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Tying and Exclusion in FRAND Licensing: Evaluating Qualcomm

Erik Hovenkamp and Timothy Simcoe

In May 2019, District Court Judge Lucy Koh ruled that Qualcomm violated the antitrust laws by tying its cellular licensing and modem chip sales and by refusing to license its direct competitors in the chip segment.¹ In her opinion, Judge Koh embraced a view of Qualcomm’s business model that was offered by the Federal Trade Commission, emphasizing what the FTC described as a “no license, no chips” (NLNC) policy.² Under this theory, Qualcomm used its licensing practices to exclude rival chipmakers and simultaneously leveraged its market power in chips to extract royalties that exceeded the “fair, reasonable, and nondiscriminatory” (FRAND) rates that Qualcomm committed to charge for patents required to practice cellular standards.³ The ruling is now on appeal.

In this article, we evaluate three novel features of the Qualcomm decision. First, we describe how the tying relationship between chips and licenses goes primarily in the opposite direction of how most commentators characterize it. Second, we consider how Qualcomm’s FRAND licensing commitments bear on the antitrust analysis. Third, we discuss how FRAND might have been used to better justify finding an antitrust duty-to-deal with competitors.

Background

Qualcomm has two primary business units. Its chip (or chipset) division designs cellular modems that allow phones to communicate with cellular networks and markets those modem chips to independent device producers (also referred to as original equipment manufacturers or OEMs). Its licensing division negotiates with the same OEM customers to secure royalty-bearing patent license agreements.

Qualcomm has market power in both lines of business. In particular, its chip division accounts for a very high share of modem sales for certain wireless technologies (CDMA and high-end LTE).⁴ At the same time, its licenses grant rights to standard essential patents (SEPs), which OEMs and rival chipmakers must infringe in order to practice the protocols that allow independently designed networks and devices to communicate. Qualcomm’s market power in licensing is somewhat constrained, however, by its commitments to various standard setting organizations (SSOs) to license its SEPs at FRAND rates.

Judge Koh’s decision focused on a number of Qualcomm’s business practices, including the use of exclusivity clauses and loyalty rebates in its chip supply agreements, which conduct the

³ Qualcomm, 2019 WL 2206013 at *68.
⁴ Id. at *14–15.
court described as “de facto exclusive dealing.” While chipset exclusivity is an important aspect of Qualcomm’s conduct, there is also a tying component that is not addressed at length in her decision. In particular, Qualcomm effectively tied its chipsets to its SEP licenses. Because there are few viable alternatives to Qualcomm’s chipsets, the threat of cutting off a customer’s chip supply gives Qualcomm a large stick in licensing negotiations. Judge Koh devoted a considerable part of her ruling to evidence that Qualcomm wielded this threat shrewdly, and to explaining how it enabled Qualcomm to capture unusually high royalty rates relative to those charged by other SEP licensors.

Qualcomm did offer its customers some relief on the royalty rate, but only in exchange for de facto exclusivity in the chipset market. In particular, Qualcomm offered various types of rebates and “incentives”—effectively partial reimbursements of royalty payments—for customers that agreed to purchase chipsets nearly exclusively from Qualcomm. Charging higher royalties to licensees that chose to use rival-made chips worked to forestall would-be competitors from gaining a foothold in the chipset market. The exclusivity agreements with Apple in particular were alleged to deprive rivals of the scale and know-how required to compete in cutting-edge cellular modem markets. In effect, Qualcomm imposed a tax—in the form of a forgone rebate—on purchases of rival-made chips, leaving such rivals unable to match the “all-in” (chip plus license) price that Qualcomm offered in exchange for exclusivity.

**Understanding Qualcomm’s Tying Strategy**

In a tying arrangement, the sale of one product is conditioned on the buyer’s agreement to take a second good as well. In such cases, the antitrust plaintiff usually identifies one product as the “tying good” and the other as the “tied good.” In a typical case, the defendant already possesses a monopoly in the market for the tying product, whereas many consumers would have bought the tied good from another provider but for the tie. The alleged exclusion therefore occurs in the tied market.

It is tempting to posit that Qualcomm’s chips are the tying good, while SEP licenses are the tied good. After all, its NLNC policy suggests that its chips are providing the relevant bargaining leverage, and in a qualified sense (discussed below) this is correct. However, on closer inspection, it becomes clear that Qualcomm’s SEP licenses are the tying good. It is worth evaluating why this is so, because the explanation highlights the two primary factors that distinguish this case from conventional tying cases: first, Qualcomm’s FRAND commitments constrain its ability to “act like a monopolist” when selling the tying good (licenses). Second, Qualcomm presently has monopoly power over both goods in its tie, although its dominant position in the tied market (chipsets) is more vulnerable to potential erosion by competitive entry.

Qualcomm’s FRAND commitments imply that it cannot refuse to license its SEPs. To illustrate the relevance of this constraint, consider a counterfactual world in which Qualcomm is not bound

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5 Id. at *85.

6 There is significant overlap between tying and exclusive dealing, namely where the availability of one good is conditioned on exclusivity in another. In these cases, it may be appropriate for the complainant to allege either tying or exclusive dealing. In Qualcomm, the FTC chose the latter characterization and Judge Koh followed suit.

7 Qualcomm, 2019 WL 2206013 at *27–68.

8 See, e.g., Koren W. Wong-Ervin et al., A Comparative and Economic Analysis of the U.S. FTC’s Complaint and the Korea FTC’s Decision Against Qualcomm, CPI: ANTITRUST CHRON. at 4 (Apr. 2017) (characterizing Qualcomm’s SEP licenses as the tied good).

9 This is due in part to the likelihood that Qualcomm would be unable to enjoin infringers in light of its FRAND commitments.
by any FRAND commitments and can rapidly enjoin any unlicensed implementer. The threat of withholding a license would be at least as troubling to downstream implementers as a threat to cut off the chip supply. After all, implementers need both chips and licenses, but in the chipset market there is at least a prospect of competition on the horizon. In the absence of FRAND commitments, however, Qualcomm could forestall the entry of potential chip competitors through tying. Specifically, it could threaten to withhold licenses from any implementer that declines to buy its chips.

This is precisely the opposite of how Qualcomm’s actual conduct has been described. Indeed, in this counterfactual case, we could aptly describe Qualcomm as implementing a “no chips, no license” policy. It would then be clear that chips are the tied product.

When we add FRAND back into the mix, the underlying motivation for the tie—exclusion of actual or potential competitors in chipsets—does not change. Therefore, our designation of chipsets as the tied good should not change either. Rather, what changes as a result of FRAND is the manner in which Qualcomm can implement the tie. Evaluating these constraints on implementation is critical to understanding Qualcomm’s conduct as a whole.

With FRAND in place, Qualcomm cannot implement a tie by threatening to cut off the flow of SEP licenses to any downstream implementers that buy rival-made chips. In the antitrust case law, the closest analogue to this predicament arises in cases where the tying good is an essential utility that must be made available at a regulated rate to all comers. In such cases, the impetus for tying is typically to circumvent the regulatory price control—by shifting the monopoly overcharge to an unregulated good—rather than to exclude rivals in the tied market, though in principle a tie could accomplish both objectives.

How could Qualcomm hope to implement an exclusionary tie in light of its FRAND commitment? If the chipset market were already competitive, it couldn’t: implementers could just buy chips from rivals and then go to court to secure a license at a FRAND rate. However, as Judge Koh found, Qualcomm has monopoly power in the chipset market. That is, Qualcomm currently has monopoly power in both the tying and tied markets, although its power over chipsets is vulnerable to competitive entry. The threat of entry in chipsets has little bite in the short run, however, during which time implementers depend on Qualcomm for both licenses and chips. Thus, a threat to withhold chips can provide considerable bargaining leverage in license negotiations, especially if the threat could be implemented before customers would be able to obtain a FRAND judgment in court. Qualcomm can use this short-run bargaining leverage to demand that implementers agree to its preferred licensing terms. As noted earlier, these terms involve an unusually high royalty rate that applies upfront, but which can be reduced ex post through rebates that are conditioned on continued exclusivity in chipsets.

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11 Id. at 102–05 (discussing the similarities with tying by regulated utilities). For an example of a case involving a regulated tying good, see, e.g., Int’l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 449 F. Supp. 1158 (D. Haw. 1978).


13 Here we are assuming that the FRAND commitment can actually be enforced. If it is unenforceable for some reason, then it would not prevent the kind of tying discussed above (wherein SEP rights are withheld from implementers who buy rival-made chips). However, the fact that Qualcomm’s tie did not take that form suggests that it anticipated its FRAND commitments being enforceable.

14 Qualcomm, 2019 WL 2206013 at *16.
All of this accomplishes two important things for Qualcomm. First, it achieves exclusion in the chipset market by securing de facto exclusivity commitments from downstream implementers. This can deprive prospective chipset rivals of the scale they would need to enter the market successfully. Second, the arrangement establishes a high benchmark royalty rate (i.e., the pre-rebate royalty that applies upfront), which Qualcomm can point to as its established FRAND royalty in future negotiations or litigation, including with third parties.15

Evaluating Qualcomm’s Licensing Practices
Qualcomm’s FRAND commitments motivate its tying strategy by constraining its ability to directly exercise the market power it obtains from holding SEPs. That is, the tying strategy is a way of at least partially evading the FRAND commitments. But where do these FRAND commitments come from, and what is the precise nature of the constraints that they impose? Answering these questions sheds additional light on Qualcomm’s SEP licensing practices, as well as the antitrust issues discussed above.

FRAND commitments are a promise to license patents incorporated into industry standards broadly and at reasonable rates. These voluntary commitments are usually made to SSOs in accordance with the rules and procedures described in individual SSOs’ intellectual property policies.16 U.S. courts have generally treated FRAND commitments as a binding contract between the patent owner and the SSO, with all implementers of the relevant standard as third-party beneficiaries.17 This contractual approach does not, however, imply that antitrust law is irrelevant. SSOs inherently involve collective action by competing firms, and numerous cases have considered the antitrust implications of how firms acquire and exercise market power through SEPs.18

At first, it may seem puzzling that patent holders would voluntarily limit their rights to withhold a license. In practice, however, they are often willing to make FRAND commitments because incorporating their patented technology into a standard guarantees access to a large market of prospective licensees and because widespread implementation of a standard can increase demand for proprietary complements, such as chipsets. When a patent owner refuses to make a FRAND commitment, the other members of an SSO may be required to search for non-infringing substitute technologies so that exclusivity and licensing disputes do not threaten widespread adoption of the standard.19 Thus, although FRAND commitments place meaningful constraints on patent access and pricing, refusing to offer a FRAND commitment can produce a sharp drop in demand for the patented technology, and is a relatively rare event.

The FRAND commitment has two prongs: the agreement to license on “fair and reasonable” terms, and the commitment to ensure that such licenses are “non-discriminatory.” We consider them in turn.

15 Courts often rely on “comparable licenses” as a basis for computing reasonable royalties, meaning they look at the royalty rates assigned in private agreements involving the same or similar patents. For discussion of how this relates to the Qualcomm case, see Hovenkamp, supra note 10, at 110–12.

16 Three cellular SSOs that play an important role in the Qualcomm litigation are the European Telecommunications Standards Institute (ETSI), the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS).

17 See, e.g., Microsoft Corp. v. Motorola, Inc. (Microsoft III), 696 F.3d 872, 884–85 (9th Cir. 2012); Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1083–84 (W.D. Wis. 2012); Microsoft Corp. v. Motorola, Inc. (Microsoft II), 864 F. Supp. 2d 1023, 1031–33 (W.D. Wash. 2012).

18 For an overview, see Allan Shampine and Tim Simcoe, Economics of Patents and Standardization: Network Effects, Hold-up, Hold-out, Stacking, in 1 THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW 100–24 (Jorge L. Contreras ed., 2018).

Reasonable Royalties: The consensus economic view is that “reasonable” royalties in the FRAND licensing context should not reflect any market power created by excluding feasible substitute technologies from the standard. For this reason, many economists endorse an ex ante incremental value standard that caps royalties at the difference between the value of a SEP and the value of the next best alternative that was available when the standard was introduced.\(^{20}\) The Federal Circuit has espoused a similar principle whereby “[a SEP] royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”\(^{21}\) Moreover, because FRAND commitments indicate a SEP owner’s willingness to license its patents, it is generally very difficult for patent holders to establish the “irreparable harm” required under the eBay factors for a grant of injunctive relief.\(^{22}\)

All of this brings us to the question of whether Qualcomm’s royalties are FRAND, given the lack of a precise and detailed legal definition. It is generally understood that Qualcomm’s royalties exceed those of other major cellular SEP licensors, both in absolute terms and when normalized by various measures of Qualcomm’s contribution to relevant standards.\(^{23}\) Although Judge Koh cited this evidence regarding Qualcomm’s relative royalty rates, her analysis placed more weight on Qualcomm’s licensing conduct, and specifically its willingness to withhold chipsets from handset producers that refused its licensing terms.\(^{24}\)

The logic behind Judge Koh’s approach can be understood by analogy to injunctive relief. If a SEP holder can prevent an implementer from practicing the standard, negotiated royalties will reflect demand for the standard (or indeed, the entire device) and not just the value of the patented feature. A handset manufacturer unable to obtain a sufficient supply of chips finds itself in much the same position as one facing a patent injunction—it is unable to sell its device for lack of an essential input. By emphasizing Qualcomm’s practice of threatening to withhold chip supply when negotiating its SEP licenses, Judge Koh is highlighting how Qualcomm’s market power in chips when combined with its “no license, no chips” bargaining strategy creates a de facto injunction that can be used to extract unreasonably high royalties.

Qualcomm’s appeal argues that Judge Koh erred by not considering its many license agreements as evidence of an “established” rate that would be considered reasonable under the Georgia Pacific factors\(^{25}\) typically applied to determine reasonable royalty patent damages.\(^{26}\) Although other courts have used evidence from comparable licenses in FRAND disputes, this objection is misplaced for several reasons. First, it ignores the question of whether Qualcomm’s conduct influenced the terms of these prior agreements, either directly (through threats of with-
holding chips and offering rebates for chip exclusivity) or indirectly (because negotiations take place in the shadow of Qualcomm’s “established” rates). Second, many of Qualcomm’s early license agreements covered different patents and devices, calling their comparability into question even if they applied to the same standards.27 And third, the standard Georgia-Pacific notion of reasonableness (under which many of Qualcomm’s license agreements were negotiated) does distinguish between the value of a patented technology and the value created by coordinating on a common standard.28

**Non-Discrimination:** For SEP owners to fulfill their FRAND commitments, it is necessary but not sufficient to charge reasonable royalties: their licensing practices must also be nondiscriminatory. Although legal and economic scholars have paid relatively less attention to the nondiscriminatory (ND) prong of FRAND, courts have indicated that, at a minimum, it requires SEP holders to offer similar terms and conditions to similarly situated (i.e., competing) licensees.29

Qualcomm’s licensing practices involved two types of discrimination: between handset producers that did or did not purchase Qualcomm chipsets, and between Qualcomm’s in-house chip division and its rivals. We consider them in that order.

As described above, Qualcomm’s tying strategy involved discounts and incentives for handset producers that agreed to purchase chipsets primarily or exclusively from Qualcomm. While the most notable example was a set of contracts with Apple that provided large royalty rebates conditioned on exclusivity, Judge Koh’s decision also noted that similar terms were offered to Blackberry, LG Electronics, Samsung, and Motorola.30 In the economics literature, this mixed bundling strategy is widely recognized as a form of price discrimination because it produces different effective royalties based upon the implementer’s decision to purchase Qualcomm’s chips or not.31

In its appeal, Qualcomm argues that its incentives and discounts were unrelated to its SEP licensing, and therefore nondiscriminatory, because volume discounts and other types of incentives are permissible in the market for chipsets.32 Judge Koh’s ruling provides evidence that Qualcomm actually viewed these provisions as royalty rebates.33 But even if one accepts Qualcomm’s argument that these are chipset discounts, it would be wrong to ignore the fact that under its “no license, no chips” policy, every chip purchase is bundled with a SEP license, making chip discounts equivalent to royalty reductions. A simple numerical example can help illustrate these links between the all-in price, discriminatory licensing, and exclusion.

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28 In Ericsson v. D-Link, 773 F.3d 1201, 1230, 1232 (Fed. Cir. 2014), the Federal Circuit opined that “in cases involving RAND-encumbered patents, many of the Georgia-Pacific factors simply are not relevant,” and indicated that when considering damages for SEPs, “The patentee’s royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”
30 Qualcomm, 2019 WL 2206013 at *153–54.
31 Although the economics literature has generally treated price discrimination as a benign explanation for tying, as compared to monopoly leverage, the two need not be mutually exclusive. See, e.g., David S. Evans & Michael Salinger, Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law, 22 Yale J. on Reg. 37 (2005).
32 Opening Brief for Appellant Qualcomm Inc. at 16, 105, FTC v. Qualcomm, Inc., No. 19-16122 (9th Cir. Aug. 27, 2019).
Suppose the monopoly price for chipsets is $10, and that a vertically integrated monopoly supplier of chips and SEPs is facing an entrant that can market its chips for $6. If it were unconstrained by ND, the vertically integrated licensor might offer to license its own chip customers at $2 per unit, and its rivals' chip customers at $7 per unit. This type of price discrimination yields an all-in price of $12 for the incumbent's chip-SEP bundle, compared to $13 for a mixed bundle containing the entrant's chip. In this simple example, no one would purchase from the entrant because the total price of doing so would be higher than purchasing from the incumbent.

Now suppose that FRAND commitments prohibit price discrimination in SEP licensing. The vertically integrated incumbent might try reducing its chip price by $5 and increasing the SEP royalty charged to its own chip customers by the same amount. This leaves the all-in price for each bundle unchanged, so the rival is still excluded. It also creates the appearance of nondiscriminatory SEP pricing. But the effects of this price structure remain discriminatory: when Qualcomm increases SEP prices to subsidize chip rebates, the customers of a (potential) chip rival pay that cost and receive nothing in return.

Note that this example does not contain royalty rebates or any of the other incentives that Qualcomm offered certain licensees in return for chipset exclusivity. In the absence of a credible threat to its royalty rates, Qualcomm would have no need for such discounts. In practice, these provisions seem to have been used with a select set of customers, such as Apple, that might be able to support a nascent chip rival or mount a FRAND challenge.

The second type of discrimination considered in Qualcomm was its refusal to license rival chip producers. In particular, the court ruled at summary judgment that the intellectual property policies of two cellular SSOs—ATIS and TIA—required Qualcomm to license any firm that wished to implement the standards, and that a refusal to license one class of prospective implementers (chipmakers) is inherently discriminatory. Although it was grounded in a contractual interpretation of the ATIS and TIA intellectual property policies, this ruling is consistent with a historical record showing that FRAND commitments emerged from a set of remedial access rules that required patent holders to grant licenses to “all applicants” upon request.

In its appeal, Qualcomm admits that its refusal to license competitors is meant to increase licensing revenue. But it denies that this practice is discriminatory, since rival chipmakers are treated equally and do not pay to use its SEPs. This argument overlooks the exclusionary impact of leveraging market power in chips to raise SEP prices, which, as we saw above, can increase the all-in price of a mixed bundle (Qualcomm SEPs and rival chips) relative to using Qualcomm chipsets.

Qualcomm’s refusal to license at the component level of the supply chain does, however, raise two questions about its overall licensing strategy. First, why doesn’t Qualcomm simply avoid the issue by offering to license chip producers at OEM rates? And second, why haven’t chipset manufacturers sued for a FRAND license?

With respect to the first question, Qualcomm appears to believe that courts would not force chip makers to pay its OEM royalties because those rates represent a substantial fraction of the entire chipset price. As a matter of economics, however, there is no reason to think that chip-
makers could not pass on the increased costs of a license. An alternative explanation for Qualcomm’s refusal to license at the chip level is that rival chipmakers have no need for its chipsets, which eliminates the bargaining leverage created by threats to withhold chip supply. Thus, chip-level licensing could reduce royalties not because of courts’ reluctance to increase chipmakers’ costs, but rather because the threat point in SEP licensing negotiations would shift from a de facto injunction to a court-ordered FRAND rate.

This line of argument begs the second question posed above: why don’t chip producers sue for a FRAND license? Although this question was not taken up in Judge Koh’s decision, one explanation is that although the costs of a lawsuit would fall upon an individual chipmaker, the benefits of a victory would be widely shared. In particular, nondiscrimination implies that rival chip producers would be entitled to the same FRAND rates, and robust competition might cause much of the resulting savings to be captured by customers. Another explanation is that Qualcomm’s rivals do have an incentive to sue and then, given that both parties want to keep the outcome private, settle. This is one way to interpret the outcome of the litigation between Qualcomm and Ericsson that preceded the adoption of 3G cellular standards.

The Antitrust Duty to Deal

The tying and exclusive dealing issues form the basis of one of two separate antitrust decisions in the Qualcomm opinion. The second was Judge Koh’s conclusion that Qualcomm had an antitrust duty to deal with rivals—namely a duty to sell SEP licenses to prospective rivals in the chipset market. Significantly, this is separate from the court’s conclusion (on summary judgment) that Qualcomm’s FRAND commitments created a contractual duty to license rivals.

The duty-to-deal analysis is the most controversial aspect of Judge Koh’s decision, and is probably the most vulnerable to reversal on appeal. In her opinion, Judge Koh found such a duty based on the Supreme Court’s 1985 decision in Aspen. However, the antitrust duty to deal is extremely narrow in scope; courts almost never find such a duty in practice.

Under Aspen, a court may find an antitrust violation where a dominant firm refuses to deal with a rival, despite an established history of such dealings, if the refusal seems to be motivated by the prospect of exclusion. To establish a history of prior dealings, Judge Koh pointed to the fact that Qualcomm licensed rivals about 20 years ago. One may question whether agreements

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37 This is an application of the general principle of litigation externalities in patent litigation. See, e.g., Joseph Farrell & Carl Shapiro, How Strong Are Weak Patents?, 98 AM. ECON. REV. 1347 (2008). Moreover, chip producers may recognize that ND provisions can function like most-favored customer clauses, which dramatically raise the stakes for Qualcomm, giving them incentives to expend considerable resources in the event of a challenge.


39 Qualcomm, 2019 WL 2206013 at *81–85.


41 Remarkably, a current FTC Commissioner, Christine Wilson, penned an op-ed that sharply criticized this aspect of the decision, which she dubbed “antitrust overreach.” Christine Wilson, A Court’s Dangerous Antitrust Overreach, WALL ST. J. (May 28, 2019), www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055?mod.


43 Qualcomm, 2019 WL 2206013 at *83.
formed so long ago (and involving different patents) are sufficient to establish a duty under
Aspen, given how much has changed in the cellular technology space since that time.44

Alternatively, one could argue that this was simply not the most effective way to apply Aspen
to Qualcomm’s refusals, and that a better application would have hinged instead on Qualcomm’s
FRAND commitments. The reason that Aspen relies in part on a history of dealings with rivals is
that this helps to support an inference that subsequent refusals were motivated by the prospect
of exclusion. That Qualcomm entered into FRAND agreements suggests that it contemplated mon-
etizing its patents largely through licensing—and perhaps that it contemplated licensing all com-
ers.45 This is probably a better signal of Qualcomm’s willingness to deal with rivals (absent the
prospect of exclusion) than any licensing deals from the turn of the century.

Moreover, Qualcomm’s FRAND commitments may allay the primary concern that has led courts
to impose tight limits on the antitrust duty to deal. The principal economic rationale for not impos-
ing a widespread duty to deal with rivals—which can almost always be expected to enhance stat-
ic competition—is ostensibly that this is necessary to protect dynamic incentives for investment.
A firm’s investment decision may have been predicated on an expectation of exclusive use of the
fruits of its investment. Such decisions would be undermined by imposing a duty to deal ex post.
However, Qualcomm’s willingness to make a FRAND commitment signals that it anticipated earn-
ing a satisfactory return even (or perhaps especially) when it is required to license all comers.
Indeed, it may have anticipated making such commitment when it originally invested in develop-
ing the technologies embodied in its SEPs. In that case, imposing a duty to deal would not under-
mine Qualcomm’s prior investment decisions.

Conclusion
The district court found that Qualcomm violated antitrust law through a set of contracting practices
that amounted to “de facto exclusive dealing” and through its refusal to license its SEPs to com-
peting chipmakers. In this article, we offer a novel perspective on both findings. First, by exam-
ining the exclusionary contracting practices through the lens of tying, we explain how many com-
mentators who see chipsets as the tying good in the NLNC business practice have things
backwards. And second, we argue that Qualcomm’s FRAND commitments may provide a better
basis for finding an antitrust duty to deal than Qualcomm’s historical contracts with other chip-
makers.

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44 A separate potential problem is that the Patent Act could be interpreted to immunize refusals to license patents, which would preclude the
finding of a duty here. See Erik Hovenkamp, FTC v. Qualcomm, Antitrust, and Intellectual Property, REGULATORY REV. (June 11, 2019),

45 Recall from the discussion above that Judge Koh interpreted Qualcomm’s FRAND commitment to create a contractual duty to license rivals.
That is, she found that the creation of such duty was the intent of the parties, including Qualcomm.
Interview with Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, Federal Trade Commission

Editor’s Note: Maneesha Mithal has served as the FTC’s Associate Director for the Division of Privacy and Identity Protection for 10 years. Ten years prior to that, she moved from private practice to the FTC, where she held a number of positions before becoming Associate Director. During her time as Associate Director, Maneesha has had a front row seat as privacy law and privacy concerns have rocketed to the forefront of all our consciousness as we have all become familiar with privacy acronyms such as GDPR in the EU and California’s CCPA. She has also presided over a period of active FTC education, guidance, and enforcement in the consumer privacy space, playing an important role in last summer’s $5 billion settlement with Facebook over allegations that it had violated a prior consent order governing how it should handle consumers’ personal information.

The interview was conducted for The Antitrust Source by Randal Shaheen, a partner in the Digital Assets and Data Management Practice Group at BakerHostetler LLP, and an Editor of The Source.

ANTITRUST SOURCE: Thank you Maneesha, I know that there’s a lot going on in the privacy world so I appreciate you taking the time to speak with me.

MANEESHA MITHAL: My pleasure.

ANTITRUST SOURCE: Before we delve into substance, could you just talk a little bit about your background and your time at the FTC?

MANEESHA MITHAL: Sure. I have been at the FTC for about 20 years. Prior to that, I was in private practice in the litigation group of a big firm. During my time at the FTC I’ve had many roles. I started off in the International Consumer Protection Division, then I was Chief of Staff for Bureau Director Lydia Parnes. From there I came to DPIP (Division of Privacy and Data Protection) to work on privacy issues, first as a staff attorney and now as the Associate Director. I’ve held this last position for about 10 years.

And I would say that every job I’ve had prior to this has prepared me for being in the privacy space. When I graduated from law school, privacy wasn’t a field or a profession for lawyers. But I had a litigation job and then I had an international job where I did a lot of privacy work and saw how Europeans view privacy. I worked in the FTC’s international division right after the EU/U.S. Privacy Safe Harbor was negotiated.

And then when I was Chief of Staff for the Bureau Director, I got to interact with the Commissioners on a host of issues including privacy. Finally, as a staff attorney in DPIP, I got to work on privacy cases, as well as a privacy rulemaking—the Health Breach Notification Rule. And so over the course of several years, I developed an interest in privacy. Each of the positions I had held prepared me to become Associate Director of DPIP in 2009.
**ANTITRUST SOURCE:** I imagine being in this job for 10 years is like a lifetime in terms of developments in the privacy space.

**MANEESHA MITHAL:** Absolutely, and I think one of the things that’s really interesting is that when I talk to people who just graduated from law school, what an interest there is in the profession and how much growth there is in the profession. For example, when I started going to the meetings of the International Association of Privacy Professionals, it was a couple of hundred people and now it’s several tens of thousands of people in that group, so the profession has grown by leaps and bounds.

**ANTITRUST SOURCE:** There are, as you know, a lot of different divisions at the FTC with different responsibilities. Do you find yourself interacting pretty frequently with the other divisions at the FTC?

**MANEESHA MITHAL:** Yes, we interact with a number of the other divisions in the consumer protection area. For example, the heads of each of the divisions meet every week, and we identify issues where there’s overlap or cases where there may be overlap.

And we’ve worked with other divisions on many matters. The most recent and pretty noteworthy example is the Facebook matter. Our division negotiated the original consent order from 2011 and then, most recently, when there were allegations of non-compliance, the enforcement division got involved as they act to enforce all of our consent orders.

The enforcement division had the lead on the 2019 Facebook settlement, but we worked very much hand in hand with them. Attorneys from both divisions were staffed on the case.

There are also financial privacy issues that come up. For example, the Division of Financial Practices is litigating a case against Lending Club, and there’s a Gramm-Leach-Bliley privacy count in that case, alleging that the company failed to provide a clear and conspicuous privacy notice. Finally, we see cases that have privacy components and deceptive advertising components, and we work together with other divisions on those.

**ANTITRUST SOURCE:** It does seem like the privacy and consumer protection worlds are intersecting more and more.

**MANEESHA MITHAL:** Yes, absolutely, and when you think about privacy law at the FTC, most of it is based on Section 5’s prohibition of unfair or deceptive practices. Our work builds on the work that the Division of Advertising Practices has done on deception and the elements required to establish it.

**ANTITRUST SOURCE:** I want to talk about enforcement in a second, but on the education side, one thing I hear people say is that while they have all these privacy rights, they don’t really know what they are and how to trigger them. Is the FTC engaged in trying to educate consumers with respect to what privacy rights they have and how to assert them?

**MANEESHA MITHAL:** Yes, the FTC has done a lot of work to educate consumers. The most prominent example is our IdentityTheft.gov website where consumers can go if they’ve been a victim of a data breach or if they have been a victim of identity theft. That website is a one-stop shop where consumers can go to learn about these issues and figure out what steps to take.
On privacy more generally, we have a number of materials on our website. We have, for example, videos on how companies use your data. We have more specific items on things such as cookies and how you can opt out of certain tracking online.

But perhaps the most significant way we get our message out to consumers is that every time we have an enforcement action where we think there is an important lesson for consumers, we put out information on our consumer blog. One recent example is a case we brought against a company that manufactured a stalking app, spyware that secretly monitors smartphones. We then worked with the domestic violence community and put out consumer messages on how you could tell if there’s a stalking app on your phone.

We use our cases as a vehicle to talk to consumers. Our award-winning Division of Consumer Business Education also has a lot of modules where they train the trainer. They’ll go out to senior centers or libraries and they’ll put our publications there and then hopefully that has a ripple effect where community leaders can tell people about privacy and other issues affecting consumers.

**ANTITRUST SOURCE:** Many people have noted that the FTC is in somewhat of a unique situation in terms of having five brand new commissioners, though I guess increasingly they’re not so new anymore. How engaged have you found them on privacy issues?

**MANEESHA MITHAL:** All five of them are incredibly engaged, and I think you saw that from some of the big cases we announced last year. They were very heavily involved, and I think they asked a lot of terrific questions.

It’s nice for us as staff who have been here for a long time to have bosses who are really engaged in our work and want to advocate for it. While we knew that Chairman Simons has an extensive antitrust background, we were wondering what his level of engagement would be on privacy. And he has turned out to be incredibly engaged. He has been supportive of all of our big cases, and he came right out of the gate with the hearings on competition and consumer protection, wanting us to look at how we can have better remedies in privacy and data security cases.

He has supported congressional legislation on privacy and data security issues.

**ANTITRUST SOURCE:** Turning to enforcement, we read about data breaches all the time. It seems like almost every day someone has a data breach somewhere. I believe it was Chairman Maureen Ohlhausen who noted that the FTC doesn’t open an investigation every time there’s a data breach. What factors go into deciding if you’re going to investigate a particular data breach?

**MANEESHA MITHAL:** There are a number of factors that go into it. First is the size of the breach. Obviously a larger breach is going to get our attention more than a smaller breach.

Second is the sensitivity of the data. We’d be very interested in a case where we thought that a company might not have protected Social Security numbers, for example, as opposed to a list of names or public information.

A third factor is likelihood of harm. For example, let’s say we hear about a vulnerability in a particular product, but the path to exploiting that vulnerability would require several steps and it would be unlikely for that vulnerability to be exploited. I think we would be less likely to bring that case. Or, suppose there is data that was breached but it was encrypted. I think in that situation, we would probably be less likely to open an investigation unless, of course, the encryption key was included with the data breach.

**ANTITRUST SOURCE:** There’s also been a lot of discussion in the consumer protection space
about remedies, and it’s one of the areas that Chairman Simons and the other commissioners have said that the Commission should take a fresh look at. On the privacy side specifically, there has been some debate about when monetary remedies are or should be available.

What are the range of remedies that are available and how do you settle on a particular remedy in a particular case?

MANEESA MITHAL: If you look at some of our prior orders, you’ll see we have a range of remedies. In deception cases, our settlements typically prohibit specific misrepresentations regarding privacy.

Sometimes, we have provisions requiring deletion of data and notices to individuals. In a case from last year, a company called Unroll.Me operated a service that helped you manage your inboxes. There were some consumers who declined to participate. The company tried to reassure consumers who declined to participate because of privacy concerns and said, “Don’t worry, we won’t touch your personal stuff.” But in fact, we alleged that they took consumers’ e-receipts and shared them with another company that, in turn, used that information for marketing. We alleged that was deceptive.

In addition to a “do not misrepresent” provision, the order included a requirement that the company delete the data that it had collected. It also included a requirement that the company provide notice to consumers about how it used and shared consumers’ information.

We have also sometimes required companies to undergo comprehensive privacy assessments. Facebook and Equifax are notable examples of where we required companies to engage in a comprehensive risk assessment on either privacy or security and to get their programs audited by an independent third party.

Those are some of the types of remedies we look at on the injunctive side. And of course, where we have civil penalty authority, we would look to impose civil penalties on the company in appropriate cases, depending on several factors.

ANTITRUST SOURCE: The Commission ran into a bit of a hiccup in court on some of its injunctive relief language, which caused the Commission to introduce some new language. Has that roll out gone pretty smoothly?

MANEESA MITHAL: Yes. There were a couple of things that happened last year that made us take another look at some of our orders. First is the case you are referring to which is the Eleventh Circuit decision in LabMD, where we had required the company to have a reasonable data security program and the Eleventh Circuit said that requirement wasn’t specific enough.

The second thing that happened last year, as you alluded to, is that Chairman Simons asked us to relook at some of our orders and some of our remedies. Based on that feedback, we’ve announced orders in seven data security cases last year, and if you look at them, I think we have made improvements in three areas.

The first is we’ve made the orders more specific, so in addition to requiring a comprehensive data security program, we have required things like encryption and access controls and training, in part to respond to the Eleventh Circuit. The second thing is we have tried to improve the accountability of third-party assessors. Our prior orders required companies to get outside assessors biannually. We’ve now added a provision that gives the FTC the right to approve the assessor for each two-year period. So, if we are not happy with the job the assessor has been doing, then we can tell the company that they have to pick a different assessor.
The third thing we’ve tried to do is to elevate security and privacy issues to the board level. If you look at some of our new requirements, we talk about having a written program that’s reviewed by the board. And we also talk about requiring individual certification by an officer or a senior person at the company. One of the statistics we’ve seen is that companies are 35 percent less likely to be breached if they have a CISO, a Chief Information Security Officer, who reports to the board. And so that is something that we’re trying to include in our orders.

**ANTITRUST SOURCE:** I’ve been watching this debate with interest because I can remember a time when, with respect to advertising orders, some companies were complaining that the requirement for competent reliable scientific evidence to support certain product claims was too vague. Then the Commission rolled out a new, more specific definition for the term and then many companies began to complain about the lack of flexibility.

**MANEESHA MITHAL:** Yes, exactly, right. Well, we’re seeing the same debate play out in our Gramm-Leach-Bliley (GLB) Safeguards Rulemaking. The GLB Safeguards Rule was passed in the early 2000s and imposes data security requirements on financial institutions. After it passed, companies said, “Oh, this is not specific enough, we need more guidance.” We’ve responded with a notice of proposed rulemaking where we have tried to fill in some more meat on the bones of the GLB Safeguards Rule. In the initial round of comments, we got some supportive comments, but we got some companies saying, “Oh, this is too specific.” We are reviewing these comments and trying to develop a final rule with the right level of specificity.

**ANTITRUST SOURCE:** I’m wondering if you have advice for a company that has a data breach and then they get a CID from the FTC. Obviously they need to begin preserving relevant documents, but is there any other advice you would give in terms of engaging successfully with your staff that companies should think about doing sooner rather than later?

**MANEESHA MITHAL:** Yes, I’d offer a couple of pieces of advice. First is that oftentimes when companies get CIDs, they try in their responses to hew very specifically to the questions that we ask. I would tell a company if you have a story to tell, tell it even if we haven’t asked the specific question. Because a lot of times if a company comes in and tells an affirmative story about the lack of likelihood of harm or the specific pieces of data that were breached and all of their mitigation efforts, in some cases we might elect to close the case early on, rather than having the company spend a lot of money to respond to the CID. I think telling your story and telling it early is really important.

The second thing is that a lot of companies make overbroad assertions of burden. Your objections are much more likely to be successful if you can pinpoint where the problems are and give examples, not just make a broad proclamation of burden. The more specific examples you can provide, the more helpful it is to us.

The third thing I would say is to work with the staff. I think some counsel, particularly repeat counsel, have a tendency to want to escalate up the chain early and I think that’s very counterproductive. The best outcome is to get the staff on your side because they’re the ones who are going to advocate to people at more senior levels. And so I think trying to work with staff and then, only if you don’t get the result you want, going up the chain is the best approach.

**ANTITRUST SOURCE:** OK, don’t jump the line.
MANEESHA MITHAL: Yes, nobody wants a line jumper. Having said that, we don’t punish companies because their counsel does things we don’t like. But I think that there are things you can do to help the process.

ANTITRUST SOURCE: A lot of your work involves tech companies. There has been some discussion about tech company mergers and whether privacy should be a relevant consideration in any antitrust review of proposed mergers. For example, will a merger stifle competition with respect to privacy policies. Do you weigh in sometimes on those issues?

MANEESHA MITHAL: Yes, we work really closely with our counterparts in the Bureau of Competition, particularly the technology enforcement division. We meet regularly. We try to identify issues and areas of interest to both competition lawyers and privacy lawyers. And while I’m not an antitrust lawyer by any means, one thing I understand from my antitrust colleagues is that they do consider aspects of privacy competition in mergers. I expect going forward, we will be working with them very closely on this question.

There are also other examples in the past where we have worked closely with our Bureau of Competition counterparts. An example that comes to mind is the Facebook/WhatsApp merger, where our antitrust colleagues looked at it and the FTC staff sent a public letter to the company reminding them that their respective consumer protection statements continue to apply even after the merger. In general, I think we are seeing more and more interest in the intersection between competition and privacy and it’s something that we are looking at closely.

ANTITRUST SOURCE: January 1, 2020, is the CCPA (California Consumer Privacy Act) rollout in California. I’ve read that the California AG’s office has been staffing up in anticipation of numerous enforcement actions. Do you foresee a role for the FTC with respect to CCPA or is this really more of a state issue?

MANEESHA MITHAL: I don’t see a specific role for the FTC in enforcing the CCPA. That will be up to California state authorities.

ANTITRUST SOURCE: Suppose a company goes further and says, “We’re going to be CCPA compliant not just in California, but nationwide,” and it turns out that in Iowa or Nebraska allegedly they’re not. That doesn’t seem like a promise California can enforce. Is that a claim that the FTC would potentially enforce?

MANEESHA MITHAL: I can’t think of any case where we have done something like that. On the one hand a claim like that could be deceptive. On the other hand, we’d have to determine whether the company was in fact compliant with CCPA in those other states, and it’s difficult to ask us to opine on the parameters of state law and what it does and does not require. I think that’s something we’d have to look at on a case-by-case basis.

ANTITRUST SOURCE: Whether they’re actually compliant with CCPA in other states?

MANEESHA MITHAL: Among other things. But I think this shows one of the things that people talked about at the Congressional hearing this morning—that privacy doesn’t stop at state lines. For example, you’re engaged in a transaction, using a phone with an area code from a place you used
to live in, and you’re sitting in Washington D.C., ordering from a Californian company and shipping the goods to your sister in Ohio. Which state’s privacy laws apply? I think this illustrates the need for federal legislation in the privacy area.

**ANTITRUST SOURCE:** That’s a good segue for my next question, which is about the hearing today and the federal legislation that’s being considered. Has the FTC taken an official position on a federal privacy bill or federal privacy legislation?

**MANEESHA MITHAL:** Yes. The FTC supports a comprehensive federal privacy law. The law we’ve recommended would have four key components. The first is the ability to fine companies for first-time violations. Right now, we have to wait to get a company under order and then we can obtain civil penalties for any violation of that order.

Second is targeted APA (Administrative Procedures Act) rulemaking authority so that we modify regulations and requirements as technology evolves. Third is jurisdiction over common carriers and non-profits. Last is additional resources for the FTC to enforce a new privacy law.

One model that people have talked about as a potentially good model for how to include these types of provisions is COPPA (Children's Online Privacy Protection Act). The FTC has civil penalty authority under COPPA. In terms of APA rulemaking authority and the ability to adapt to new technology, when Congress enacted COPPA in the late 1990s, kids weren’t uploading their photos onto social media. Kids also weren’t carrying around their geo-location information in their pocket. And so we were able to update COPPA in 2013 to take into account these changes in technology, and I think that would be really important in any federal privacy law.

**ANTITRUST SOURCE:** Let me ask you about data exporting. The EU has restrictions on data exports on the theory that you shouldn’t be able to take consumer data out of a country and then it loses whatever protections it originally had. Has the FTC given any thought to whether there should be restrictions like that in any federal privacy law?

**MANEESHA MITHAL:** Yes. The EU has certain restrictions on cross-border data transfers unless the recipient country has adequate protection. I think what we’ve always said in the U.S. is that we really need to balance people’s legitimate interest in protecting the privacy of their data with the need for the cross-border free-flow of data.

We would leave whether to include such protection and how to specifically balance those competing interests to Congress, but I think that to the extent that any requirement is considered along those lines, we’d want to balance the cross-border flow of information with privacy interests.

**ANTITRUST SOURCE:** I’d like to conclude with a couple of general questions. First, are there particular areas of privacy or data security that the FTC is particularly concerned about right now?

**MANEESHA MITHAL:** Sure. An evergreen concern is the misuse of sensitive information. Within that broad category there are a couple of areas we’ve been focused on. The first is health information. We’ve brought a number of cases in the health area, particularly with respect to companies like data brokers and health apps that are consumer facing that are not necessarily covered by HIPAA (Health Insurance Portability and Accountability Act), yet they collect very sensitive data. And so that continues to be an area of interest for us—non-HIPAA covered entities that are collecting health information.
I think another area is monitoring the content of communications. An example of this is the Retina-X case, which is a stalkerware case where the company permitted surreptitious monitoring of the content on someone else’s device.

Kids’ privacy is also always a front-and-center issue for us. On the technology front we continue to be interested both in privacy and data security involving the internet of things, e.g., connected devices. We just settled our D-Link litigation earlier this year, where we alleged there were security vulnerabilities in the company’s routers and internet-connected cameras.

In terms of emerging areas—artificial intelligence, machine learning, algorithmic biases—these are issues that we’ve been working on for the last couple of years. I think you’re going to be hearing more and more about privacy and data security concerns related to these areas. And we had a hearing on artificial intelligence last year.

ANTITRUST SOURCE: How do you and your staff keep abreast of all these developments. It changes so fast, and it can be so complex. I assume you must have non-lawyers who assist you?

MANEESHA MITHAL: Yes, I think it’s really important to stay on top of the technology, and we do that in several ways. We have our Office of Technology Research and Investigations which often helps us generate case leads. This office does original research. For example, they did a recent study where they posted consumer data sets on a site frequented by identity thieves, and they saw that the first use of the data occurred within nine minutes of posting.

A second way in which we get information is through an annual conference called PrivacyCon. As part of that conference we solicit original research on various privacy and data security issues, primarily what are the new issues, what are the things that technologists and academics are concerned about in the privacy area? We get numerous papers, and we review those papers and we generate case leads through that.

We also try to be smart in our hiring. We’ve hired people who have tech backgrounds, who are interested in technology, who have a lot of capacity for looking at technology issues.

The final thing I would say is that we often supplement our in-house expertise with technology experts. In many of our data security cases, we retain consulting experts on data security as the needs arise.

ANTITRUST SOURCE: One last question. The Antitrust Source spans both consumer protection/privacy and antitrust. For those of our readers who may be very familiar with antitrust law but not so much with consumer protection or privacy, what are some essential things antitrust lawyers should know about privacy law?

MANEESHA MITHAL: I was talking to an antitrust lawyer who said that she didn’t appreciate in advising merger clients that the statements the companies made to consumers pre-merger relating to privacy and data security may continue to apply post-merger. The WhatsApp letter that we did a couple of years ago where we reminded Facebook and WhatsApp of their obligations in light of Facebook’s proposed acquisition of the company highlights that. So as you’re advising clients on mergers, make sure that they’re continuing to comply with their commitments to protect data post-merger.

More generally, as antitrust lawyers begin to think about privacy issues, there are a number of privacy laws that practitioners might want to be familiar with. In terms of ones the FTC enforces, you have the Gramm-Leach-Bliley Act that applies to financial institutions, the Children’s Online Privacy Protection Act, the Fair Credit Reporting Act, and of course the Section 5 prohibition against unfair and deceptive practices.
against unfair and deceptive practices. I would obtain a general understanding of those laws and how they might apply to your situation.

We also have a number of tech companies under FTC orders already. Antitrust lawyers might want to look at those for clues about how we think about privacy and what we expect in terms of best practices.

**ANTITRUST SOURCE:** I imagine if you’re doing due diligence for a proposed merger, privacy and data security as well as order compliance, if one exists, have got to be important elements of that.

**MANEESHA MITHAL:** Yes, right, exactly. A lot of times when we see a big data breach occur the companies say, “Oh, this is a company that we had acquired.” But I think it’s important for the company to do that due diligence when they are considering the acquisition, so they know what they’re getting into.

**ANTITRUST SOURCE:** Thank you very much, Maneesha. I think you’ve educated us all and given us a lot to chew on.

**MANEESHA MITHAL:** Thank you, Randy. It’s my pleasure and it’s always good to talk to this audience and let them know what we’re doing.
Litigating in the Post-Godfrey World:
What You Need to Know About the New Ground Rules for Competition Class Actions in Canada

Chantelle Cseh, Alysha Manji-Knight, and Maura O’Sullivan

On September 20, 2019, the Supreme Court of Canada released its long-awaited decision in two companion appeals in Pioneer Corporation v. Godfrey. The Godfrey decision arises out of the Canadian counterpart to the U.S. class action litigation, In re Optical Disk Drive Products Antitrust Litigation. Godfrey has significant implications for current and future class actions seeking damages for alleged conduct in contravention of the criminal provisions of the Competition Act (Canada).

Antitrust lawyers and class action litigators involved in cross-border matters should be aware that Godfrey is likely to result in many Canadian antitrust class actions being far broader in scope than their U.S.-based counterparts, and the decision may have substantial impacts on the potential quantum of liability for Canadian market participants. In particular, the decision impacts and clarifies the state of the law on several long-disputed issues in Canadian competition class action jurisprudence:

(1) Umbrella Purchasers: The Supreme Court of Canada held that “umbrella purchasers,” who purchased products from non-conspirators, have a cause of action under Section 36(1)(a) of the Act if the illegal conduct of the defendants led to higher prices in the overall market. This price movement is known as the “umbrella effect.” The proposed certification of classes including umbrella purchasers has been hotly contested in both Canada and the U.S. The issue of umbrella purchasers will be of particular interest to U.S. antitrust practitioners, as a claim brought on behalf of a class including claimants analogous to umbrella purchasers recently progressed to trial in the case of In re Processed Egg Products Antitrust Litigation. The Third Circuit, which has traditionally been hostile towards umbrella purchasers, granted the claimants standing.

(2) Evidentiary Standard at Certification: At the certification stage, the plaintiffs’ expert methodology need not be capable of either showing that all members of the proposed class were harmed or identifying who was harmed and who was not.

(3) Intersection of the Act and Common Law and Equitable Claims: The statutory cause of action under Section 36(1) of the Act does not supplant common law or equitable claims that are based on breaches of the Act, which may have longer limitation periods and a broader scope for damages.

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1 Pioneer Corp v. Godfrey, 2019 SCC 42 (Can.).
2 Godfrey, 2019 SCC 42 (Can.); In re Optical Disk Drive Prods. Antitrust Litig., No. 3:10-md-02143 (N.D. Cal.).
(4) Discoverability and Fraudulent Concealment: Common law principles of discoverability and fraudulent concealment can toll the two-year limitation period for claims for damages under the Act.

The Court’s decision on these fundamental issues is likely to result in an increased number of complex competition class actions filed in Canada, seeking higher damages on behalf of larger classes of claimants.

**Background**

Godfrey stems from an alleged conspiracy amongst certain manufacturers, marketers, distributors, and sellers of optical disk drives (ODDs) to fix the prices of their products.

In 2010, a proposed class action was commenced in the province of British Columbia, with representative plaintiff Neil Godfrey seeking damages on behalf of all British Columbia residents who purchased ODDs between 2004 and 2010. The proposed class included persons who directly or indirectly purchased products from the alleged conspirators, as well as “umbrella purchasers” who purchased ODDs directly or indirectly from competitors of the defendants that were not alleged to have participated in the conspiracy. Umbrella purchasers are individuals or entities that purchased the products at issue directly or indirectly from non-conspirators, who are alleged to have been overcharged because non-conspirator firms were able to inflate the prices of their products as a result of the unlawful conspiracy (for example, because the conspiracy raised the market price generally).

In May 2016, the Supreme Court of British Columbia certified a class that included umbrella purchasers. The British Columbia Court of Appeal upheld the decision, which was subsequently appealed to the Supreme Court of Canada. The appellant-defendants challenged the lower courts’ decisions on the following grounds:

1. Umbrella purchasers do not have a cause of action under Section 36(1) of the Act, in part because recognizing a cause of action for umbrella purchasers would give rise to indeterminate liability;

2. The plaintiff failed to meet the requisite standard for certifying loss as a common issue, as articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v Microsoft Corp.*;

3. The availability of a statutory cause of action under Section 36 of the Act bars a plaintiff from bringing concurrent common law and equitable claims (i.e., the Act forms a “complete code” for purposes of recovery by plaintiffs); and

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5 ODDs are small pieces of computer hardware which retrieve or store information on optical disks, such as DVDs or CD-ROMs. These drives may be sold alone or may be included in retail electronics, such as DVD players, computers, or stereos.

6 While the plaintiff brought the action against the majority of the defendants in 2010, claims against a subset of defendants were not commenced until 2012. Unlike the U.S., Canada does not have a national framework for multi-jurisdictional class actions. It is not uncommon for separate and overlapping class actions flowing from the same alleged misconduct to be commenced and proceed in multiple provinces.

7 Section 36(1) of the Act provides: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to [specified criminal offenses in the Act] may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.” Competition Act, R.S.C. 1985, c. C-34, § 36(1) (Can.).

(4) Certain of the defendants argued that the claims against them were time-barred by the statutory limitation period under the Act, and that the limitation period could not be extended by the common law doctrines of discoverability and fraudulent concealment.

**Summary of the Godfrey Decision**

In an 8–1 ruling written by Justice Russell Brown for the majority (with Justice Suzanne Côté dissenting in part), the Supreme Court of Canada made the following key rulings.

**Umbrella Purchasers.** The Court held that umbrella purchasers do have a cause of action under Section 36(1)(a) of the Act, based on the plain language of the statute (i.e., Section 36(1)(a) of the Act allows a claim by any person capable of demonstrating harm suffered as a result of the defendants’ actions; umbrella purchasers are included within “any person”).

The Court rejected the defendants’ concerns of indeterminate liability and potential difficulties in proving harm on a class-wide basis, while also noting that the practical difficulties involved in proving harm in umbrella-purchaser cases may ultimately limit the scope and utility of such claims.

In her vigorous dissent, Justice Côté disagreed with the majority’s conclusion on umbrella purchasers, drawing on the principles of remoteness and indeterminacy in concluding that defendants should not be forced to bear liability for the independent pricing decisions of non-parties.

**Evidentiary Standard at Certification.** Revisiting its 2013 decision in *Microsoft*, the Court clarified and confirmed that, at certification, plaintiffs need only provide a “plausible and credible” expert methodology that is capable of establishing that harm flowed to each relevant purchaser level (meaning in most cases that the methodology is capable of showing harm was suffered by at least one or more indirect-purchaser class members). The Court emphasized that, at the certification stage of proceedings, the plaintiffs’ methodology need not be capable of either showing that all members of the proposed class were harmed or distinguishing between those class members that were harmed and those that were not.

Justice Côté cautioned that this finding by the majority could result in the certification of classes for which harm can never be proved for many, if not most, class members. In support of her reasoning, Justice Côté referred to the 2002 decision of the United States Court of Appeals for the Third Circuit in *In re Linerboard Antitrust Litigation*, noting the requirement in U.S. antitrust class action jurisprudence that “sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class.”

The Court also confirmed that, while harm need not be proven for all class members at certification, plaintiffs will eventually need to show who was harmed and who was not, at the ultimate trial on the merits. Notably, there have not to date been any decisions on the merits of a competition class action trial in Canada. Accordingly, it remains to be seen whether, and how, such determinations of harm can be made by the courts.

**Intersection of the Act and Common Law and Equitable Claims.** Based largely on “the presumption that Parliament does not intend to abrogate common law rights,” and that the Act does not “represent a comprehensive and exclusive code regarding claims for anticompetitive

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9 Section 36(4) of the Act provides: “No action may be brought under subsection (1), (a) in the case of an action based on conduct that is contrary to [the relevant offenses in the Act], after two years from (i) a day on which the conduct was engaged in, or (ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.” Competition Act, R.S.C. 1985, c. C-34, § 36(4) (Can.).

10 *In re Linerboard Antitrust Litig.* 305 F.3d 145, 155 (3d Cir. 2002).
conspiratorial conduct,” the Court determined that Section 36(1) does not supplant common law or equitable claims that are based on alleged breaches of the Act. The Court confirmed that alleged breaches of the criminal provisions of the Act can satisfy the “unlawfulness” element found in certain common law torts, including unlawful means conspiracy.

Often pleaded in Canadian antitrust class actions, the tort of unlawful means conspiracy requires not only that the defendants’ conduct was directed at the plaintiff but also that the defendants knew (or should have known) that the plaintiff was likely to be injured, that the plaintiff was, in fact, injured, and that the conduct at issue was unlawful in its own right. Plaintiffs may wish to pursue an unlawful means conspiracy claim alongside claims under Section 36 of the Act in part due to the availability of punitive conspiracy damages under the former.

**Discoverability and Fraudulent Concealment.** Finally, certain of the defendants argued that the claims against them were barred by the statute of limitations. The Court held that the common law principle of discoverability operates to extend the two-year limitation period provided for in Section 36(4) of the Act. In other words, a cause of action under this Section does not begin to accrue for purposes of the limitation period until the underlying material facts are, or ought to have been, discovered by the claimant.

While it was not necessary for the Court to consider the applicability of the doctrine of fraudulent concealment in light of its conclusion with respect to discoverability, the Court clarified that fraudulent concealment is available to a claimant whenever the defendants’ own behavior means it would be “unconscionable” to permit the defendants to rely on the statutory limitation period. Though the Court did not wish to limit the behaviors that could potentially rise to this standard, it offered, by way of example, that fraudulent concealment may be found where the defendants have engaged in “some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts” that has prevented the cause of action from coming to light. As a result, there are likely to be circumstances where plaintiffs are permitted to pursue Section 36(1) claims against defendants even where the underlying actions occurred more than two years prior to the commencement of the claim.

**A Deeper Dive into the Approach to Umbrella Purchaser Claims in Canada and the United States**

Canadian and U.S. courts have taken markedly different approaches with respect to the recognition of antitrust damages for umbrella purchasers.

While U.S. law generally prohibits umbrella purchasers from seeking damages, there is some precedent in support of such claims. The state of the law on umbrella purchasers in the U.S. is decidedly unsettled, with some circuits permitting umbrella purchaser claims, some outright barring them, and the remainder lacking any appellate authority on the issue.

Much of the controversy surrounding this issue stems from the application by U.S. courts of the principles set forth in *Hanover Shoe v. United Shoe Machinery Corp.* and *Illinois Brick Co. v.*

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11 Godfrey, 2019 SCC 42, paras. 85–88 (Can.).
13 This holding is in keeping with the Supreme Court of Canada’s previous decision in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59 (Can.), that plaintiffs in Québec (which employs a civil law system) are able to pursue similar claims based on breaches of the criminal offense provisions of the Act under the Civil Code of Québec.
14 Godfrey, 2019 SCC 42, paras. 51–55 (Can.).
15 *Id. at para. 54 (Can.) (quoting M. (K.) v. M. (H.), 3 S.C.R. 6 (1992), para. 57 (Can.).*)
Illinois, which, unlike case law in Canada, serve to preclude indirect purchaser claims under federal antitrust laws. In some jurisdictions, this prohibition has been interpreted as a blanket prohibition on umbrella purchaser claims, on the basis that umbrella purchasers lack the requisite antitrust standing under Section 4 of the Clayton Act, which is necessary to bring a claim for treble damages. In other U.S. jurisdictions, courts have considered on a case-by-case basis whether or not the proposed umbrella purchaser plaintiffs have established antitrust standing through the application of the antitrust standing test, as they would with any other direct purchaser.

The U.S. antitrust standing assessment is a two-part, multi-factor test that considers: (1) whether the injury pleaded is an “antitrust injury”; and (2) whether the plaintiffs are “efficient enforcers.” With respect to part one, an injury is an “antitrust injury” if it satisfies two criteria, namely the injury is the “type [of injury] the antitrust laws were intended to prevent” and the injury flows “from that which makes defendants’ acts unlawful” (i.e., there is causal link between the injury and the anticompetitive conduct). As set out in Associated General Contractors of California v. California State Council of Carpenters—a case relied upon by the defendants in Godfrey to argue that umbrella purchasers were too remote to allow them to recover damages—part two of the antitrust standing assessment, i.e., the “efficient enforcers” inquiry, is itself a loosely constructed, multipart test. This test examines whether the plaintiffs have a relationship to the underlying facts such that they are appropriately suited to act as private enforcers of antitrust legislation through litigation (e.g., including by considering whether anyone else is better placed to bring the action).

In 2018, the Third Circuit addressed the issue of umbrella purchasers in its decision in *In re Processed Egg Products Antitrust Litigation*. The court found that certain of the plaintiffs were well placed as efficient enforcers and had antitrust standing where they had purchased the relevant egg products directly from the alleged conspirators, regardless of whether the eggs themselves were subject to the alleged conspirators, regardless of whether the eggs themselves were subject to the conspiracy or if their price had simply been moved by the umbrella

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16 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). Though outside the scope of this article, it should be noted that many “Illinois Brick repealer” states have enacted state-level consumer protection acts which permit recovery by indirect or similarly situated purchasers. As noted by the plaintiff in Godfrey, the Supreme Court of Canada rejected Illinois Brick concerns respecting indirect purchasers in *Microsoft*, 2013 SCC 57 (Can.). See also Bodrug et al., supra note 6.


19 For example, in *In re Loestrin 24 Fe Antitrust Litigation*, No. 13-2472-WES-PAS, 2019 U.S. Dist. LEXIS 118308 (D.R.I. July 2, 2019), the court found that umbrella purchasers had successfully demonstrated antitrust standing following a lengthy antitrust standing analysis. In *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 778–80 (2d Cir. 2016), the court, though ultimately denying certification to umbrella purchasers, conducted a thorough analysis of antitrust standing for the umbrella purchasers in that case and further canvassed the mixed state of the law with respect to umbrella purchasers. Only a few months later, a district court bound by Gelboim performed an antitrust standing analysis on a class which included umbrella purchasers and found antitrust standing, such that the class was certified. In *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237 (S.D.N.Y. Sept. 20, 2016). In the Fifth Circuit, *In re Beef Indus. Antitrust Litigation*, 600 F.2d 1148, 1167 n.24 (5th Cir. 1979), confirms that umbrella purchaser status need not be determinative of antitrust standing in the Seventh Circuit, district courts have rejected the concerns of *Illinois Brick* in analyzing antitrust standing for umbrella purchasers and analogous claimants in *In re Copper Antitrust Litigation*, No. 1303, 2000 U.S. Dist. LEXIS 23741 (W.D. Wis. Jul. 7, 2000) and *In re Uranium Antitrust Litigation*, 552 F. Supp. 518 (N.D. Ill. 1982).


23 Id.

24 *In re Processed Egg Products*, 881 F.3d 262.
effect. What differentiated the case from prior Third Circuit decisions was the direct relationship between the plaintiffs and the alleged conspirators, which the court relied upon to establish antitrust standing. This direct relationship provided a basis to distinguish the case from precedents such as Mid-West Paper and Illinois Brick, which otherwise would seem to bar recovery of umbrella damages. With this decision, the Third Circuit effectively certified a class involving umbrella-like claims, which has been described by some as “a crack in the ‘umbrella damages’ prohibition.” While the plaintiffs’ claims of conspiracy in In re Processed Egg Products Antitrust Litigation were recently rejected by a jury at a trial on the merits, the jury’s finding does not negate the significance of this “crack” in Third Circuit jurisprudence.

Unlike the fact-heavy analysis seen in the U.S. jurisprudence relating to umbrella purchasers, the Supreme Court of Canada in Godfrey approached the issue of umbrella purchaser standing as a pure question of law, specifically one of statutory interpretation. For an issue that has created so much tension in U.S. jurisprudence, the Supreme Court of Canada’s analysis was surprisingly simple. The majority relied on the plain language reading of Section 36: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI . . .” and noted that “Parliament’s use of ‘any person’ does not narrow the realm of possible claimants. Rather, it empowers any claimant who can demonstrate that loss or damage was incurred as a result of the defendant’s conduct to bring a claim.” The Court also engaged with the purposes of the Act, concluding that its decision with respect to umbrella purchasers would increase the intended deterrence effect of the statute, while enabling more people suffering harm to be made whole.

The defendants in Godfrey argued that recognizing a cause of action for umbrella purchasers would impermissibly expose the defendants to indeterminate liability. The Supreme Court engaged with, but declined to resolve, the question of whether indeterminate liability is relevant at all in assessing the availability of a cause of action to claimants under Section 36 of the Act. Instead, the Court appeared to be satisfied that the restrictions implicit in the timeframe defined in the class, and the identity of the specific products whose prices were alleged to have been fixed, would be sufficient to permit the alleged conspirators to know the scope of the alleged harm. In contrast to U.S. cases, which have used the complexity of proving damages as a basis for not permitting umbrella purchaser claims, the majority in Godfrey noted that complexity is an unavoidable reality in antitrust cases, and a plaintiff willing to bear the burden of proving a complex case should not be prevented from seeking to do so.

While the U.S. maintains a patchwork of case law relating to the permissibility of umbrella damages and antitrust standing in umbrella claims, these issues are now effectively settled in Canadian law. In sum, umbrella purchaser claims are no more or less permissible in Canadian law.

26 Godfrey, 2019 SCC 42, paras. 57, 61.
27 Id., para. 64.
28 Id., 65–68.
29 Rejecting the majority’s position, the dissenting Justice Côté relied in part upon Illinois Brick and Associated General Contractors in arguing that the “there is a point beyond which the wrongdoer should not be held liable,” and that defendants of price-fixing claims should be liable for losses flowing from their own pricing decisions, not those of third parties. Godfrey, 2019 SCC 42, para. 187.
30 Id., para. 77.
than direct or indirect purchaser claims, and the decision in Godfrey provides no requirement that such claims be subjected to special analysis or additional scrutiny at the certification stage.

Going forward, umbrella purchaser claims are likely to be included in many Canadian class actions alleging anticompetitive conduct (including multijurisdictional class actions). This is likely to result in larger and more complex classes, challenges for plaintiffs related to proving damages caused to umbrella purchasers (should the action proceed to a trial on the merits), and increased costs for defendants at both the certification and the merits stages required to defend such expanded claims.

### Competing Approaches to Proof of Harm at Class Certification in Canada and the United States

**The Canadian approach**

Canadian and U.S. courts have developed distinct approaches to assessing harm at class certification. In the United States, Rule 23(a) of the Federal Rules of Civil Procedure sets out the requirements that a plaintiff must meet in order to succeed in certifying a class action, including in particular numerosity, commonality, typicality, and adequacy (and the predominance requirement under Rule 23(b)(3)). Predominance requires that “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy . . . .”

Individual injury, known as antitrust impact, is “often critically important for the purposes of evaluating Rule 23(b)(3)’s predominance requirement.” To demonstrate predominance, the plaintiffs at certification need not prove antitrust impact, but must demonstrate, based on the available evidence and their proposed methodology, that the antitrust impact is capable of proof at trial across the class. In taking a “close look” at the evidence put forward to show predominance, it is both appropriate, and often necessary, to probe the merits of the claims advanced by plaintiffs at the certification stage.

In determining whether the requirements of Rule 23 have been met, U.S. courts will engage in a “rigorous analysis” of the expert methodologies put forth by the parties at certification. This represents a significant departure from the Canadian approach, wherein certification is viewed as being purely procedural in nature.

The Canadian approach at certification “does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial.” Thus, while U.S. courts are often required at certification to assess the merits of competing expert methodologies purporting to show antitrust impact, such an analysis is

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32 In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008).
33 Id.
35 Microsoft, 2013 SCC 57, paras. 101–02.
36 This is not to say that Canadian courts will never consider the legal merits of a proposed class action prior to certification. For example, in Hughes v. Liquor Control Board of Ontario, 2018 ONSC 1723 (Can. Ont. Super. Ct.), a proposed class action was dismissed on summary judgment before reaching the certification stage given the availability of a complete legal defense. See Kent E. Thomson, John Bodrug, Matthew Milne-Smith, Michael H. Lubetsky & David Feldman, Ontario Court Applies Regulated Conduct Defence on Summary Motion to Dismiss Class Action Alleging Market Allocation Conspiracy, Davies Insights (Mar. 23, 2018), https://www.dwvp.com/en/Insights/Publications/2018/Ontario-Court-Applications-Regulated-Conduct-Defence-on-Summary-Motion-to-Dismiss-Class-Action?mode=pdf.
37 Microsoft, 2013 SCC 57, para. 105. It should be noted that on December 9, 2019, the Provincial Government of Ontario introduced Bill 161, which proposes substantial changes to the provincial Class Proceedings Act, 1993, including by introducing a predominance requirement.
impermissible in Canadian law. The increased propensity to look ahead to trial in the United States may stem in part from a greater body of experience in actually seeing class actions through to trials on their merits.

Moreover, when certifying antitrust class actions, U.S. courts are comparatively intolerant of the presence of uninjured class members. While U.S. courts do not require proof of harm to all members of a proposed class at certification, plaintiffs must be able to put forward a methodology at certification that can ultimately be used to separate the injured from the uninjured class members. Regardless of the availability of such a methodology, for certification to be successful, there cannot be more than a de minimis number of uninjured members in a class. The precise meaning of de minimis remains the subject of much debate. In Godfrey, however, the Supreme Court confirmed that to certify loss (or antitrust impact) as a common issue, plaintiffs need only proffer a methodology capable of establishing that overcharges were passed on to the requisite purchaser level—i.e., that one indirect purchaser, or one umbrella purchaser, suffered a loss, as a result of the alleged conduct.

Godfrey effectively shifts the issue of commonality of harm from certification to trial, and hypothetically permits the certification of a class in which many members either cannot be shown to have suffered a loss, or whose loss is not capable of common proof.

In confirming that “a plaintiff’s expert’s methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level,” the Supreme Court of Canada has endorsed a low bar for certification of antitrust class actions. This makes it increasingly likely that more antitrust class action cases will proceed to trial, which will serve to increase costs to all parties involved in such litigation.

Conclusion

The Supreme Court of Canada’s decision in Godfrey has put to rest several of the most contentious issues recently debated in Canadian antitrust class action litigation. In doing so, the decision has not only set the stage for larger and costlier claims with the addition of umbrella purchasers, it has also increased the potential that battles between plaintiffs and defendants with respect to central issues of proof of harm will be fought at trial, as opposed to at certification. Many proposed antitrust class actions across Canada were stayed pending the outcome of Godfrey—their resumption will no doubt provide an interesting window into its practical implications for both plaintiffs and defendants.

Like many antitrust cases, Godfrey is the Canadian iteration of a class action that was also pursued by plaintiffs in the United States. Given the frequency of antitrust allegations involving harm in both Canada and the United States, it is important that U.S.-based participants in Canadian markets understand the ramifications of the decision in Godfrey on the liability they could face for allegedly anticompetitive conduct.

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38 Hydrogen Peroxide, 552 F.3d at 13–14; Microsoft, 2013 SCC 57, para. 102.
39 In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018); In re Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015); In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013).
40 In re Nexium, 777 F.3d at 9–11 (collecting cases). U.S. case law provides a broad continuum of how developed and particularized such an expert methodology must be at certification. See, e.g., Comcast Corp., 569 U.S. at 27; Nguyen v. Nissan N. Am. Inc., 932 F.3d 811 (9th Cir. 2019).
41 In re Asacol, 907 F.3d at 42; In re Nexium, 777 F.3d at 30–31; In re Rail Freight Fuel Surcharge, 725 F.3d at 244.
Badmouthing Your Competitor’s Products: When Does Denigration Become an Antitrust Issue?

Morten Nissen and Frederik Haugsted

Over the past decade, different competition authorities across Europe have begun to identify and pursue a new form of abusive conduct by dominant companies. The authorities are investigating dominant companies that launch strategic campaigns aimed at restricting or excluding competition by portraying competing products or services as unsafe and/or inefficient, or of significantly lower quality. The authorities have generally found this type of abusive behavior in markets where trust in the products is a decisive element and price competition is less important. We broadly refer to such practices as “denigration” in this article.

Interestingly, the European Commission did not bring these denigration cases even though they are primarily based on the prohibition of abuse of a dominant position in Article 102 of the Treaty on the Functioning of the European Union (TFEU). Instead, this development in case law is driven by the Danish, French, and Italian antitrust regulators and was later confirmed by their national courts. The European Court of Justice has also indirectly accepted denigration as an abuse under Article 101 of the TFEU.¹ Denigration has become a clear example of how conduct addressed by Article 102 can develop through case law to encompass new types of abuses to ensure that companies with significant market power compete fairly.

It is obviously not unlawful to be good at what you do and become the leading, dominant player in the market. However, European case law has consistently applied the principle that dominant remaining companies are subject to a special obligation not to harm remaining effective competition and are, therefore, limited in their actions to only “compete on the merits.” For example, the European Commission has previously stated:

This implies that conduct which may be permissible in a normal competitive situation may amount to an abuse if carried out by dominant firms. Undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.²

The competition-on-the-merits definition in European competition law is vague. Nonetheless, it is generally understood to mean that dominant companies are only allowed to compete by, for example, having better prices or quality, sharper marketing, providing better before and after sales service, offering a wide range of products, and/or being more innovative.

¹ The Consolidated Version of the Treaty on the Functioning of the European Union (TFEU). The TFEU prohibits agreements between companies that prevent, restrict, or distort competition in the EU and that may affect trade between Member States (anticompetitive agreements). In the United States, the equivalent is Section 1 of the Sherman Act.
Denigration as a Concept Caught by Antitrust Rules

In simple terms, denigration is criticizing a competitor’s products or services in a derogatory manner, ultimately with a view to influencing customers’ purchasing patterns. These practices are normally covered by unfair marketing rules in European or national legislation. They are typically enforced through litigation in courts or by complaints to special regulatory authorities. To oversimplify somewhat, unfair marketing rules are aimed at preventing, for example, untruthful information to consumers or aggressive marketing techniques to influence their choices. These rules are usually adequate in dealing with isolated incidences of unfair marketing. Such legislation is often centred around making sure that companies focus on the qualities of their own products, or comparisons with competing products are based on objective facts.

In more serious cases, denigration has also found its way into the antitrust arena. Certain cases have even caught the attention of the European antitrust regulators when dominant companies have instituted systematic campaigns against competitors and denigrating conduct has formed the central part of their in-market communication strategies. Those campaigns had the underlying intent of disseminating negative information to customers about a competitor’s products in order to either create uncertainty and doubt about the competitor’s ability to carry out certain activities or bring into question the quality, safety, or efficacy of their products and services. The most common form of denigration is the dissemination of information based on false or misleading claims concerning competing products. The aim of such conduct is ultimately to tip customers’ purchasing decisions in the dominant company’s favor.

In this sense, denigration of competitors’ products may have the same effects as other well-known exclusionary abuses, but the effects in the market can be more nefarious as they are likely to be longer lasting than purely monetary-based incentives. This is because the unjustified doubts or fears can be overcome only with significant effort by the target company to re-educate customers and disprove the denigrating statements.

The Legal Standard for Bringing a Denigration Claim is Still Evolving

While the European Commission has not made a decision specifically on the issue of a dominant company denigrating rival products, there is a considerable body of law at the national level under Article 102. The fact that the cases were decided under Article 102 and not only under the national equivalents of Article 102 is important. The European Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN). To ensure coherent application of the European competition rules, national competition authorities are required by law to inform and consult with the European Commission’s Directorate-General for Competition at an early stage of the investigation.

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The French Competition Authority (FCA) has, in particular, brought a number of cases in this area. Where appealed, the cases have been upheld in two instances (the cour d’appel de Paris and the cour de cassation).

Importantly, the concept of denigration in those cases seems to have general applicability as they covered diverse industry sectors, such as pharmaceuticals, telecommunications, electricity, and pay-TV. Common to all the cases was that the dominant player attempted to hinder market entry and product switching by conducting systematic in-market campaigns that denigrated competitor products in a number of different ways. Typically, the dominant company conducted a consistent, widespread strategy of misinformation aimed at those who take or influence purchasing decisions. For example, in the pharmaceutical sector, the dominant companies launched campaigns to generate doubt among prescribing doctors as to the safety and/or efficacy of a particular (typically generic) pharmaceutical product. The information systematically provided to doctors by the dominant pharmaceutical company was false (or at least against commonly accepted scientific knowledge) and exploited the well-established relationships that the dominant company’s medical representatives had with doctors across France.

The FCA has consistently held that denigration of competitors or their products does not constitute competition on the merits and, as a result, denigration can constitute an abuse of a dominant position in certain circumstances. The FCA has interpreted denigration under Article 102 and the French equivalent as follows: “Such conduct consists of publicly discrediting an identified person, product or service. It differs from criticism insofar as it comes from an economic player who seeks to benefit from a competitive advantage by penalizing his competitor.”

According to French courts, for denigration to infringe Article 102, four elements are required:

1. There is denigration of a competitor’s product with a view to obtaining a commercial advantage;
2. Taking the pharmaceutical sector as an example, non-price exclusionary conduct such as denigration has been facilitated by the inherently conservative nature of the industry. Trust is a major issue, as noted in French case law:

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4 See, e.g., the decisions by the French authority de la concurrence in the following cases: (1) Décision no. 07-D-33 du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l’accès à l’Internet à haut débit (France Télécom); (2) Décision no. 07-MC-06 du 11 décembre 2007 relative à une demande de mesures conservatoires présentée par la société Arrow Génériques (Arrow Génériques), upheld on appeal to the cour d’appel de Paris on February 5, 2008 (Décision en référé à la Cour: no. 07-MC-06 rendue le 11 décembre 2007 par le Conseil de la Concurrence) and the cour de cassation on January 13, 2009 (Pourvoi: no. 08-12.510); (3) Décision no. 09-D-14 du 25 mars 2009 relative à des pratiques mises en œuvre dans le secteur de la fourniture de l’électricité (GEG), upheld on appeal to the cour d’appel de Paris on March 23, 2010 (Décision en référé à la Cour: no. 09-D-14 rendue le 25 mars 2009 par l’autorité de la concurrence); (4) Décision no. 09-D-28 du 31 juillet 2009 relative à des pratiques de Janssen-Cilag France dans le secteur pharmaceutique (Janssen-Cilag France); (5) Décision no. 10-D-32 du 16 novembre 2010 relative à des pratiques mises en œuvre dans le secteur de la télévision payante (Groupe Canal Plus); (6) Décision no. 13-D-11 du 14 mai 2013 relative à des pratiques mises en œuvre dans le secteur pharmaceutique (Sanofi-Aventis), upheld on appeal to the cour d’appel de Paris on December 18, 2014 (Décision en référé à la Cour: no. 13-D-11 rendue le 14 mai 2013 par l’autorité de la concurrence) and the cour de cassation on October 18, 2016 (Pourvoi: no. X 15-10.384); (7) Décision no. 13-D-21 du 18 décembre 2013 relative à des pratiques mises en œuvre sur le marché français de la buprénorphine haut dosage commercialisée en ville (Schering-Plough), upheld on appeal to the cour d’appel de Paris on March 26, 2015 (Décision en référé à la Cour: no. 13-D-21 rendue le 18 décembre 2013 par l’autorité de la concurrence) and the cour de cassation on January 11, 2017 (Pourvoi: no. 15-17.154).

5 Arrow Génériques, GEG, Sanofi-Aventis, and Schering-Plough, supra note 4.

6 Sanofi-Aventis, supra note 4, ¶ 365. See also Schering-Plough, supra note 4, ¶ 360.
As has been noted at the outset, health professionals are cautious about drugs and tend to favor those they know. In fact, these products have a relatively high degree of rigidity in terms of prescribing physicians and pharmacists, as well as a certain mistrust of novelty, which can only be overcome by precise and objective information.\footnote{Sanofi-Aventis, ¶ 375.}

This is why instilling doubts in healthcare professionals’ minds on key factors such as efficacy or safety can be enough to discredit a new product, as explained by the court:

Therefore, the dissemination of negative information, or even instilling a doubt about the intrinsic qualities of a drug can be enough to discredit it immediately with health professionals. Indeed, if they wonder about its therapeutic efficacy or even its safety, because of the presentation made to them or the answers given to their questions in this regard, they will not take the risk to prescribe it or issue it.\footnote{Id. ¶ 376.}

(2) A link between the dominance and the denigration has to be established.

Relevant in this regard has been whether the dominant company has put in place a comprehensive, widespread, and structured communication to denigrate competitors. In one case the denigration was made possible by the dominant company’s reach in the market, namely a corps of 77 medical representatives covering all of France.\footnote{Schering-Plough, supra note 4, ¶¶ 396–398.}

French case law has also put emphasis on how well respected the dominant company is in the market. For example, health care professionals’ trust in a dominant pharmaceutical company may be misused by that company.\footnote{See, e.g., id. ¶ 398.}

(3) The statements put forward in the market by the dominant company are not based on objective findings or verified assertions.

In the French case law, the communication from the dominant company was centered on instilling doubts in the minds of health care professionals\footnote{Id. ¶¶ 374–376; Sanofi-Aventis, supra note 4, ¶ 444.} and could not be backed up by, or was even contrary to, medical or scientific studies,\footnote{Schering-Plough, supra note 4, ¶ 381.} or simply omitted relevant information. The communications made it difficult for health care professionals to form an objective opinion\footnote{See, e.g., Sanofi-Aventis, supra note 4, ¶ 463.} “by providing information that is organized and structured, but incomplete, ambiguous or presented in such a way as to suggest that substitution [with a generic product] carries a risk . . . .”\footnote{Id. ¶ 378.}

(4) The commercial statements are liable to influence the structure of the market.

Again, as mentioned above, health care professionals are generally risk averse when it comes to patient health and susceptible to negative statements about safety concerns from a trusted source. Such doubts can be enough to potentially influence the structure of the market.\footnote{See id. ¶ 490.} Should an actual impact be proven, this will reinforce the finding of abuse.\footnote{See id. ¶ 512.}
In Italy, a decision adopted by the Italian Competition Authority (ICA) was appealed to the Italian courts that posed questions on the interpretation of EU competition law to the European Court of Justice, Europe’s highest court.

The European Court of Justice found that an agreement between competitors marketing two competing products to communicate certain denigrating information to decision-makers constituted a restriction of competition “by object,” the most severe form of competition law restriction. A “by object” restriction can best be compared to a per se violation in the United States. The case dealt with two pharmaceutical products registered for the treatment of different diseases where one of the products could be used “off label” for treatment of the same disease as the first product. The European Court of Justice concluded:

Article 101(1) TFEU must be interpreted as meaning that an arrangement put in place between two undertakings marketing two competing products, which concerns the dissemination, in a context of scientific uncertainty, to the EMA, healthcare professionals and the general public of misleading information relating to adverse reactions resulting from the use of one of those products for the treatment of diseases not covered by the MA for that product, with a view to reducing the competitive pressure resulting from such use on the use of the other medicinal product, constitutes a restriction of competition “by object” for the purposes of that provision.

The Advocate General elaborated further in his very concise opinion: “To my mind, the concerted communication of misleading allegations of the lesser safety of one medical product compared to another is, by its very nature, harmful to the proper functioning of normal competition, so much so that an examination of its effects on competition is not necessary.” The Advocate General continued, pinpointing the very essence of denigrating behavior:

[C]oncerted communication of those allegations impairs the quality of the information available on the market, and consequently, adversely affects the decision-making process of those who create the demand for the two products concerned. Such concerted communication is, in itself, likely to reduce, if not suppress, demand for the first product to the advantage of the second.

Europe’s highest court stressed that by providing misleading information on the safety of pharmaceutical products “given the characteristics of the medicinal products market, it is likely that the dissemination of such information will encourage doctors to refrain from prescribing that product, thus resulting in the expected reduction in demand for that type of use.” Interestingly, the Advocate General defined misleading information to include not only incorrect (i.e., erroneous) information, but also “information which is in itself correct but is presented selectively or incompletely where, because of that manner of presentation, the information disseminated is likely to mislead those who receive it.” He went on to state that “[i]n my opinion, omitting to state that the risks created by using the medicine are uncertain, or exaggerating such risks with a lack of

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18 Id. ¶ 95.
20 Id. ¶ 157.
21 Hoffmann-La Roche, supra note 17, ¶ 93.
22 Hoffmann-La Roche, supra note 19, ¶ 158.
objectivity with regard to the available evidence, may render the concerted communication of those risks misleading. 23

Thus, while not a case on abuse of dominance, the European Court of Justice nonetheless confirmed that putting forward misleading information to stakeholders in a given market can—in certain circumstances where such information has an impact on customers’ purchasing decisions—constitute an infringement of competition law.

Most recently, in January 2019, the Danish Competition Authority (DCA) found that the Danish business unit of the ambulance service company, Falck, had abused its dominant position on the market for ambulance services by excluding a Dutch competitor, BIOS, from the market by disparaging BIOS. The DCA concluded that Falck had implemented a general strategy to exclude BIOS from the market by creating uncertainty and concern about BIOS as a supplier of ambulance services and, in particular, as an employer. Prior to the implementation of the strategy, Falck had lost a public tender for the supply of ambulance services in the region of Southern Denmark. Among other things, Falck’s strategy consisted of secretly sending negative stories about BIOS to the press and to their own employees, thus purposefully aiming to influence paramedics from applying for a job at BIOS. It is important to understand that the Danish market for ambulance services is characterized by a limited workforce as all educated paramedics are already employed and the education of new paramedics is time-consuming and expensive. Therefore, it was a well-known fact that BIOS had to take paramedics from Falck in order to be able to deliver its services in the region, which made denigration an effective non-price exclusionary strategy. Falck’s conduct was effective in making it difficult for BIOS to recruit paramedics. Ultimately BIOS left the market as it could not deliver its services under its contract with the regional contracting authority. The DCA found it especially relevant to the finding of an abuse that Falck had channelled its negative communication through third parties to hide Falck’s involvement, which made the misleading information seem more trustworthy and objective.

Falck argued for the case to be assessed under the Danish Marketing Practices Act and not competition law. The DCA rejected this argument and stated that even though the practices had many similarities to conduct governed by the marketing rules it did not preclude antitrust enforcement.

As illustrated above, the case law relating to denigration in France and at the EU level requires the communication to be overtly false, misleading, or based on unverified assertions. However, the DCA was not particularly concerned whether Falck’s communication strategy was wrong or misleading. Instead, the DCA found that some of the information might even have been factually correct, but the mere fact that the communication strategy was carried out covertly through third parties was itself misleading and manipulative. Accordingly, the conduct did not constitute competition on the merits. The DCA held that it is sufficient in order to establish abusive behavior that the dissemination of information takes place in a covert manner in order to make the information seem more credible and objective, regardless of whether the information is factually accurate or not. The DCA attached substantial weight to the fact that Falck’s covert behavior—in the DCA’s opinion—departed significantly from behavior considered to be within the scope of competition on the merits.

23 Id. ¶ 160.
In its decision, the DCA did not refer to the prior case law from France but put forward its own criteria. The DCA based its decision on the following five elements: (1) Falck enjoyed a very strong position on the market and several pieces of evidence suggested that BIOS was excluded from the market due to Falck’s general exclusionary strategy; (2) the Danish market for ambulance services was characterized by a limited workforce since all educated paramedics were already employed and the education of new paramedics was time-consuming and expensive; (3) Falck’s overall exclusionary strategy was implemented in a covert manner, which consequently meant that the real mastermind behind the denigration was unknown to the paramedics in the region of Southern Denmark; (4) Falck, as a dominant undertaking, had a special obligation to compete only on the merits in the market for ambulance services, for example, by having better prices or quality and/or being more innovative; and (5) Falck’s activities on a long-term basis were likely to foreclose other players from entering the market for ambulance services.24

When assessing the second element (the limited workforce in the Danish market for ambulance services), the DCA considered that Falck’s exclusionary strategy made it more difficult to both enter and establish a position in the market.25

For example, the introduction of disincentives in the form of doubts or fears were explicitly laid out in the agenda for strategic meetings between Falck and the communication agency that was hired to perform the denigration.26 The DCA inferred that Falck’s ultimate purpose in its marketing campaign was to harm its competitor BIOS, based on instructions such as: “We need to create alarm”; “the other supplier should be presented as unsafe and unprofessional”; and “we need to create uncertainty about the BIOS business model and financial standing.”

Moreover, a specific headline in an agenda for a meeting between Falck and the communication agency identified the major risks and threats associated with the strategy. Among other examples, the agenda included a bullet identifying a risk that “Falck may be disclosed as the instigator of the negative campaign activities.”27 This indicated that Falck was very aware that its strategy could be criticized.

As mentioned above, and contrary to the French and European case law, the DCA explicitly stated that the veracity of the denigrating information was of less importance, probably due to the covert nature of the dissemination. Unfortunately, the DCA’s reasoning was never tested in court as Falck chose not to appeal the case, so it is difficult to be certain whether the mere fact that information was disseminated in a covert manner is enough to trigger Article 102.

In December 2019, Falck was fined DKK 30 million (approximately USD 4.5 million) for “a very serious infringement” of the competition rules. The fine is the highest ever in Denmark for a competition law infringement. In its press release, the DCA explicitly stated that Falck had neglected, as a dominant undertaking, its special obligation not to harm effective competition by executing a strategy intended to damage the image of the competitor, BIOS.28

25 Id., ¶¶ 1019–1021.
26 The DCA decision is available only in Danish. The following quotations from the decision have been translated by the authors’ firm and are not official.
27 Falck, supra note 24, ¶ 161.
**Denigration Is in the Same Category as Financial Disincentives**

As clarified by the Advocate General in the Roche/Novartis case, denigrating behavior impairs the quality of information available on the market and consequently adversely affects the decision-making process of buyers.

At its core, therefore, denigration is aimed at changing the mind-set of customers, not by providing financial incentives, but by introducing disincentives in the form of doubts or fears about the competing products in the minds of the decision-makers. Where applied in a systematic and continuous manner, denigrating conduct may be exclusionary. The effects of denigrating measures are not very different from conduct by a dominant company aimed at providing incentives to change market behavior that falls well outside the scope of competition on the merits. For example, providing financial incentives to customers for them to delay, cancel, or otherwise restrict the commercialization of the planned launches of competing products, are all classified as so-called naked restrictions in EU case law.

Accordingly, in terms of effects on the structure of the market, there is no material difference between disincentivizing customer switching through payment of incentives (for example, naked restrictions) and through denigrating the competing products. This is described in the case law as positive incentives that "tend to remove the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition." In *Intel*, the Court of First Instance found that the naked restriction constituted an abuse of dominance because "[a] marketing restriction which targets a competitor’s products undermines the competition structure, since it impedes in a targeted manner the placing on the market of that competitor’s products." In addition, the Court of First Instance stated in *Intel* that “it should be recalled that a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult,” and went on to state that “[t]he only interest that an undertaking in a dominant position may have in preventing in a targeted manner the marketing of products equipped with a product of a specific competitor is to harm that competitor.”

Thus, in the special market circumstances which makes denigration a viable strategy to hinder competitor access, non-financial disincentives have been found to have the same effect as financial incentives.

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29 *Hoffmann-La Roche*, supra note 19, ¶ 157.

30 See Case COMP/C-3/37.990—Intel, Comm’n Decision § 4.3 (May 13, 2009) (summary at 2009 O.J. (C 227/13), https://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf), ¶ 4.3, upheld on appeal to the General Court, see Case T?286/09—Intel, Intel Corp v. Commission, 2014 ECLI:EU:T:2014:547 (GC June 12, 2014), ¶¶ 198–220, but overturned on appeal to the European Court of Justice. In its review of the General Court’s judgment, the European Court of Justice did not focus on the issue of naked restrictions but on the right for a dominant firm, in situations where this had been an issue during the administrative procedure, to rebut a presumption that a rebate scheme is capable of restricting competition. It should be mentioned that Intel had not raised any objective justifications or efficiency claims with respect to naked restrictions in the administrative proceedings. *Intel*, supra note 30, ¶ 1676. It can therefore be argued that the General Court’s reasoning on naked restrictions still stands.

31 *Intel*, supra note 30, ¶ 176.

32 Id., ¶ 207.

33 Id., ¶ 201.

34 Id., ¶ 204.
No Limits in Case Law on Type of Products Affected by Denigration

It could be questioned whether the French case law on denigration is limited to originator-to-generics competition. However, the case law has not restricted the applicability of the theory of denigration to only one type of product. In the Roche/Novartis Opinion dealing with denigration of pharmaceutical products, it was specifically highlighted that the relevant products were competing originator products “based on different active substances”\(^{35}\) where the scientific debate concerning the therapeutic equivalence of the two medicines was “still ongoing”\(^{36}\) and “where the comparative safety of the two medicinal products is the subject of scientific uncertainty.”\(^{37}\)

Indeed, a full review of the French case law reveals that the case law is also relevant in situations of head-to-head competition between competitors that have differing product offerings aimed at the same market (e.g., energy or telecommunications services). This could be highly relevant for competition cases in the pharmaceutical sector involving denigration of, for example, biosimilars.\(^{38}\)

The Concept of Denigration as an Abuse of Dominance Is Confirmed but Subject to Differing Legal Tests Across Europe

The different European denigration cases have so far turned on the dominant company targeting the most important non-price parameters to be able to compete in a market. They also generally conclude that the customer decision-making process can be influenced by instilling fears or concerns in decision-makers and stakeholders by a systematic and consistent denigration campaign. Just as safety and effect are essential parameters in the pharmaceutical sector, paramedics comprise an essential non-price competition parameter in the sector of ambulance services.

Therefore, it seems that abuse of a dominant position as a consequence of denigrating conduct is more likely to be sanctioned in sectors where non-price competition parameters are more relevant than price. The more important a given non-price competition parameter is, the more effective it is when a dominant company tries to exclude competitors through either false or misleading information, or tries to make information credible in a covert manner.

The development of the denigration cases demonstrates that the scope of competition law is ever expanding. The fact that national competition authorities, and not the European Commission, have led a novel application of competition law is also worth noticing. This seems to have resulted in slightly different national interpretations of the law, in spite of the ECN being involved in coordinating the cases. It will be very interesting to see if the European Commission will take on the issue in future abuse of dominance cases to provide guidance to the national competition authorities, and promote uniformity.

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\(^{35}\) Hoffmann-La Roche, supra note 19, ¶ 2.

\(^{36}\) Id. ¶ 138.

\(^{37}\) Id. ¶ 144.

This development would not be surprising since denigration to change the mind-set of customers is not an unknown concept in European case law. Similarly, the inclusion of denigration as a specific example of conduct constituting an abuse of dominance covered by Article 102 could be justified by the European Commission based on the same basis as so-called naked restrictions.
Case law concerning two-sided markets continues to develop since the Supreme Court’s *Ohio v. American Express* decision. In that case, the Court defined a two-sided platform as a platform that “offers different products or services to two different groups who both depend on the platform to intermediate between them.”¹ As the Federal Trade Commission explained in the *FTC v. Surescripts, LLC* complaint, these platforms are unique because they often exhibit what economists refer to as “network effects,” where the two different groups find increasing value in the platform as the group on the opposite side of the platform grows.² Depending on the strength of these network effects, they can present significant challenges to an incumbent platform’s rivals trying to compete by developing a critical mass of users on each side of the rivals’ platforms.

As explained in more detail below, antitrust enforcers should be mindful of three particular aspects of antitrust law when analyzing platform conduct. First, the market should be defined clearly and accurately under existing case law concerning the substitutability of alternative products and services. Second, in analyzing harm to competition, both sides of the two-sided market should be considered if the platform at issue is a two-sided transaction platform or if it exhibits substantial indirect network effects. Lastly, in analyzing whether the platform conduct has an actionable exclusionary effect on rivals, the focus should be on whether customers are deprived of making a meaningful choice to conduct business with the allegedly dominant platform’s rivals.

As large technology firms have grown over time in the digital era, they have found themselves navigating the post-*Amex II* developing area of antitrust law covering platform conduct. Meanwhile, politicians and regulators have been questioning whether the firms are unfairly using their alleged market power to compete against rivals on digital platforms. These concerns generally are framed within a “big is bad” viewpoint.³ But antitrust law does not condemn firms for growing in scale, even to the size of having a monopoly; rather, the law condemns the acquisition or maintenance of monopoly power by means of anticompetitive conduct.⁴ With the antitrust platform case law still developing, and government agency investigations still underway, the antitrust inquiry for examining platform conduct begins with defining the relevant market that is allegedly harmed by the

³ See, e.g., Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N. Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html. (Senator Elizabeth Warren proposing a regulatory plan that would roll back some acquisitions by and split up the businesses of tech companies such as Facebook and Amazon).
⁴ United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (“The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”) (emphasis added).
conduct. The analysis then proceeds to determining whether the subject firm has significant market power, and if it does, whether it is using that power to harm competition in the relevant market.

**Market Definition**

Defining the market is the first important step in determining whether platform conduct is potentially harmful to competition. The Supreme Court’s *Amex II* decision recognizes that defining a market as two-sided is central to the inquiry because if the two-sided market is characterized as having significant indirect network effects, the plaintiff challenging the conduct cannot succeed on its claim alleging anticompetitive conduct without taking into account effects on both sides of the platform.\(^5\)

Note that *Amex II* concerned a claim against American Express Co. under Section 1 of the Sherman Act, which condemns agreements and combinations that unreasonably restrain competition. Notably, in *Surescripts*, the court distinguished *Amex II*, noting that the case “concerned an alleged restraint in violation of Section 1” against American Express (not a monopolist) with the plaintiffs failing to offer evidence of supracompetitive prices for credit-card transactions.\(^6\) This article assumes a court would apply *Amex II*’s two-sided market definition approach to a claim under Section 2, which prohibits the illegal acquisition or maintenance of monopoly power and attempts to monopolize.

Courts and government regulators will also presumably be mindful of defining a relevant antitrust market that reflects commercial realities. If the market definition does not align with the commercial realities, there is a risk that these antitrust enforcers will over-estimate the platform’s market power and mistakenly identify platform conduct as competitively dubious.\(^7\) As with traditional markets, two-sided markets are defined in terms of (1) the reasonable interchangeability of the products or services at issue,\(^8\) and (2) the geographic area in which the firm at issue competes and to which consumers can turn for alternative sources of goods or services.\(^9\)

In *Amex II*, the Supreme Court defined the relevant market as credit-card networks connecting merchants and cardholders, which are two-sided platforms that “offer[] different products or services to two different groups who both depend on the platform to intermediate between them.”\(^10\) One important way that two-sided platforms differ from traditional markets is that the former often exhibit “indirect network effects,” i.e., “where the value of the two-sided platform to one group of participants depends on how many members of a different group participate.”\(^11\) To ensure sufficient participation from these two groups, two-sided platforms must be sensitive to the prices they charge each side. Thus, two-sided platforms often “cannot raise prices on one side without risk-

\(^5\) *Amex II*, 138 S. Ct. at 2280–86.

\(^6\) Memorandum Opinion on Motion to Dismiss at 16, No. 1:19-cv-01080-JDB, Dkt. No. 45 (D.D.C. Jan. 17, 2020). Nevertheless, the court found that even if *Amex II* applies to Section 2 claims, “the FTC still pleaded sufficient facts addressing the totality of both two-sided markets.” Id. at 17.

\(^7\) *See Amex II*, 138 S. Ct. at 2285 (“Without a definition of [the] market there is no way to measure [the defendant’s] ability to lessen or destroy competition.”) (internal citations omitted); *Grinnell Corp.*, 384 U.S. at 587 (Unless the relevant market is defined with “relentless clarity,” “the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.”).


\(^10\) *Amex II*, 138 S. Ct. at 2280.

\(^11\) Id. at 2280 (citing DAVID EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 25 (2016)).
ing a feedback loop of declining demand.”12 As a result of these indirect network effects, “the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides’ demand elasticity, not market power or anticompetitive pricing.”13 However, when the impacts of indirect network effects and pricing are minor (e.g., they only run in one direction), a court may consider only one side of the platform.14 This will be a fact-specific inquiry. The Court notably labeled a subset of two-sided platforms as transaction platforms, both sides of which must be evaluated for purposes of the antitrust analysis since, by their transaction-facilitating nature, they “exhibit more pronounced indirect network effects and interconnected pricing and demand.”15

With the DOJ’s and FTC’s investigations of large tech companies in their early stages, reports indicate that the agencies are conducting interviews with relevant market participants, such as merchants that use the Amazon.com Marketplace platform that connects merchants and consumers.16 Like credit-card networks in *Amex II*, Amazon Marketplace arguably meets the four elements of a transaction platform that the dissent identified were present in the majority opinion, i.e., the platform’s (1) offer[s] different products or services, (2) to different groups of customers, (3) whom the ‘platform’ connects, (4) in simultaneous transactions.17 Similar to American Express, Amazon Marketplace offers different services to different groups of customers—to merchants, it offers access to prospective purchasers via the platform; to consumers, access to various products and pricing information from merchants, including Amazon itself—and it connects consumers to merchants in simultaneous transactions. In investigating Amazon’s and other tech companies’ digital platforms, the agencies will likely have to evaluate both sides of these platforms when they are either (1) two-sided transaction platforms or (2) two-sided platforms in which the impacts of indirect network effects and relative pricing in the market are substantial or at least more than “minor.”18

*Amex II*’s guidance on evaluating two-sided markets is important because a finding of a two-sided transaction platform or a two-sided platform with significant network effects likely increases the challenger’s initial burden in rule of reason cases for demonstrating anticompetitive effects from the subject restraint(s). The reason is because, as *Amex II* teaches us, the challenger cannot focus on only one side of the market in arguing anticompetitive effects.19 For example, allegations of harm to competition, such as price increases, “on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform’s services.”20 Indeed, as another court recognized, *Amex II* affects the overall risk

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12 Id. at 2285 (citing Evans & Schmalensee, supra note 11, at 674–75; Evans & Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 680–81 (2005)).

13 Id. at 2285–86.

14 See *id.* at 2286.

15 Id. at 2278; see also US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 57 (2d Cir. 2019).


17 *Amex II,* 138 S. Ct. at 2298 (Breyer, J., dissenting); see also US Airways, 938 F.3d at 58.

18 See *Amex II,* 138 S. Ct. at 2286 (“A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.”); see also Complaint ¶¶ 22–28, Surescripts (FTC’s complaint against Surescripts explains that the platforms at issue have significant indirect network effects which creates a “chicken and egg problem,” as bringing more users on board on one side of the market requires more users on the other side.).

19 *Amex II,* 138 S. Ct. at 2287.

20 *Id.* at 2286.
assessment for the plaintiffs and government having to prove their antitrust cases involving a two-sided market, including by perhaps increasing the difficulty in proving damages.\textsuperscript{21}

What remains to be seen is how courts would respond to a market definition allegation that digital platforms, like Amazon's Marketplace, do not compete with traditional brick-and-mortar retailers.\textsuperscript{22} For example, does Amazon's Marketplace compete with other online platforms, like Walmart.com, as well as traditional brick-and-mortar retailers? Because courts have traditionally defined relevant antitrust markets as including products or services that are reasonably interchangeable for the same purposes, the relevant market for digital platforms likely include both competing platforms and traditional brick-and-mortar retailers that serve as reasonable substitutes. That is, in all likelihood there exists a cross-elasticity of demand between these services such that the sales of traditional retailers are responsive to price changes by their digital retail counterparts. To reach a different result would require a finding that consumers do not view traditional retailers as suitable alternatives merely because shopping with them may require a physical trip to a store, rather than the click of a button or touch on a screen. Such a finding could unreasonably shrink the interchangeability standard that governs market definition. This inquiry is important because the market definition analysis will significantly affect any determination of market power and/or whether conduct actually has the potential to substantially lessen competition.

**Market Power**

The next step in the inquiry into platform conduct is typically assessing the platform's degree of market power in the defined relevant market. In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the Court defined “market power” as “the ability to raise prices above those that would be charged in a competitive market.”\textsuperscript{23} And in *United States v. E.I. du Pont de Nemours & Co.*, the Court defined “monopoly power” as “the power to control prices or exclude competition.”\textsuperscript{24} These terms generally refer to the ability of a firm to "achiev[e] supra-competitive prices by exercising either the power to control prices or the power to exclude competition."\textsuperscript{25} The reason that these terms will be relevant is because courts evaluating the competitive effects of unilateral conduct will examine whether the subject firm even has sufficient market power to affect the relevant market in which it competes. Generally, for such unilateral conduct to be problematic in the eyes of courts and antitrust regulators, the firm must have some appreciable degree of market power such that its alleged conduct can plausibly have an anti-competitive effect on the relevant market.


\textsuperscript{22} For example, in connection with the Amazon probe, the FTC has “asked [merchants] what percentage of revenue their business derive[s] from Amazon versus other online marketplaces like Walmart Inc. and EBay Inc., suggesting regulators are skeptical about Amazon’s claims that shoppers and suppliers have close alternatives to the Seattle-based company,” Soper & Brody, *supra* note 16 (emphasis added). See also Spencer Soper, *Amazon Is Accused of Forcing Up Prices in Antitrust Complaint*, BLOOMBERG (Nov. 8, 2019), https://www.bloomberg.com/news/articles/2019-11-08/amazon-merchant-lays-out-antitrust-case-in-letter-to-congress (A merchant’s “allegations propose narrowly defining Amazon as the dominant online marketplace with few competitors, which makes its merchant customers more susceptible to its demands.”) (emphasis added). Cf. Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc., 985 F. Supp. 2d 612, 621 (S.D.N.Y. 2013) (dismissing complaint where plaintiffs defined the relevant market as only encompassing e-books but offered no allegations as to why print books should not be included).


\textsuperscript{24} 351 U.S. at 391.

One particularly noteworthy concept that arose in the wake of antitrust scrutiny of tech firms is whether their access to “big data” confers upon them or otherwise enhances their market power. This idea, however, is in tension with the position of some economists that access to big data cannot, in and of itself, confer upon a firm, or enhance a firm’s, market power. Whether a firm’s access to big data has any bearing on its degree of market power is an issue that will likely be determined or litigated in future antitrust cases covering platform conduct. Suffice it to say that the inquiry will concern whether a firm’s access to big data allows it (and whether it has already begun) to charge supracompetitive prices, restrict output, hinder innovation and quality, and/or exclude competition, including by erecting barriers to entry or expansion.

**Firm Conduct and Anti- and Procompetitive Effects**

Platform conduct is among the more hotly debated topics in antitrust after *Amex II* and the commencement of government investigations into big tech firms. On one hand, conduct that has traditionally been condemned as anticompetitive, such as certain exclusive dealing arrangements, will likely continue to draw the attention of antitrust regulators. On the other hand, there is a host of firm conduct that some may view as deserving of antitrust scrutiny, even though there is little or weak precedent for condemning such conduct. In any event, assuming a firm has market or monopoly power in a properly defined antitrust market, the inquiry into the firm’s conduct will analyze whether the firm’s conduct has caused a substantial anticompetitive effect that harms consumers in the defined market. If so, the burden shifts to the defendant, who must proffer a procompetitive rationale for the conduct. If the defendant makes the showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive benefits could have been achieved through less restrictive means.

The recent *US Airways* and *Surescripts* cases offer guidance on how courts and regulators might scrutinize allegations of anticompetitive conduct in platform cases.

*US Airways, Inc. v. Sabre Holdings Corp.* *US Airways* concerned contracts between US Airways, an airline company, and Sabre, the largest global distribution system (GDS) in the country with a market share of more than 50%. US Airways and other airlines listed their tickets on GDSs like Sabre to reach travel agents that use the GDS platform and their traveling customers. With respect to the travel agent side of the platform, Sabre structured its contracts with travel

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26 “Big data” generally refers to “data that contains greater variety arriving in increasing volumes and with ever-higher velocity. . . . Put simply, big data is larger, more complex data sets, especially from new data sources . . . [that] are so voluminous that traditional data processing software just can’t manage them.” See Oracle, *WHAT IS BIG DATA?: The Definition of Big Data*, https://www.oracle.com/big-data/guide/what-is-big-data.html.


29 See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (“If the plaintiff puts forth evidence of restricted output and supra-competitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. . . . To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.”).

30 See, e.g., *Surescripts* (FTC complaint against Surescripts alleging Surescripts illegally maintained its monopolies in the United States eligibility and routing markets for the electronic prescribing of pharmaceutical drugs).

31 See *Amex II*, 138 S. Ct. at 2286.
agents to include minimum-booking thresholds, which did not allow the travel agents to collect incentive payments from Sabre unless they used Sabre’s GDS platform for a minimum volume of bookings. Most travel agents therefore used one GDS platform, which resulted in airlines like US Airways using a particular GDS platform to reach the travel agents and their traveling customers. On the airline side of the platform, Sabre insisted on “full content” provisions that generally required airlines like US Airways to refrain from disadvantaging Sabre’s platform vis-à-vis competing channels of airline ticket distribution, such as the plaintiff’s own website.32

The Second Circuit analyzed the record evidence and determined that because Sabre was a transaction platform, under Amex II, US Airways had to demonstrate harm to competition by taking into account both the travel agent and airline sides of the two-sided market.33 This determination is significant, as the court makes clear in its discussion of US Airways’ theory of damages. Because its theory was that the challenged restraints in the 2011 contract with Sabre caused it to be charged supracompetitive fees, the damages had to reflect supracompetitive prices “only to the extent that the net prices charged to travel agents . . . and airlines . . . combined exceeded the prices that would have been charged in a competitive market.”34 Thus, the finding that the Sabre GDS was a two-sided transaction platform meant that “the payments made by Sabre to travel agents would therefore necessarily reduce any damages US Airways might receive.”35

The case raises an interesting question as to how contractual restraints like the full content provisions insisting on equal treatment with competition can be viewed as anticompetitive. According to US Airways, it had to agree to the full content provisions out of a “fear of being removed from the Sabre GDS or being retaliated against, for example, through ‘display biasing,’ which means reordering search results as they appear in the system to disadvantage a particular airline.”36 In other words, US Airways feared that if it did not submit to Sabre’s contractual restraints, US Airways would be subjected essentially to the same type of display bias that Sabre itself was trying to avoid.

There are a growing number of similar antitrust complaints regarding platform conduct that results in bias to a particular business.37 The viability of these allegations of anticompetitive conduct may ultimately hinge on findings of sufficient market power and anticompetitive effects that

32 Specifically, there were four “full content” provisions at issue: (1) the “No Better Benefits” provision required US Airways to provide all available US Airways fares to customers through the Sabre GDS; (2) the “No Discounts” provision required any fares offered by US Airways through the Sabre GDS to be no more expensive, and no less comprehensive, than fares offered by US Airways through any other forum; (3) the “No Direct Connects” provision prohibited US Airways from requiring or inducing any travel agent to book on the US Airways website, or otherwise circumvent the Sabre platform; and (4) the “No Surcharge” provision prevented US Airways from charging higher fees to travel agents for booking through the Sabre platform than for booking through other means. See US Airways, 938 F.3d at 51.

33 Id. at 58.

34 Id. at 59.

35 Id.

36 Id. at 51 (quoting US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2017 WL 1064709, at *5 (S.D.N.Y. Mar. 21, 2017)). Cf. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 400 (3d Cir. 2016) (no substantial foreclosure where contract term between defendant and hospitals merely required hospitals to provide unrestricted access so that the availability of the drug was not more restricted or limited than the availability of competing drugs, and the only threat of not accepting the term was a lost discount). Similarly, reports indicate similar complaints being made by merchants who choose to use Amazon’s Fulfillment by Amazon logistics service in order to increase their visibility on Amazon Marketplace. See Spencer Soper, Amazon Is Accused of Forcing Up Prices in Antitrust Complaint, BLOOMBERG (Nov. 8, 2019), https://www.bloomberg.com/news/articles/2019-11-08/amazon-merchant-lays-out-antitrust-case-in-letter-to-congress.

have no countervailing procompetitive benefits. With case law on platform conduct still in its early stages, it will be important for courts to examine closely allegations of anticompetitive conduct to avoid the risk of finding false-positive instances of anticompetitive conduct. Such false positives can stunt innovation by imposing unnecessary and excessive litigation costs on firms that primarily compete by innovating.38

**FTC v. Surescripts, LLC.** FTC Commissioner Noah J. Phillips has identified **FTC v. Surescripts, LLC** as an informative case reflecting the FTC’s current position concerning platform conduct.39 Surescripts is a health information technology company holding an allegedly dominant position in the complementary markets of electronic prescription routing and eligibility. In the routing market, Surescripts facilitates the transmission of prescription information from a prescriber to a pharmacy. And in the eligibility market, Surescripts facilitates the transmission of a patient’s formulary and benefit information from a payer to a prescriber’s electronic health record (EHR).40

In its complaint, the FTC alleges that Surescripts has illegally maintained its monopolies in both the routing and eligibility markets in three primary ways. First, Surescripts allegedly began a loyalty pricing program conditioning discounts and increased incentive payments to routing and eligibility customers on their exclusive or near-exclusive loyalty to the Surescripts platforms. Second, Surescripts allegedly engaged in non-merits-based competition, such as threatening customers that attempted to deal with Surescripts’ competitors. Third, Surescripts allegedly contracted with a potential competitor in a way that required the latter to be a reseller for Surescripts rather than develop into a viable competitor.41

Setting the backdrop for its allegations of anticompetitive conduct, the FTC characterizes both the eligibility and routing markets as two-sided with significant indirect network effects. Under such conditions, there appears to exist a “chicken-and-egg problem.” That is, to develop a viable competing platform in markets where there exists allegedly dominant platforms, the market entrant or nascent platform must develop a critical mass of customers to join one side of the network by convincing them they will be able to access enough customers on the other side. And to develop such a critical mass, new platforms rely on customers that “multi-home” (i.e., customers who use more than one platform). Customers are more likely to multi-home when they face little to no cost of doing so. This, the FTC alleges, creates a significant concern over Surescripts’ conduct—it allegedly increases the costs of multi-homing for customers, thus making it virtually impossible for competitors to solve the chicken-and-egg problem.42

The FTC’s characterization of the market as setting the stage for potentially anticompetitive conduct again raises an interesting question: how much deference and leeway should we give to the incumbent platforms? Presumably the significant indirect network effects do not come about by accident; rather, they likely are the product of brand loyalty prompted by procompetitive benefits, such as innovation, only made possible (at least initially) by the business acumen of the incumbent platform. Are we to fault these platforms for being first in time, especially when their research

38 See Answer to Amended Complaint 1–4, Cameron v. Apple Inc., No. 4:19-cv-03074-YGR (N.D. Cal. Nov. 11, 2019), Dkt. No. 74 (describing how the Apple App Store “has revolutionized the way consumers find, purchase, and install software applications, and the way developers sell those software applications to consumers”).


40 Complaint ¶ 1, Surescripts.

41 Id. ¶¶ 3–5.

42 Id. ¶¶ 26–32.
and development is the primary driver in creating and/or expanding the market in which the incumbent platforms compete? Courts will presumably be cautious in determining where they draw the line and condemn conduct as anticompetitive, at the risk of penalizing incumbent platforms for their superior business acumen and efficiency, thereby chilling the very competition that the antitrust laws were designed to encourage and stimulate.

An example of a potential false-positive identification of anticompetitive conduct may exist in Surescripts. There, the FTC alleges that Surescripts engaged in de facto exclusive dealing by charging discounted prices or providing increased incentive payments to customers that are loyal, while charging non-discounted prices or providing lower incentive payments to those that were not loyal. That is, the discounted prices or increased incentive payments were conditioned on the customers’ exclusive or near-exclusive use of the Superscripts eligibility and routing platforms.43 But at least one other circuit has rejected this theory in some circumstances. For example, in Eisai, based on the record before the Third Circuit, the court of appeals stated that “the threat of a lost discount is a far cry from” anticompetitive conduct that the court previously condemned, such as a threat to cut off supply or the bundling of rebates across a diverse line of products to foreclose competition from competitors that did not offer equally diverse product lines.44 The Third Circuit’s finding was motivated by its effort to avoid condemning loyalty discounts, which can effectively lower prices for consumers and thereby further antitrust law’s consumer welfare goal.

The district court in Surescripts held that the FTC adequately stated a claim for exclusive dealing. Specifically, the court credited the FTC’s allegations that:

[T]he threat of increased prices had the “practical effect” of preventing customers from working with other e-prescribing platforms, “since doing so would trigger the massive penalty provisions in their contracts with Surescripts . . . and cost routing [and eligibility] customers millions of dollars through increased prices or, for EHRs, decreased incentive payments.”45 Notably, this decision is in tension with Eisai’s rejection of the proposition that a “threat of a lost discount” prevented customers from being able to meaningfully choose between suppliers. The Surescripts court was persuaded by the FTC’s claim that “[defendant’s] loyalty programs—and the implicit threat to charge non-exclusive customers higher prices—prevented the entrance of competitors into e-prescribing markets” and led, in turn, to “increased prices for pharmacies and PBMs.”46 The “threat to charge non-exclusive customers higher prices” is simply another way of saying there existed a “threat of a lost discount.” As the case moves forward with discovery, an important inquiry for the dispute should be whether Surescripts’ customers had the ability to switch some or all of their business to a competing platform. In other words, the proper focus should be on whether the allegedly dominant firm has substantially foreclosed competition by “us[ing] its power to break the competitive mechanism and depriv[ing] customers of the ability to

43 Id. ¶¶ 66–82.
44 Eisai, 821 F.3d at 407. However, FTC’s allegations that Surescripts’ contracts with customers went further than a conditional discount, requiring that non-loyal customers repay discounts previously applied, finds support under Third Circuit law as evidence of coercion. See ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (recognizing that customers were “essentially forced” to disadvantage defendant’s competitor where refusal invited a risk of having to repay contractual savings or supply shortages).
45 Memorandum Opinion on Motion to Dismiss, supra note 6, at 12.
46 Id.
make a meaningful choice.”47 Through this lens, the standard by which the firm conduct is judged is in line with the consumer welfare prescription that guides antitrust law. Logically, under this approach, testimony from pharmacies, payers, and EHRs (i.e., Surescripts’ customers) will be crucial in determining whether Surescripts’ conduct has violated the antitrust laws.

However, adding a layer of complexity to this inquiry is Amex II’s holding that for two-sided transaction platforms (and two-sided platforms with substantial indirect network effects), courts must consider the effects on both sides of the two-sided platform. Thus, it is possible that customers on one side of a platform are perfectly content with the platform’s services (e.g., consumers who use Facebook’s or Google’s services free of monetary charge), whereas customers on the other side might feel subject to coercion (if, e.g., advertisers using Facebook’s or Google’s services alleged a cognizable theory of anticompetitive conduct). Under these circumstances, courts will likely assess the significance of the effects on the relevant market, including whether the indirect network effects are so minor that both sides of the platform need not be considered for purposes of the analysis.

Conclusion

In sum, it remains to be seen how much leeway courts will give to platforms that capitalize on the existence of indirect network effects, impose switching costs on customers, or otherwise engage in efforts that promote single-homing. Nevertheless, the consumer welfare standard that has been the bedrock of antitrust law for decades dictates that the focus for judging platform conduct should be on whether customers are deprived of the ability to make a meaningful choice. As the case law develops further, the government agencies investigating platform conduct will presumably pay close attention to the options available to the customers of these firms. This should include an examination of whether indirect network effects having any impact on the growth of competitors is actually posing a threat to competition, as opposed to being the result of innovation, efficiency, and superior business acumen that the antitrust laws should encourage. ●

47 Eisai, 821 F.3d at 404 (quoting ZF Meritor, 696 F.3d at 285). Cf. Jonathan M. Jacobson & Daniel P. Weick, Countering Exclusion: The Complainant’s Obligation, 81 ANTITRUST L.J. 423, 440 (2017) (“[W]here the concern is that one or more exclusionary contracts have been used to increase the costs of entry/expansion, asking whether an equally-efficient rival could plausibly counter them strikes a good balance between avoiding undue condemnation of vigorous competition and having an analysis so rigid that it fails to condemn seriously anticompetitive conduct.”).