performing on a lasting basis all the functions of an autonomous economic entity). By contrast, the acquisition of non-controlling minority shareholdings or the creation of a non-full function JV is not subject to the notification requirement. The term concentration will be interpreted in the same way as under the EUMR.[19]

(3) Geographical scope of transaction: In order to qualify as a notifiable transaction, the acquired undertaking, the JV or—in case of a merger—one of the merging undertakings must be established in the European Union.[20] "Established in the European Union" includes any form of permanent business establishment in the European Union (for example the incorporation of a subsidiary). Hence, if none of the target group companies is established within the European Union, or if a JV is incorporated outside the European Union and has no subsidiary or other permanent business presence in the European Union, a transaction will not be captured by the new rules (even if the seller, purchaser, or, in case of a JV, the JV's parent companies, have a permanent presence in the European Union).

(4) EU turnover threshold: The acquired undertaking (including its subsidiaries), the JV (including its subsidiaries), or—in case of a true merger—at least one of the merging undertakings (including its subsidiaries) have generated an aggregate turnover in the European Union exceeding EUR 500 million in the last financial year.[21] Unlike under the EUMR, the turnover generated by the acquirer and, in case of a JV, the revenues generated by the JV's parent companies are not relevant in this context *(e contrario)*.[22]

(5) Third-country financial contribution threshold: The acquirer group and the acquired undertaking (including its direct and indirect subsidiaries)/the JV and its (controlling) parent companies/the merging undertakings have been granted combined (aggregate) third-country financial contributions ("TCFCs") exceeding EUR 50 million in the three financial years prior to the transaction.[23] Importantly, the concept of TCFCs is not limited to actual subsidies, but covers all kinds of business relationships with the "public sector" of non-EU countries in the broadest sense (discussed further *infra*).

Notably, there are no restrictions on or exceptions for specific economic sectors or for certain non-EU countries.[24] Hence, even transactions in which only EU-based companies are involved are covered if the filing thresholds are met.

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[18] FSR, *supra* note 1, art.20(1).

[19] *Id.* recital 9. For further guidance on the notion of "concentration", see Eur. Comm'n, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, 2004, O.J. (C 95) 1, 48 (on the control of concentrations between undertakings).

[20] *Id.* art. 20(3)(a).

[21] *Id.* art. 20(3)(a).

[22] *Id.* art. 20(3)(b).

[23] *Id.* art. 20(3)(b).

[24] The only potential exception is FSR, art. 44(9) which provides that the Commission is prevented from carrying out investigations or taking measures that would be contrary to the EU's obligations emanating from any relevant international agreement it has entered into. It remains to be seen to what extent this exemption will become practically relevant in the future.

[I]t can be expected that a significant number of transactions involving the acquisition of companies with permanent presence in the European Union will be caught by the new notification regime.

Given the relatively limited thresholds for the EU turnover of the target company group and for the aggregate TCFCs from non-EU countries across the globe, it can be expected that a significant number of transactions involving the acquisition of companies with permanent presence in the European Union will be caught by the new notification regime.

The (questionable) concept of "third-country financial contributions." While most of the five criteria set out above are relatively straightforward or at least familiar from the EUMR, the TCFC concept is not only new but also very broad. Both the term "financial contribution" and the imputability of the measure to a "third country" are defined in vague terms.[25] The concept essentially covers all financial relationships with the public sector of third countries.

In order to qualify as a "third-country" contribution, it is sufficient that the measure can be attributed directly or indirectly to a public authority of a non-EU country (e.g. central or federal governments, but also authorities at regional or local levels such as local municipalities).[26] In addition to public authorities, public entities (in particular stated-owned enterprises, e.g. public banks in non-EU countries) and potentially even private entities are covered, provided that their actions can be attributed to a non-EU state, taking into account all relevant circumstances.[27] It is likely that this criterion will be interpreted broadly, especially when it comes to state-owned enterprises. In this sense the application of this criterion may resemble the Commission's approach when assessing "imputability" of a measure to an EU Member State when applying EU State Aid law.[28]

The notion of "financial contribution" also includes a very wide set of measures. It encompasses not only "traditional" subsidies, but also (i) any transfer of funds or liabilities, (ii) the foregoing of revenue that is otherwise due, and even (iii) the mere provision or purchase of goods or services.[29] It is irrelevant whether the TCFC involves any subsidy element (i.e., whether a selective advantage is granted that is not in line with market terms) or whether it was actually granted in the context of the transaction.[30]

Accordingly, the concept of TCFC covers any kind of financial value stemming from public resources of non-EU countries in the broadest sense. In addition to public grants, it also includes measures such as state guarantees, tax benefits, the lease of land, the foregoing of revenues (e.g. tax waivers) and, ultimately, any kind of business involving the public sector in a third country. If, for example, a German or U.S. company purchases electricity from a municipal energy supplier in South Africa, the energy purchase will be considered as a TCFC even if it was fully remunerated by the company concerned. Similarly, the purchase price a Spanish company receives for the sale of products to a Japanese state-owned enterprise will constitute a TCFC even if the price paid by the

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25 The (overly) broad scope of the TCFC-concept had been criticized already during the legislative process - unfortunately to no avail (*see*, *e.g.,* ESALA, Response of the EU State Aid Law Association to the Commission Consultation on the proposal for a regulation of the European Parliament and the Council on foreign subsidies distorting the internal market ("ESALA response"), at paras. 1.8 et seq, https://www.esala.eu/wp-content/uploads/2021/08/ESALA-submission-Foreign-Subsidies-Proposal-final-20210722.pdf; *see* also Christian von Köckritz & Harald Weiß, *"Merger control meets State aid law"—Der Vorschlag der Kommission für eine Verordnung über wettbewerbsverzerrende Subventionen aus Drittstaaten*, *in* FESTGABE FÜR RAINER BECHTOLD ZUM 80. GEBURTSTAG, 2021, 165, 169 et seq. (Sozietät Gleiss Lutz ed., 2021); Ulrich Soltész, *"Game changer" für die M&A-Praxis: Die Verordnung über Drittstaatensubventionen*, 425, 426 (NZKart ed., 2022).

26 FSR, *supra* note 1, art. 3(3).

27 *Id.* arts. 3(3)(b) and (c).

28 *See* Eur. Comm'n, Notice O.J. (C 262) 1, 50 (on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [hereinafter Notice on Aid], section 3 (paras. 38 et seq.)

29 FSR, *supra* note 1, art. 3(2).

30 *E contrario* FSR, *supra* note 1, arts. 3(1) 5(1)(e). *See* also FSR, *supra* note 1, recitals 11 et seq.

Japanese purchaser was extremely low. Whether the product, service or consideration is provided on an arm's length basis, i.e. in line with market terms, does not matter in terms of assessment of the filing requirement and the calculation of the value of TCFCs. While the FSR does not specify how the value of individual TCFCs should be calculated, it is likely that the Commission will look at the full value of the financial benefit received from entities attributable to a foreign state, regardless of any consideration paid by the receiving company.

The impact of the EUR 50 million TCFC threshold will thus be very limited, in particular because the threshold is based on the aggregate amount, meaning that all TCFCs received by the parties' corporate groups worldwide over the last three years will have to be added together.[31] Consequently, not only the specific companies involved in the deal need to be taken into account, but the acquirer's entire corporate group, as well as the target and all its subsidiaries worldwide.[32] In case of a JV, the entire corporate groups of the JV's controlling parent companies will have to be taken into account as well. There are no exemptions or allowances for certain types of investors, such as private equity ("PE") investors. Consequently, PE firms may have to consider all financial contributions received by portfolio companies in which they directly or indirectly hold a shareholding conferring sole or joint control (as well as all subsidiaries solely or jointly controlled by such portfolio companies). Identifying and tracking such contributions can be expected to be burdensome. It remains to be seen whether the Commission will be able (and willing) to alleviate this burden in cases that are substantively unproblematic. Unfortunately, however, the scope for the Commission to make such allowances appears relatively limited given the impractical legal framework of the FSR.

No safe harbor for transactions below the filing thresholds. There are two important devices provided for under the FSR which effectively extend the reach of the filing regime to transactions which do not meet the filing thresholds set out in the FSR.

First, the Commission can, at its own initiative, request the notification of concentrations that do not meet the filing thresholds as long as the relevant deal has not yet closed.[33] Such transactions will then be treated as notifiable transactions and will also be subject to a standstill obligation. The Commission can thus use this instrument in order to review certain transactions that do not meet the filing thresholds, but which likely involve foreign subsidies, and to prevent or stop the implementation of such deals pending the Commission's review.

Second, the Commission can use even wider general ex officio powers[34] in order to conduct an ad hoc investigation of any transaction that is not covered by the notification-based merger review–potentially even a long time after a transaction has been implemented.[35] The general ex officio instrument is supposed to serve as a catch-all instrument for distortions in the internal market linked with foreign subsidies. The Commission can thus apply this second tool to any kind of transaction, irrespective of whether it involves a concentration or not (including, for instance, the acquisition of non-controlling minority shareholdings or the creation of non-full function JVs), and even after closing has taken place. Hence, this second tool can be used in order to review potentially problematic transactions that do not qualify as "concentrations," or in cases where

[31] FSR, *supra* note 1, art. 20(3)(b), 23.

[32] On the sell side, only the target and its direct and indirect sole or jointly controlled subsidiaries need to be taken into account, but not other parts of the seller's corporate group (*see,* FSR, *supra* note 1, arts. 23 and 22(2)).

[33] FSR, *supra* note 1, art. 20(5).

[34] *Id.* arts. 9 et seq.

[35] *See Id.* recitals 25, 36.

> *The FSR's aim to ensure that virtually no transaction escapes the Commission's radar obviously comes at a high price for transaction security.*

the Commission only obtains knowledge of a potentially problematic "concentration" after its implementation.

It is still unclear how actively the Commission will make use of these ad hoc powers. It can, nonetheless, be assumed that other market participants, such as unsuccessful bidders, will attempt to use these tools as weapons for their own purposes, notably by filing complaints to the Commission and pushing the authority to intervene. The FSR's aim to ensure that virtually no transaction escapes the Commission's radar obviously comes at a high price for transaction security.

Substantive Test

Pursuant to Article 19 FSR, the Commission's investigation will assess whether a "foreign subsidy in a concentration distorts the internal market." This assessment "shall be limited to the concentration concerned," at least in the notification-based subsidy control proceedings (no similar limitation is foreseen for the general ex officio instrument).

It is not entirely clear how this will play out in practice. However it seems likely that the Commission will primarily assess whether a notifiable transaction was directly supported by foreign subsidies (leading to a "distortion of the acquisition process"),[36] or whether the transaction allows a heavily subsidized foreign undertaking to enter or expand its presence in the internal market. Such scenarios typically indicate that competition in the relevant markets in the EEA may be distorted due to subsidies granted to the activities of the undertakings involved in the transaction ("distortions resulting from the acquisition").

The Commission's assessment of foreign financial contributions will involve several steps.

Existence of a foreign subsidy. In a first step, the Commission will have to assess whether one or more of the TCFCs granted to the relevant undertakings involved in a concentration indeed qualify as "foreign subsidies" within the meaning of Article 3(1) FSR. According to this provision, foreign subsidies shall be deemed to exist where a financial contribution of a third country (i) confers a "benefit" to an undertaking engaging in an economic activity in the internal market; and (ii) is "selective," i.e., limited to one or more specific undertakings or industries.[37]

These notions are very similar to the well-established concepts of "advantage" and "selectivity" under EU State Aid law[38] and will in all likelihood be interpreted consistent with the case law and Commission's practice on these EU State Aid law concepts.[39] Broadly speaking, this means that a "foreign subsidy" will be deemed to exist if a specific undertaking or a specific industry obtains a financial contribution from foreign state resources (or resources attributable to a foreign state) at terms that the undertaking could not have obtained from private actors on the market and if this financial contribution is not made available to all other undertakings or industries in a similar situation. In addition to public grants, state guarantees or loss compensation payments, this may also cover a multitude of other measures such as tax reductions or tax incentives (including, potentially,

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[36] FSR Article 5(1)(d) states that such "subsidies directly facilitating a concentration" are one category of the kinds of subsidies that are "most likely to distort the internal market."

[37] See also FSR, *supra* note 1, recitals 11 et seq.

[38] Notice on Aid, *supra* note 28, sections 4 (paras 66 et seq.) and 5 (paras 117 et seq.).

[39] FSR recital 9.

tax credits under the U.S. Inflation Reduction Act),[40] the transfer of staff, the lease of land, or the sale of a public shareholding. In addition, aid measures or subsidies can also be hidden in indirect measures, and—as far as publicly owned companies are concerned—even in intra-group measures (i.e., measures taken by one entity within a corporate group controlled by public authorities for the benefit of another entity of the same corporate group).

Nexus between foreign subsidy and the notified concentration. The wording of Article 19 FSR suggests that the notification-based concentration control proceedings only relate to "foreign subsidies "*in a concentration*," i.e., there must be some specific nexus between an identified subsidy and the notifiable transaction. Such a nexus will be easy to identify insofar as subsidies directly supporting an acquisition are concerned, but it is not yet clear how far the Commission will stretch this notion beyond such relatively clear-cut cases.

It seems likely that the Commission will take a broad approach and would deem any identifiable direct or indirect link between the foreign subsidy and the concentration as being sufficient for the purposes of establishing sufficient nexus. For example, the Commission might argue that a significant tax reduction granted to an acquirer in a third country had the effect of freeing up additional financial resources that could be used for a notifiable acquisition project. Hence, it is unlikely that the limitation of the assessment to foreign subsidies "in a concentration" will significantly limit the scope of the Commission's review.

Distortive effect. If a TCFC constitutes a foreign subsidy, the Commission will further assess whether this subsidy "distorts the internal market." Article 4(1) FSR specifies that a distortion in the internal market exists "*where a foreign subsidy is likely to improve the competitive position of the undertaking concerned in the internal market and, in doing so, actually or potentially negatively affects competition in the internal market.*"

Contrary to EU State Aid law, there is (of course) no general prohibition of foreign subsidies, and there is also no general presumption that foreign subsidies actually distort the internal market. Consequently, an actual or potential "distortion" has to be positively established by the Commission. Unlike under EU merger control, however, there is no "significance threshold" for the required effect on competition.

Article 4(1) contains a non-exhaustive list of indicators that the Commission should take into account in its assessment of a potential "distortive effect." This list includes indicators such as the amount and nature of the subsidy, the economic and competitive situation of the undertaking and the markets concerned, the purpose and conditions attached to the foreign subsidy as well as its use on the internal market. This list leaves the Commission a large margin of discretion and makes it difficult for companies to predict the outcome of the Commission's assessment in a specific case.[41]

The FSR specifies certain categories of foreign subsidies that will "most likely" be deemed to distort the internal market.[42] This category includes foreign subsidies granted to an ailing undertaking in the absence of a viable restructuring plan; unlimited guarantees for debts/liabilities of beneficiary undertakings; export financing measures that are not in line with the OECD Arrange-

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[40] See also the (elusive) answer given by the Commission's Executive Vice-President Vestager to a parliamentary question asking about the relationship between the FSR and the U.S. Inflation Reduction Act (*see* Eur. Parliament, Answer given by Executive Vice-President Vestager on behalf of the European Commission (March 23, 2023) (P-000441/2023(ASW)), https://www.europarl.europa.eu/doceo/document/P-9-2023-000441-ASW_EN.html).

[41] *See supra* note 25, para. 1.11 of the ESALA response.

[42] *Id.* art. 5.

ment on officially supported export credits;[43] and subsidies directly facilitating a concentration or the submission of an “unduly advantageous tender” that would enable the undertaking concerned to win a public contract.

On the other hand, the FSR also clarifies that certain types of foreign subsidy should benefit from more benevolent treatment.[44] A foreign subsidy will not be considered to distort the internal market if its total amount does not exceed a de minimis threshold defined in the Regulation on de minimis aid[45]– i.e. EUR 200,000—per third country, over any consecutive period of three financial years. In addition, a foreign subsidy is unlikely to distort the internal market if it does not amount to more than EUR 4 million over any consecutive period of three financial years.[46] Finally, a foreign subsidy may be considered not to distort the internal market if it is intended to remediate damage caused by natural disasters or exceptional occurrences. Unfortunately, however, only the de minimis threshold of EUR 200,000 constitutes a real safe harbor providing protection against a finding of a distortive effect in individual cases. The EUR 4 million threshold set out in Article 4(2) does not provide comparable comfort: for example, it is likely that even a foreign subsidy amounting to less than EUR 4 million could be considered to be distortive if the relevant subsidy falls within one of the subsidy categories considered to be “most distortive” pursuant to Article 5 FSR (e.g., a subsidy directly facilitating a concentration).

Further guidance on the Commission’s assessment of “distortive effects” is not available at present but is expected to be published in the course of next year. However, the Commission emphasizes that EU State Aid law will serve as a benchmark for its assessment of foreign subsidies.[47] This suggests that a subsidy will not be considered to have a distortive effect if the subsidy in question could also have been granted by EU Member States under EU State Aid law. This certainly makes sense in light of the FSR’s aim to avoid discrimination against non-EU companies. But it is difficult to see how this will work in practice, in particular as far as concentrations are concerned as the various Regulations and guidance documents setting out the conditions of permissible State aid measures are very detailed and difficult to comply with, and they typically do not contain provisions specifically addressing aid measures facilitating M&A-transactions.

Balancing test. If the Commission finds that a foreign subsidy distorts the internal market, it will further assess whether the distortive effects may be counterbalanced or outweighed by positive effects “on the development of the relevant subsidized economic activity on the internal market

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[43] The text of this instrument can be downloaded at: http://www.oecd.org/tad/xcred/theexportcreditsarrangementtext.htm. The general aim of the OECD Arrangement is to provide a framework for the orderly use of officially supported export credits. In particular, the OECD Arrangement puts limitations on the financing terms and conditions (such as repayment terms, minimum premium rate, minimum interest rates) to be applied when providing officially supported export credits.

[44] FSR, *supra* note 1, arts. 4(2)-(4).

[45] Eur. Comm’n Regulation No. **1407/2013** O.J. (L352) 1, 8 (on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid).

[46] In contrast to the calculation of the TCFC-value for the assessment of the filing requirements, the values contained in FSR Articles 4(2) and (3) only relate to the “subsidy element,” i.e., the financial benefit received by an undertaking without adequate consideration. By way of an example, assume a company purchases raw materials worth EUR 5 million from a state-controlled entity in China for a consideration of EUR 4.5 million. In that case, the TCFC would be valued at EUR 5 million (and this value would have to be taken into account for the purpose of assessing the filing requirement of a concentration), while the subsidy element would only be EUR 500,000 and thus remain below the EUR 4 million threshold (with the result that the subsidy would be considered as “unlikely” to distort the internal market).

[47] See, for example, FSR, *supra* note 1, recital 9.

It is likely that the Commission will want to use the balancing test and its power to request commitments in order to shape foreign subsidies and subsidized activities in a way that would ensure the equal treatment of recipients of foreign subsidies and recipients of State Aid granted by EU Member States.

while considering other positive effects of the foreign subsidy such as broader positive effects in relation to the relevant policy objectives, in particular those of the Union."[48]

Regrettably, the FSR does not contain any guidance as to how the balancing test will be applied in practice. The wording suggests that potential positive effects on the subsidized "economic activity" can only be taken into account to the extent that these effects actually materialize in the EU internal market, while other positive effects and contributions to the EU's policy objectives (such as combating climate change and promoting the green economy) are also relevant if they occur outside the EU. Nevertheless, the lack of any more precise criteria for the exercise of the balancing test leaves the Commission with almost unlimited discretion in identifying and weighing the potential negative and positive effects of a foreign subsidy.

It is likely that the Commission will want to use the balancing test and its power to request commitments in order to shape foreign subsidies and subsidized activities in a way that would ensure the equal treatment of recipients of foreign subsidies and recipients of State Aid granted by EU Member States. However, this is not guaranteed and there remains a significant risk that foreign subsidies and their recipients may be held to stricter standards than those applicable under EU State Aid law.[49]

Commitments and prohibition decisions

If the balancing test leads to a negative result, the Commission will prohibit the deal unless the parties offer commitments that fully and effectively remedy the identified distortion in the internal market.[50]

According to the list in Article 7(4) FSR, suitable commitments may consist, inter alia, of the following: (a) offering FRAND access to infrastructures acquired or supported by the foreign subsidies; (b) reducing capacity or market presence; (c) refraining from certain investments; (d) licensing on FRAND terms of assets acquired or developed with the help of foreign subsidies; (e) publishing the results of research and development efforts; (f) divesting certain assets; (g) dissolving the concentration; (h) repaying the foreign subsidy, including an appropriate interest rate, provided that the Commission can ascertain that the repayment is transparent, verifiable and effective while taking into account the risk of circumvention; and (i) adapting the undertaking's governance structure.

Commitments will have to be tailored to the issues identified in the case at hand, and they may have to be aligned with potential commitments in "ordinary" merger control proceedings that may have to be conducted in parallel. Based on the way in which the EU merger control regime has been enforced, it can be expected that the Commission will adopt a relatively strict stance on the suitability of proposed commitments to remedy any concerns that may have been identified.

Procedural aspects

Merger review process. The FSR procedure for notifiable transactions is closely modeled on merger control procedure under the EUMR.

Once the companies to a relevant transaction have formally notified, there will be a preliminary investigation ("Phase I") lasting up to 25 working days, potentially followed by an in-depth

[48] FSR, *supra* note 1, art. 6(1).

[49] In that sense, see also *supra* note 25, paras. 2.1 et seq. of the ESALA response.

[50] FSR, *supra* note 1, art. 25(3).

investigation ("Phase II"), lasting up to an additional 90 working days (with possible extensions upon request and in case of submission of a commitment proposals).[51] In addition, there will be an informal pre-notification stage prior to the submission of a formal notification, which–just as in EU merger control cases–may take several weeks or even months in complex cases.

While these timelines and procedural steps are almost identical to those of EU merger control proceedings, it must be stressed again that the FSR proceedings will be separate proceedings that are run independently from merger control proceedings (and most likely even by different case teams/units within the Commission). As a result, even if notifications under the FSR and the EUMR can be aligned and filed at the same time, there is a significant risk of diverging timelines for the completion of both proceedings.

The investigation measures that will be at the Commission's disposal[52] are also largely inspired by the powers available to the Commission under the EUMR. The Commission may send requests for information, conduct on-site inspections, "stop the clock" in case of a failure to respond to certain requests for information, etc. The FSR provides, however, for a significant lowering of the Commission's burden of proof in situations where the undertaking under investigation and/or the third country concerned fails to cooperate with the Commission, for example by failing to provide requested information. Article 16 FSR states that, in case of non-cooperation, the Commission can take decisions "on the basis of the facts available" and states that, in such a case, "the result of the procedure may be less favorable to the undertaking than if it had cooperated." It remains to be seen whether this threat will really incentivize foreign companies and governments to cooperate with the Commission.

Notification form. The Commission will have to adopt an implementing regulation setting out detailed procedural rules for the Commission's proceedings, including notification forms, by the time that the FSR becomes enforceable (July 2023 at the latest). A draft implementing regulation was published by the Commission on February 6, 2023 and was open for comment until March 6, 2023.[53] The text of the draft implementing regulation contains a version of the notification form that companies will have to complete and submit when filing a concentration.

Although there is some overlap with the notification forms under the EUMR as to the type of information required (such as deal rationale, information on the parties, etc.), a substantial amount of additional information needs to be provided in the FSR notification form.

First, Section 3 of the draft notification form requires the notifying parties (typically the acquirer) to disclose all sources of finance used for the funding of the transaction, including detailed information on debt and equity financing measures employed. This information should allow the Commission to detect the involvement of state-controlled entities in the funding of the transaction and allow for a first screening for unusually advantageous financing arrangements.

Second, and most significantly, the current draft notification form requires the notifying parties to disclose extensive information on TCFCs that they have received over the past three years. The draft notification form provides a detailed template to be filled in line by line for each financial contribution, listing the receiving entity, the granting authority, type of financial contribution, amount, date, conditions for the financing, etc. Given that the notion of TCFC is very broad and includes many types of measures that ultimately may not qualify as subsidies, this exercise will require

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[51] See *Id.* arts. 24(1), (4) and (5).

[52] *Id.* arts. 13 et seq.

[53] Draft Commission Implementing Regulation, including Annex 1 and 2, *supra* note 2.

companies to implement sophisticated internal tracking tools to monitor, collect, and compile all the relevant information on financial contributions, on a group-wide basis.

The draft form provides only for (very) limited exceptions: individual financial contributions do not have to be reflected in the notification form if they do not reach the de minimis threshold of EUR 200,000, or if the total amount of all financial contributions received by the undertakings concerned in a given third country and a given year remain below EUR 4 million. In addition, the notifying parties have the option to submit reasoned requests for a waiver of the requirement to provide certain information that "is not necessary for the examination of the notification" and/or that is not "reasonably available" to them.[54] While all of this may lessen the burden of providing information to the Commission to some extent, it does not significantly reduce the workload for the undertakings concerned, since even TCFCs below the values indicated above will still have to be tracked in order to establish whether the EUR 50 million TCFC threshold is met and a filing is required.

Another example of new information necessary under the current draft form is that, in case the "concentration occurs in the context of a structured bidding process," the parties have to provide, inter alia, details on how many other candidates were contacted, which candidates expressed an interest or submitted an offer, the profile of each candidate, which bidders withdrew at what stage of the process, whether an advisor assisted the notifying party, copies of all due diligence reports, the contact details of all other candidates, etc. Requesting such information from the notifying party (i.e. the successful bidder) does not seem to make much sense, given that such information will typically not be available to the bidder (but only to the seller who may be reluctant or even barred by confidentiality obligations from disclosing such information to the successful bidder). This information would thus be an obvious candidate for a waiver request unless the transaction documentation ensures that the seller can provide this information to the notifying party on an outside counsel only-basis for the purpose of preparing the notification.

These examples show that notifications under the FSR will place an enormous burden on notifying parties. It is therefore not surprising that the feedback from stakeholders on the draft implementing regulation was extremely negative across the board, stating inter alia that the new rules put an "extraordinarily burdensome workload both on affected companies as well as on the Commission" and that "the uncertainties surrounding the concept of financial contributions are simply unacceptable."[55]

In light of this adverse feedback, there is still some hope that the Commission may substantially revise the draft implementing regulation and the notification forms. It has been reported that there are concrete plans within the Commission to no longer request companies to provide, in the merger filing form, information on TCFCs (i) stemming from transactions regarding the provision of goods or services or the purchase of goods or services at market terms, (ii) resulting from non-selective tax advantages, or (iii) not exceeding certain thresholds, which would be significantly higher than the thresholds currently foreseen in the draft notification forms.[56] Such amendments would alleviate the administrative burden on companies and would constitute an important step in the direction of a more focused application of the FSR. However, for full clarity, companies will have to wait for the final version of the implementing regulation.

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[54] Draft Commission Implementing Regulation, *supra* note 2, section E of Annex 1.

[55] The feedback has been published on the website of the Commission, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them_en.

[56] Tono Gil and Lewis Croft and Nicholas Hirst, *Companies face looser 'contribution' threshold under the foreign-subsidies regulation, new draft implementing rules show*, MLex (24 May 2023).

Another ray of hope in the medium term is that, according to statements by Commission officials at various public events, the Commission aims to introduce a simplified procedure for unproblematic cases.[57] Unfortunately, however, this "light" version of the notification process will in all likelihood not be available from the beginning of the application of the FSR, but only once the authority has reviewed a sufficient number of FSR cases and gained a certain level of practical experience in this area.

There is no question that the FSR will lead to significantly more red tape for a significant number of companies doing business or willing to invest in the EU.

Conclusion and Future Outlook

There is no question that the FSR will lead to significantly more red tape for a significant number of companies doing business or willing to invest in the EU.

At this stage, almost all elements of the substantive assessment to be carried out by the Commission under the FSR remain largely unclear and require further clarification. The Commission has committed to provide initial guidance regarding the concept of a distortion on the internal market and the application of the balancing test at the latest 12 months after the date of application, i.e. by mid-2024. Until any such guidance is issued and enters into force to bind the Commission in the exercise of its discretion, companies active in the European Union and benefitting from foreign subsidies (or companies acquiring EU-based recipients of such subsidies) will be exposed to significant legal uncertainty when investing in the European Union.

The notification procedure for planned acquisitions will be costly and time-consuming. The new system is to run in parallel to merger control regimes at EU and national level as well as national trade and investment control rules . The standstill obligations, the risk of diverging timelines, as well as all other potential risks and uncertainties–including the possibility of ex officio investigations in cases in which the notification thresholds are not met, potentially even after closing–will all have to be addressed in M&A deal documentation.

The FSR therefore goes far beyond the U.S. Merger Filing Fee Modernization Act of 2022 which introduced a foreign subsidy disclosure requirement to the existing HSR filing notification process. The U.S. disclosure requirement only covers subsidies which the parties received from "foreign entities of concern," namely entities owned or controlled by "covered nations" such as China and Russia.[58] By contrast, the FSR introduces an entirely new mandatory filing regime that comes on top of the existing merger and foreign investment filing requirements. The notification and review procedures under the FSR and the relevant merger control and foreign investment laws are independent from each other, with the result that companies may have to prepare and file parallel notifications and cope with parallel proceedings under different legal instruments with different timelines and standstill obligations. In particular, each regime has different public policy objectives and consequently different substantive standards of assessment. In addition, the FSR is not limited to subsidies from a specified list of countries, but applies to all subsidies received from any non-EU country.

The overall impact of the FSR will largely depend on the Commission's enforcement approach. It is an open secret that the tool was mainly introduced to address potential distortive effects resulting from heavily subsidized Chinese companies active in Europe. In addition, it seems that the Commission itself is trying to restrain the new regulatory behemoth: according to recent statements by Commission Vice President and Competition Commissioner Margrethe Vestager, the

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[57] See also FSR, *supra* note 1, recital 75 and art. 47(1)(a).

[58] *See* H.R.3843 - Merger Filing Fee Modernization Act of 2022, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/3843/text.

Commission intends "to focus on major distortions [and the FSR] is a net that is designed to catch the big fish … .And one way to achieve this, of course, is to focus on large transactions."[59]

Ultimately, however, the practical relevance of the FSR in the longer term will largely depend on the reaction of non-EU countries. The FSR explicitly stipulates that international agreements concluded by the European Union take precedent over the new regulation.[60] The far-reaching and ambiguous content of the FSR may thus work as a "bargaining chip" and might be perceived as a strategic attempt by the European Union to incentivize third countries to negotiate and conclude bilateral or multilateral trade agreements with the European Union, containing clear rules for a fair and predictable foreign investment regime. It is still unclear whether this strategy has any chance of success. At the moment, and unless significant changes are made to the implementing rules, it seems more likely that this strategy might backfire and the FSR may simply curb investment by global players into the European Union. ●

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[59] Tono Gil and Natalie McNelis, *EU's foreign-subsidies control will be 'fair' in light of state aid tweaks*, MLex (March 6, 2023).

[60] FSR, *supra* note 1, art. 44 (9).