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Editor’s Note
This issue of the Source features a group of articles offering practical tips on how to approach antitrust matters more efficiently or, as one of the articles describes it, “Faster, Better, Stronger.” Organized by Amanda Wait, who writes on “Clearing the Deal in the Initial Waiting Period,” the symposium also includes articles by Joanna Tsai (on economic analyses), Lisa Phelan and Megan Gerking (on criminal enforcement), and Michelle Lowery and Jodie Williams (on class certification).

We also offer an interview with FTC Chairman Joe Simons, an article on the antitrust analysis of vertical mergers by Koren Wong-Ervin, and an article on gun jumping in the EU by Jay Modrall.

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Nothing to See Here! Clearing the Deal in the Initial HSR Waiting Period

Amanda L. Wait and Andrew W. Eklund

Over the past ten years, over 83 percent of reportable transactions that have received Second Requests from either the Federal Trade Commission or Antitrust Division of the U.S. Department of Justice have been challenged.¹ Merger review in the United States is taking longer² and getting more expensive. In the past year, both federal antitrust enforcement agencies in the United States have recognized this increased burden on merging parties and are taking commendable and encouraging steps to address unnecessary burdens on merging parties. One way to eliminate the burden of a Second Request, however, is not to get one in the first place.

By statute, deals that trigger premerger filings under the Hart-Scott-Rodino Antitrust Improvements Act (HSR) are usually subject to a 30-day initial waiting period (certain transactions, such as cash tender offers and transactions involving assets in bankruptcy, have a shorter waiting period) during which the parties cannot consummate the pending transaction.³ At the conclusion of the initial waiting period,⁴ the reviewing agency may either close its investigation without further action or seek additional information from the parties in the form of a “Second Request.” A Second Request is a request from the reviewing agency to the transaction parties for documents, data, and other information. The issuance of a Second Request tolls the statutory waiting period under the HSR Act until 30 days after the parties “substantially comply” with the Second Request. As a practical matter, compliance can take several months and command substantial financial and management resources.

Avoiding a Second Request is not possible in all transactions, of course. Some transactions are “red lights”—highly likely to receive significant scrutiny because they involve direct competitors in industries and geographic areas served by few (or no) other competitors. On the other end of the spectrum, many other deals are unlikely to receive a Second Request in the first place. These “green light” deals, for example, may involve acquisitions by private equity firms of companies that


³ 15 U.S.C. §§ 18a(a), (b). This timing can be shortened if the parties request, and the FTC grants, early termination of the initial waiting period.

⁴ As discussed in more detail below, the parties may choose to extend the initial waiting period by an additional 30 days by “pulling and re-filing” the HSR form.
are not in the same or adjacent industries as the firm’s existing portfolio companies. Many deals, however, are “yellow lights”—merging firms should proceed with caution because at least some level of scrutiny is possible. These “yellow light” deals present opportunities for merging parties to proactively address potential issues to obtain U.S. merger control clearance during the initial waiting period.

Clearing one of these “yellow light” deals during the initial waiting period often requires significant advance planning. This article discusses some ways merging parties and their counsel can make efficient use of the initial waiting period to optimize the chance of obtaining clearance without the issuance of a Second Request.5

**The likelihood of the FTC or Antitrust Division challenging a transaction in the form of a consent decree, litigation, or the parties abandoning the transaction entirely after the issuance of a Second Request, has increased dramatically in the past ten years.** During the George W. Bush administration, an average of 70 percent of adjusted reported transactions6 that received Second Requests ultimately were challenged. This number increased to over 82 percent during the Obama administration. Said another way, in just a few years, transactions were over 12 percent more likely to be challenged if they received Second Requests. Relevant data for a complete fiscal year under President Trump has not yet been released, but we expect the percentages of challenges after receipt of a Second Request to remain high.

**FIGURE 1. Combined FTC and Antitrust Division Merger Challenges as a Percent of Second Requests by Fiscal Year**


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5 To the extent a Second Request has been issued, there are several strategies that parties may use to reduce the scope or burden of the Second Request. These strategies are beyond the scope of this article.

6 “Adjusted reported transactions” are those in which the agencies could issue a Second Request. “Adjusted transactions exclude transactions that are not subject to antitrust review under the HSR Act because: (1) the notification filing was incomplete or withdrawn before the start of the initial waiting period; or (2) the transaction reported was subject to review by another federal agency or later determined to be not reportable.” Andrea Zach, *Diving into the Data in the HSR Report*, FTC: News & Events, Blogs, COMPETITION MATTERS (Oct. 4, 2017), https://www.ftc.gov/news-events/blogs/competition-matters/2017/10/diving-data-hsr-report.
This increase occurred over a time period in which the percentage of adjusted reported transactions receiving Second Requests remained fairly constant. From fiscal year 2001 through fiscal year 2016, on average, 3.2 percent of adjusted reported transactions received a Second Request from either FTC or the Antitrust Division, with a high of 4.5 percent in fiscal year 2009 and a low of 2.5 percent in fiscal year 2008.

**FIGURE 2. Percentage of Adjusted Reported Transactions Receiving Second Requests by Fiscal Year**

![Graph showing percentage of adjusted reported transactions receiving Second Requests by fiscal year from 2001 to 2016. The average is 3.2%.](https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports)

Many companies are unwilling to play these odds, especially given the additional expense, time, and deal disruption that comes with Second Request compliance. Assistant Attorney General Makan Delrahim recognized that, even though the Antitrust Division issued Second Requests in less than 1 percent of reported transactions, “[t]hat 1%, however, is expensive [and] resource intensive.”⁷ A 2014 survey of antitrust practitioners reported a median cost of Second Request compliance of $4.2 million, with a reported range of $2 to 9 million.⁸ This same survey reported, on average, production of documents from 26 document custodians, typically employees of the merging parties.⁹

The duration of merger reviews is also increasing. One U.S. law firm compiles statistics regarding the length of review of public transactions. While their reporting metrics cannot account in all instances for some non-public aspects of merger review, such as the dates when HSR filings are made, Second Requests are issued, and parties comply with those requests, they provide directionally relevant information showing that the duration of merger reviews is increasing steadily.¹⁰

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⁷ Delrahim, supra note 2.
⁹ Id. at 31.
¹⁰ DAMITT 2017, supra note 2. The DAMITT report uses publicly available information to analyze trends in U.S. and EU merger enforcement, and is updated quarterly. Not all of this delay is attributable to the reviewing agency—reviewing parties may have reasons of their own to slow down the U.S. review process, particularly if they are trying to match up timing in other jurisdictions. However, both the Antitrust Division and the FTC have taken steps to shorten the parts of the review they can control. Delrahim, supra note 2; Bruce Hoffman, Dir. Bureau of Competition, Fed. Trade Commission, *Timing Is Everything: The Model Timing Agreement*, FTC: News & Events, Blogs, COMPETITION MATTERS (Aug. 7, 2018), [https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement](https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement).
In addition to the cost and delay, merging parties also must consider business practicalities when their transactions receive Second Requests. While the deal is pending, employees from both sides of a transaction may have concerns about their positions post-acquisition and may seek other employment, risking corporate “brain drain.” Customers may have concerns about the effects of the transaction and may cancel or not enter contracts due to the lack of certainty. The stock market may react with lower share valuations for companies whose deals are caught up in antitrust review, which could, in turn, affect deal valuation if any part of the deal consideration is paid in stock of the acquiring party. The issuance of a Second Request, and the associated delay and uncertainty, can result in these and other business ramifications well beyond the expense and labor required to respond.

Second Requests also increase the risk of a non-public deal or other confidential information of the merging parties becoming public. The contents of HSR filings generally are confidential and exempted from Freedom of Information Act requests by statute. Likewise, the HSR Act and regulations and the Antitrust Division Manual contain detailed practices and safeguards to ensure confidentiality of ongoing investigations. For example, the HSR Act states that

> any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

But in the course of investigating a “yellow light” transaction, the agencies likely will reach out to non-party market participants to gather additional information. The reality is that discretion on the part of the agencies does not prevent non-parties from figuring out the subject of the agencies’ inquiries. The mere act of being contacted by an investigating staff attorney may be enough for a non-party witness to infer that its competitor (or customer, or supplier) is involved in a non-public transaction.

Both the FTC and the Antitrust Division often conduct non-party interviews during the initial waiting period, but the agencies likely will contact even more non-party witnesses after the issuance of a Second Request, further increasing the chances of a deal becoming public. Moreover, although the Antitrust Division takes the position that “HSR material produced by a party should not be shown to another party or third party during a CID [civil investigative demand] deposition or otherwise,” the Antitrust Division Manual is clear that “CID material may be disclosed to third parties without the consent of the producing party” in some circumstances, including in connection with the taking of oral testimony.

All of these burdens and risks associated with a Second Request provide strong incentives for parties and their counsel to attempt to convince the reviewing agency that the deal does not warrant investigation beyond the initial waiting period.

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14 ANTITRUST DIVISION MANUAL, supra note 12, § III.D.2.h (As part of the investigation, “staff should outline its provisional theory of anti-competitive harm and should begin contacting customers, trade associations, competitors, and other relevant parties.”).
15 Id. § III.D.1g.iii.
16 Id. § III.E.6.a.
Is There Something to See Here? Staff Assessments During the Initial Waiting Period

In order to optimize chances of avoiding a Second Request, parties and their counsel must understand the reviewing agency’s objectives for the initial waiting period and, to the extent possible, predict the reviewing staff’s likely topics of inquiry and concern to respond quickly.

At the most basic level, the initial waiting period gives reviewing staff a limited time to conduct a preliminary investigation to determine whether the transaction warrants additional investigation through a Second Request. 17 The initial waiting period also provides a sense of certainty to merging parties that their transaction will be reviewed promptly. As the legislative history shows, prior to the passage of the HSR Act, merging parties were concerned about the lack of a definitive timetable for merger review. 18 By implementing a 30-day initial waiting period, Congress weighed the agencies’ need to review mergers against the business interests of the merging parties, as a longer waiting period could “kill an acquisition just as effectively” as a court order. 19

The “short, 30-day waiting period” 20 created by the Act, however, provides staff usually only about two weeks to review a proposed transaction before having to make a decision whether to recommend the issuance of a Second Request. After HSR reports are filed, staff at the FTC’s Premerger Notification Office ensure the filing is complete. The deal must then be “cleared” to either the FTC or the Antitrust Division for investigation, which may take a few days (and sometimes may take significantly longer). 21

In our experience, absent any unusual issues, approximately a week to ten days will pass from the time a transaction’s HSR filings are submitted until the file lands on the desk of agency staff with clearance to investigate the transaction at issue. This leaves only about three weeks until the statutory end of the initial waiting period. This entire three-week period, however, is not always available for staff’s investigation. In the event staff have concerns about a transaction, they typically need at least a few business days to prepare a recommendation for the reviewing agency to issue a Second Request, and a few more business days for that recommendation to be reviewed through internal reporting chains and for the Second Request to be issued. As a practical matter, parties should assume that reviewing staff may not contact them until seven to ten days post-filing and that the parties will only have until about day 23 or 24 of the initial waiting period to convince staff not to issue a Second Request—reducing the time period for substantive advocacy on behalf of merging clients to only about two weeks.

Staff at both the FTC and the Antitrust Division have several investigative tools for the preliminary initial waiting period inquiry. In addition to consulting public resources, agency staff may seek

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17 ANTITRUST DIVISION MANUAL, supra note 12, § III.D.2.d.

18 Merger Oversight and H.R. 13131, Providing Premerger Notification and Stay Requirements: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 94th Cong. 133 (1976) (statement of Rep. Romano Mazzoli, Member, H. Comm. on the Judiciary) (“[I]t has been brought up by some of the witnesses that because of the lack of a time certain, there appears to be at this point kind of an open-ended aspect to the premerger waiting period. There were some suggestions that a definite time be set, some say 60, 90, or 120 days, within which action will have to be taken, or the merger will be permitted to go through.”).

19 Id. at 192 (letter from Thaddeus Holt, attorney and former Deputy Undersecretary for the U.S. Dept’t of the Army).


21 See, e.g., Jenna Ebersole & Leah Nyleen, DOJ, FTC Jockeying for Deals Is Dragging Out Merger Reviews, MLEX (Nov. 30, 2018); cf. ANTITRUST DIVISION MANUAL, supra note 12, § VII.A.1.a.iii (“[N]o attorney of either agency should contact any filing party or any other private person or firm in connection with a premerger filing without first having obtained clearance”); id. § VII.A.1.c. (Although the agencies generally try to resolve clearance disputes via phone calls and emails, a “small number of matters are resolved through written Contested Matter Claims,” which are more in-depth than standard requests for clearance.).
voluntary submissions from merging parties in a variety of forms, such as informal discussions or written explanations, or more formal methods, such as issuing a CID. Staff may also “begin contacting customers, trade associations, competitors, and other relevant parties to determine whether there are likely competitive concerns in any relevant markets.” As the initial investigation takes place, staff will develop a preliminary understanding of the likely relevant markets at issue, the competition in those markets, and even potentially run preliminary economic screens.

Developing a sufficient understanding of these topics in a compressed timeframe is easier in some industries than others. For example, staff at the Antitrust Division have significant experience assessing the competitive implications of transactions in such industries as insurance, banking, agriculture, and telecommunications, among others. Similarly, FTC staff have significant experience reviewing transactions in such industries as retail, consumer products, hospital and other health care providers, supermarkets, chemicals, oil and gas, and pharmaceuticals, among others. If a transaction falls in an area in which the reviewing agency has significant experience, reviewing staff may be able to get up to speed on the current competitive dynamics and the specific competitive interaction (or lack thereof) of the merging parties quickly. For better or worse, staff may also come into the investigation of these transactions with some preliminary ideas on the potential competitive issues to investigate. Many transactions, however, present issues or industries of first impression and may take longer for reviewing agency staff to understand and develop theories of potential harm to test through the investigative tools available during the initial waiting period, such as non-party witness telephone interviews.

Strategies for Making the Most of the Initial Waiting Period

Given the very limited time that merging parties and their counsel have during the initial waiting period to educate reviewing staff regarding the merging parties, the products and services at issue, the competitive dynamics at play, and potential consumer benefits of the transaction, parties must carefully plan to maximize the impact of their advocacy efforts.

In this section we provide practical guidance for merging parties and their counsel for optimizing the chances of avoiding a Second Request during the initial waiting period.

Tip 1: Stack the Deck in Your Favor. Optimizing the chances of avoiding a Second Request during the initial waiting period requires significant advance preparation. As early as possible, parties and their counsel should work together to develop a game plan for the entire antitrust review. This plan should incorporate strategies to respond to all possible areas of agency inquiry quickly and efficiently.

Antitrust review in the United States has no “one-size-fits-all” approach. Each deal’s game plan will vary. In developing the strategy, however, parties and their counsel generally should consider the following:

22 Antitrust Division Manual, supra note 12, §§ III.D.2.h, III.D.2.i.
23 Id. § III.D.2.h.
24 These initial screens often include calculating the relevant market’s Herfindahl-Hirschman Index (HHI) and performing Gross Upward Pricing Pressure Index (GUPPI) analyses. HHIs are used to calculate the market concentration of a given market, and are derived by summing the squares of the individual firms’ market shares. U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 5.3 (2010), [hereinafter Merger Guidelines], http://ftc.gov/os/2010/08/100819hmg.pdf. GUPPI analysis helps determine whether a post-merger firm could raise prices on one product to divert sales to different products, thus increasing profits. Diversion analysis looks to the “number of units diverted to that product multiplied by the margin between price and incremental cost on that product.” Merger Guidelines § 6.1.
Survey the playing field. As early as possible, and optimally significantly in advance of submitting HSR or other merger control filings, parties’ counsel should survey all available public materials relating to U.S. antitrust agencies’ review of other transactions in the same or adjacent industries. This research will inform:

- What agency/office likely will review the proposed transaction at issue;
- Whether the reviewing agency staff likely already has a working knowledge of the industry and relevant players (or whether and to what extent the parties are likely to need to spend time educating the reviewing staff about the industry and parties);
- Whether the parties should anticipate complaints from market participants, and potential arguments and strategies to counter any complaints; and
- Whether the transaction likely will be investigated by one or more state attorneys general or foreign competition authorities in parallel with the federal antitrust enforcer. If so, counsel should discuss with their client the possibility of confidentiality waivers and whether to grant them so the parties are not spending valuable initial waiting period time making these decisions. Further, foreign premerger review may alter the overall pre-closing timeline for the parties.

Prepare for advocacy. Parties’ counsel should replicate, to the extent possible, the preliminary analysis in which the agency staff will engage during the initial waiting period. During this short time frame, agency staff initially will have access to limited sources of information, primarily consisting of the parties’ HSR filings (and, in particular, the Item 4(c) documents—materials prepared by or for officers or directors that discuss competition-related issues, such as markets, competitors, or potential product/geographic expansion opportunities presented by the deal), customers and other non-party witnesses, and other publicly available and/or internet sources. Parties should survey this information and view it through the lens of a skeptical antitrust enforcer to understand what initial impressions reviewing staff may have. Working through this lens, parties’ counsel can anticipate the likely early questions and prepare materials (ideally with ordinary course business documents as support) to respond to those questions consistent with the deal’s procompetitive story.

These advocacy materials may take different forms: for example, maps demonstrating geographic constraints (such as major roadways or bodies of water) may allay agency concerns about post-merger concentration in local geographic markets. Alternatively, if the parties are involved in an industry in which the agencies do not have much experience, preparing base-level educational presentations may help agency staff get up to speed on key aspects of the industry at issue.

Know your Item 4 documents. Item 4 documents may contain language that can raise the eyebrows of a reviewing staff attorney—even if the actual underlying meaning is innocuous. When parties and their counsel identify these types of unhelpful documents, they should discuss these statements with their authors to fully understand the intention and context in which they were made and to develop a strategy to address them with reviewing staff. For example, the authors once had to explain to agency staff why statements about the client achieving “market dominance” were puffery and in fact impossible for the post-merger firm to achieve, given market realities in the specific industry. But because these statements were identified in the process of reviewing potential Item 4 documents, the client was able to explain the statements soon after agency staff asked

25 Efficiently navigating parallel reviews by state and global enforcers are beyond the scope of this article.
Anticipate a voluntary access letter and the parties’ responses. Shortly after opening the investigation, agency staff often will send parties an “access letter” asking for the parties voluntarily to submit materials to assist in the agency’s initial investigation. Voluntary access letters present an opportunity for parties and their counsel to rebut any “bad” or “unhelpful” facts or statements that may be among the first the agency staff see about the deal at hand and to help begin to tell the deal’s positive, procompetitive story.

Both the FTC and Antitrust Division have posted model “voluntary access letters” describing the types of information they regularly seek from merging parties at the outset of a merger investigation. Parties should begin collecting this information early both to understand what the requested documents say about competition and other key issues, but also to be able to quickly provide the reviewing agency materials that show their initial concerns may be unwarranted. Based on the model voluntary access letters, parties should be prepared to produce organizational charts, strategic plans and marketing plans for the past three years, information regarding products currently sold and in development, lists of the top ten customers for products that overlap with the other side of the transaction, lists of competitors, and market share information.

Know your customers. Both the FTC’s and Antitrust Division’s model access letters request information regarding the customers of the merging parties. Often collecting the requested information regarding the top customers can take several days. Parties and their counsel should collect the requested information from clients in advance. The parties should think carefully about the points of contact they will provide to the agency for top customer/supplier interviews—giving the main telephone line for a company may create delays in agency staff getting on the phone with the appropriate individuals, whereas giving the cell phone number of the head of sales/purchasing (if that person is open to providing that to the agency) may expedite the reviewing agency’s investigation.

In addition, parties should consider giving their customers a “heads up” in advance of turning their names and contact information over to the investigating agency. In the authors’ experience, it is helpful for the client to explain to the customer in a matter-of-fact way that the Antitrust Division and FTC routinely contact customers as a normal part of their antitrust review process, and to encourage the customer to answer their questions if they are comfortable doing so. These outreach calls can also help gauge whether the customer/supplier is likely to be supportive, neutral, or hostile to the deal.

Anticipate non-party witness concerns and issues. In addition to the customers whose contact information reviewing agency staff will request from the parties, reviewing agency staff may also have discussions with other non-parties about the deal under review. These other non-parties could include competitors, trade associations, other industry experts, suppliers or other firms at different levels of the supply chain, and others. These non-parties may be contacted by the reviewing agency staff or may affirmatively reach out to staff to express their views of the potential deal. Parties and their counsel should, to the extent possible, anticipate the likely issues and concerns that may be raised by these other non-party witnesses. In our experience, counsel

can sometimes identify potential complainants through discussions with their client’s business team. Suppliers or vendors who have recently lost sales to one or both of the merging parties, customers who have been less than satisfied about quality or service or who have recently pushed back on pricing or other terms may be among the most likely parties to raise concerns about the proposed transaction with the reviewing agency staff.  

**Prepare for an agency roadshow.** Reviewing agency staff often ask for parties to identify a business executive or other knowledgeable employee with whom staff can discuss the parties, the industry, competition, and the rationale for the deal, among other possible topics. Parties should anticipate this interview request and be prepared to put these individuals quickly in front of agency staff, sometimes even before being requested to do so by reviewing staff.  

Clients may hesitate to have their executives speak to government enforcers. These are busy individuals who often have broader deal team responsibilities, in addition to maintaining their regular “day jobs.” Preparing for and participating in these government interviews can take several hours, and could take an executive out of commission for a day or more if the interview is done in person at the reviewing agency’s offices rather than by telephone.  

This executive participation, however, can be a critical piece of the agency review process. Often the client’s executives are the best advocates for your deal. In the authors’ experience, having agency staff hear about a company’s business directly from management is often viewed by agency staff as more genuine and credible than the same arguments submitted by the parties’ counsel.  

These interviews also can help shape the nature of the agency’s investigation. By telling their procompetitive affirmative story of the deal, the executives can identify facts for agency staff to verify during their calls to non-party witnesses. If the non-party witnesses, and customers in particular, respond to staff’s questions with facts that are consistent with what the staff has heard from the parties, this significantly improves the chances of clearance during the initial waiting period.  

Parties should also carefully consider whether agency interview requests should take place by phone or in person. This decision will, again, depend on a number of factors including the timing of the deal and antitrust review and the physical location of the client. Several years ago, one of the authors represented a party before the FTC in a merger involving high-tech consumer products. The parties’ CEOs came to the Commission with examples of products to show agency staff and used them to explain how the deal could accelerate R&D in certain product lines. The deal was granted early termination the following week and staff told counsel that the ability to talk directly to the CEOs and hear the CEO’s vision for the company directly was a significant factor in their decision to close the investigation.  

**Tip 2: Play the Hand You’re Dealt.** Even the most experienced counsel cannot always predict with certainty the likely questions and concerns of reviewing agency staff. For example, in a recent matter, the authors anticipated that the reviewing agency would likely focus on a small subset of products produced by both parties. The agency did exactly that—except they drew the scope of competing products in a way that was not anticipated. When these unexpected avenues of investigation arise, merging parties and their counsel should be prepared to quickly pivot to tell a pro-competitive story of the deal through the lens applied by staff. Parties and their counsel may respectfully disagree with staff regarding the staff’s view of competition, but unless parties have independently verifiable facts that they can use to quickly show staff that another view is more consistent with business realities, debating with staff over complex issues like market definition will often simply eat up a large chunk of the precious little time available during the initial waiting period.
As parties and their counsel are considering whether to push back on the reviewing staff’s market views, they must carefully evaluate which arguments are likely to resolve staff concerns without raising additional issues for investigation. As a general rule, the initial waiting period is not the time to engage in protracted disagreements with staff about the definition of the relevant market or other complicated antitrust issues. Parties must distinguish between arguments to make during the initial waiting period (IWP arguments) and which arguments are best saved for after the issuance of a Second Request (Second Request arguments), if staff have expressed concerns about the deal.

IWP arguments are those that make it easy for staff to close their investigation. These are based on facts that can be quickly and easily demonstrated by the parties’ ordinary course documents and, most importantly, reviewing staff can independently verify with non-party witnesses and/or public sources. For example, an IWP argument might be that a large number of companies provide competitive products or services to those offered by the merging parties. To support this argument, the parties can point to internal business planning documents naming many of these other competitors, third-party industry publications describing them, and the competitors’ own webpages describing their similar products. The reviewing agency’s staff can verify that these other competitors are, in fact, viable competitive options through customer calls.

Second Request arguments, on the other hand, require more analysis. These are the types of arguments that may be based on detailed econometric analysis or would require compilations of documents from multiple sources to verify. A Second Request argument might be that, despite a small number of competitors in an industry, the merging parties would lack the financial incentives to raise prices. This may be supported by merger simulations, analyses of natural experiments, or economic or other evidence that would require the collection of data by the reviewing agency from multiple parties and significant work by the agency’s economists to verify. Even if the staff ultimately could verify the parties’ statements, this type of analysis likely would take longer than the limited time available in the initial waiting period.

Finally, in advocating for a merger, statements about potential efficiencies of the transaction are rarely as compelling as showing how the transaction will benefit consumers. For example, simply stating that the deal will result in substantial cost savings may carry little weight with a reviewing staff attorney, particularly if there is no support to show the cost savings are merger-specific, verifiable, or cognizable. By contrast, showing how the cost savings will directly benefit consumers, whether through lower prices, new product development, or increased competition, is more likely to sway an investigating agency. And sometimes, explaining the rationale behind the deal can help to show the positive aspects of a combination in the broader context. For example, showing a strong procompetitive rationale for the deal, supported by business documents, can help tell the story that the parties’ intent is fundamentally procompetitive and will benefit consumers, and not that it is being done to harm competition.

**Tip 3: Know When to Hold ‘Em and When to Fold ‘Em.** A party’s playbook may have outlined a plan to obtain merger clearance during the initial 30-day waiting period. Part of effective and efficient counseling, however, is knowing when to change course.

In some investigations, agency staff may need more than the statutory 30-day waiting period to complete their preliminary investigation. Staff may have received the file later than usual in the

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27 Merger Guidelines, supra note 24, § 10.

28 Miriam Carroll, Program Summary: “Economic Analysis of Partial Acquisitions, JVs, and Alliances,” ABA TRANSP., ENERGY & ANTITRUST NEWSL. Fall 2018, at 22.
initial waiting period due to delays at the Premerger Notification Office or in obtaining clearance to review the deal. In one recent matter, the authors were not contacted by the reviewing agency until day 17, giving reviewing staff only 13 days to conduct their review during the initial waiting period. If reviewing staff are not familiar with the industries, products, or services at issue, staff may need additional time to learn the competitive landscape. Staff may also need additional time if the transaction at issue involves a large number of products and/or geographic markets.

Parties can provide staff with additional time to complete their reviews in a number of ways. If the parties have already filed their HSR notice, the parties can “pull and refile” to restart the HSR waiting period. The acquiring person must formally withdraw the initial HSR filing in writing, and include the fact that it intends to refile. The acquiring person must also state the date when the refile is expected. Finally, the refile must include new affidavits, and update any responsive Item 4(c) or 4(d) materials that may have been generated since the initial HSR filing was submitted.

Pull and refile can be effective where agency staff are unlikely to have substantive concerns but they need additional time to complete their investigation. As described above, the parties should have a sense as to whether agency staff will need additional time by week three of the initial waiting period. If the parties think staff merely need additional time to process the filing, it may make sense to “refresh” Item 4 collections during the final week of the first waiting period in anticipation of a potential pull and refile.

Giving the agency staff early assurances that they will have additional time to review the transaction can allow them to focus on the deal specifics rather than on preparing a Second Request. In one recent deal, the authors represented a company whose filing was likely delayed in the clearance process. The staff attorney responsible for the investigation did not receive the parties’ filings until day 17 of the initial waiting period. Due to the late start to the investigation, staff were unable to complete their customer and competitor interviews before the expiration of the first initial waiting period. The authors provided written notice of the buyer’s intent to pull and refile several days in advance of the expiration of the first initial waiting period, noting the specific date and time at which the filing would be effectively withdrawn to give the agency staff assurances that they would not be “crunched” and have to issue a Second Request to ensure they would have time to complete their investigation. In this matter, the “pull and refile” decision was a successful one: the reviewing agency granted early termination a few weeks into the second initial waiting period.

Whether this type of “pull and refile” strategy makes sense may depend on a number of factors. For example, deal practicalities, such as any antitrust risk shifting or efforts provisions in the parties’ merger agreement, may govern whether parties could “pull and refile.” For instance, an agreement may include a “drop dead” date at which point one or both of the parties can walk away from the deal. If that date is approaching, the parties may choose to see if they can get the deal cleared. But, on the other hand, if that date is months away, the parties may want to comply

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29 Recent press articles have discussed the potential increase in the time for an agency to obtain clearance. See, e.g., Ebersole & Nylen, supra note 21.

30 16 C.F.R. §§ 803.12(a), (c).

31 16 C.F.R. § 803.12(c); see also Fed. Trade Comm’n, Tips on Withdrawing and Refiling an HSR Premerger Notification Filing (Sept. 15, 2017) [hereinafter Tips on Withdrawing and Refiling], https://www.ftc.gov/system/files/attachments/hsr-resources/withdraw_and_refile_procedures_tip_sheet_updated_091517.pdf. If the refile is made more than two business days after the filing is withdrawn, the parties are required to pay a new filing fee.

32 16 C.F.R. § 803.12. See also Tips on Withdrawing and Refiling, supra note 31.
with the Second Request before that time period runs. Whether to “pull and refile” may also depend on the nature of the questions or concerns from the reviewing agency staff. Generally, if the reviewing agency likely only needs a few additional weeks in order to confirm a certain set of facts that would allay their concerns about a proposed transaction, it may make sense to extend the initial waiting period to avoid the issuance of a Second Request. However, in some matters, the agency’s concerns may not be likely allayed during the initial waiting period and so “pulling and refiling” the HSR to give the agency more time may simply delay the inevitable Second Request.

**Additional Options.** Even before submitting the initial HSR filings, parties may consider “going in early” to staff at the likely reviewing agency to give them time to start their investigation prior to starting the official HSR initial waiting period clock.\(^33\) A strategy of going in early, however, is not without risk and should be carefully considered. This approach risks flagging a deal for additional scrutiny that may have otherwise not been the subject of inquiry.\(^34\) On the other hand, if parties and their counsel believe that reviewing staff may use some additional time to either get comfortable that the transaction will not likely result in anticompetitive effects or to limit the scope of the issues that will be subject to a Second Request, approaching agency staff prior to submitting HSR filings may be beneficial.

Finally, in the event that the staff’s concerns relate to a specific product line or business unit, the parties may consider approaching staff with a remedy that would resolve all concerns without the need to comply with a Second Request. Even if the parties are proposing a complete remedy, the investigating staff may well issue the Second Request anyway in order to prevent the parties from closing.\(^35\)

**Conclusion**
The issuance of a Second Request can inject significant uncertainty, delay, and burden into a proposed transaction. Staff inquiries during the initial waiting period, however, do not automatically mean that a Second Request is forthcoming. Parties can mitigate (or at least prepare for) these risks by proactively approaching the antitrust review and being ready to respond efficiently and effectively to staff inquiries and concerns.

\(^33\) Donald G. Kempf, Deputy Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Remarks Before Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-donald-g-kempf-jr-delivers-remarks-american-bar (“[I]f you are aware of competitive issues from the get-go, meet with us early and often. . . . I would urge the parties to provide relevant information early in the investigation.”).

\(^34\) Post-consummation challenges of transactions that were subject to the HSR Act are rare, but not impossible. In one recent example, the Antitrust Division challenged Parker-Hannifin’s consummated acquisition of CLARCOR, Inc. eight months after the expiration of the HSR waiting period. See Complaint, United States v. Parker-Hannifin Corp. and CLARCOR, Inc., at 1–4 (Sept. 26, 2017), https://www.justice.gov/atr/case-document/file/999341/download.

\(^35\) If parties anticipate divestitures, they can also consider a “fix it first” approach in which the parties carve the potentially problematic assets or business units from the transaction such that the acquiring party does not buy them in the first place. See, e.g., Dissenting Statement of Commissioner Joshua D. Wright, Reynolds American Inc. and Lorillard Inc., FTC File No. 141-0168 (May 26, 2015), https://www.ftc.gov/system/files/documents/public_statements/644991/150526reynoldsjdwstatement.pdf (no anticompetitive effects of proposed transaction due to parties’ proactive finding of a divestiture buyer before even approaching FTC with the deal, effectively making a three-way transaction).
The Role of Economic Analyses in Preparing for the First 30 Days of a Merger Review

Joanna Tsai

The 2010 Department of Justice/Federal Trade Commission Horizontal Merger Guidelines (Guidelines) describe the types of analyses that the agencies would find informative, persuasive, or even dispositive, during a merger review. The Guidelines therefore offer a very good map of the analyses that might be helpful to the parties’ efforts before the agencies. In any given merger review, however, those efforts are often constrained by the lack of some combination of time, budget, or data and information. Such constraints limit the scope of the analysis that an economic expert can pursue and create the need to focus on and prioritize a more limited key set of analyses.

Identifying this key set of analyses helps everyone. It helps consulting economists have confidence that their efforts will be informative to the agencies and to their clients (both antitrust lawyers and parties). It helps antitrust attorneys provide accurate counsel to the parties about the deal’s overall antitrust risk, develop a strategy for agency engagement, and predict the timing and likely outcome of the agency’s investigation. It helps the parties be confident that the work they are paying for is the work that is critical and that matters to the outcome. And, if it leads parties’ antitrust team to present sound determinative economic analyses to agency staff, it helps the agency staff, which is often resource constrained, evaluate the impact of the proposed transaction on competition and consumers. In particular, the key set of analyses can help agency staff quickly weed out non-problematic transactions and focus their limited resources and time on transactions that might be problematic. Importantly, doing the right analysis from the outset also ensures that the parties’ antitrust team is prepared to be helpful and answer questions from agency staff when they arise. At the end of the day, a smooth and informed process, regardless of the outcome, is good for everyone.

In this article, I set forth some thoughts on the analyses I have found informative, based on my experience as a consulting economist and my time at the FTC as Economic Advisor. This is an article intended for lawyers and economists. There is no overall cookie-cutter approach, as every case has its own idiosyncrasies and features based on, among other things, the way competition works in the particular industry, the manner in which the data is kept by the parties, and the scope and quality of the data kept.

The Starting Point
The starting point for a consulting economist is typically a consultation call with outside antitrust counsel about the parties involved in the proposed transaction, background on the industry, and some details about the plan and timing for engaging the agency. Many times this starting point is
prior to the parties signing the deal, which gives antitrust counsel the option of collaborating with the economist to provide a risk assessment to the merging parties. Other times, the starting point may be right after, or around the signing of the deal, when antitrust counsel and the parties begin to prepare for premerger notification filing.

During this initial call, the economist and counsel may also discuss the objective of the first 30 days of review. For some transactions, the objective is to maximize the chance of clearance in the first 30 days (or the first 60 days in the case of a pull and refile), and avoid a second request. For other transactions, a second request might be considered very likely from the start, and the objective might be to narrow the product and/or geographic scope of the second request, and/or to begin advocacy and engage with the agency from the start. The objective will help to prioritize the analyses that the economist pursues for the first 30 days of the merger review.

After the initial call with counsel, counsel will often ask the consulting economist to provide a Data and Information Request. In some ways this makes a lot of sense—counsel would like the economist to be able to begin the analyses as quickly as possible, and a list of the data and information the economist would like to have begins that process. The sooner the client can begin to collect the information, the thinking goes, the sooner the economist will receive the information necessary for his or her analysis, and the sooner the analysis can begin (and sometimes beyond).

That said, in many circumstances, a pre-data request fact-finding call between the economist and relevant business executives can be very productive before the economist formulates a data request. It can be an effective and an efficient way for the economist to begin to understand how firms in the particular industry compete, what the key areas of concern of the proposed transaction may or may not be, the types of data and information the companies keep, and the types of analyses that would be informative and can be pursued given the data and information that are kept. It is also a time that the economist can describe to the business executives the types of information that would be useful or informative in an antitrust analysis, and explain why, so that the business executives have a better understanding of the types of information that would be helpful and how it would be used.

A challenge that the consulting economist sometimes faces is that data kept by the parties in the ordinary course of business is not generally organized in a way used by antitrust economists to evaluate the competitive implications of a merger. Instead, that data is organized to help the firm run its business and report for accounting and management purposes. Because of this, there are inevitably challenges to get the right data for the antitrust analyses, a process that might require the merging of diverse data sets within or between the companies. But often these challenges are overcome, or at least reduced, by a pre-data request fact-finding call or a follow-up call to clarify and confirm the proper interpretation of the data. For example, economists are often interested in marginal costs, and variable cost may be used as a proxy for marginal costs. On the other

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2 The Hart-Scott-Rodina Act (HSR) Act requires that parties to certain mergers and acquisitions submit premerger notification filings and wait 30 days before consummating the transaction. The pull and refile, or the “withdraw and refile” process allows the acquiring firm to withdraw its HSR filing and refile again by providing an additional 30-day waiting period for the agencies to conduct a preliminary review of the transaction. See Premerger Notification Office Staff, Bureau of Competition, Fed. Trade Comm’n, Getting in Sync with HSR Timing Considerations (2017), https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations. Based on what the agency finds, it can: (1) terminate the waiting period and allow the parties to consummate the transaction (often referred to as an “early termination”); (2) let the waiting period expire, which allows the parties to consummate the transaction; or (3) if the initial review has raised potential competition issues, the agency may extend the review and ask the parties to turn over more information so it can take a closer look at how the transaction will affect competition (often referred to as a “second request”). See Fed. Trade Comm’n, Merger Review: How Mergers Are Reviewed, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review.
hand, company profit and loss statements often keep track of categories of costs that are based on accounting categories such as COGS (Cost of Goods Sold), SG&A (Selling, General, and Administrative Expenses), labor, etc. In order to get to an estimate for variable costs, an economist can work with a finance executive to identify in a more granular way costs that are variable versus fixed.

Once the economist has an understanding of the competitive dynamics in the industry, and the data and information that might be available and useful, she or he can better map out the substantive analyses that may be informative for the transaction.

**Substantive Analyses of Competitive Effects**

A key area of inquiry in a merger analysis is closeness of competition i.e., how closely the merging parties’ products and/or services compete. In some industries, products are differentiated, and products sold by different participants in the market are not perfect substitutes for one another. Sellers that sell closer substitutes tend to compete more directly. In order to understand whether (or to what extent) competition will be lost post-merger, economists and lawyers alike are interested in the extent to which the merging parties (and their products) compete head to head, are close substitutes to each other, or are first and second choices to the merging firms’ consumers. The more closely the parties and their products and/or services compete, the more likely that some competition would be lost as a result of the merger. In particular, absent merger-specific efficiencies, if a significant share of consumers regard the products of the merging firms as their first and second choices, and repositioning of the non-parties’ products (or entry) to replace competition lost through the merger is unlikely, consumers would likely face a price increase post-merger. In such cases, the merged firm would likely find it profitable to unilaterally raise the price of one or both products above the premerger level, because it would recapture a relatively large share of any lost sales through its merger partner. The likely price increase is greater, if the share of recaptured sales is higher, and the share of recaptured sales is likely higher for products that are closer substitutes.

Alternatively, if a significant share of consumers do not regard the products of the merging firms as uniquely close substitutes, or if the other firms in the industry are able to reposition themselves fairly easily and quickly to become the next best alternative for the affected consumers, then those consumers would be less likely to face a price increase. In that case, the merged firm may not find it profitable to increase prices, because it would not be able to recapture a large enough share of lost sales—instead consumers would turn to the repositioned rivals. Indeed, the agencies’ own public analysis of consent orders frequently references how closely the merging parties compete.

To understand the degree of competition between the merging parties and their products, and, to some extent, the degree of competition between them relative to other market participants, several types of analyses can be informative and fairly straightforward to implement.

**Win/Loss Analysis.** The first type of analysis, a win/loss analysis, also known as a bidding analysis, is no stranger to many in antitrust who work on analyzing the potential competitive effects of proposed transactions. To the extent companies keep track of data on the results of each merging party’s efforts to acquire new business or maintain existing business, such data can

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3 Guidelines, supra note 1, § 2.21.
be analyzed to understand questions such as: (a) how frequently do the merging parties compete against each other? (b) when they do compete, do other competitors also compete for the same sales? (c) how effective are the other competitors at gaining sales that the merging parties both compete for (e.g., do the other competitors win from time to time)? (d) how significant are the sales that the parties both compete for, to each individually?

If the merging parties keep track of bidding and win/loss data, and if it is fairly clean and user-friendly, then answering these questions is normally a fairly simple exercise that involves straightforward statistics. To put a rough time frame on this analysis, if the win/loss data is fairly organized and straightforward to interpret, this analysis could be accomplished in a matter of days, rather than many weeks or months. Typically, companies tend to systematically track win/loss data if they compete in industries in which firms compete via bids or Request for Proposals (RFPs), or in which sales are relatively concentrated with relatively few customers. In other words, it would be both feasible and informative for firms in such industries to keep track of their wins and losses against other competitors and help determine how the firm can be more competitive in the ordinary course of business. Moreover, larger firms or firms with dedicated sales personnel often keep win/loss data through software like salesforce.com. On the other hand, firms in industries in which sales are relatively dispersed, such as in retail, are less likely to keep track of wins and losses in a database format but may keep track of customer purchase patterns via data gathered through loyalty card programs.

Even for firms in industries in which sales are relatively concentrated, some do not keep track of this type of data or the data is very incomplete. In those circumstances, a win/loss analysis could be pursued by analyzing the merging parties’ sales data. From the parties’ sales data, the economist could infer the merging parties’ possible wins and losses to each other. For example, as a start, an economist can use the parties’ sales data to determine the merging parties’ top customers for each year in the last few years. A simple comparison of such a list can show whether either of the parties have lost major customers during those years or if sales to a major customer have shifted from one merging party to the other, based on discussions with company executives or sales reps. If there were lost sales to each other, the economist can determine how significant and frequent they were, and whether those losses were a result of direct competition with each other. If the data does not reveal lost sales, this may suggest that the merging parties do not compete head to head, at least not for the same customers, which suggests that the merging parties are differentiated, have complementary businesses, and/or tend to compete for different segments of the marketplace.

This type of analysis involves examining the sales data over time, establishing what might be wins/losses to each other, and matching customers across the two parties’ databases. These tasks are not difficult to do, but may take some time because comparing customer data across databases may require careful data cleaning and standardization. The data cleaning aims to ensure that data as received from the parties are free of anomalies, outliers, and are comparable across parties, while the standardization involves customer name standardizations to facilitate name matching. This could take possibly anywhere from two to four weeks on average after receiving the sales data from the merging parties. The amount of time this would require can also depend on the size of the sales data, i.e., how many customers the parties have (are we matching 50 customer names or 2000 names?), how comparable the sales data are across parties, and whether the analysis only needs to focus on the top customers, top wins and losses, or it needs to cover all (which could depend on the results of an initial analysis and the percentage of the companies’ sales that are covered by the top customers).
Entry or Exit Analysis. Another type of analysis that can be informative at this stage in evaluating competitive effects, if applicable, is an entry or exit event analysis. It may be that one of the merging parties has a new and competing product that entered the market in recent years or that one of the merging parties started to compete with the other merging party in a segment of the market or in a geographic region that it did not compete in before. Alternatively, one of the merging parties may have exited one of the segments of the market or a geographic region where it previously competed with the other merging party.

These events might form the basis of a natural experiment that would allow an economist to analyze the impact of such events on the merging parties to gauge (and possibly quantify) how closely the parties compete. One would expect that an entry event by merging party A would not have had significant impact on merging party B’s sales if merging parties A and B were not close competitors. On the other hand, if merging party A’s entry suggested that a large percentage of the sales gained by A came at the expense of merging party B, this could suggest that A and B are close competitors. Sometimes merging party A’s entry may not have a significant impact on B’s sales or on other competitors’ sales. This may be a possibility if A entered with a product that is serving a new demand. The product is different enough from existing products that it induced consumers who were not in the relevant market to purchase.

Entry or exit analysis requires information and dates of the entry (or exit) events for the merging parties, and the merging parties’ sales data covering a time period before and after the events. While every case is different, and a lot can depend on how clean or messy the parties’ sales data are, one should budget a minimum of two weeks to pursue an analysis of this type.

Pricing Variation Analysis. A related analysis, though it need not involve entry or exits, is to compare merging party A’s prices (or other competitive variables) when it faces competition from merging party B versus when it does not. Instead of exploiting the natural experiment of entry and exit events to tell us about how much of a competitive constraint merging party A poses on B, and vice versa, when they competed versus not, this analysis would take advantage of the variation in outcomes based on where A and B compete versus where they do not.

Known by some as the “Staples” analysis, this analysis can be informative if competition is relatively local, say in a given city, region, or even smaller areas, and the merging parties do not both compete in all of the areas. The variation would allow an economist to estimate the extent to which competition between A and B matters, controlling for other differences between the areas where A and B compete and where they do not.

Alternatively, this analysis can also be implemented to show pricing constraint or lack thereof, when the merging parties compete head to head for certain customer contracts, versus when they do not, as learned from the win/loss analysis. This analysis would require information on the locations of the merging parties and other rivals, the merging parties’ sales data, ideally for at least two years, and win/loss data if one intends to use the merging parties’ presence in bidding situations as the variation in the analysis. Again, while every case is different, and a lot can depend on the data readily available, one should budget a minimum of two weeks to pursue this type of analysis.

For industries that involve high transportation costs to deliver products or services to customers, such as cement or industrial gas, an analysis of the merging parties’ distances to customers, vis-à-vis third-party producers’ distances to the customers, can be very informative about the relative closeness of the parties and its rivals. In these industries, distances to the customers is an important component in the cost of the product and therefore in the competition among firms. All else equal, producers that are farther away would incur substantially higher cost in freight, and thus be less price competitive, than producers that are closer to the customer. A merger between two firms that are closest to the customer, without a third party nearby, may mean the merger would likely eliminate the competitive constraint that the merging parties imposed on each other to gain that customer’s business. However, if a third party is also nearby, or if there is a lower cost producer that can ship to the customer competitively for longer distances, these third parties would likely continue to exert pressure on the merged firm post-merger. On the other hand, for many customers, the two merging parties may not be the closest supplier. For these customers, at least one other third-party producer is closer than one of the merging parties, and the constraint they can impose on the merging party would continue post-merger.

This analysis allows the economist to identify the customers (if any) that would likely experience a price increase post-merger, as well as the extent of the likely price increase. The analysis requires information on the merging parties’ locations, customer locations, other rivals’ locations, and estimates of production and freight/delivery costs for both merging parties and rivals. If product delivery relies on terminals and rail, such information should also be included in estimating freight/delivery costs to the customers. Depending on the number of supplier and customer locations, the data, computation, and time requirements for this analysis can be significant. However, for certain cases it may be probative to implement the analysis on a sample of customers in selected regions, which would significantly reduce the requirements.

**GUPPI Analysis.** Finally, the Guidelines prescribes a way to implement a first-blush effects-based analysis for analyzing mergers involving differentiated products by using the Gross Upward Pricing Pressure Index (GUPPI). The Index helps to evaluate the effect of the proposed merger on competition and prices. Simply put, it relies on only two primary pieces of information—diversion ratios and margins—to estimate the amount of upward pricing pressure the merger would bring. The Index is meant to be simple to implement, and gets at actual competitive effects rather than focusing on the structure of the market (e.g., number of firms, market shares, concentration) to infer the effect that the merger would have on competition.

But is the GUPPI really a short-cut effects-based analysis? A reason for the Herfindahl-Hirschman Index’s (HHI) popularity as an initial screen is that it is simple to implement once market shares are determined. GUPPIs, however, require different information than HHIs, information about diversion ratios and margins. Some use market shares as proxies for diversion ratios, but actual diversion ratios might be quite different from these proxies. And, calculating margins is

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6 Guidelines, supra note 1, § 6.1.
7 The HHI is a commonly accepted measure of market concentration calculated by squaring the market share of each firm competing in the market and summing the resulting numbers. It approaches zero when a market has a large number of firms of roughly equal size, and reaches a maximum of 10,000 points when a market is controlled by a single firm. See, e.g., U.S. Dep’t of Justice, Herfindahl-Hirschman Index (July 31, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index. The Guidelines describe the HHIs, and agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated and markets in which the HHI is in excess of 2,500 points to be highly concentrated. Guidelines, supra note 1, § 5.3.
a complex exercise itself. Note that the win/loss analysis and the entry or exit event analysis described above can yield estimates for diversion ratios that can be much more reliable than estimates based on market shares. Thus, an informative GUPPI analysis requires prices (that one can calculate from the sales data), detailed profit and loss statements for the merging parties to estimate margins, and the data and information necessary to estimate diversion ratios, through win/loss or entry event type of analysis described earlier. A GUPPI analysis based on shares can be done in a matter of a few days, but GUPPIs that are based on estimates of diversion ratios can take up to two weeks or more to implement.

Substantive Analyses on Entry and Efficiencies

Substantive analysis of competitive effects is one key component of merger analysis, but the overall potential effect of a transaction needs to account for the effects of any entry and repositioning, and cognizable merger efficiencies. Quantitative analysis showing that entry and repositioning would be timely, likely, and sufficient is not common during the first 30 days of a merger review. More often than not the analyses for the first 30 days has a greater focus on competitive effects, although qualitative, descriptive information about entry and repositioning is helpful to bring up with the agency. Similarly, quantitative analysis of cognizable merger efficiencies in the first 30 days is rare. However, it can be helpful for the economist to review the parties’ efficiency estimates to get a preliminary understanding of the likely overall effect of the transaction on competition, net of the possible price effects, if any.

Data and Information Request

As discussed earlier, an economist’s data and information request should be based on the analysis that the economist plans to pursue and the objective at this stage. Many times, it would typically include:

- **Sales data:** Monthly or quarterly sales data by customer by product or product type, showing net revenues, volumes, costs/margins (if available at this level of detail), customer location (ship-to address, state, country), customer type (e.g., distributor vs. manufacturer, or segment), product segment, and store/manufacturing/plant location;
- **Bidding, win/loss data, and/or Customer Relationship Management (CRM) data:** Any sales staff data (e.g., salesforce.com data) identifying customers that sales personnel have contacted, including information such as current supplier(s), willingness to switch suppliers, opportunities, wins/losses, frequency of contact, and any competitive intelligence kept in the ordinary course of business;
- **Profit and loss data:** Detailed financial reports, profit and loss statements showing margins (gross and net) over time for different product and application categories, as well as cost information and cost category breakdowns; and
- **Industry data:** Estimates of market shares, and overall industry trends.

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Other than data, the economist might normally be interested in the information contained in the following types of documents:

- Existing company documents and analyses that identify key competitors (domestic or international), competitive strengths and weaknesses of each competitor, and the range of competing products offered by those firms;
- Existing company documents and analyses that provide estimated market shares by product category and/or product segment and by geographic regions (if available);
- Existing company documents and analyses that show or discuss levels and changes in prices, costs, and margins over time for the different products/product categories and geographic regions;
- To the extent available, company documents and analyses that show or discuss current or potential customers and future plans for different products/product categories; and
- Information, documents, and presentations on expected efficiencies from the merger. In particular, documents and any presentations that show any merger-specific efficiencies, in categories such as potential benefits from combining product lines, manufacturing locations, distribution and/or manufacturing cost reductions, procurement, and/or R&D.

Together, the qualitative and quantitative information described here can serve as a very useful basis for beginning the substantive analyses. In some cases, as noted in the previous section, implementing these analyses may require additional information.

In some cases, publicly available data sources can also be helpful, to complement the merging parties’ internal data. For example, in health care, data pertaining to inpatient and outpatient hospital services are available through the American Hospital Association, Centers for Medicare and Medicaid Services, or the states’ hospital associations. In the agriculture industry, the U.S. Department of Agriculture publishes a number of reports and economic data on the production and overall prices of agricultural products. In retail, Nielsen publishes data on retailers, including store location, characteristics, and size, that can be useful for an economist’s analysis.

In some cases, the agency may request data from the merging parties through a Voluntary Access Letter in the initial 30-day period. Such requests often include the types of information described here, including win/loss information and sales data. In such cases, the economist and team can have a helpful role in understanding and submitting the data specifications to the agency.

**Presenting to and Engaging with Agency Economists in the First 30 Days**

Whether to present and engage with an agency’s economists in the first 30 days is a judgment call that is typically made by the antitrust counsel on the team, often in consultation with the consulting economist. The benefits of having an economist engage with the agency staff can include an alignment on any economic analysis that can be particularly informative and any key areas of focus. During an early meeting, the consulting economist can also provide helpful information to the agency economists and lawyers based on initial analyses. On the other hand, some practitioners prefer to avoid having the economist engage at an early stage, in the belief that the agency could view it as a signal that the proposed transaction could be problematic. However, given that merger review has become much more data intensive, even in the initial phase, the engagement of an economist early on for most cases has become common place. In some instances, economists do not appear in front of the agency in the first 30 days because the nature of the agency’s inquiry in the first 30 days does not always require significant economic analysis or an economist’s presentation to answer. However, as merger analysis and the inquiry into whether a given proposed merger would substantially lessen competition is inherently an eco-
economic analysis, engaging in the types of analysis described above proactively can ensure that the team is ready to provide helpful information to the agencies as they review and conduct their analyses on proposed transactions.

**Conclusion**

In any given merger review, one is often constrained by time, budget, and/or data and information. Such constraints limit the analyses that an economic expert can pursue, leading to a need to focus on, or prioritize, a more limited set of analyses. Identifying the focus, or the priorities is productive for everyone. The results of the economic analysis can help the antitrust attorneys in their overall assessment of the antitrust risks, provide counseling to the business clients on timing, align expectations with respect to possible outcomes, and where appropriate, determine a strategy with regard to timing. During this process, counsel and the consulting economist can work closely to get up to speed on the key industry facts, and involving the consulting economist in discussions with business executives early on can help the economist identify the relevant issues at an early stage by asking the questions that are informative for the economic analysis. In doing so, the consulting economist can also more quickly offer insights into any potential, good arguments for the merger review.

Ultimately, agency staff appreciates credible, sound economic analysis, as it can help to lessen the burden on agency economists, allowing them to allocate their limited resources and time efficiently. Implementing the right analysis from the very beginning also ensures that the team is prepared to answer questions from agency staff when they arise.
Efficient Criminal Enforcement—Achieving Faster, Better, Stronger Investigations and Resolutions

Lisa Phelan and Megan Gerking

Today, a criminal cartel investigation by the U.S. Department of Justice Antitrust Division lasts on average between three and five years, often longer if a subject agrees to waive or a court extends the five-year statute of limitations period. In investigations that begin with self-reporting of cartel conduct, the time from the moment a company or individual submits a request for leniency until the grant of a conditional leniency letter by the DOJ has grown substantially in the 25 years since the current iteration of the Corporate Leniency Program was announced. The burden on leniency applicants has also increased with the growing number of jurisdictions in which a company can and should consider self-reporting.

What can be done by the DOJ, defense counsel, leniency applicants, and subjects to more efficiently advance and resolve criminal antitrust investigations? In this article, we explore practical suggestions to make various stages of an investigation and the resolutions process more efficient.

A consistent guiding principle is for subject companies and executives—and for the DOJ—to raise issues as they arise and to continue a dialogue in a purposeful and meaningful manner throughout the investigation. At all stages, the key is to focus on the heart of the relevant conduct, while not completely ignoring the possibility that the matter could expand.

The Beginning of a DOJ Criminal Antitrust Investigation: Accelerating Grants of Conditional Leniency

Would-be leniency applicants and their counsel have expressed a concern that the Division’s Corporate Leniency Program is becoming less attractive because of increased burdens and expenses associated with qualifying for the Program in the United States. In recent years, complaints by applicants and members of the bar have been particularly acute as they relate to the burdens associated with obtaining conditional leniency.

1 This figure is an estimate based on the authors’ experience investigating, prosecuting, and defending criminal violations of the Sherman Act.


3 See Warren Feldman, David Meister & Steven Sunshine, DOJ Updates Leniency Program FAQs (Jan. 27, 2017), https://www.skadden.com/insights/publications/2017/01/doj-updates-leniency-program-faqs (noting that recently updated FAQs make clear that the Division has become less willing to accept anonymous markers without being provided complete information up front); see also Brent Snyder, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing (June 8, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf (noting that Gary Spratling, former Antitrust Division DAAG who “oversaw the adoption of the program,” suggested that “the enormous cost and disruption to a company’s business operations from seeking leniency in multiple jurisdictions may cause companies to think twice about the value of seeking leniency”).
The DOJ expects to receive substantial information about cartel conduct from a leniency applicant, prior to granting leniency.⁴ In the early years of the Leniency Program’s existence, an attorney proffer of conduct that appeared to constitute a criminal violation of the Sherman Act was typically sufficient to obtain a conditional leniency letter.

In more recent years, the scope and nature of the information that the DOJ requires before issuing a conditional leniency letter has grown. An applicant, in typical circumstances, is likely to be required to provide detailed attorney proffers concerning the conduct, relevant documents (including those located outside of the United States, with translations as necessary), and interviews of multiple relevant employees.⁵ This process can require substantial time and resources, depending on the nature and scope of the potential conduct. In some instances, the Division has been known to take as long as one year to grant conditional leniency.⁶ When an applicant is also seeking leniency from other jurisdictions with similar or greater evidentiary requirements, the totality of requirements for a single applicant can quickly pile up. Easing the burdens on leniency applicants would likely incentivize more applications and accelerate investigations.

Acting Deputy Assistant Attorney General Richard Powers recently acknowledged the concerns about the increasing burdens of leniency across jurisdictions and proposed some concrete steps that the DOJ can and should take to make the process more efficient. In particular, he stated that when applicants are seeking leniency in multiple jurisdictions, the Division can, where possible, coordinate timelines and deadlines with other jurisdictions, tailor document demands to get the DOJ the “necessary evidence” without avoidable burden, and coordinate timing and location of interviews.⁷

It is unclear in practice if the Division will mitigate the burden on leniency applicants. The Division’s Leniency FAQs make clear that applicants must be ready to provide “truthful, continuing, and complete cooperation.”⁸ In former Assistant Attorney General Bill Baer’s words, leniency applicants “must recognize that the policy requires far more than a quick phone call to the division and a promise to cooperate.”⁹ Current Division leadership has expressed a concern that the Division’s resources could be wasted by inadequate and insufficient applications. Acting DAAG Powers recently remarked that the requirements for leniency applicants exist because, “if a com-

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⁵ See Questions About Leniency Program, supra note 2; Note by the United States, OECD Roundtable on Challenges and Coordination of Leniency Programmes (June 5, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/leniency_united_states.pdf (noting that “Perhaps the greatest disruption to a leniency applicant’s legitimate business operations comes from interview demands placed on the applicant’s executives and employees”).

⁶ Further, a leniency applicant’s obligations to cooperate with the Antitrust Division does not typically end with the grant of conditional, or formal, leniency. The leniency applicant may be required to continue to provide witnesses for interviews during the investigation or at trial. If the Antitrust Division litigates a case, the applicant must also comply with civil discovery obligations.


⁸ Questions about Leniency Program, supra note 2.

pany provides minimal, incomplete, or inexplicably slow cooperation, or does not give us sufficient
evidence of an agreement, then we have wasted valuable taxpayer dollars interacting with that
applicant. Those scarce resources otherwise could have gone to our independent investigative
efforts.”

The DOJ Leniency Policy does not clearly describe the timing of when a party can expect to
receive conditional, or formal, leniency. And the Division has been reluctant to provide statistics.
Former AAG Baer remarked during his tenure that “a company that invests the time and the
resources can typically satisfy the initial requirements for conditional leniency within a few
months.” As former AAG Baer suggests, there could be atypical situations, including circum-
cstances out of the applicant’s control, which might prolong this time period. For example, if
through its review of documents and witness interviews, the Division learned of additional oppor-
tunities for evidence gathering, it may work with the FBI in further evidence-gathering operations,
such as recording cartel meetings or telephone calls or conducting other searches and arrests.

**Efficiency Enhancing Tips.** Counsel to a leniency applicant interested in a speedy decision
on leniency should advise a client that an up-front investment of significant resources and time to
conduct a comprehensive internal investigation and be able to make substantive proffers quick-
ly to the government may be more cost-effective in the long run. Likewise, quickly producing rel-
levant documents and offering up relevant employees for interviews advances the ball and may
result in a conditional leniency letter quickly.

The use of the marker system can create efficiencies on both sides. The Division will typical-
ly grant a leniency applicant a marker for a finite period of time (commonly 30 days, which can
be extended on a good-faith basis) to hold the applicant’s spot at the front of the line while coun-
sel investigates the conduct.

During the interviews, counsel should focus on identifying the presence of any collusive under-
standings or arrangements with competitors and their scope. Then, potentially relevant documents
that support the statements made by the witnesses may be identified through the use of target-
ed search terms based on the facts and any jargon used by the witnesses (e.g., “gentlemen’s
agreement”), as well as reviewing documents around relevant time periods (e.g., a date of a meet-
ing with co-conspirators).

If there is collusive conduct, counsel will be better prepared to engage with staff after a thor-
ough initial investigation. And, if there is not conduct that would rise to a criminal violation, coun-
sel may withdraw the request for leniency.

When confronted with complications from applying for leniency in multiple jurisdictions—in par-
ticular regarding documents, timelines, interviews, and other factors that the Division can control—
counsel should raise these difficulties with the Division. For example, if counsel is receiving
requests for interviews of executives from multiple jurisdictions, counsel should consider whether
to raise this with the Division and ask for coordinated interviews. Further, if an applicant cannot
meet the timing demands set by the Division because of requests across jurisdictions, counsel
should raise this concern with staff.

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10 Powers, supra note 7.
11 Baer, supra note 9.
12 Questions About Leniency Program, supra note 2.
13 Id.
The explosion of new communications technology in recent years makes the consequences of receiving a grand jury subpoena even greater. It is common for employees to use multiple communications methods to discuss business, including text messaging, social media, chat rooms, and encrypted messaging applications. In the context of responding to a subpoena, the implication of this is that a company must preserve, collect, review, and produce more data from many more sources, and doing so may be difficult or even impossible. Nevertheless, recent Division prosecutions have highlighted the increasing importance of communications via social media and chat rooms.

Given that these newer forms of electronic communications have been fruitful sources of evidence, the DOJ is not likely to stop insisting on such materials. However, the DOJ should consider

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14 The Leniency Plus Program has been a very successful source of new investigations. The policy permits a company or individual who is under investigation in one product to report its involvement in a conspiracy related to a second product. Specifically, in former AAG Thomas Barnett’s words, the Division’s “practice of rolling one investigation into another is well known in the antitrust community and should strike fear in the heart of cartelists. Through Amnesty Plus, exposure of a single member of a single cartel has the potential to bring a series of cartelists tumbling down like a house of cards.” Thomas O. Barnett, Seven Steps to Better Cartel Enforcement: Presentation to the 11th Annual Competition Law & Policy Workshop (June 2, 2006), https://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement.

15 First, in 2017, the Division brought charges against two companies and their top executives for conspiring to fix the prices of customized promotional products sold online. According to the Division, the conspiracy was carried out online, through social media and encrypted messaging applications. See Press Release, U.S. Dep’t of Justice, Second E-Commerce Company and Its Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy in Customized Promotional Products Industry (Aug. 22, 2017), https://www.justice.gov/opa/pr/second-e-commerce-company-and-its-top-executive-agree-plead-guilty-price-fixing-conspiracy; Press Release, U.S. Dep’t of Justice, E-Commerce Company and Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy for Customized Promotional Products: Conspiracy was Conducted Through Social Media and Encrypted Messaging Applications (Aug. 7, 2017), https://www.justice.gov/opa/pr/e-commerce-company-and-top-executive-agree-plead-guilty-price-fixing-conspiracy-customized. Second, in the recent trial against three foreign currency exchange rate traders, the Division introduced evidence at trial that the traders used a chatroom that they referred to as “the Cartel” or “the Mafia” that they purportedly used to share information about their financial positions. See, e.g., Indictment at 8, United States v. Usher, No. 17-cr-00019-RMB (S.D.N.Y. 2017). The conspirators used Facebook, Skype, and WhatsApp to reach and implement their illegal agreements and to attempt to hide their conspiracy. Although the defendants were acquitted in that case, the volume of recorded chat room communications involved was likely massive, requiring significant amounts of time and resources for the companies and prosecutors to review, and demonstrates the importance of such communications to the Division in recent prosecutions. And it may be difficult for companies to access such communications, especially if employees are using personal, rather than work-issued devices, and without the explicit permission of the employees to access these accounts.
that issuing a broad subpoena to a large corporation can have negative consequences for the Division. First, there is potential delay. Because it can take a long time for the recipient to collect, review, and produce documents, data, and other materials, the DOJ may not start to receive documents for months. When it does receive the materials, the DOJ may use search terms and other methods to identify relevant information, but even with such time-saving tools, the volume of materials can significantly slow the pace of the investigation. (The government does not typically have the ability to quickly scale up contract or document-review attorneys as a private law firm would). And, if the subpoena requests turn out to be unnecessarily broad, the DOJ must sift through materials not relevant to its investigation.

**Efficiency Enhancing Tips.** As initial steps, it is important for a recipient to carefully review the subpoena and immediately preserve and retain any material that might arguably relate to the subject matter of the Division's investigation. Counsel should devote time up front to learning what the government may be interested in, which employees may have relevant information, and the potential sources of information. This initial process should include internal interviews with a few top employees and the review of some documents, if possible. Similar to the leniency application process, the focus of the interviews and document review should be on identifying any collusive agreements or understandings with competitors and their scope, including who at the company may be involved or have knowledge of the agreements. In addition, counsel should ensure that they understand the scope of relevant communications methods to facilitate more productive conversations with the Division and to avoid any surprises later in the investigation.

Once counsel has completed a swift, initial investigation into the scope of the potential conduct, counsel should reach out promptly to the DOJ to discuss the parameters and focus of the investigation, as well as the subpoena response. Counsel should plan to reach out to the DOJ in advance of the subpoena return date to demonstrate that the recipient is taking the subpoena seriously and its willingness to respond, as well as to ask for an extension on the return date, which is likely to be necessary. It may also be a good time to offer to set up a call to discuss potential custodians and the subpoena response.

Both parties should be willing to negotiate up front a narrower set of material and issues that the company or individual should begin to collect, review, and produce relatively quickly. For example, the Division may be willing to limit the initial response to a subset of custodians. Providing an organization chart can help steer the discussion regarding potential custodians to those persons who are most likely to have material that is responsive to the subpoena. Counsel may consider offering to provide certain high-value materials up front that it can produce quickly to the DOJ. These materials may be based on what counsel has learned during the initial investigation and on the DOJ’s description of its priorities and focus. This could include potentially incriminating emails and other supporting documents. The Division typically is willing to defer certain types of materials (e.g., bidding history files and sales data) until later in the investigation.

After the company reviews that first set of materials, counsel will be in a better position to know whether there is “fire” along with the smoke suggesting collusive conduct that the Division has identified. At that point, counsel is in a better position to evaluate whether additional searching is necessary and where additional resources should be focused. This information will be valuable for counsel in further negotiations with staff and could lead toward a swifter resolution than if the company tried to simply respond to the subpoena as drafted. Staging the submissions can also benefit the DOJ because it will receive rolling document productions without a potentially delayed and ultimately cumbersome document “dump.”
Closing In on the Relevant Scope of the Investigation: Encouraging Productive Reverse Proffers

Reverse proffers are sessions during which the DOJ staff describes evidence it possesses that it believes reflects cartel conduct involving a counsel's corporate or individual client. In a cooperative setting, a reverse proffer can serve as a valuable and time-saving tool for counsel to a subject or target of a grand jury investigation, and for the DOJ. The DOJ utilizes reverse proffers to encourage or convince someone to cooperate with the investigation or to plead guilty.

A reverse proffer can provide counsel with a glimpse into the quality and quantity of evidence that the DOJ has obtained that is relevant to counsel's client. Depending on the timing of the reverse proffer, counsel can use the information from the DOJ to start or further its investigation of the facts or to weigh the information in its consideration of whether a client should enter a plea agreement. If counsel becomes aware early that the DOJ may be misunderstanding or missing certain facts, the record can be fleshed out or corrected quickly. Also, a reverse proffer can be helpful to the DOJ because staff can use it to point counsel in a particular direction that may produce additional evidence regarding a specific conspiracy. If a company or individual perceives that the DOJ may be looking to build a case against a "bigger fish," the information given in the reverse proffer may show the way to achieve more lenient treatment from DOJ by providing evidence against others in the conspiracy. Or, counsel can show the DOJ at an early point why its suspicions involving the client are unfounded.

The DOJ faces risks when it decides to proffer evidence to counsel. Counsel could evaluate the evidence, conclude it is not strong, and recommend to the client to not cooperate or to fight any charges that the DOJ brings against counsel's client. Because of the potential downside for the Division, staff may be hesitant to reveal the full scope of evidence, and instead provide circumspect or limited information.

There are no formal Division policies regarding reverse proffers or requirements that either side reveal anything to the other. This means that individual DOJ staff attorneys will determine whether and when to offer a reverse proffer and the scope of information to provide. The result is that there can be significant variations across criminal offices within the Division.

Efficiency Enhancing Tips. In any case where a counsel's client is taking a cooperative posture with the Division, counsel should reach out to the DOJ to ask for relevant information that could aid their internal investigation. There is little-to-no-downside for counsel to participate in a reverse proffer. It is a good way to learn information about the DOJ's case, and it can help counsel to conduct a more focused investigation, ultimately saving the client time and money. It also enables defense counsel to identify the most relevant exculpatory evidence, if such evidence exists. If counsel has taken the information provided by the DOJ and used it to try to start or further their investigation and is not coming up with information suggesting that there is collusive conduct, counsel should consider proffering the information that the company counsel has or has not found and asking the DOJ for additional evidence that could further help focus the internal investigation.

Likewise, the DOJ staff should consider offering incrementally more information and guidance where it believes company counsel is proceeding in good faith toward discovery of relevant information. Barring reasons for not disclosing evidence to a cooperating party (e.g., the DOJ is concerned that providing evidence to counsel could result in a loss of evidence collection opportunities), the DOJ staff would most often advance its investigation more quickly if it provides counsel useful information that could focus and help further the company's internal investigation.

Letting time pass before counsel communicates with the Division—taking a “no news is good news” approach—is not only inefficient but means valuable time and cooperation opportunities may be lost. If months have passed and counsel has not furthered their own investigation and not
sought more guidance from Division staff, a company should not expect to receive significant cooperation credit.

On the government side, the DOJ should consider establishing more consistent policies regarding reverse proffer practice, so that there is a consistent approach across offices. These approaches by both sides will lead to quicker understanding of areas of disagreement, and, if possible, quicker resolutions, which are in the interest of all parties.

Plea Resolutions: Considerations for Fast-Tracking Negotiations with the Division

One of the first questions that a company often asks upon receiving a subpoena, or being a subject of a dawn raid or visit from the FBI, is often “how soon can we put this behind us?” Investigations are time-consuming, take resources away from the business, and companies may have disclosure obligations to investors. Promptly resolving outstanding questions of potential criminal liability can be a top priority for a corporate target.

Even when a company is willing to plead guilty to an antitrust offense, the Division might not be so quick to agree to a resolution. First, it is generally in the Division’s interest to continue its investigation until it is certain that it has identified the entire scope of the conduct. Charging the entire scope of the conduct serves the greater goals of criminal deterrence and retribution. A greater scope also means the Division may be able to prepare a plea agreement that incorporates multiple conspiracies and a more significant volume of commerce.

Companies also face risk in entering a swift plea agreement. It is possible that the company, and the Division, may not yet have uncovered all illegal conduct in which the company engaged. For example, Hitachi Automotive Systems entered into two separate plea agreements for its conduct related to collusion on the sale of automotive parts, the first in 2013 and the second in 2016. The plea agreements cover different products and alleged conspiracies. Thus, the Division and a subject company need to balance the desire to collect all evidence associated with potential conspiratorial conduct with the desire to wrap up the investigation quickly.

Plea negotiations can often stall for months over determination of the appropriate volume of commerce—the key to reaching a penalty decision. There can be disagreement regarding the conduct that should be or should not be included in the plea or on the approach used to calculate the affected volume of commerce.

One potential solution for speeding up plea negotiations is to allow companies to contest the volume of commerce calculation. The Division frequently requires an agreement on the amount of commerce to a corporation as a corporate offender can increase the offense level significantly. See U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (U.S. Sentencing Comm’n 2018). Depending on the volume of commerce, the offense level can be adjusted upward from two to sixteen offense levels. 18 U.S.C. § 3571(c)(1)–(2), (4); 15 U.S.C. § 1; U.S. Sentencing Guidelines Manual § 2R1.1(d) (U.S. Sentencing Comm’n 2018). The Division can seek 20% of the volume of affected commerce as a base fine up to $100 million, consistent with the Sentencing Guidelines. If the volume of the affected commerce would yield a fine larger than the statutory maximum, the Division could seek a greater fine up to twice the gain derived or twice the loss caused by the cartel, under the Alternative Fine Statute. 18 U.S.C. § 3571(d). The DOJ has obtained fines in excess of $100 million in many recent cases. See U.S. Dep’t of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Oct. 25, 2018), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

17 See supra note 16.
18 The determination of the volume of commerce attributable to an individual participant in the conspiracy drives the criminal fine level for companies, as it also does for the jail term for individual executives participating in a cartel. Under the Sentencing Guidelines, the amount of volume of commerce attributed to a corporate offender can increase the offense level significantly. See U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (U.S. Sentencing Comm’n 2018). Depending on the volume of commerce, the offense level can be adjusted upward from two to sixteen offense levels. 18 U.S.C. § 3571(c)(1)–(2), (4); 15 U.S.C. § 1; U.S. Sentencing Guidelines Manual § 2R1.1(d) (U.S. Sentencing Comm’n 2018). The Division can seek 20% of the volume of affected commerce as a base fine up to $100 million, consistent with the Sentencing Guidelines. If the volume of the affected commerce would yield a fine larger than the statutory maximum, the Division could seek a greater fine up to twice the gain derived or twice the loss caused by the cartel, under the Alternative Fine Statute. 18 U.S.C. § 3571(d). The DOJ has obtained fines in excess of $100 million in many recent cases. See U.S. Dep’t of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Oct. 25, 2018), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.
the criminal fine. In practice, this means that the Division and the pleading party must agree on the amount of commerce affected by the conspiracy, in addition to any aggravating factors and cooperation credit. The Division should consider allowing parties to litigate the penalty in guilty pleas, as U.S. Attorney’s Offices do in other white collar and financial crime cases. A plea agreement could be entered with the DOJ more quickly than to continue negotiating the volume of commerce.

Rather than moving toward practices that might shorten plea negotiations, the Division recently took a move in the other direction. A new Division practice could further prolong future resolutions in cases where the government is a victim. Specifically, the Division recently used its authority under Clayton Act Section 4A to obtain treble civil damages from defendants involved in a criminal bid-rigging conspiracy. The Division entered coordinated and simultaneous criminal plea agreements and civil settlements with three South Korean fuel supply companies. Historically, where the government has been a victim of an antitrust crime, the Civil Division has investigated the conduct, typically well after the criminal cases have been resolved. It has done so by bringing False Claims Act charges. The Korean Fuel Supply cases represented the first time that the Division brought an action under Clayton Act Section 4A in many years.

Seeking dual resolutions in cases where there is clear evidence of wrongdoing may not substantially delay a global settlement. However, not every case will be straightforward, and damages can be notoriously difficult and time-consuming to calculate. Because there are different legal frameworks for determining the criminal fines and civil damages, attempts to resolve criminal charges and civil claims together could delay a resolution until these different types of issues have been settled. It may not always be apparent that the government has been “injured” by the conduct in question, much less by what amount. From a criminal enforcement perspective, this delay of the criminal resolution to determine civil damages could affect the timetable for obtaining critical cooperation. That delay could in turn slow efforts to advance and expand the ongoing criminal investigation of other subjects.

**Efficiency Enhancing Tips.** Throughout the process of responding to the subpoena and giving and receiving proffers with Division staff, a company with a goal of settling any criminal liability should engage in a continuing dialogue about what a resolution would look like. After a recipient of a subpoena has produced all materials and the company’s relevant employees have been

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19 U.S. SENTENCING GUIDELINES MANUAL, supra note 18, § 8C2.5.

20 Clayton Act Section 4A, 15 U.S.C. § 15a, permits the government to recover treble civil damages when it is injured as the result of a violation of the antitrust laws. The statute was originally passed in 1955 in response to a Supreme Court decision ruling that the government was not entitled to pursue civil damages for antitrust violations, but could only seek criminal fines. That version of Section 4A only permitted the recovery of single damages. Section 4A was amended in 1990 to provide for treble damages, consistent with the treble damages afforded to private antitrust plaintiffs as well as to the government under the False Claims Act. However, since 1990, only three Section 4A cases had been filed prior to the Korean fuel supply settlements, resulting in less than $10 million in recovered damages. See infra note 21.


22 For example, in 2004, the DOJ entered into conditional plea agreements with Gosselin Group N.V. for its involvement in a conspiracy to rig bids submitted to the U.S. Department of Defense (DOD), increasing the prices that DOD paid to ship goods to and from Europe. See Information, United States v. Gosselin World Wide Moving N.V. & the Pasha Group, CR-03-551-A (E.D. Va. Feb. 18, 2004). After the criminal proceedings were resolved in 2006, the Civil Division intervened in qui tam actions filed against the companies. See United States ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390 (4th Cir. 2013).

interviewed, counsel interested in obtaining a plea agreement should move staff toward an offer of resolution terms and resolve any remaining questions as quickly as possible.

However, counsel should evaluate the results and scope of their own internal investigation and consider whether the Division could possibly expand the investigation later on. Counsel should not expect the Division to be willing to close off the possibility of a future enforcement action involving an unrelated conspiracy in a plea. If there is potentially additional problematic conduct that counsel is aware of, consider whether to disclose that in advance of any plea negotiations.

The Division may also want to be cautious in its use of its Clayton Act Section 4A authority. Consistent reliance on it could ultimately slow investigations. Parties facing a dual criminal and civil investigation should ask the multiple DOJ staffs to coordinate requests and share materials produced by companies to reduce the burden on subjects. The Division should consider setting consistent timelines for resolving criminal matters once a subpoena recipient certifies that all responsive materials have been submitted. Delay creates problems for both sides, as witnesses’ memories fade and evidence becomes stale. It is in the interest of all to resolve criminal investigations more efficiently, barring a need to expand the scope.

Conclusion

In sum, there are many inflection points in a criminal antitrust investigation where both the Division and outside counsel could take productive steps and approaches to make the investigation and negotiation processes more efficient. Taking these steps can lead to a quicker assessment of whether there is a common understanding of the scope of the facts and, ultimately, a speedier agreed-upon resolution.

In a cooperative setting, counsel should proactively engage and communicate with the Division on issues that arise in the investigation. The Division should consider how it can more effectively balance the need to collect evidence, fairly assess facts, and bring the best deterrent resolution with the need to be efficient, conserve resources, and bring swift justice.

As the saying goes, justice delayed can be justice denied, and cartel cases, which are frequently large and complex, necessarily take more time than many other types of criminal cases. However, it would be in the interest of all to look for ways to expedite and advance these investigations and resolutions more quickly, so that companies and executives can get back to business, and the DOJ can move on to the next matter.
Waging the Merits War at Class Certification: Does Expert Evidence Streamline the Process?

Michelle Lowery and Jodie Williams

Successfully certifying an antitrust class under Rule 23 can be a battle. There are the well-known tenets of Rule 23(a)—numerosity, commonality, typicality, and adequacy—that must be established. And then there are the Rule 23(b)(3) hurdles—predominance and superiority—where plaintiffs are seeking money damages.

Under Rule 23(b), plaintiffs must prove that liability, causation (or impact), and damages can be resolved through evidence common to the class. Plaintiffs used to be able to meet this burden by describing the type of evidence they intended to submit at trial and that this evidence would be the same if the plaintiffs’ several cases were tried separately. Within the last 20 years, however, the Supreme Court and lower courts around the country have changed the game. Courts are now to look forward and determine whether the plaintiffs’ claims are capable of being tried en masse: Will the proposed common questions produce answers at trial that will resolve the claims of all class members?

This has led courts to “rigorously analyze” the plaintiffs’ class certification submissions, including all evidence, to ensure that all elements of Rule 23 are met. As a result, merits issues may be considered and resolved when intertwined with class issues. Many courts have made it clear that Rule 23 is not a pleading standard. But it is also not an evidentiary standard, and the “rigorous analysis” requirement has blurred the lines between class certification and summary judgment.

Against this backdrop, plaintiffs are often unwilling to assume the risk of an adverse ruling for lack of sufficient evidence. As a result, class certification motions are generally supported by complex economic testimony opining that the structure, conduct, and performance of the industry is consistent with the antitrust violation alleged. Plaintiffs often offer robust econometric models for common impact and estimated aggregate damages. Defendants submit their own economic and econometric reports to rebut the plaintiffs’ experts’ findings. What used to be a motion made early in the proceedings based on a “some showing” standard—abbreviated evidence and relaxed admissibility—has evolved into a lengthy and expensive process, frequently near the close of discovery.

Because plaintiffs’ experts now offer comprehensive reports, defendants have seized the opportunity to attempt to exclude the evidence early on through expert challenges under Daubert v. Merrill Dow Pharmaceuticals, Inc. This sort of admissibility challenge was typically reserved for later stages of litigation, such as summary judgment. Whether or not these motions are properly considered at the class certification stage, courts have begun to meet the rigorous analysis requirement by conducting a Daubert-like analysis of plaintiffs’ proposed models, and, therefore, Daubert motions at class certification are becoming the norm.

In this article, we consider how Daubert motions can be used effectively to streamline litigation. We discuss what rigorous analysis means, and survey recent class certification opinions to see how courts are applying that analysis and reacting to Daubert motions at the class certification stage. We conclude with views from the plaintiffs' and defendants' sides about how to work within these litigation realities to streamline the time, money, and effort expended in an antitrust class action. Perhaps it is time for courts to give Daubert motions due consideration at class certification and either fast-track the cases to trial where plaintiffs have met their burden, or dispose as early as possible of alleged class actions where plaintiffs have not met their burden of demonstrating that the cases could be tried with common evidence.

Rigorous Analysis Part I: How We Got Here

Plaintiffs and defense counsel agree that the standard for certifying a class under Rule 23 has become more stringent throughout the last 20 years. Long gone are the days of filing a “stalking horse” opening brief previewing evidence to be submitted later in litigation, followed by a more detailed but still limited reply. Courts are now required to rigorously analyze the plaintiffs’ submission, including evidence, sometimes even delving into issues traditionally deferred until the merits stage to determine whether a case can be tried on a class-wide basis. Plaintiffs’ submissions have evolved in turn, containing both admissible qualitative and quantitative evidence. Economic and econometric evidence is often introduced, comprising robust models and opinions demonstrating that liability (impact) and damages are issues common to the class. Defendants counter the plaintiffs’ evidence with equally robust expert reports and models. The proverbial “battle of the experts” ensues. It is an increasingly expensive war, both in time and money.

To understand how to streamline the process, we must first understand how we got here. To start, Wal-Mart requires a “rigorous analysis,” which may “entail some overlap with the merits of the plaintiff’s underlying claim” to determine whether plaintiffs have met their burden. However, Amgen Inc. v. Connecticut Retirement Plans & Trust Fund clarified that “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”

Later, the Supreme Court clarified how the required rigorous analysis might apply in antitrust cases and in class actions. In Comcast v. Behrend, a rigorous analysis was applied to an antitrust case and the Court determined that damages methodologies must measure only damages that are a result of the alleged wrong. In other words, the damages model and theory of liability must match. In Tyson Foods Inc. v. Bouaphakeo, a rigorous analysis was applied to a class action and the Court found that, under certain circumstances, representative statistical evidence or averages may be used to meet plaintiffs’ burden.

In a nutshell, “rigorous analysis” requires that plaintiffs’ liability theories must be cohesive among class members and correlate with their damages models. Experts cannot rely on “some showing,” but rather must submit robust models proving class-wide impact and damages. These robust submissions lead to Daubert challenges being brought earlier and earlier. Do early Daubert

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3 564 U.S. at 351.
6 136 S. Ct. 1036 (2016).
challenges increase case efficiency, disposing of expert testimony (and often the case) well in advance of summary judgment? Or does the current class certification regime unnecessarily increase litigation costs and run afoul of Rule 23’s principles? Recent opinions interpreting Supreme Court precedent seem to fall somewhere in between.

**Rigorous Analysis Part II: Where We Are Now**

With class certification subject to a more stringent analysis, courts are delving deeper into the intricacies of economic models before granting class certification. The deeper dive involves a *Daubert*-style analysis, seemingly to satisfy the rigorous analysis standard. Despite the more rigorous analysis, granting class certification remains the norm except in a few outlier cases. And how courts have treated *Daubert* motions at class certification has varied. Most often, courts conclude that if the economist used a reliable methodology, then the model is admissible even if the results seem questionable. Issues such as data choice and reliability are reserved for later stages of litigation. Opinions in the more recent class certification decisions in which economic evidence was underscored range from cursory overviews to stringent analyses. The wide range has left many wondering whether the class certification process could be more streamlined and efficient.

In other words, are these robust economic models, counter-models, and depositions worth the cost at this stage of the litigation?

In *In re Air Cargo Shipping Services Antitrust Litigation,* the court walked through, in dozens of pages, the many details of the plaintiffs’ model and the defendants’ critiques (expressed in class briefing, not *Daubert* motions). Nonetheless, it ultimately found that the plaintiffs’ evidence would not be too individualized and that the offered regression model was sufficient for Rule 23 purposes. Notably, the regression model concluded that 96 percent of customers were impacted in at least one transaction. The percentage of impacted class members, or conversely the percentage of uninjured class members, existing in the model has been used by courts more recently as grounds to reject the model and not certify a class.

In *In re Steel Antitrust Litigation,* the defendants filed formal *Daubert* motions against each of the plaintiffs’ proposed experts. The district court held a three-day evidentiary hearing before making a class certification determination. After gaining what it believed to be a thorough understanding of the broad range of products and producers contained within the class definition, the court found that even if steel prices increased, the plaintiffs had not proffered any model that could measure accurately what impact or damages, if any, any member of the class experienced. It denied the *Daubert* motion nonetheless, finding that the plaintiffs’ experts applied reliable methodologies and their models were admissible, although it ultimately denied class certification for impact and damages.

In sharp contrast, the Tenth Circuit took a much more surface-level approach to expert evidence in *In re Urethane Antitrust Litigation.* In that case, the circuit court affirmed the district court’s decision to both certify the class and deny the defendants’ *Daubert* motions. The court

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2. For instance, in *In re Asacol Antitrust Litigation,* 907 F.3d 42 (1st Cir. 2018), the First Circuit expressly rejected a damages model that allowed for 10% uninjured class members and reversed the district court’s order certifying the class. From that decision, plaintiffs heading toward class certification should be prepared to proceed only with models showing a *de minimis* number of uninjured class members, perhaps 5% or less. *In re Air Cargo Shipping Services Antitrust Litigation,* upholding a 96% impact percentage, remains good law.
4. 768 F.3d 1245 (10th Cir. 2014).
delved into the plaintiffs’ model only enough to determine that it was capable of showing that a conspiracy to price fix polyurethane products could affect all buyers. For the defendants’ Daubert motions, it looked only at whether the plaintiffs’ expert used a reliable methodology.

In re Processed Egg Products Antitrust Litigation,11 stemming from the Eastern District of Pennsylvania, is consistent with the Tenth Circuit’s approach. In Egg Products, the district court examined many of the challenges advanced in the defendants’ Daubert motions, but deferred each of them to summary judgment. It ended up denying the Daubert motions and granting class certification. But, unlike Urethane, the district court delved further and criticized the plaintiffs’ economic evidence. It explained that because the plaintiffs’ expert’s model may not have incorporated certain demand factors and also relied on averages, it likely masked any variability in individual class member impact. Nonetheless, the court found the model to be reliable and refused to dispose of it at class certification.12

The Northern District of Illinois reached a similar result in Kleen Products LLC v. International Paper Co.13 That court also deferred resolving challenges to the plaintiffs’ expert’s models until summary judgment. It accepted as sufficient models that predicted price increases for 92 percent of class members and an average overcharge based on the product purchased for class certification purposes. Interestingly, upon a detailed review at summary judgment, the Court noted that the model contained flaws it likely ought to have taken up at class certification.

Conversely, the D.C. Circuit took a more aggressive approach to economic evidence in In re Rail Freight Fuel Surcharge Antitrust Litigation.14 That case is somewhat of an outlier both because class certification was denied and because the court specifically stated that flaws should not be deferred to summary judgment for resolution. There, the plaintiffs’ claims hinged on a damages model that predicted overcharges for class members who had contracts negotiated before the alleged conspiracy began and therefore could not have paid higher prices because of the conspiracy. The court took up the flaws at class certification rather than deferring consideration to the summary stage, stating that “if damages models cannot withstand [] scrutiny [at class certification], that is not just a merits issue,” and denied class certification.

The cases above demonstrate that district and circuit courts have taken the rigorous analysis requirement to heart, carefully examining each aspect of the plaintiffs’ class certification submission, yet the accompanying Daubert motions are rarely granted and certifying a class continues to be the norm. With this framework in mind, what should plaintiffs’ and defense attorneys do to streamline the process? Is the best course of action to submit multiple expert reports on both sides of the “v” and corresponding challenges under Daubert?

Tips from the Trenches: Streamlining the Battle Ground

Plaintiffs’ Perspective.15 There is no question that the bar to certify a class has been raised significantly in the last 20 years. Classes used to be certified based on briefs summarizing the evidence to be relied on at trial. Expert reports (if any) were short, explaining what methodologies

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12 Later, after denying summary judgment, the court also refused to decertify the class because the model was reliable for the 2004–2008 class period even though the plaintiffs’ expert admitted he could not distinguish between legal and illegal behavior predicted by the model post-2008. No. 08-MD-2002, 2017 WL 5177757 (E.D. Pa. Nov. 7, 2017).
13 831 F.3d 919 (7th Cir. 2016).
14 725 F.3d 244 (D.C. Cir. 2013).
15 Jodie Williams presents Plaintiffs’ Perspective.
could be used to show that impact could be proven with evidence common to the class, and that damages could be estimated.

Opening class certification briefs now must include a detailed explanation of the alleged violation. That explanation must be supported by evidence. Expert reports are required to show that liability questions can be answered through evidence common among class members, with no sign of significant individual factual issues. These reports must also be based on reliable facts and data, supported by widely accepted methodologies fitting the facts of the case. Damages models must produce a sound estimate, also based on evidence common to the class. And, although prepared in many instances while fact discovery is still ongoing, the class certification reports cannot deviate substantially from reports submitted later at the summary judgment phase or beyond. Those that do risk additional exposure to reliability and admissibility challenges.

The question becomes, then, how to convince a court that the class should be certified while not overrunning litigation costs on a global level. The answer lies in preparation. Plaintiffs need expert evidence, particularly to demonstrate predominance. Although, technically, class certification is not an evidentiary motion, plaintiffs also can no longer rest on the plausibility of their allegations. Reliable proof is critical, supported by those qualified to opine on the economic and econometric significance of that proof at trial.

The above opinions demonstrate that courts are not only willing to entertain Daubert motions, they believe these motions are required to satisfy their rigorous analysis obligation. The key, then, is to carefully select your experts and do so early in the case. Use those experts to guide your discovery requests to ensure they have the information needed to prepare robust reports at class certification. Undertake efforts to obtain the most reliable dataset available in early phases of litigation. With models that have already been found relevant and reliable from qualified experts, summary judgment becomes that much easier and more cost effective to withstand. Although litigation costs may increase in the short term, the latter phases of discovery and pre-trial litigation become significantly less costly. And the class certification submission becomes more persuasive.

My co-author Ms. Lowery advocates for more serious consideration to expert methodologies and admissibility challenges at class certification. Many of the opinions above dive deeply into the economics and econometrics of the cases traditionally presented in expert reports. But as she notes, courts are increasingly reluctant to exclude expert testimony at this stage of litigation. Disposing of inadmissible or unreliable expert opinions early on may help reduce litigation costs for all parties. For instance, if defense expert testimony is deemed inadmissible or unreliable at class certification, it is possible that summary judgment is streamlined or forgone altogether, paving the way for trial.

But perhaps the better answer is to follow Justice Ginsburg’s opinion in Amgen that class certification is not meant to be a vehicle to adjudicate the case and return the proceeding to its procedural motion roots. 16 Rule 23 still dictates that class certification should be determined at “an early practicable time.” Some local rules at one point interpreted this to mean within 90 days of

16 568 U.S. at 465–66.
filing the complaint. And, in light of *Twombly*, plaintiffs’ complaints are supported by ample factual allegations for courts to consider whether common issues can be resolved on a class-wide basis. Rather than incorporate *Daubert* into class certification, courts could reject the notion altogether, require class certification motions to be brought earlier in a case’s lifecycle, and then forge ahead to summary judgment and trial. Returning class certification to a procedural motion rather than an evidentiary motion will reduce the volume of the plaintiffs’ submissions and, in turn, the defendants’ submissions, all of which will lead to reduced litigation costs and increased judicial efficiency. The alternative, full-blown evidentiary hearings at class certification, may result in mini-trials in the middle of the pre-trial litigation with discovery ongoing, and may increase litigation costs rather than streamline.

**Defendants’ Perspective.** Courts should give more serious consideration to expert methodologies at the class certification stage and eliminate before summary judgment or trial those models that cannot work.

Defendants continue to bring *Daubert* challenges at the class certification stage even though they are rarely granted. By the time the *Daubert* motions are filed, defense attorneys have spent months analyzing the plaintiffs’ experts’ proposed models and finding all of their flaws. Defendants have hired their own experts to analyze the models and form rebuttals to those models. They have spent significant time and money condensing all of the critiques into a short list of the most important flaws, and hours editing the explanations of these models and their flaws into something understandable for non-economists. The conclusion defendants reach, long before a *Daubert* motion is filed, is that the plaintiffs’ proposed model cannot work as a common methodology to establish that the class was impacted and by how much. Defendants then file *Daubert* motions to highlight to the court that the model won’t do what it is supposed to do.

The prevailing case law gives courts the opportunity and authority to grant *Daubert* challenges at the class certification stage, yet courts, albeit after a rigorous analysis, continue to routinely accept plaintiffs’ models as capable of proving impact and damages, deny *Daubert* motions (if filed), and grant class certification. While a properly constructed regression model admittedly may be able to appropriately calculate impact and damages, many courts have never tested the model they ultimately approve. Courts accomplish the rigorous analysis required by discussing many components of the model, but nevertheless ultimately find the model reliable and passable under a *Daubert* challenge. Courts then find that class certification is appropriate because a regression model could potentially serve as a common proof of impact and damages. Courts feel sound making this decision because of the myriad precedential cases that accepted regression models at class certification. But, regression models are widely accepted methodologies and every antitrust case has a well-qualified economist who constructed the model.

In accepting plaintiffs’ impact and damages model, particularly where defendants have filed *Daubert* motions, most courts must leave some set of factual disputes for resolution at summary judgment or trial that could have been resolved at class certification. Instead of resolving on the merits conflicts over flaws in the model, courts often deny *Daubert* motions if the economist has some science-backed justification for constructing the model. In other instances, courts simply defer conflicts over flaws in the model by characterizing them as suitable for resolution at sum-

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18 Michelle Lowery presents Defendants’ Perspective.
mary judgment or at trial as weight or credibility issues. Very rarely do courts delve into the model and the facts of the case to determine whether the model will actually work.

Precedent exists for courts to start excluding unworkable expert models at class certification. As noted above, Comcast has been interpreted by some courts as requiring them to consider expert methodologies at class certification regardless of whether a Daubert motion is filed. Wal-Mart dictates that class certification is not a mere pleading standard; courts must conduct a rigorous analysis, which often entails an overlap with the merits of the case and plaintiffs’ underlying claim. The purpose of the rigorous analysis is to determine “the method best suited to adjudication of the controversy fairly and efficiently.” Where the model does not work at the class certification stage, class treatment cannot be “the method best suited to adjudication of the controversy.”

Courts should grant Daubert motions or exclude experts at the class certification stage. A model that could work is not necessarily one that actually does work, and courts should take the opportunity at class certification to run the model and apply it to the facts of the case. If understanding the model fully requires an evidentiary hearing, then one should be held. If the model does not actually work, then flaws exist in the methodology of constructing it, and it can be disposed of under Daubert. The court already is examining the model, and should not have to continue to analyze it at every additional stage of the case, especially because a model that does not work means the case should never have proceeded as a class action in the first place.

Steel and Kleen are excellent examples. In Steel, the Court found that the plaintiffs’ model did not fit the realities of the industry, but did not grant the pending Daubert motions even though Daubert requires expert testimony to fit the facts of the case. Excluding the expert testimony would have further streamlined the case, by eliminating the class without the need to reach a full-blown class certification decision. In Kleen, the court did not fully engage at class certification with the flaws identified in the plaintiffs’ proposed model, although the defendants also did not file Daubert motions at that time. But, at summary judgment, the court characterized that same model as “suspicious” and unreliable and admitted to having misunderstood it at the class certification stage. By deferring so-called merits issues with the model to summary judgment, the court had to engage with the model twice, when, if the flaws had been enough to deny class certification, the multi-stage review likely led to the case lasting years longer than it otherwise would have. In both Steel and Kleen, granting Daubert motions and resolving flaws in proposed models at the class certification stage could have further streamlined the cases, because without experts to present the flawed methodologies, there is no need for the court to engage in a full class certification analysis.

Excluding expert models at class certification would resolve more cases earlier. In many cases, plaintiffs use the same model at summary judgment and trial as they did at the class certification stage, and defendants must identify the flaws once again. Further, the duration of antitrust class actions alone causes many defendants to settle, even when a case has no merit. Determining at the class certification stage whether plaintiffs have presented an expert whose model works (not just that it has the potential to work) well enough to allow the case to proceed as a class should allow more cases to resolve even before a full analysis of the rest of the class certification elements, and also eliminate substantial expert motion practice at both summary judgment and trial.

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19 Wal-Mart, 564 U.S. at 350–51.
20 Amgen, 568 U.S. at 460.
21 Id.
Conclusion
Rigorous analysis at class certification has made briefing voluminous and expensive. Plaintiffs submit extensive evidence and econometric models to withstand rigorous analysis. Defendants respond with rebuttal experts and by filing Daubert motions. Courts have interpreted “rigorous analysis” as requiring resolution of merits issues where there are factual disputes. Since the courts are already looking, perhaps precedent will evolve to streamline evidentiary issues at the class certification stage. Courts are already digging into expert testimony submitted by both sides. And while many fully satisfy the rigorous analysis requirement, few are definitively resolving concerns with reliability, methodology and fit. Those issues are being saved for later stages of litigation and thereby increasing costs. If courts can provide more certainty on these expert issues early in the case, they will pave the way for cases to be resolved early or fast-tracked to trial.
Interview with Joseph Simons, Chairman, Federal Trade Commission

Editor’s Note: Joe Simons was sworn in as the Chairman of the Federal Trade Commission on May 1, 2018. He joined the FTC from the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, where he was the co-chair of the firm’s antitrust practice group. He served as the Director of the Bureau of Competition from 2001 until 2003.

The interview was conducted at the ABA Section of Antitrust Law Fall Forum on November 15, 2018,* by Svetlana S. Gans, a Vice President and Associate General Counsel at NCTA—The Internet & Television Association, and formerly the Chief of Staff for Acting Chairman Maureen Ohlhausen.

SVETLANA GANS: Mr. Chairman, you kicked off the FTC’s 21st Century Hearings earlier this year. Can you describe your goals for the hearings and what the reaction has been so far?

CHAIRMAN SIMONS: I’m extremely pleased with how the hearings are going. I want to give a big shout-out to Bilal Sayyed, the head of our Office of Policy Planning. He’s the one who developed the idea and is supervising it. Of course, I also want to give a shout-out to the staff at the FTC who are working tirelessly on this project and are really just going above and beyond on it. As everyone probably knows, we’ve modeled these hearings on the ones that were done in 1995, initiated by late Chairman Bob Pitofsky. I am so glad that we were able to continue this initiative in his memory, and also that we were able to start the hearings before Bob passed last month (a big loss for the antitrust community).

As I see it, the hearings have two broad purposes. First, the Commission is engaging in critical self-examination. We’re considering whether our approach has been right or wrong—and if it’s been wrong, what can we do to fix it?

Second, I am hopeful that these hearings will at least start—if not contribute significantly to—a rebuilding of what was previously a very strong bipartisan consensus about how to do antitrust enforcement. For 25 years or so, probably beginning in the ‘90s, stakeholders in the antitrust community generally agreed on antitrust enforcement and policy. In recent years, that consensus has fractured somewhat, and I am hoping that these hearings will go some ways to reinvigorating that.

I think this kind of consensus is important for a host of reasons. First, it contributes and did contribute for a long time towards support on the Hill for what the FTC and the DOJ Antitrust Division were doing, including support for our budgets. Second, bipartisan consensus is important for staff morale. When everyone knows what they’re supposed to be doing and they are all singing from the same hymnal, it’s much easier to be productive and to sustain high staff morale. Personally, I was at the FTC back in the late ‘80s, when bipartisan consensus hadn’t quite taken hold yet, and it was sometimes very divisive and counterproductive. We want to avoid that.

* This interview has been edited for publication. At the time of the in-person interview, Chairman Simons indicated that his remarks reflected his own views, not necessarily those of the Commission or any other individual Commissioner.
Another reason that bipartisan consensus is very important is, I think, because it increases our effectiveness in court. If it’s apparent that we have, for example, well-supported bipartisan agreement on merger guidelines, then those can be more influential when we get to court. And finally, I think that a strong bipartisan consensus also helps promote our brand of competition law overseas.

I think it’s really important that we make efforts to get our bipartisan consensus back, and I think we’re doing that. We’ve gone into these hearings with an open mind, and we’re doing our best to include testimony from a wide range of perspectives and viewpoints. So far, I’ve been criticized both from the left and the right for not having enough of either side. I think that’s a good sign. We have already received many thoughtful comments, hundreds of detailed written comments, and we still have more ground to cover with the hearings. I encourage everyone to stay tuned and follow the rest of the hearings over the next few months.

SVETLANA GANS: This week the FTC had hearings on artificial intelligence and predictive analytics, and there are some hearings coming up on privacy and data security in the next month, so we are looking forward to those.

CHAIRMAN SIMONS: Right. And more to be announced.

SVETLANA GANS: Recently the FTC has had a number of successes in merger litigation. Can you tell us what your key takeaways are from those successes?

CHAIRMAN SIMONS: This is something that the Bureau of Competition has been working on for a really long time. As Bureau Director back in the early 2000s, one of my goals was to reinvigorate litigation, in particular administrative litigation. We looked for cases that fit that bill, and we initiated training and recruitment to make sure we had the capability to execute on that strategy.

Since I left the Bureau, BC has taken litigation to a whole new level. When I was sworn in on May 1, there were 14 active cases in litigation. Let’s just pause on that for a minute: 14 cases in litigation. Four of them were active merger litigations. I can’t remember when there were four active merger litigations at the FTC or the DOJ. That’s a lot. And then, in addition, there were 10 non-merger litigations going on. To put that in perspective, if you look at the number of non-merger enforcement actions on an annual basis over, say, a 25-year period, you would see that overwhelmingly, the number of non-merger enforcement actions was 10 or fewer. And now, we have 10 litigations, not just enforcement actions. So, really, this is both a historic and crazy time. And of course, in order to support that level of litigation, the Bureau has improved and expanded the training programs that it offers, and it has been able to recruit very talented litigators, including from the private sector, for some time now. We are fortunate to have some very talented assistant directors and deputy assistant directors to manage all these litigations.

Our heavy workload is important for several different reasons. First, we demonstrate commitment to enforcement. Second, we put the Commission in a position to have an impact on antitrust jurisprudence. With administrative litigation, the Commission is able to write opinions and hopefully have some influence on the courts. And, finally, we put ourselves in a position to recruit and better retain top talent. I will put a plug in here for the Bureau of Competition. If you want to litigate, the FTC is a great place to be.

SVETLANA GANS: There’s been some discussion about remedies lately, including some increased
scrutiny of remedies. In your mind, what are the sorts of things that make for a good remedy, and what are the things that have been accepted in the past but may no longer be accepted as a remedy in the future?

**CHAIRMAN SIMONS:** On the competition side, first and foremost, a remedy must be effective in restoring competition to the status quo. That's the first principle of remedies in a competition case. Some of the increased scrutiny comes about as a result of the Bureau of Competition and Bureau of Economics study of merger remedies that was published last year, which is another example of our commitment to critical self-evaluation. As a result of that study, we've started to shift away from post-order divestitures towards favoring upfront buyers even more so than in the past. We're also bringing more monitors with industry expertise into the process. This occurs much earlier than before to help expedite and facilitate consent negotiations, especially with merging parties and prospective buyers. Most typically, this happens in IP cases, cases that are highly technical, and cases that involve more complex transition issues. This has been a longstanding practice in pharmaceutical divestitures, and now we're expanding it to other kinds of mergers.

We're also conducting more in-depth due diligence of divestiture buyers. One of the findings from the merger remedy study was that there was a high failure rate with respect to mergers that did not involve a standalone business. So for transactions like that, in particular, we're going much deeper in the due diligence process.

On the consumer protection side, we are reevaluating monetary relief. We want to consider afresh when monetary relief is appropriate and, when it is appropriate, how to calculate the amount. Our reevaluation is being undertaken by staff in the Bureau of Economics in consultation with the Bureau of Consumer Protection. So look for something to come out on that.

**SVETLANA GANS:** You were mentioning divestiture buyers and I recall that Commissioner Chopra has been skeptical of private equity as divestiture buyers and frankly as buyers at all. Do you have a take on that?

**CHAIRMAN SIMONS:** Yes. I think it would be a mistake to categorically condemn private equity buyers and prohibit them from participating in the process. I think we need to evaluate the buyers on a case-by-case basis, and not eliminate them from consideration just because they're private equity. Private equity buyers can be very effective in providing both financing and management expertise. There are some really large, well-run, well-financed private equity firms and I wouldn’t want to keep those in particular out of the process. Having said that, there are some private equity companies that may be less effective. In dealing with those companies, we will conduct the more in-depth due diligence analysis that I described earlier, to ferret out whether they would be acceptable buyers or not. But I wouldn’t take them out of the picture entirely on a categorical basis.

**SVETLANA GANS:** Sticking with remedies, there’s been some skepticism lately on conduct remedies for vertical deals in particular, although it seems like they’ve been used for years. What do you think is animating the skepticism?

**CHAIRMAN SIMONS:** I think the talk of increased skepticism is a little bit overblown. I’m not sure that our skepticism has changed that much, at least not at the FTC; it may be a little more present than before at the DOJ. Other than the cases where there are information exchange issues, the FTC has
generally looked for structural remedies. We certainly want to avoid remedies that look like mini regulatory schemes—something that might be more appropriate for an agency like the FCC. I think there have been a small number of cases where the remedies look like mini regulatory schemes, but my sense is that we haven’t really done one of those in quite a while. The one that comes to mind immediately is AOL/Time Warner, which was somewhat regulatory in structure.

You could also argue that maybe there are some defense cases for which the remedies are a little more behavioral in nature on the vertical side. Those cases are a bit different because they typically involve one buyer: usually, the Department of Defense. And the DOD, the single customer, has a lot of influence over what the enforcement agencies can do. If you were to try to bring a case against DOD’s wishes, your case would probably have a low chance of success. So you have to pay a lot of attention to what the single customer is telling you. Not only that, but DOD has a unique ability to enforce behavioral requirements. In fact, I believe that in the Northrop Grumman case, the monitor is either associated with the DOD or approved by the DOD.

I think maybe on the DOJ side, people would be focused on the remedies in the Comcast/NBC deal, which was very regulatory in nature and kind of unusual. Maybe what you see at the DOJ is a step-back from that. I don’t remember the FTC doing something that regulatory in the recent past.

**Svetlana Gans:** There has been some discussion of timing agreements, and there are some in the Bar who may believe that the model timing agreement is awfully one-sided and would actually lead to longer rather than shorter review periods. What’s your reaction to that criticism?

**Chairman Simons:** I don’t agree with that. The model timing agreement that we published is designed to allow the staff to get more information that will either resolve their concerns sooner, or narrow down and structure staff’s concerns to enable potentially quicker discussions on a remedy.

If you don’t have some kind of timing agreement, it gets very difficult for the staff unless it’s a really easy case. If you think about the way timing works, this becomes apparent. After the parties substantially comply, there’s a 30-day waiting period. The Bureau Director is generally going to take a week or two to digest the papers from the parties and the staff and to hold meetings. Then, the Bureau sends the material up to the Commission level, and the Commissioners engage in the same process. Usually that takes another two weeks. So between the Bureau and the Commission, the work takes up the 30-day period almost entirely. If that’s what you’re faced with as the staff, then as the parties are about to substantially comply, you are focused on: “Gee, I have to get my staff recommendation memo together, I have to brief the Bureau, and that means I have less time to talk to the parties about what their arguments are and why we should amend our recommendation.”

When you have that kind of timing pressure, it really is counterproductive for the parties to surprise the staff about when they intend to comply. Whereas, if you give the staff notice about when you’re going to comply with the Second Request, staff will feel comfortable about budgeting in time that they need to complete their staff memo, talk to the Bureau, and also talk to you. They will be more comfortable and will devote more time talking to you and addressing your concerns and hopefully, if they’re doing their job right, they will hear your concerns and they will respond. There will be a dialog, so that by the time you get up to the Bureau level and are making your arguments to the Bureau Director, they will all be fleshed out. The Bureau Director will have a good sense of them, and it won’t be the first time he’s heard them. He’ll understand the staff’s position and be able to make his own judgment in a better, more efficient way. I think conceivably there might be
instances in which a timing agreement leads to a longer review period, but on average, a timing agreement simply provides a better, more efficient review process.

SVETLANA GANS: Now I want to switch gears a little bit to talk about consumer protection and then we’ll turn back to non-merger enforcement. The EU’s General Data Protection Regulation (GDPR) and the new California Consumer Privacy Act (CCPA) have altered the privacy landscape. To what extent have these two new regimes changed the Commission’s perspective on these issues and in what circumstances could privacy be a competition concern?

CHAIRMAN SIMONS: I agree that these laws have changed the landscape on privacy. It’s not a big secret. The interest on the Hill in privacy, including federal privacy legislation, is now pretty high. And we encourage Congress to consider this type of legislation. We at the FTC are ready, willing, and able to work with Congress on this, if asked—and I assume we will be asked. In the first instance, however, my own view is that this type of legislation requires cultural, societal, and political value judgments that are best made by Congress, not the FTC. However, we believe that any legislation that is passed should be enforced by the FTC, and we are committed to vigorously enforcing whatever Congress passes.

One thing I would suggest is that Congress should carefully consider the effects of any potential privacy legislation on competition. We are watching to see if the GDPR is having any impact on competition, and we are concerned that it could have the effect of entrenching some major tech platforms. We’re not saying that is definitely the case, but we’re looking to see if that is what might be happening over time. The GDPR, in my view, is a natural experiment that we should take advantage of and learn from. For example, if it turns out that some GDPR provisions are disadvantaging small companies or new entrants and entrenching the larger tech platforms, then that’s something that we could adjust and try to avoid. And I think this is a significant concern. We don’t know yet and the evidence is not all in. I will note that one Wall Street Journal article published right around the time the GDPR became effective suggested there were already signs that the regulation was causing advertisers to move towards the large platforms and away from the small ones. If true, that’s something we would look at carefully and try to learn from.

SVETLANA GANS: And I recall there was a hearing on big data and the GDPR last week at the FTC where you discussed this very issue.

Sticking with consumer protection for just a little bit longer, as you know, robocalls are always a huge problem and one the FTC has been trying to tackle for a long time. Can you tell us how the FTC and FCC are coordinating enforcement and what we should be looking out for in the way of robocalls in the future?

CHAIRMAN SIMONS: This is clearly a huge issue. Robocalls are the top consumer complaint received by the FTC. We received over 7 million “Do Not Call” complaints last year, of which about two-thirds involved robocalls. We aggressively pursue robocalls and other “Do Not Call” violations. To date, we have brought 139 cases against robocallers and “Do Not Call” violators.

Although we coordinate our enforcement with the FCC and the states, unfortunately, technology has overtaken our rules. It is now so cheap and easy to make robocalls from overseas, and it is hard for us to find the perpetrators. They’re in one place today, someplace else tomorrow. And, of course, the numbers from which they call change minute by minute. In response, we have launched four public challenges to develop technology to counteract robocalls, and we have
awarded $25,000 in prize money. One of the winners came up with a particularly ingenious call blocking app, which not only blocks the call, but also sends the robocaller to a source that keeps the caller on the line indefinitely. That wastes the robocaller’s time and money and not yours. I have one of these apps on my own phone and it works pretty well.

We also began publishing caller ID numbers that were included in consumer complaints filed with us through our Consumer Sentinel Network. This helps call blocking apps and the telecom carriers block these calls.

One of the things the FCC has done—with our encouragement—is to ask the carriers to block spam and robocalls. Of course, as you all know, we don’t have jurisdiction over common-carriage activity. We’ve asked for that authority many, many times, but unfortunately have never gotten it. Legislation has been introduced to do that, and I am hopeful the situation will change soon. Repeal of the common carrier exemption would allow us to go after common carriers that knowingly enable robocallers by providing them with access to our nation’s telephone network. We believe that common carriers servicing robocallers know what is going on because robocallers generate an extremely high volume of calls that are usually very, very short. It should be fairly easy to identify huge numbers of calls for very short time periods. If we had jurisdiction over the common carriers that are facilitating these robocalls, we might be able to attack the problem at the source.

SVETLANA GANS: One last question on consumer protection. You mentioned the repeal of the common carrier exemption. Is there any other additional authority you’d like to have in the consumer protection area?

CHAIRMAN SIMONS: Absolutely. In addition to the repeal of the common carrier exemption, we would like civil penalty authority for data security cases; authority over non-profits; and APA rulemaking authority, at least for data security.

Let me elaborate on additional rulemaking authority. Section 5 cannot address all of the privacy and data security concerns in the marketplace, and one specific problem with our authority is our inability to obtain civil penalties, which reduces the Commission’s deterrent capability. In data security investigations, for example, it’s very hard to link a specific data breach to a specific series of identity thefts. That, in turn, makes it very hard for us to get monetary relief in the form of consumer redress. In privacy cases, it’s simply hard to put a monetary value on privacy. The Commission has a history of bipartisan support for data security legislation that would give us APA rulemaking and civil penalty authority, and the Commission continues to reiterate its longstanding call for comprehensive data security legislation.

We’ve already talked about the common carrier exemption and why its repeal would help in the fight against robocalls. But FTC jurisdiction over common carriers also could be useful in the privacy and data security area. The common carrier exemption creates some asymmetry because there are situations where—even within the same company—the FTC has authority over only some activities within the company. For example, we have authority over the wireless carriers with respect to their data services, but not with respect to services related to traditional telephony. That creates problems for us. In addition, on the advertising side, the carriers often bundle the products together. That conceivably creates a problem for us in terms of our jurisdiction to investigate potentially deceptive advertising involving a bundled product. So there are a whole host of reasons why it would be good to get rid of the common carrier exemption.
SVETLANA GANS: The Ninth Circuit definitely helped out there with the AT&T case, but maybe legislation would be warranted to clarify it even further.

CHAIRMAN SIMONS: If that case had gone another way, it would have been a much bigger problem. As you know, there are still other circuits in which this issue may come up. It would be nice to avoid having to litigate the issue elsewhere around the country.

SVETLANA GANS: I want to turn back to non-merger enforcement. You’ve talked about merger enforcement in the last few months. Can you tell us about the non-merger enforcement side and what you’re focusing on?

CHAIRMAN SIMONS: Yes. I did say I wanted to ramp up non-merger enforcement because historically that’s what I did while I was the Bureau Director. But when I said that, I didn’t really appreciate how active the Bureau already was in these non-merger enforcement matters. As I mentioned, there were already 10 ongoing non-merger litigations when I showed up and, as you can imagine, the staff and the Bureau is just running flat out. Keeping up the pace with the current level of non-merger enforcement is going to be a heavy lift, but we’re going to try. Maybe these litigations will calm down a little bit, the staff will get a little bit of a break to refresh themselves, and we’ll get back up and do it again.

The last time I was at the Bureau, in terms of the cases that we were looking at, there were four factors that we focused on. One, does the conduct pose a substantial threat to consumers? Two, does the conduct involve a significant economic sector of the economy? Three, does the FTC have experience that will allow it to make an impact quickly and efficiently? And four, does the conduct present a legal issue that would benefit from further study and potentially have a significant effect on antitrust jurisprudence? This last one tied into increasing and invigorating FTC administrative litigation for the purpose of having the Commission write opinions on matters that were either novel or could influence the courts.

These four factors clearly explain our sustained emphasis in the Bureau on the health care industry. For example, we have had pay-for-delay cases, sham litigation, and abuse of regulatory process cases in pharmaceutical markets, and we still have a very full plate with respect to those types of cases. I expect that to continue. The Commission’s recent federal court victory against AbbVie is a good illustration. We challenged AbbVie’s use of sham litigation to illegally maintain its monopoly over Androgel, a testosterone replacement drug. The district court awarded almost $500 million in monetary relief to those who were overcharged. This case was the first time that sham litigation was found to have violated Section 2 of the Sherman Act since the Supreme Court first recognized this theory back in the 1990s. Hopefully, this case is moving antitrust jurisprudence in a useful direction from the Commission’s perspective. The case also involved an industry the Commission knows a lot about, and it also yielded significant monetary relief that will directly help consumers. So that case is a really good example that effectively covers all four of the factors the Bureau continues to use. In addition, we’re adding another factor: is there a dominant firm carrying out unilateral conduct operating in an industry with significant network effects, such that the conduct may impinge on entry or expansion?

SVETLANA GANS: That’s a very helpful framework. Sticking with IP issues, can you tell us what your views are on SEP licensing and whether the antitrust laws should play a role there?

CHAIRMAN SIMONS: I think antitrust definitely should be playing a role there. I continue to believe
that *Rambus* and *Unocal* are still good cases. Those were cases that I promoted while I was the Bureau Director back in the early 2000s. *Rambus* didn’t come out the way we had hoped, but aside from that, the court’s opinion still upholds the validity of that type of case. I think I would disagree with the court’s opinion in terms of whether you have to prove for sure that the defendant’s technology would not have been chosen had the deception not occurred.

I also believe that there’s an issue about holdup versus holdout, and whether one is more problematic than the other. I don’t really have a view on whether one is more problematic than the other, but I do have a view that both of them can be problematic. So if there is anticompetitive conduct going on in the sense that the companies in the standard-setting body are colluding against the technology owner—that would be a problem. And it’s also a problem, in my view, if the patent holder violates the rules of the standard-setting body. But that’s not in and of itself a problem. It’s not sufficient if the patent holder just breaches a FRAND commitment or commits fraud or deception. It must also be the case that the breach, the fraud, or the deception contributes to the acquisition or maintenance of monopoly power, or it involves some kind of an agreement that unreasonably restrains trade. You need both of those factors in order to have an antitrust claim. So, if the rest of the violation exists, in my view, there is no special privilege or exemption under the antitrust laws for the fraud, the deception, or the breach of contract merely because those acts occurred within the standard-setting process.

**SVETLANA GANS:** Just a few more questions on competition. Does the ownership interest of large, passive investors in multiple competitors in an industry present competition issues that the antitrust laws should address?

**CHAIRMAN SIMONS:** Well, this is obviously a new area of concern, and we are already looking at it in the context of our hearings. Some studies show that there are price effects from mutual funds owning non-trivial shares of multiple competitors in a particular industry—I recall airlines, at least, and maybe another one. Other studies looking at this type of issue find no effect. So it’s a little unclear. I don’t know if this is a widespread problem or whether it’s limited to one industry or another. That’s something we’re looking at.

We also don’t have a really good handle on the mechanism that would produce the price effects. The executives who are running the company and the board of directors have a fiduciary obligation to the shareholders as a group. Also, these mutual funds probably have heterogeneous portfolio holdings. So they’re not all holding the same competitors in the industry and probably not to the same degree. So it’s a little complicated in terms of how the incentives would work, and if there were to be some kind of impact caused by the mutual funds’ ownership, how that would actually occur? We have some more work to do in this area, but it’s definitely worth looking at and we are looking at it.

**SVETLANA GANS:** From your perspective, what are the best and worst practices when engaging with government officials investigating a company, and do they differ depending on whether you’re on the merger side versus non-merger side?

**CHAIRMAN SIMONS:** I don’t think they differ too much between the merger and the non-merger side. Let me give some of the worst practices first. One of the worst things you can do is not engage with the staff and just give them a stiff arm. It’s a terrible idea to assume that they’re against you all the way, and to decide not to engage with them.
being less than truthful. If the staff thinks they can’t trust you, you don’t get any benefit of the
doubt, and getting the benefit of the doubt is worth a lot. So be truthful and upfront with the staff.
Another poor practice is not providing the staff information or access to documents in a time-
lessly manner—in other words, jamming the staff. This goes along with creating an atmosphere of dis-
trust. Staff are worried about whether they can do their job, especially in a merger case because
that’s where the timing becomes significant.
Another poor practice is failing to make all of your arguments to the staff and saving them for
the Bureau Director, much less the Chairman. Failing to make all your arguments to the staff, and
then running to the Bureau Director to try to get the investigation closed when he is hearing your
arguments for the first time, is a bad idea. The Bureau Director will have no idea what the staff
thinks of those arguments because the staff hasn’t heard them before either. This does happen,
and it creates a big mess. It’s the worst when you get to the Bureau Director’s meeting, and the
staff is completely uninformed, they don’t have your documents, they haven’t heard your argu-
ments, and they’ve been unable to test them. That actually happens a lot more on the consumer
protection side and the non-merger side, in terms of withholding documents. Usually, for H-S-R
transactions, you can’t start the waiting period back up until you’ve complied, so that worst-case
scenario is not an issue.
The best practices are pretty much the reverse of what I just said. Meet with the staff early and
be diligent in responding to their concerns. When the staff raises a concern with you, address it.
Ignoring it is not likely to make the concern go away. Make all of your arguments to the staff and
solicit their feedback. If they’re doing their job, they will give you feedback. Sometimes certain staff
members have inclinations to not be as up-front about their concerns, I’m not sure exactly why.
What I would recommend you do in those cases is be diligent and persistent and keep asking.
Make sure that staff has told you all of their concerns. For example, you get in a meeting with the
Bureau Director and staff, you start to make an argument. The Bureau Director says, “Oh, what
about this and what about that?” You could respond by saying: “That concern has never been
raised before with us, and we’ll get back to you on that.” Or: “We have an answer for that.” That
would be a signal to the Bureau Director that the staff hasn’t been as transparent with you as they
should have been.
Particularly on the merger front, try to build in enough time to account for review at the Bureau’s
Front Office and at the Commission level. As I said before, a package probably requires two
weeks at the Bureau and two weeks at the Commission. You should build that in. Now, we under-
stand that sometimes, there are exigencies that you just can’t help. If that happens, we do the best
we can to evaluate your transaction and give you an answer sooner than the normal process. But
as a general rule, you should be cognizant of that time and try to build that in.
Finally, the last thing I’ll say is you should not use the meetings at the Commission level as an
opportunity to negotiate settlement terms with individual Commissioners. That’s just incredibly inef-
ficient and inconvenient, and basically what we’re going to end up doing is sending you back to
the staff. Negotiate whatever settlement you’re trying to negotiate with the staff. If you get to log-
gerheads and they won’t agree and you want to pursue that with the Commission, that’s fine. But
it’s certainly not appropriate to negotiate at the Commission level in the first instance, or at least
not until you’ve gotten into loggerheads with the staff.
SVETLANA GANS: Thank you. It’s been a privilege to be here with you.
Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings

Koren W. Wong-Ervin

The generally accepted belief underlying modern antitrust analysis of vertical mergers (i.e., acquisitions that combine companies at different levels of the same supply chain) has been that they are generally procompetitive or neutral. This belief is supported by a significant body of empirical evidence. For example, in a meta-study surveying the empirical work, former Director of the U.S. Federal Trade Commission’s Bureau of Economics, Francine Lafontaine, and her co-author Professor Margaret Slade, concluded: “consistent with the large set of efficiency motives for vertical mergers . . . the [empirical] evidence on the consequences of vertical mergers suggests that consumers mostly benefit from mergers that firms undertake voluntarily.”

This view of the empirical evidence is consistent with other meta-studies by leading industrial organization economists from academia and the U.S. antitrust agencies. It is perhaps not surprising, then, that the U.S. antitrust agencies have challenged vertical mergers only infrequently. When the agencies have done so, they have tended to resolve any concerns with narrowly tailored behavioral remedies, such as firewalls to prevent the sharing of rivals’ competitively sensitive information, non-discrimination clauses to counter incentives to disfavor rivals, and requirements to supply and/or license competitors.

Professor Steven Salop and Daniel Culley found that between 1994 and July 2018 the U.S. Department of Justice’s Antitrust Division and the FTC collectively conducted in-depth reviews of 58 deals involving vertical integration (or approximately 2.4 reviews per year). Of these, six were abandoned prior to the imposition of remedies, and one (AT&T/Time Warner) was approved without conditions following a loss by the DOJ at the trial court level. Of the 51 remaining deals, 6 resulted in both structural and behavioral remedies; 8 resulted in structural remedies only; 36 resulted in behavioral remedies only; and 1 did not require any remedies to address vertical concerns (although divestitures were required to resolve horizontal overlaps).

1 Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. Econ. Lit. 629, 663 (2007).
2 See, e.g., James C. Cooper et al., Vertical Antitrust Policy as a Problem of Inference, 23 INT’L J. INDUS. ORG. 639, 642, 658 (2005) (surveying the empirical literature, concluding that although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition,” and, “in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects”); Global Antitrust Inst., The Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University 6–8 (Sept. 6, 2018) [hereinafter Global Antitrust Institute Comment], https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf; see also Daniel P. O’Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72–76 (2008).
In recent years, the consensus view of vertical integration as typically beneficial or competitively benign has been challenged by certain commentators (as discussed below) and, in 2017, the DOJ brought the first litigated vertical merger case in 40 years (against AT&T/Time Warner). The U.S. antitrust agencies have also announced a “return to the preferred focus on structural [over behavioral] relief.”

In a 2017 speech, DOJ Assistant Attorney General Makan Delrahim stated: “antitrust is law enforcement, it’s not regulation,” and described behavioral remedies as “fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market.” He went on to say:

That is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there’s a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It’s a high standard to meet.\(^7\)

The FTC’s Bureau of Competition Director Bruce Hoffman has explained that, while the “FTC prefers structural remedies to structural problems, even with vertical mergers,” “in some cases we believe that a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration.”\(^8\) Hoffman pointed to the FTC’s recent Remedy Study, which covered four orders related to vertical mergers, noting that in all four, behavioral remedies “succeeded in maintaining competition at premerger levels.”\(^9\) Hoffman concluded that, while “[t]his is a small sample, it does suggest that we can, and we do, and we have fashioned conduct remedies in vertical mergers that curtail opportunities and incentives for anticompetitive behavior.”\(^10\)

These statements from the DOJ and the FTC are significant given the importance of not categorically precluding narrowly tailored behavioral remedies, particularly when they are likely the best way to preserve the generally procompetitive benefits of vertical mergers.

As explained below, in my view, if anything, the existing empirical evidence would tend towards a presumption of procompetitive effects (and thereby, a presumption of legality). It is important to keep in mind that vertical mergers do not involve any competitive overlaps or the associated loss of a least some degree of rivalry between actual or potential competitors. Instead, “[v]ertical integration is a decision by a firm about how to organize production, so that the firm might harness productive efficiencies from coordinating production within a single entity and reduce the trans-

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6 Delrahim Speech, supra note 5, at 1.

7 Id. at 8.

8 Hoffman Speech, supra note 5, at 7.

9 Id. at 8.


11 Hoffman Speech, supra note 5, at 8.
action costs of trying, in the alternative, to achieve these efficiencies of vertical coordination through contract.”

With respect to structural versus behavioral remedies, I recommend clearer thinking and guidance on how remedies are classified. For example, is a third-party arbitration dispute mechanism (which AT&T offered, and the DOJ rejected, in AT&T/Time Warner) really an unwieldy and costly regulatory scheme that requires monitoring and ongoing enforcement? And, regardless of how we categorize a remedy, limiting the availability of behavioral remedies risks sacrificing the significant efficiencies generally created by vertical mergers.

**Empirical Evidence on Vertical Integration**

Empirical evidence indicates that vertical mergers generally result in significant efficiencies. These can include the elimination of double-marginalization (or double markups in price by separate firms each with market power at different levels in a supply chain); quality improvements and faster and/or better innovation from coordination in product, design, and innovation efforts; elimination of free-riding from the harmonization of incentives; and the creation of a maverick (i.e., a firm that plays a disruptive role in the market to the benefit of customers). While there is considerable theoretical work describing potential anticompetitive effects (namely concerns that vertical integration increases incentives for post-merger firms to foreclose rivals, including through raising rivals costs), there is only limited empirical evidence supporting that finding in real markets.

There are two leading surveys that summarize the empirical literature on vertical integration and, relatedly, vertical contracts.

The first, authored by a group of DOJ and FTC economists, reviews 24 papers published between 1984 and 2005 providing analysis of empirical effects of vertical integration and vertical restraints. The survey offers a careful synthesis of the evidence and observes that “[e]mpirical analyses of vertical integration and control have failed to find compelling evidence that these practices have harmed competition, and numerous studies find otherwise.” The authors conclude that, while “[s]ome studies find evidence consistent with both pro- and anticompetitive effects[,] . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”

The second survey, by Professors Francine Lafontaine and Margaret Slade, reviews 23 empirical papers, including some of those in the study prepared by the DOJ and FTC economists. Lafontaine and Slade reach a similar conclusion, stating:

[[It] appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and

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14 Cooper et al., *supra* note 2, at 642, 658.

15 Id. at 658.

16 Id.

better service provision . . . . The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned.\textsuperscript{18}

In addition to these two surveys, in 2018, a group of scholars, including Judge Douglas Ginsburg (a former head of the DOJ's Antitrust Division) and Professor Joshua Wright (a former FTC Commissioner), released a summary of published research in peer-reviewed journals since 2008 that empirically analyzed the welfare effects of vertical mergers in the United States.\textsuperscript{19} Their analysis of papers from 2009 through 2018 supports the earlier conclusions of Lafontaine and Slade and Cooper et al.

Ginsburg et al. note the likelihood that the set of papers examined “is not exhaustive,” and thus they consider their summary to be merely a “snapshot of the likely larger empirical literature.”\textsuperscript{20} They found:

Of the thirteen papers examined, we can directly or indirectly infer the welfare effects identified by the authors as a result of vertical integration in eleven of them. Of these eleven, six had results that indicated vertical integration resulted in positive welfare changes; four had results with either no change, a mixed change, or no economically meaningful change in welfare; and only one (and perhaps two) had results that are consistent with a negative impact.\textsuperscript{21}

Some commentators, such as Professor Jonathan Baker (also a former Director of the FTC's Bureau of Economics), have criticized the meta-studies on the ground that the authors include in their review empirical studies of firms that do not possess market power.\textsuperscript{22} In particular, Baker contends that studies of more competitive market structures are not informative about whether oligopolists can use vertical integration to harm competition.\textsuperscript{23} This critique is limited in force.

Although not all of the markets captured in the studies examined by Lafontaine and Slade involve durable market power at one or both levels—that is, markets likely to result in antitrust scrutiny—the critics ignore the fact that at least some of those markets do involve market power. Perhaps more importantly, the meta-studies by Lafontaine and others (discussed above) do not find that vertical integration systematically creates significant anticompetitive effects in any market. The criticism would have greater force if the various meta-analyses found that vertical integration involving firms with market (or, more importantly, monopoly) power was more likely to result in harm than vertical integration involving firms without market (or monopoly) power. But that is not what the surveys find. Rather, these surveys show that the plurality of empirical evidence suggests regarding vertical mergers as generally procompetitive or benign—whether the firms involved have market power or not. If the critics were correct that vertical integration harmed consumers and resulted in anticompetitive effects, these results would surely show up more systematically in the dozens of product markets studied.

\textsuperscript{18} Id. at 409.
\textsuperscript{19} Global Antitrust Institute Comment, supra note 2, at 6. The author is the former Director of the Global Antitrust Institute.
\textsuperscript{20} Id. at 6.
\textsuperscript{21} Id. at 6–7.
\textsuperscript{23} See, e.g., Baker PPT, supra note 22, at 29.
Baker also criticizes reliance on these studies on the ground that they are not informative on whether to modify antitrust policy because they do not control for the possibility that firms are deterred from anticompetitive vertical conduct by the threat of antitrust enforcement. Baker relies on a recent unpublished study in which the authors compared states that retain per se illegality for resale price maintenance (RPM) after the U.S. Supreme Court’s decision in *Leegin Creative Leather Products v. PSKS, Inc.* (in which the Court held that RPM is subject to the rule of reason) with states in which that practice would be reviewed under the rule of reason. The study purports to demonstrate that, in the years since *Leegin*, price increases for household consumer goods have been larger, and output growth smaller, in rule of reason states than in states retaining the per se rule against minimum RPM. According to Baker, “[t]his study suggests that the rule of reason did not deter anticompetitive uses of resale price maintenance that the per se rule deterred.”

However, as Thomas Lambert and Michael Sykuta have explained, the study is flawed for a number of reasons: First, it fails to account for the fact that anticompetitive theories of RPM predict both a reduction in output and an increase in price (only 1.6 percent of the product categories surveyed had both an increase in price and a decrease in quantity in states that shifted to the rule of reason); and second, the study "systematically disregards information on transactions likely to reflect a procompetitive use of minimum RPM."  

### Antitrust Analysis of Vertical Mergers

Horizontal mergers involve the combination of businesses that are either actual or potential competitors. Thus, they result in at least some loss of rivalry and a combination of actual or potential substitutes. Vertical mergers, by contrast, involve the integration of complements, which does not reduce competition on its face. If anything, the existing empirical evidence would tend towards a presumption of procompetitive effects (and thereby, a presumption of legality).

There are a number of economic theories for vertical integration as a response to market inefficiencies. For example, when there is market power in both upstream and downstream markets, it follows that price will be greater than the marginal cost of production at both stages. Known as double marginalization, the downstream firm adds a markup to the price it pays the upstream supplier that ignores the upstream firm’s true cost of production. Vertical integration allows the two firms to maximize joint profits and increase output (e.g., lower retail prices).

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Similarly, vertical mergers can reduce or eliminate transaction costs associated with contract writing and monitoring between firms at different levels of the supply chain, as well as the costs associated with ex ante investment and ex post performance. More generally, vertical mergers enhance efficiency when firms at varying levels of production must cooperate in order to design, produce, and distribute goods. Whereas merger-specific efficiencies are important in the analysis of horizontal mergers, cost-reductions are inherent in vertical mergers.

There are also numerous specific theories of harm from vertical mergers. Broadly, the question is whether the vertically integrated firm is likely to exclude or collude. One traditional concern, called two-stage entry, was that a vertical merger could deter entry because any firm seeking to enter the market post-merger would need to enter at both levels. A more nuanced concern is that when two firms are well positioned to enter each other’s market, a vertical merger might eliminate the competitive constraint of a potential entrant (similar to the potential competition theory in the horizontal context).

Another more prevalent concern is whether the vertically integrated firm will substantially foreclose competition and raise its rivals’ costs, or make entry more difficult. For example, an upstream firm might supply inputs to multiple downstream companies. After merging with one of those downstream companies, the upstream firm might refuse to supply the remaining downstream rivals or supply them only on substantially unfavorable terms. Of course, there still exists the countervailing incentive for the vertically integrated firm to charge a lower price for its own downstream product.

The FTC’s challenge to the proposed $420 million acquisition by Cytyc of Digene is a good example of a vertical transaction that presented a clear potential for consumer harm. Cytyc at the time accounted for 93 percent of U.S. liquid-based Pap tests used for the detection of cervical cancer. Digene was the only company in the United States selling a DNA-based test for the human papillomavirus (HPV), which was believed to cause nearly all cervical cancer cases. Digene’s HPV test relied on samples obtained from a liquid Pap test, and any liquid Pap test supplier competing with Cytyc required access to Digene’s HPV test. Thus, by purchasing Digene, the FTC alleged Cytyc would be in a position to eliminate its only existing liquid Pap competitor as well as thwart the entry. The FTC also alleged that the Digene was positioned to develop a competitive test and ultimately that the potential competitive harm was real.

In an article discussing Cytyc/Digene, Joseph Simons (now FTC Chairman) contrasted Cytyc to another vertical merger, Synopsys/Avant!, noting that the threat to consumers in the latter case

31 See, e.g., Paul L. Joskow, Vertical Integration, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 319–48 (Claude Menard and Mary Shirley eds., 2005).
32 See Lafontaine & Slade, supra note 1, at 680 (“[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms’ but also from the consumers’ points of view. . . . we have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions.”).
37 Id.
was “considerably more speculative and distant.”38 That transaction involved software used to
design software chips. Synopsys had a 90 percent share of front end-tools for chip design and
Avant! had a 40 percent share of back-end tools. Among the theories that FTC staff investigated
was whether the merger would give Synopsys the incentive and ability to enhance Avant!’s mar-
ket power by restricting back-end competitors from communicating with the Synopsys front end.39
Ultimately, the FTC unanimously cleared the transaction because (1) customer power would pre-
clude foreclosure, (2) Synopsys did not have a clear incentive to deny access to its front end, and
(3) there was apparent widespread believe among customers that the merger would speed inte-
gration in ways that would benefit customers.40

It is clearly inaccurate to say that vertical mergers can never be anticompetitive. But it is equal-
ly clear that the starting point for determining net price effects in a vertical merger case is more
difficult than in a horizontal merger case.41 Moreover, while the focus of the analysis in any com-
bination (regardless of form) is to determine whether or not the transaction will lead to higher
prices or other harmful effects in the relevant market(s), vertical mergers invite more complex
questions.42 For example, vertical mergers typically have competitive effects in multiple mar-
kets—how does one resolve a situation in which the merger harms competition in one market, but
enhances competition in another? Or, when the exclusionary effects of vertical integration harm
competitors through higher input costs but nonetheless result in lower or unchanged downstream
prices for consumers, why should we infer that harm to competitors is harm to competition?

We also lack a “rough screening” technique for vertical mergers. Despite the fact that there is
no systematic relationship between market concentration and competitive effects,43 there remains
a presumption of illegality against any merger that threatens to create “undue concentration.” But
vertical mergers do not increase market concentration and therefore do not trigger the structural
presumption. Tasked with analyzing a proposed vertical merger, agencies and the courts must
look to evidence beyond market shares to estimate likely competitive effects.

The overall problem with the theoretical work is that it fails to generate administrable tests for
real-world cases.44 As FTC’s Hoffman recently stated, “the problem is that theories don’t general-
ly predict harm from vertical mergers; they simply show that harm is possible under certain con-
ditions.”45

38 Joseph J. Simons & David Scheffman, Nonmerger Enforcement at the FTC: An Aggressive Proconsumer Agenda, 49 ANTITRUST BULL. 471,
497 (Sept. 2004).
39 Id.
40 Id. at 497–98; see also Press Release, Fed. Trade Comm’n, Federal Trade Commission Votes to Close Investigation of Acquisition of Avant!
close-investigation-acquisition.
41 See Dissenting Statement of Commissioner Joshua D. Wright at 1, Par Petroleum Corp./Koko’oha Investments, Inc., FTC File No. 141 0171
petitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, though empirical
evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign.”).
42 See, e.g., Hoffman Speech, supra note 5, at 5 (describing the FTC’s willingness to challenge the proposed merger discussed above between
Digene Corporation and Cytbc Corporation. The Commission determined that a merger would “eliminate Digene’s incentive to cooperate with
Cytbc’s rivals, who needed access to Digene’s product and also Digene cooperation to obtain FDA approval” thus raising entry barriers. Id.).
43 See Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance, 80 ANTITRUST L.J.
44 It is also worth noting that economic tools designed specifically for certain functions, such as GUPPI for evaluating horizontal mergers, can
lead to misleading results when used in the wrong context, such as in vertical mergers.
45 Hoffman Speech, supra note 5, at 3.
In addition, vertical integration characteristically has extremely powerful justifications, including a firm’s choice of organization and extent of rapid product or geographic expansion, enhanced control of upstream or downstream functions, and—perhaps most commonly—avoiding the costly processes of forming, administering, and enforcing contracts with independent suppliers and customers. As Benjamin Klein, Robert Crawford, and Armen Alchian have explained, even with long-term contracts that explicitly include price and price protection clauses, not all elements of future performance can be specified.46 “Due to uncertainty and the difficulty of specifying all elements of performance in a contractually enforceable way, contracts will necessarily be incomplete to one degree or another. This creates the possibility for transactors to take advantage of the contract to hold-up their transacting partner” in order to appropriate quasi-rents.47 As Klein further suggests in a later work, “transactors choose contract terms, including vertical integration, in order to economize on their limited (and often unequal) amounts of private enforcement capital and thereby to define an optimal self-enforcing range for their contractual relationship.”48 Within Klein’s framework, the primary advantage of vertical integration is the increased flexibility that transactors gain by avoiding the use of rigid long-term contracts to supplement their reputation capital.

Indeed, the primary result of vertical integration is the substitution of direct management for reliance on the external market. The costs and benefits of such integration depend on a wide range of circumstances that agencies and courts are unlikely to be able to adequately evaluate and make judgments superior to those of the merging parties. As Klein explained, “It is difficult for judges, as it is for economists, no matter how smart and well-intentioned they may be, to understand fully the economic intent and purpose of all the complex contractual terms [including vertical integration] transactors use in their contracts.”49

2018 FTC Hearings and the Call for Updated Guidance

Antitrust practitioners recently gathered to discuss vertical merger policy as part of the FTC’s Hearings on Competition and Consumer Protection in the 21st Century.50 Some participants


47 Klein, Vertical Integration as Organizational Ownership, supra note 46, at 201. Klein then explains:

Even though contracts are incomplete, the reputations of the transacting parties limit the economic feasibility of hold-up threats. It is the magnitude of these reputations and the corresponding costs that can be imposed on a transactor that attempts a hold-up that define what can be called the “self-enforcing range” of the contractual relationship. Transacting parties enter contractual arrangements by making specific investments and setting contract terms in such a way so that they are likely to be within this self-enforcing range where a hold-up will not occur. However, there is some probability that market conditions may change (for example, the value of the quasi-rents accruing to one of the parties unexpectedly increases) so that it pays for one transactor to hold-up the other in spite of the loss of reputation.

Id. at 201–02.

48 Benjamin Klein, Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships, 34 ECON. INQUIRY 444, 462 (1996) (“Because private enforcement capital is limited and written contract terms are necessarily imperfect, transactors must optimally combine court-enforced written terms together with privately enforced unwritten terms to define what I call the self-enforcing range of their contractual relationship. Hold-ups occur when unanticipated events place the contractual relationship outside the self-enforcing range.” Id. at 444.).

49 Id. at 462.

encouraged a revamping of policy and analytic tools for evaluating vertical mergers, including a rewriting and invigoration of the Non-Horizontal Merger Guidelines. For instance, Professor Steven Salop rejected the premise that antitrust review of vertical mergers should be “systematically more permissive,” and instead advocated a more rigorous standard of review, particularly in oligopoly markets. He reasoned that vertical mergers in oligopoly markets tend to result in horizontal harm. Salop emphasized that this is particularly relevant in instances in which the acquiring firm is vertically integrated, creating at least a horizontal component to the analysis. Salop also warned that elimination of double marginalization (EDM) resulting from vertical mergers is neither certain nor merger-specific, a point upon which Professor Carl Shapiro concurred, explaining that “EDM can sometimes be eliminated with non-linear prices or quantity-forcing contracts.”

Other panel participants disagreed with Salop and advised caution on establishing new standards or eliminating presumptions of procompetitiveness when these presumptions are warranted. For instance, Lafontaine added that the only thing worse than a monopoly is a “succession of monopolies.” In response to Salop’s suggestion that EDM could be achieved via contract, Lafontaine elaborated that this argument suffers from a lack of real-world application. Simply put, if eliminating double marginalization were easily achieved via contract, it would occur more often; the existence of double marginalization in a world presuming two profit-maximizing firms confirms that its elimination absent a merger is unlikely. Moreover, as Lafontaine pointed out, there are antitrust restrictions against the types of contracts that would be required to achieve the benefits of EDM. Embracing the role of contract would require a lessening of antitrust enforcement in vertical restraints.

The divide between Salop’s views on the one hand and Lafontaine’s on the other has implications beyond academia, especially in the context of whether regulators should update and revitalize the Non-Horizontal Merger Guidelines. For example, how could the DOJ and FTC, or the antitrust bar at large, reach a consensus on new guidelines when there is such little agreement about the underlying principles?

One additional complexity comes from the observation that many “vertical mergers” are in fact only partially vertical, making it especially difficult for economists and practitioners to devise models and templates that are widely predictive and therefore useful. Before this can be done, wider consensus must be reached and applicable standards must be crafted.

One of the great strengths of the U.S. antitrust laws is the tethering of the consumer welfare standard to economic learning. To be sure, the agencies’ thinking on vertical mergers has evolved beyond the existing Non-Horizontal Merger Guidelines. In the context of vertical mergers, how-

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52 Id. at 14.
53 Id. at 15.
54 Id. at 28.
56 See, e.g., Benjamin Klein, The Economic Lessons of Fisher Body—General Motors, 14 INT’L J. ECON. BUS. 1 (2011) (illustrating the costs of using inherently imperfect long-term contracts to solve potential holdup problems, and therefore the advantages of vertical integration.).
57 Transcript, supra note 51, at 73–74.
58 See Non-Horizontal Merger Guidelines, supra note 33.
ever, significant consideration should be given to the purpose underlying guidelines. In drafting guidelines, the agencies generally focus on circumstances under which they will bring enforcement actions, rather than when they will not. That can be dangerous given the obvious consumer benefits inherent in vertical combinations. Thus, any undertaking to update the guidelines should consider equally the efficiencies and benefits to be recognized as well as the possible harms. Along these lines, it is also imperative that if the agencies do decide to update their Non-Horizontal Merger Guidelines, they resist the temptation to consider and address novel and purely theoretical theories of harm that are not substantiated by existing empirical evidence. Antitrust laws can and should evolve alongside evolution in our economic understanding to better address both new and existing business models and practices, but only when the empirical evidence supports doing so.

With or without updated guidelines, the question remains what facts and economic analyses should be considered in the case of a vertical merger? Agencies and courts can consider ordinary course documents as they always do, but such qualitative evidence usually cuts both ways and is not reliable for inferring competitive effects. Instead, sound economic evidence and factspecific analysis are critical to the evaluation of vertical mergers. As stated in an article authored by a group of economists including both former and current enforcers, “A major difficulty in relying principally on theory to guide vertical enforcement policy is that the conditions necessary for vertical restraints to harm welfare generally are the same conditions under which the practices increase consumer welfare.”

In the vertical merger context, theories of harm generally lack any clear “likelihoods,” and (as with all antitrust analysis) each case requires a fact-intensive analysis. The strength and methodology of economic models must be tested against alternatives and economic testimony. Appropriately calibrated, natural experiments that analyze the actual effects of prior vertical constraints in a similar competitive setting can be invaluable. Existing empirical evidence makes clear that vertical combinations offer myriad consumer benefits, and it is entirely appropriate that challengers to a vertical merger be required to present evidence sufficient to show that the transaction will likely substantially lessen competition.

Indeed, the real-world effects of vertical integration found in the meta-study surveys discussed above suggest that, if anything, enforcement policy (and perhaps the law) should include a presumption of legality for vertical integration. Shorthand analytical tools based upon judicial and market experience and accumulated economic knowledge serve to help identify conduct that is either likely or unlikely to harm competition. Truncated analysis (here, a presumption of legality) is appropriate when it, rather than the full-blown rule of reason in every case, can save administrative costs while minimizing error costs. The benefit of truncation is that it takes advantage of existing judicial and economic knowledge to produce more efficient legal rules. In short, truncated analysis is at its core intended to be an easily administrable, effects-based application of the rule of reason.

In its recent case against AT&T/Time Warner, the DOJ stated that “[t]here is no presumption in the law that vertical mergers are ‘presumed procompetitive,’ or ‘presumptively efficient,’ such

59 Cooper, et al., supra note 2, at 641.

that the government would face a heightened burden of proof.” The DOJ acknowledged that “[t]he cases cited by Defendants make the well-accepted point that vertical integration often is procompetitive—while acknowledging that it can be anticompetitive.” Yet, the DOJ went on to note that “[s]ome scholars have in fact suggested the opposite.” In support of this, the DOJ relied on the following quote from George Stigler over 60 years ago: “Where a firm has a fifth or more of an industry’s output, its acquisition of more than five to ten per cent of the output capacity of industries to which it sells or from which it buys in appreciable quantities shall be presumed to violate the statute.” (Of note, while Stigler had structuralist views of antitrust early in his career—likely as a product of the time—he later rejected those views.) While a legal presumption, particularly given the empirical evidence, is worthy of consideration, it is important to recognize the distinction between a presumption in the law and reliance on real-world empirical evidence to guide enforcement priorities and decisions. At a minimum, the evidence suggests that the latter is warranted.

### Remedies in Vertical Merger Cases

Remedies must be tailored to address either the structure of the market or the post-merger conduct of the merged firm. Structural remedies generally require merging firms to sell their physical or intangible assets, while behavioral remedies impose conditions that regulate the merged firm’s actions after the merger is consummated.

In an important speech at the beginning of his term, AAG Delrahim reinvigorated the preference for structural remedies and skepticism of behavioral remedies. Delrahim lamented that, “[i]nstead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.” Delrahim went on to explain that behavioral remedies not only created unwieldy and costly regulatory schemes, but often prove counterproductive because they “require companies

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62 Id.

63 Id.

64 Id. (quoting George J. Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 176, 183 (1955)).

65 As former FTC Chairman Timothy Muris noted in a 2003 speech:

> Many today probably do not know that George Stigler called for economy-wide industrial deconcentration in the early 1950s. Stigler’s recommendation was based on existing empirical economic research on economies of scale at the plant level in manufacturing that appeared to indicate that American industry was concentrated far beyond “efficiency requirements.” Stigler changed his position when he learned of various analytical flaws in the research and of empirical work inconsistent with deconcentration.

Timothy J. Muris, Improving the Economic Foundations of Competition Policy, Remarks Before George Mason University Law Review’s Winter Antitrust Symposium (Jan. 15, 2003), https://www.ftc.gov/public-statements/2003/01/improving-economic-foundations-competition-policy (internal footnotes omitted) (“Stigler himself created the ‘survivorship’ analysis for identifying efficient firm size. See George J. Stigler, The Economics of Scale, 1 J. L. & ECON. 54 (1958) (introducing “survivor principle”).”). Stigler’s views changed significantly over the course of his career. In his memoirs, he explained “[u]ntil the 1950s I accepted the prevailing view of my profession that monopoly was widespread . . . . I was an aggressive critic of big business.” George J. Stigler, MEMOIRS OF AN UNREGULATED ECONOMIST 97 (1988). After discussing his prior belief in the wisdom of breaking up U.S. Steel, Stigler confessed, “I now marvel at my confidence at that time in discussing the proper way to run a steel company . . . . What is still more embarrassing is that I no longer believe the economics I was preaching.” Id. at 99.

66 Delrahim Speech, supra note 5, at 5.
to make daily decisions contrary to their profit-maximizing incentives, and [] demand ongoing monitoring and enforcement to do that effectively."67

During this same speech Delrahim announced that the Antitrust Division would seek to reduce the number of long-term consent decrees and “return to the preferred focus on structural relief to remedy mergers that violate the law.”68 Delrahim’s comments signal a perhaps modest, yet still significant, departure from the prior administration’s views that, though structural remedies are preferred, behavioral remedies “can effectively address anticompetitive issues raised by vertical mergers.”69

In accordance with the DOJ’s stance on remedies, AAG Delrahim announced that the DOJ is withdrawing its 2011 Policy Guide to Merger Remedies70 and that the 2004 Policy Guide to Merger Remedies71 will be in effect until further guidance is released.72 Delrahim explained that the withdrawal of the 2011 Remedies Guide stems from the Division’s commitment to shortening the duration of merger reviews,73 with the thinking that the 2011 Policy Guide’s more flexible approach to conduct remedies has prolonged review processes while regulators tried to dream-up perfect regulatory fixes to small competition concerns. Under the 2004 policy, behavioral remedies are appropriate only when required to ensure an effective structural remedy or when “significant efficiencies” would be lost if a structural remedy were imposed or the deal were blocked altogether.74

In my view, narrowly tailored behavioral remedies should not be eliminated as a viable option to resolve concerns with vertical mergers. The baby, as the saying goes, should not be thrown out with the bathwater, and antitrust enforcers should not unreasonably prevent themselves from requiring small behavioral conditions when the situation and context are appropriate. When competition concerns can be resolved with a narrowly tailored behavioral commitment, the result benefits consumers by embracing the benefits of vertical integration while also mitigating the downsides. The distinction lies in understanding the differences shown in the sweeping, business-altering requirements in cases such as Comcast/NBC-Universal,75 Google/ITA,76 and Live Nation/
Ticketmaster.\textsuperscript{77} In this respect, the recent comments of the FTC’s Bureau of Competition Director Bruce Hoffman that “a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration” ring true.\textsuperscript{78}

**Conclusion**

Vertical integration characteristically has extremely powerful justifications including, perhaps most commonly, avoiding the costly and risky processes of forming, administering, and enforcing contracts with independent suppliers and customers. Given the numerous advantages on the plus side (supported by empirical evidence) and very few on the minus side (hypothesized by theoretical models), a presumption of procompetitive effects for vertical mergers is worthy of consideration.

This is particularly so given the likely comparative advantage of merging parties over agencies and courts in evaluating the costs and benefits of vertical integration. The primary result of vertical integration is the substitution of direct management for reliance on the external market. The costs and benefits of such integration depend on a wide range of circumstances that agencies and courts are unlikely to be able to adequately evaluate and make judgements superior to those of the merging parties. This, combined with the empirical evidence discussed above, indicates that we should be extremely careful about exposing vertical mergers to routine government examination without at least some significant qualifying conditions suggesting that, unlike the vast majority of vertical mergers, the particular merger at issue may pose a competitive problem.\textbullet

\textsuperscript{77} Final Judgment, United States v. Ticketmaster, No. 1:10-cv-00139 (D.D.C. July 30, 2010), ECF No. 15 (requiring, \textit{inter alia}, Ticketmaster to license its platform software used to sell tickets to AEG and give AEG the option to acquire a copy of the source code after four years).

\textsuperscript{78} Hoffman Speech, \textit{supra} note 5, at 8.
Gun Jumping: Increasing Enforcement and Drawing Lines

Jay Modrall

The number of merger control regimes has exploded in recent years, by some estimates to as high as 150 or more. These statutes vary widely in structure. Most make merger notifications mandatory for transactions that satisfy relevant thresholds, while others are voluntary. Under most of these regimes, merging parties must suspend the implementation of notifiable transactions until approval is received. Premature implementation is commonly known as “gun jumping.”

“Gun jumping” is a deceptively simple concept. The clearest case of gun jumping occurs where the parties close a notifiable concentration without filing a required notification at all. But conduct short of closing can also be considered an illegal “implementation” under applicable merger control laws or be caught by general laws prohibiting anticompetitive agreements, decisions, and concerted practices, such as Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) or Section 1 of the U.S. Sherman Act. Practices that may be scrutinized from a gun-jumping perspective include the exchange of competitively sensitive information during pre-deal due diligence or after signing of an acquisition agreement; implementation of pre-closing “ordinary course” covenants between signing and closing; planning for or commencing the integration of the parties’ businesses after closing; and coordination of competitive behavior before closing.

Two 2018 European Union cases of first impression shed unprecedented light on the line between gun jumping and anticompetitive conduct in the merger context, as well as on what pre-closing conduct can be treated as gun jumping. In the May 2018 Ernst & Young P/S v. Konkurrencerådet (EY) ruling, the European Court of Justice found that a significant pre-closing action taken by the target in anticipation of an acquisition would not qualify as gun jumping for purposes of the EU Merger Regulation (EUMR). Under the ECJ’s ruling, the EU Commission is required to distinguish between pre-closing conduct challenged under the EUMR and under Article 101(1) TFEU, applying different procedures and substantive tests. In the April 2018 Altice

Together, the twin EU cases will significantly impact how the Commission approaches future gun-jumping cases, as well as how merging parties negotiate transactions and plan for closing. These decisions come at an auspicious moment, as gun-jumping enforcement is increasing and attracting interest from antitrust authorities worldwide. This new focus was demonstrated in a November 2018 OECD roundtable on gun jumping and the suspensory effects of merger notifications, for which a record 31 contributions were submitted. In the coming years, the two EU cases may prove to be a model for other authorities as they further develop their own gun-jumping enforcement regimes.

**Clearer Lines in the EU**

As mentioned, in 2018 the ECJ and the Commission adopted landmark gun-jumping decisions, offering unprecedented clarity on conduct short of prematurely closing a notifiable transaction that is considered illegal implementation. This section summarizes the two suspensory provisions of the EUMR and discusses how these were applied in *EY* and *Altice*.

**EU Merger Regulation.** The EUMR contains two distinct suspensory provisions, Article 4(1) and Article 7(1). Article 4(1) EUMR provides that “[c]oncentrations with a Community dimension . . . shall be notified to the Commission prior to their implementation.” Article 7(1) EUMR provides that “[a] concentration with a Community dimension . . . or which is to be examined by the Commission pursuant to . . . [a referral from EU Member State authorities], shall not be implemented either before its notification or until it has been declared compatible with the common market,” subject to exceptions set out in Article 7(2) EUMR and the possibility for the Commission to grant derogations under Article 7(3) EUMR.

Thus, Article 4(1) EUMR applies to pre-notification conduct, while Article 7(1) applies to pre-approval conduct, whether before or after notification. There are also other differences: Article 4(1) EUMR only applies to concentrations that are subject to mandatory notification under the EUMR, while Article 7(1) EUMR applies both to transactions subject to mandatory notification and to transactions referred to the Commission at the request of the notifying parties. On the other hand, Article 7(1) EUMR is subject to exceptions and possible derogations not applicable to Article 4(1) EUMR.

Both of the EUMR’s suspensory provisions prohibit premature “implementation” of notifiable or notified concentrations. However, neither defines the term “implementation” or discusses what type of conduct may be caught. This gap was addressed by the ECJ in *EY*.

**The EY Ruling.** The *EY* case arose from a request from the Danish Maritime and Commercial Court (the Danish Court) for a preliminary ruling on the interpretation of the suspensory provisions of the Danish law on competition (the Danish Law), which are modelled on the corresponding provisions of the EUMR. The Ernst & Young (EY) network had agreed to acquire the Danish affiliate

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8 Article 4(1) EUMR, *supra* note 5.

9 Article 7(1) EUMR, *supra* note 5.
of KPMG (KPMG DK) and notified the transaction to the Danish Competition and Consumer Authority. Without waiting for antitrust approval, KPMG DK terminated its cooperation agreement with KPMG’s international network. The Danish Competition Council found that this action violated the Danish Law’s prohibition against implementing a notifiable concentration prior to approval, because, inter alia, it was merger-specific, irreversible, and likely to have market effects prior to approval of the merger. EY challenged this decision in the Danish Court, which asked the ECJ whether the EUMR “must be interpreted as meaning that a concentration is implemented only by a transaction which . . . contributes to the change in control of the target undertaking” and in particular, “whether the termination of [the] cooperation agreement . . . may be regarded as bringing about the implementation of a concentration.”

The ECJ noted that the EUMR does not indicate the circumstances in which a concentration is deemed to be “implemented” and thus referred to the EUMR’s “purpose and general scheme.” The EUMR’s suspensory provisions only apply to “concentrations,” which are defined as

the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking.

According to the ECJ, “It follows that a concentration . . . arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking.” Whether or not such operations affect competition is irrelevant, because “it cannot be ruled out that a transaction having no effect on the market might nevertheless contribute to the change in control of the target undertaking and that therefore, at least partially, it implements the concentration.” Thus, “it must be concluded that Article 7(1) must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking.”

Conversely, transactions that “are not necessary to achieve a change of control of an undertaking” are not subject to the EUMR’s suspensory provisions, even though

carried out in the context of a concentration . . . [because] [t]hose transactions, although they may be ancillary or preparatory to the concentration, do not present a direct functional link with its implementation, so that their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations. 10

However, such transactions remain subject to the Commission’s jurisdiction under Regulation 1/2003, which empowers the Commission to investigate and sanction infringements of Articles 101(1) and 102 TFEU. 11

Applying these principles to the situation at hand, the ECJ observed that “the termination of a cooperation agreement . . . [even if it is] subject to a conditional link with the concentration in question and is likely to be of ancillary and preparatory nature . . . does not contribute, as such, to the change of control of the target,” even if it is likely to have effects on the market. That termination “did not give EY the possibility of exercising any influence on KPMG DK, which was independent both before and after that termination.”

10 EY, supra note 4, ¶¶ 49–59.

The ECJ concluded that, for EUMR purposes, “a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking.” The termination of a cooperation agreement in circumstances such as those in the case at hand “may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects.” Although the ECJ discussed only Article 7(1) EUMR, the same considerations presumably apply to Article 4(1) EUMR.

In summary, in EY, the ECJ for the first time drew a clear line between conduct constituting gun jumping, which must be evaluated and sanctioned under the EUMR, and conduct to be evaluated and sanctioned under Article 101 TFEU. Conduct that “contributes to” a change of control of the target is illegal gun jumping under the EUMR, whether or not it has any competitive impact. The Commission’s procedure would be subject to the EUMR, rather than Regulation 1/2003, and the fining guidelines published by the Commission in relation to Article 101(1) TFEU infringements would not apply. By contrast, other pre-approval conduct between the buyer and target should be assessed under Article 101(1) TFEU, and any Commission investigation would be subject to Regulation 1/2003 and other Commission rules, potentially including the Fining Guidelines.

The Altice Decision. On April 24, 2018 (shortly before the EY judgment), the Commission fined Altice €124.5 million for gun jumping in connection with its acquisition of PT Portugal—€62.25 million for breaching Article 4(1) EUMR, and €62.25 million for breaching Article 7(1) EUMR. This 50/50 split seems rather arbitrary, but the Commission rejected Altice’s argument that the absence of guidelines for calculating fines under the EUMR breached the EU principle of legal certainty. Interestingly, the Commission did not investigate whether Altice’s conduct infringed Article 101(1) TFEU.

Altice, a multinational cable and telecommunications company based in the Netherlands, entered into an agreement (the Transaction Agreement) to acquire PT Portugal, a Portuguese telecommunications and multimedia operator, in December 2014. Altice carried out a due diligence investigation of PT Portugal between October 16, 2014 and November 27, 2014, without putting in place a non-disclosure agreement or clean team. Altice notified the transaction to the Commission on February 25, 2015, and the Commission approved it, subject to commitments, on April 20, 2015. The transaction closed on June 2, 2015. Following news reports about visits by Altice executives to PT Portugal before the Commission approved the transaction, the Commission opened an investigation into whether Altice had implemented the transaction within the meaning of the EUMR prior to notification, approval, or both.

The Commission found that Altice had indeed improperly implemented the transaction in a number of respects. First, the Commission found that the Transaction Agreement gave Altice a veto right between signing and closing over such a broad range of contracts that it gave Altice the possibility to exercise decisive influence over PT Portugal. The Commission acknowledged that an acquirer can have a degree of oversight over contracts a target can enter into, and the commitments it can make, to protect the target’s value between signing and closing. But in the Commission’s view the monetary thresholds in the Transaction Agreement caught contracts that were not relevant to preserving the value of PT Portugal’s business. In reaching this conclusion,
the Commission analyzed how the parties came to an agreement on the materiality thresholds, which were subject to a negotiation process and not based on objective criteria. The thresholds also did not correspond to the value of contracts disclosed in the due diligence data room.

The Commission relied heavily on the concept of “ordinary course of business” to assess whether contracts and commercial actions covered by Altice’s consent rights were likely to have a material impact on the value of the target. It noted that contracts and actions in the ordinary course of business were unlikely to have a material impact on the target’s business. However, the Commission noted that even an issue falling outside the ordinary course of business may not be relevant to maintain the value of a target.

Second, the Commission found that a variety of commercial decisions for which Altice’s agreement was not required pursuant to the Transaction Agreement were not made unless and until Altice consented. The Commission pointed to instances in which the target sought Altice’s instructions and agreed to implement, or actually implemented, Altice’s instructions in relation to commercial decisions prior to the date of notification and/or prior to the date of the clearance decision. As with the matters subject to Altice’s veto under the Transaction Agreement, the Commission considered that these went beyond what could reasonably be considered as necessary for preserving the value of the target.

Third, the Commission found that the target engaged in the “systematic and extensive” provision of commercially sensitive information to Altice, partly prior to the date of the notification and prior to the date of the clearance decision. These exchanges occurred during meetings between the management of the two companies on an ad-hoc basis, often at Altice’s initiative, with Altice proposing meeting agendas and requesting specific information. The Commission concluded that these information exchanges contributed to demonstrating that Altice exercised decisive influence over certain aspects pertaining to the target before and after notification.

Interestingly, the Commission cited its own guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements15 regarding information considered competitively sensitive, but it did not discuss whether this information exchange violated Article 101(1) TFEU as well as or instead of the EUMR. The Commission did not deem it necessary to demonstrate that Altice used the information it received to exercise decisive influence over the target, because implementation for the purposes of Articles 4(1) and 7(1) EUMR takes place where the acquirer has the possibility to exercise decisive influence over the target.

In summary, the Commission concluded that Altice’s right under the Transaction Agreement to consent to contracts and actions by the target between signing and closing granted Altice the legal right to exercise decisive influence over PT Portugal’s business and that Altice actually exercised decisive influence. The Commission acknowledged that some provisions can legitimately be put in place by an acquiring company to preserve the value of a target’s business between signing and closing, but found that the Transaction Agreement enabled Altice to veto strategic and day-by-day commercial decisions going beyond what could have been considered justifiable for reasons of value preservation. Beyond these consent rights, the Commission found that Altice exercised decisive influence over a number of PT Portugal’s day-by-day business decisions and exercised operational control over other aspects of the company, effectively acting as the controlling shareholder. In identifying actions that are relevant to the target’s value (so that requiring buyer approval is allowed), strategic decisions are presumably more likely to impact

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the target’s value than “day-to-day” or “ordinary course” decisions, but this distinction alone is not determinative.

Although the Commission adopted the Altice decision before the ECJ issued its ruling in EY, the Commission’s analysis of these contractual provisions and pre-closing behavior seems in line with EY’s definition of gun jumping as an exercise of control. However, the Commission’s approach to determining what contracts and actions can legitimately be subject to a buyer’s control goes beyond EY and provides useful guidance to merging parties. In particular, Altice demonstrates that the thresholds used to identify matters requiring due diligence before signing, and the process for negotiating materiality thresholds in the merger agreement, may both be scrutinized to determine whether a buyer’s consent rights are reasonably required to protect the target’s value. By extension, a target should not seek consent for matters not covered by pre-closing covenants, since the buyer presumably did not consider such matters to be material to the target’s value in negotiating the transaction agreement.

By contrast, it is less clear that the Commission’s treatment of the parties’ exchange of competitively sensitive information before and after signing the Transaction Agreement is in line with EY. The Commission treated this exchange as an indication that Altice was acting in the capacity of a parent company or controlling shareholder of the target. Although this behavior might be said to “contribute” to an exercise of control in a broad sense, it seems more natural to read EY to require such conduct to be assessed under Article 101(1) TFEU. It seems likely that the Commission will open parallel procedures for infringement of the EUMR and Article 101(1) TFEU in similar cases in the future.

Implications of EY and Altice

Read together, EY and Altice provide invaluable guidance on how the Commission will conduct future gun-jumping cases and how merging parties can avoid gun-jumping under EU law. Rather than opening a single investigation under the EUMR, for instance, the Commission may open parallel investigations under the EUMR and Article 101(1) TFEU, clearly defining which conduct is being assessed under which statute. The Commission sets fines under Article 101(1) TFEU based on its Fining Guidelines, but the Commission has so far not issued similar guidance on setting fines under the EUMR. The Commission may feel greater pressure to do so in future cases involving parallel investigations under both the EUMR and Article 101(1) TFEU. This would be especially helpful considering that the Commission’s increasingly aggressive enforcement for procedural infringements includes not only gun jumping but also the provision of false or misleading information in merger proceedings.16

In addition to these procedural implications, the EY framework has substantive implications. For example, EUMR infringements can be found only with respect to conduct that takes place prior to EUMR approval, while Article 101(1) TFEU applies until closing. Finding an EUMR infringement does not require an analysis of the contested conduct’s competitive effects, which is a requirement in an Article 101(1) TFEU case (although these effects may be presumed in the case of an infringement “by object”). Thus, the fact that the buyer and target are not competitors, as in many private equity transactions, will be no defense to an EUMR gun-jumping case, but could make Article 101(1) TFEU cases more difficult to bring. Since only the buyer is subject to the EUMR’s

16 For example, on May 17, 2017, the Commission fined Facebook €110 million for providing false or misleading information in connection with the Commission’s review of Facebook’s acquisition of WhatsApp. Case COMP/M.8228, Facebook/WhatsApp—Comm’n Decision (May 17, 2017), http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf.
notification and suspensory obligations, moreover, EUMR gun-jumping fines apply only to the buyer, while Article 101(1) TFEU infringements would involve the target and/or the seller as well.

*Altice* goes beyond *EY* in setting out the antitrust justification for common due diligence practices and M&A agreement provisions and illustrating how the Commission will determine whether the parties have gone too far. EU law permits a potential buyer to review competitively sensitive information for due diligence or integration planning purposes, provided appropriate precautions are taken. A buyer may also require the target to obtain consent to certain actions post-signing, so long as these are reasonably required to protect the target's value. The Commission will look closely at the transaction history to determine whether the buyer's rights are permissible. One factor the Commission can consider is the buyer's due diligence process, specifically the monetary thresholds used to identify contracts and other matters that the acquirer considered material.

Another is how monetary thresholds applicable to pre-closing consent covenants were negotiated, specifically whether the amounts were determined with a view to protecting the target's value or based on other criteria.

*Altice*'s lessons on the treatment of information exchanges may be less clear in light of *EY*. In *Altice*, the Commission considered the parties' exchange of confidential information as an EUMR infringement. In future cases, however, the Commission may apply its Horizontal Guidelines and extensive case law under Article 101(1) TFEU, which, as noted, applies until a notified transaction closes, not only until approval is granted.

Read together, *Altice* and *EY* provide a framework for distinguishing between gun-jumping violations of the EUMR and of Article 101(1) TFEU, and provide helpful reminders of the antitrust implications of certain practices that merging parties should follow in any event. For example, buyers naturally determine the scope of their due diligence and pre-closing consent covenants to focus on the issues considered important to the target's value. *Altice* reminds us that this is not only good business practice; it is important to avoid gun jumping and should be made explicit in the transaction process.

Similarly, merging parties have sound business reasons to be careful about sharing competitively sensitive information before closing and to ensure that such information is protected in the event the transaction does not proceed. Again, *Altice* reminds us that common precautions such as entering into confidentiality agreements and creating clean teams are not only good business, they are important from an antitrust perspective as well.

Applying this framework will also help merging parties and antitrust counsel assess the legality of proposed conduct at different stages of the transaction process. Because the competitive justifications for sharing information during due diligence before signing and integration planning between signing and closing are different, what information can be shared, and with whom, may differ. Post-signing, there may no longer be a justification for sharing certain information that needed to be shared to negotiate the purchase price. Conversely, the need for integration planning may justify the sharing of information on a wide range of other topics, provided customary protections are implemented.

Discussion of permitted pre-closing conduct often focuses on bilateral conduct involving coordination between buyer and target, but gun-jumping concerns also arise in connection with unilateral decisions. For example, a party may wish to defer plans for major R&D projects or other capital expenditures that would be rendered superfluous or at least less efficient if the transaction proceeds. If a party decides to defer such an action pending antitrust approval, unilaterally and without sharing competitively sensitive information, under *EY* that decision would presumably not violate either the EUMR (absent an exercise of control) or Article 101(1) TFEU (absent an anti-
competitive agreement, decision or concerted practice). Absent EY, antitrust counsel might be tempted to advise their clients that gun-jumping rules require them to continue acting in the ordinary course without regard to the pending transaction, rather than adjusting their behavior in light of the transaction.

The clear line required by EY between EUMR gun jumping and Article 101(1) enforcement contrasts with the approach in the United States, where authorities have long applied Section 7A of the Clayton Act (the Hart-Scott-Rodino Antitrust Improvements Act of 1976)\(^{17}\) and Section 1 of the Sherman Act in parallel. In their contribution to the November 2018 OECD roundtable, the U.S. authorities noted that

> during the pre-consummation period, competing firms . . . may be liable for agreements that violate Section 1 [such as] merging firms’ jointly setting prices or contract terms, or entering market division or customer allocation agreements [or sharing] competitively sensitive information. . . . The agencies also may use conduct that violates Section 1, including exchanges and use of competitively sensitive information, as indicia of operational control to prove violations of Section 7A.\(^{18}\)

In their enforcement practice, the U.S. agencies commonly treat the same conduct as violating both Section 7A of the Clayton Act and Section 1 of the Sherman Act.\(^{19}\)

The clarity provided by EY and Altice is especially welcome because few jurisdictions have provided guidance on gun jumping in general, much less the distinction between violations of merger review statutes and violations of general antitrust prohibitions. While a number of submissions to the OECD roundtable indicated that pre-closing conduct could be assessed under either merger review statutes or general antitrust prohibitions, no authority provided guidance on how to differentiate between the two types of conduct or advice on how to negotiate and implement pre-closing covenants to avoid gun-jumping infringements.

Thus, EY and Altice will serve as useful guidance for authorities other than the Commission. Indeed, EY arose from a decision of the Danish Competition Authority, and the Danish courts have since confirmed that they will follow the EY framework. Even in the EU, however, alignment may be difficult; in a major German gun-jumping case, Edeka/Tengelmann, the German Federal Court of Justice refused to be bound by EY, noting that in the EU merger control regimes are not harmonized.\(^{20}\) As a result, in a transaction subject to Member State review rather than the Commission’s one-stop-shop review under the EUMR, merging parties may be subject to different criteria in different countries.

**Conclusion**

As indicated by the number of contributions and lively discussion at the OECD’s recent roundtable, gun-jumping enforcement is on the rise. Merging parties must be ever more vigilant to

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ensure that they do not infringe antitrust rules in jurisdictions where merger filings are required. The compliance challenge is exacerbated by increasingly long review periods, especially for transactions raising substantive antitrust issues.

Despite the importance of the issue, merging parties have so far had relatively little guidance on what pre-approval conduct—short of prematurely closing a transaction—might infringe applicable merger review laws, prohibitions against anticompetitive agreements, or both. Few jurisdictions have issued guidance, and published decisions often focus on egregious conduct and are thus unhelpful under normal circumstances.

Under EU law, it is now clear that conduct contributing to a pre-approval exercise of control, for example through overly restrictive pre-closing consent covenants, will be treated as an infringement of the EUMR, regardless of its competitive effects, while pre-closing conduct not contributing to a change of control will be assessed under general EU antitrust principles. The distinction is not merely formal, but has significant implications for the Commission’s approach to future EU gun-jumping cases and for merging parties’ analysis of what conduct is permissible. In evaluating whether pre-closing consent requirements represent an impermissible exercise of control, the Commission will look closely at aspects of the transaction process that are not overseen by antitrust counsel.

The effects of EY and Altice are not limited to transactions subject to EUMR review. Authorities in EU Member States with merger control statutes modeled on the EUMR are likely to follow the EY approach, though Member States with different models, such as Germany, may diverge from this approach. Non-EU authorities would also do well to consider the lessons of EY and Altice as they develop their gun-jumping jurisprudence.