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

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

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

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

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

The Shipping Act's Competition Provisions

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

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

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

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

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

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

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

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

Lessons Learned from the FMC for the Antitrust Agencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lessons Learned from Antitrust for the FMC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] *Id.*

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

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

[17] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[32] *See* FMC v. City of L.A., Cal., 607 F. Supp. 2d 192, 200–01 (D.D.C. 2009) (FMC economic expert using HHI, although for drayage market where HHI may be more appropriate); Fact Finding Report 29, at 44 (referencing HHI to assess competitive conditions in liner transportation). *See also* Federal Maritime Commission, Bureau of Trade Analysis, Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law (2012) (analyzing trade routes using HHI).

[33] Fed. Mar. Comm'n, 60th Annual Report for Fiscal Year 2021 (2022).

[34] *See, e.g.*, Olaf Merk & Antonella Teodoro, *Alternative Approaches to Measuring Concentration in Liner Shipping*, 24 Maritime Economics and Logistics 723–46 (2022).

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

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

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

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

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

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

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

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

[43] *Id.* at 54.

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