Interview with Terrell McSweeny, Commissioner, Federal Trade Commission
The FTC’s newest Commissioner sat down with The Source to discuss a wide range of topics, including antitrust enforcement in digital and high-tech markets, how the use of algorithms could impact the meaning of “agreement,” efficiencies, standard setting, and unfair competition.

Interview with Yuriy Terentyev, Chairman, Antimonopoly Committee of Ukraine
The Chairman of the Antimonopoly Committee of Ukraine discusses the contentious investigation of Gazprom, alignment with the EU, recent changes to Ukraine merger law and its amnesty program, his past and current priorities, and the conflict with Russia.

DOJ’s Catch-22: Corporate Criminal Antitrust Targets Walk a Blurry Line with Culpable Employees
Craig Seebald and Brian Schnapp discuss recent statements, by the Antitrust Division regarding the need for targeted companies that desire cooperation credit to discipline possibly culpable employees and the tension that creates with companies’ concurrent obligation to provide the Division with all relevant facts.

Applying the Non-Discrimination Requirement of FRAND When Rates Change
Allan Shampine takes a closer look at the requirement that patented technology incorporated into standards be licensed on nondiscriminatory terms (the “N” in FRAND), particularly the implications of rate changes in subsequent licenses on existing license agreements.

A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner’s Perspective
Alexander (Alexi) Maltas, Tony Lin, and Robert F. Baldwin III take us inside the process by which the FCC and DOJ approve or block mergers in the communications and broadband Internet industries. Understanding the similarities and differences between the agencies can help practitioners representing communications companies better navigate the review process.
Interview with Terrell McSweeny, Commissioner, Federal Trade Commission

Editor’s Note: Terrell McSweeny was sworn in as a Commissioner of the Federal Trade Commission on April 28, 2014, to a term that expires on September 25, 2017. Prior to joining the Commission, McSweeny served as Chief Counsel for Competition Policy and Intergovernmental Relations for the U.S. Department of Justice Antitrust Division. She joined the Antitrust Division after serving as Deputy Assistant to the President and Domestic Policy Advisor to the Vice President from January 2009 until February 2012.

In this interview with The Antitrust Source, Commissioner McSweeny discusses the importance of antitrust in digital and high-tech markets, privacy and data protection, patent holdup, recent FTC merger investigations, the efficiency defense, Section 5, the FTC’s Part III process, the SMARTER Act, consumer redress in consumer protection settlements, and advice for young antitrust lawyers starting out their careers.

Editor Hugh Hollman conducted this interview for The Antitrust Source on June 26, 2016.*

THE ANTITRUST SOURCE: Before joining the Commission and prior to your time at the Department of Justice, you served as the Deputy Assistant to President Obama and Domestic Policy Advisor to Vice President Biden. How has this experience affected the way you look at cases that come before the Commission?

TERRELL MCSWEENY: I think it has affected the way I approach my role as a Commissioner in two ways.

First—and this is a lesson that Vice President Biden taught me as I worked on policy with him over a number of years both in the Senate and in the White House—it’s very important to understand how things work when you’re trying to make the right decision about policy or enforcement. So for me in my current job that translates to really wanting to understand the businesses, the markets, the technology products, the issues that we’re talking about, and the mechanics of how they work. I find that spending time to really learn about a business or product is essential to understanding competition and the dynamics of competition that I need to think about as an enforcer.

The second way it has impacted the way I do my job is that I really see that competition enforcers can play a very valuable role as an advocate for competition in the broader policy processes and discussions around issues like patent reform and innovation policymaking, for example. So I usually am very supportive of competition enforcers engaging in policy discussions with agencies, government officials, or other stakeholders who may need help understanding how competition should factor in the decision that they’re making.

* The Antitrust Source thanks Professor Ariel Ezrachi for providing the interview venue in Oxford, England, and gratefully acknowledges Steven Pet’s assistance in preparing for this interview. The views expressed in this speech are Commissioner McSweeny’s own and do not necessarily reflect those of the Commission or any other Commissioner.
**ANTITRUST SOURCE:** You’ve recently suggested that antitrust enforcers have tools flexible enough to monitor—and, when appropriate, challenge—anticompetitive conduct and mergers in digital and high-tech markets. Those markets, as you’ve previously pointed out, present some unique challenges, including the possibility that overly aggressive enforcement will discourage innovation. How, if at all, do concerns about adverse innovation effects affect the FTC’s enforcement decisions in those markets?

**TERRELL McSWEENY:** Well, I think we need to continue to be good antitrust enforcers even in high-tech markets precisely because protecting competition is critical to optimizing innovation. So innovation is a very important consideration.

I’m mindful of the criticism that these markets are so dynamic that enforcers should stay out of them because they can’t understand them, or can’t move quickly enough, or that their involvement may chill innovation. I understand the criticism—but I don’t think it forecloses the role enforcers need to play, whether it’s considering innovation effects or quality effects in merger analysis or whether it’s thinking about ways in which new entrants—especially entrants who might be bringing innovation into the marketplace—are being excluded through anticompetitive means.

So yes, I think competition is different in high-tech markets. For example, there are network effects. There are two-sided platforms. In the platforms there are free services. Price effects may play a different role in that situation. So it might be that price isn’t as important a consideration as an innovation effect or a quality effect because of the differences. But I think we’re capable of understanding the differences using our authorities judiciously. And I think we still have a role to play.

**ANTITRUST SOURCE:** Many would say that the main goal of antitrust enforcement is to protect and promote “consumer welfare,” which is often defined as in terms of price, quantity, and quality. But some have suggested that in digital and high-tech markets, antitrust enforcers should also consider privacy and data protection when evaluating consumer harm.

Do you think we should broaden our traditional understanding of “consumer welfare” to also include privacy and data protection; and, if so, how might enforcement agencies protect consumers who would need to trade lesser privacy or data protections for lower prices or higher quality?

**TERRELL McSWEENY:** Yes. This is certainly a hot topic among antitrust practitioners, enforcers, and scholars, especially in Europe and the United States at the moment.

The FTC is a unique agency because we are both a consumer protection/data protection privacy enforcer and also a competition enforcer. I acknowledge that may give us a little bit of an advantage in thinking about how to get the balance right around these issues.

A lot of privacy issues are in fact multidimensional policy questions that are broader than the scope of competition analysis. These issues require either appropriate consumer protection enforcement or may even require legislation or regulation in order to address them. The question of how to strike the right balance between protecting consumers’ data security and privacy while also allowing for innovation is, in many cases, beyond the scope of antitrust law enforcement.

At the same time, privacy issues can also be relevant to competition analysis in certain situations. If we were assessing a proposed transaction in a digital market, for example, and saw competition occurring over privacy or security, we would look to see whether there might be a diminution in that competition post-merger. We would think of that as an innovation or quality effect.
The FTC has certainly been thinking about these issues before I joined the Commission, and many of us have expressed an openness to the idea that if there was a real diminution of competition occurring on privacy, then that would be a dimension of competition that we would want to examine carefully.

In our digital economy, we are now connecting so many more things together, particularly with the advent of the Internet of Things, that big data and privacy issues may arise in markets that may not have traditionally confronted these issues. So I think competition enforcers are going to continue to encounter these questions, and I think they are going to need ways to work with the consumer protection/privacy enforcers to get the response right.

I think the FTC does that well partly because the agency is both a competition enforcer and data protection enforcer. Our Bureau of Competition considers competition issues, and in situations where there’s a privacy issue but it’s not a competition concern, they alert our Bureau of Consumer Protection and allow them to react to the privacy concern.

So, for example, in the Facebook/WhatsApp merger, as I understand it—again, it was before I was at the FTC—the Bureau of Competition looked at the potential competitive impact of the transaction. This included its impact on privacy. In this situation, Facebook had one set of privacy policies and WhatsApp, a messaging app, had adopted more protective privacy policies. So the Bureau of Competition looked at it, but they didn’t conclude that there was a competition concern posed by the transaction.

They did, however, alert our Bureau of Consumer Protection, which handles our privacy cases. During their review, they observed that people on WhatsApp were sharing their data under one set of terms, while people on Facebook were sharing their data under a second set of terms. In a letter to Facebook, the FTC’s Bureau of Consumer Protection noted that both companies needed to honor the privacy promises they had made to consumers and that it would be a problem if Facebook were to reach into the WhatsApp data and retroactively change how it was handled without getting the affirmative consent of consumers. Our Consumer Protection Bureau noted that consumers need to have clear notice and choices if there were changes to how the privacy policies were going to work and recommended consumers be offered the opportunity to opt out of future changes to how newly-collected data would be used. If you fast-forward in time to this past spring, WhatsApp announced that it’s adopting end-to-end encryption, which to me is a very good privacy feature, as well as a good security feature. I don’t know what role, if any, the BCP letter played in their business decision to do that, but from my perspective it’s a good outcome because we have a messaging app that’s now more privacy/security protective. Innovation occurred in the market and it benefitted consumers.

ANTITRUST SOURCE: One of the areas you have spoken a lot about is the threat increasingly sophisticated algorithms and machine learning pose to high-velocity computerized markets. Some academics have argued that these technological developments are rendering traditional antitrust concepts, like “agreement” and “intent,” less and less relevant. Do you agree?

TERRELL McSWEENY: I absolutely am fascinated by this area and I actually think it’s something that we all need to understand and study more. Certainly, the concept of agreement is going to be relevant. I don’t think we’re entering a world in which agreement and intent are suddenly going to be non-factors. But I think what’s really interesting about the literature and about the issue is that algorithms and the machine-learning software running them could do things that may be anticompetitive, and it might be that they do them without the human beings who are operating them really
engaging in the conduct themselves. So that’s the interesting frontier of antitrust law question: As competition enforcers, what do we do in that situation?

Right now the only example of an enforcer actually taking action for price fixing by algorithm is the DOJ in the posters case, which I think is a really interesting case. But there the human beings agreed to use the technology—the algorithm—to price fix, and there was a very clear human role. And so the DOJ case is an example of the impact that pricing algorithms could have, but certainly there DOJ alleged that the humans consciously and intentionally agreed and used the algorithms in a very specific way.

**ANTITRUST SOURCE:** You’ve also spoken previously about having technologists become part of the team. I think this is one area in particular where that could be very useful.

**TERRELL McSWEENY:** Yes, I think that’s true. Just to get back to my first point, understanding the technology and understanding how it works is going to be even more important for enforcers as the technology becomes more intelligent and complex. I actually think it’s going to continue to be really important for businesses too because the human beings using the technology are going to want to make sure that it’s not creating liability problems for their companies.

We’ve been talking in our country and at the FTC for a while about privacy by design, and now we talk about privacy and security by design. I actually think we’re moving into a world in which we need to also implement data ethics by design. What I mean by that is that privacy and security by design represent the concepts of building these values into products in the design phase, having not just a top-down/back-end approach to solving security and privacy problems, but to having it be part of the whole culture of an organization—to having a process in place whereby privacy and security values are reflected all the way along a product development life cycle, especially in a software technology company.

Data ethics by design is also something that I think companies are going to need to start to implement more broadly. This includes how a company responds when an algorithm starts having a disparate impact on a group of people. Does the company have the ability to audit itself in order to understand how some of the technology is working, to black-box it and see what’s happening? Does it have a response plan in place when it sees a result that it didn’t intend? Does it understand the quality of its data? Because very often, of course, algorithms are neutral on their face, and then something funky happens with the results.

I think we are all going to need to have ways in which we understand how algorithms are operating on large sets of data. And when results occur that are not intended, there should be some sort of response plan in place to address them.

**ANTITRUST SOURCE:** It sounds like a particular challenge for in-house counsel, something else that they have to prepare for.

**TERRELL McSWEENY:** I really think it’s the next phase. We have a report out at the FTC, called *Big Data: A Tool for Inclusion or Exclusion*, which goes through a bunch of these considerations and says there are of course all kinds of laws that protect people in the brick-and-mortar world—civil rights laws that protect from discrimination, equal opportunity laws, fair credit laws, and the like.²

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These laws apply in the digital world as well. So I think a lot of in-house counsel are going to be thinking a bunch about these issues in coming years.

ANTITRUST SOURCE: Turning now to mergers, over the past year or so the FTC has sued to block an unprecedented number of mergers and defended those actions in court. What do you think accounts for that uptick in litigation?

TERRELL McSWEENY: I think the data suggest that, in fact, it has been a very active cycle of mergers in the United States. We are certainly seeing combinations that we think are anticompetitive and we are challenging them. I think that’s correct. When we see a problem we should take action.

You’re right, we’ve had a lot of litigation. I’m not quite sure I have the explanation for that. It may be that we are mindful of what our own past study of our remedies and other recent scholarship have told us, which is that we also need to be careful about not accepting remedies that don’t fully restore the competition and address the harm that we can identify.

Certainly, like DOJ, I think the FTC is not afraid of litigating. To be honest—it’s in the public record—not all of our challenges have succeeded. But I think we’ve shown a willingness to persevere, and I would expect the agency will continue to be very active as a merger enforcer.

ANTITRUST SOURCE: The Supreme Court has never recognized an efficiencies defense, and yet the Commission, as you’ve noted before, carefully scrutinizes alleged efficiencies during its merger review. Assuming that merging parties can present substantial, non-speculative, and merger-specific efficiencies, when, if ever, do you think that such a showing should suffice to save an otherwise anticompetitive merger, and does the Commission give equal weight to out-of-market efficiencies?

TERRELL McSWEENY: We absolutely do consider efficiencies. I think real cognizable efficiencies that are greater than the harm, especially if it’s quantifiable in some way, would be the scenario in which the efficiencies cancel out the harm.

The issue is that we have to have enough information to be able to really evaluate the efficiencies. They cannot be hypothetical—I mean, that generally is the challenge, right?

From time to time I hear the criticism that we don’t ever credit any efficiencies. That’s just not the case. We do. It’s just that very often we either don’t have enough information to know if it’s a real efficiency or we look very carefully at them and decide some of them may not be cognizable or merger-specific or that they will not be passed through to consumers sufficiently to outweigh the anticompetitive effect of the transaction.

In terms of out-of-market efficiencies, I generally would be inclined to follow the Merger Guidelines’ approach, which is that the out-of-market efficiencies have to be inextricably linked to the efficiencies within the relevant market.

ANTITRUST SOURCE: On several occasions you’ve discussed that the Commission unanimously decided to close the Zillow/Trulia investigation because there was insufficient evidence that the combined firm would raise prices and insufficient evidence that the combined firm would have reduced incentives to innovate. Do you think the Commission should consider challenges to mergers that pose little threat of a post-merger price increase but a substantial likelihood of adverse innovation effects?
TERRELL McSWEENY: Yes. That’s the short answer. I think the reason I talk about this case, and one of the reasons I thought it was important for us as a Commission to explain what we did in it, was there was quality competition occurring on the free side of the two-sided platform in Zillow/Trulia. There was a lot of competition for consumer clicks in the form of new products and features to attract people to the products.

So I thought it was a good case in which to really look at what we thought the impact on innovation and quality competition was going to be. Partly because of potential entry and some other things happening in the market, it wasn’t a situation where we should have blocked the transaction because of those effects.

But going forward, this is an important question for competition enforcers: What do we do with a two-sided platform when there are no price effects on the pay side but there are innovation and quality effects? Can you bring a standalone case? I think the answer is definitely yes. I think that flows from the Guidelines. And we need to continue to, especially in a digital economy, think about those issues.

ANTITRUST SOURCE: Recent empirical work purports to show that U.S. antitrust agencies have historically been more likely to clear anticompetitive mergers than to challenge procompetitive mergers. Do you believe that under-enforcement is a systematic problem? Has this work influenced your decision making when you are confronted with close cases? And are there any merger cases during your tenure as Commissioner that you wish the FTC had brought?

TERRELL McSWEENY: Let me say at the outset that, in general, I think both U.S. agencies have been doing an excellent job. The staff are thoughtful and really smart about the way they approach their work. There is a really interesting body of research about these issues. John Kwoka is one of the thought leaders in this space. What he’s trying to do is assemble a big set of data to help us understand whether our concern over avoiding false positives is leading to under-enforcement. So I read his book with interest and his recent paper on the structural presumption in merger cases. I think these are important pieces of information for enforcers to consider.

Certainly it has an influence on me to the extent that we are having a broader conversation about the level of concentration in different markets across our economy. There are many people who are engaged in the discussion about the potential impact of concentration in the labor market and others things that may not necessarily be within the ambit of competition enforcers. But for me it says a couple of things. One, that we need to be mindful of this analysis and research and see how it develops going forward and see where it takes us. And two, that we really need to be thinking about our regimen when it comes to remedy and whether we are accepting remedies that are insufficient.

I am very interested in and looking forward to the results of the current remedy study that the FTC staff is undertaking. I think that will provide us with some really helpful information about the success of the Commission’s remedies. So I am looking forward to synthesizing that information with this other research and continuing to think about whether we are systematically under-enforcing.

ANTITRUST SOURCE: Last year the Commission entered into consent decrees to resolve competitive concerns in the matters of Holcim/Lafarge and ZF/TRW, where the markets were heavily concentrated. Do you think presumptions regarding concentration—for example, four-to-three or three-to-two mergers will result in anticompetitive coordination—are appropriate? Under what circumstances, if any, would the Commission permit a four-to-three merger to go through?
TERRELL McSWEENY: The Guidelines definitely establish a presumption for market power. I think presumptions can be very useful. They are sort of an efficiency tool, if you think about it. They’re not a blunt instrument. They are just the beginning of a more extensive analysis. The FTC also considers entry, efficiencies, and other factors in instances when the application of the presumption might be misplaced or harmful to consumers. I think that’s the appropriate approach. Presumptions play a useful role, but it would be wrong to assert that they are in and of themselves a bright-line rule.

The second part of your question, which is under what circumstances would we permit a four-to-three merger, again I think the answer to that—and this is an answer I think most competition enforcers give a lot because it is the correct one—is that every transaction should be handled on a case-by-case basis. The facts of the individual case matter. In each case enforcers must assess all the dimensions of competition that are occurring, fully evaluate it, understand the efficiencies and understand specific features of the markets. Each of these considerations also depends on the circumstances that are presented at the time of the case.

ANTITRUST SOURCE: Recently, the Commission voted out a complaint alleging that Endo Pharmaceuticals entered into anticompetitive reverse-payment agreements to prevent generic competition for two of its branded drugs. The Commission decided to seek disgorgement in federal court rather than pursue Part III administrative proceedings. Why do you think that filing in federal court was a better option than using the Part III process. If making harmed consumers whole through disgorgement was the concern, would follow-on private litigation have achieved that result?

TERRELL McSWEENY: I’ll keep my comments short on this since this is a case that is an active case at the moment, and in litigation. I have said in the past that I think it’s appropriate for the Commission to seek remedies like disgorgement in situations where the harm is quantifiable and we have the appropriate information and the appropriate set of facts to do so. I felt this was one of those cases.

ANTITRUST SOURCE: The second follow-on question I think you have more or less addressed. But do you think that the Commission should release a policy statement explaining what cases it will bring administratively and what cases it will bring in federal court?

TERRELL McSWEENY: I think it is a case-by-case determination. We have issued Commission statements about when it is appropriate to seek disgorgement, which can be an important tool. The recent Commission statements in Cardinal Health and Cephalon are two examples. So while I don’t see the need for a policy statement at this time, I think we need to be clear about when we are using certain procedures and why we’re using them.

ANTITRUST SOURCE: The FTC was recently handed a big win in its challenge to the Staples/Office Depot merger. What lessons do you think the private bar should glean from Judge Sullivan’s opinion, which not only ruled in the FTC’s favor but sided with the FTC on virtually every significant issue in the case?

TERRELL McSWEENY: It was an important win for the Commission, and really credit goes to the Commission staff who litigated the case. I think what was important about it in many respects is that a good number of the findings Judge Mehta also made in Sysco as well—namely, that the
mergers of the number one and number two firms in the market was a significant competitive problem that would likely harm competition and consumers. Both judges also contemplated the role of presumptions in antitrust law and found that they can be very useful in trying to understand the cases before them. I think both the Sysco opinion and Staples opinion are two very important wins for the Commission and for merger enforcement.

**ANTITRUST SOURCE:** You’ve spoken recently about the potential role that competition law can play in the standard-setting context. And you pointed out that when courts have been asked to determine FRAND rates in “hold-up” cases their findings have been orders of magnitude lower than the rates sought by the SEP holders. In general, do you think that courts confronted with these questions have struck the right balance between encouraging innovation and discouraging FRAND-encumbered SEP holders from engaging in anticompetitive “hold-up”?

**TERRELL McSWEENY:** I think that the results in these cases are very, very promising. It makes sense to me, and I’m glad to see that after extensive fact-finding that courts have concluded in these cases that the royalty rate that’s appropriate for this kind of IP is roughly equal to its value before it was incorporated into the standard.

We have this discussion sometimes about whether hold-up exists, and I think that the royalty rates in these cases are illuminating in that respect because the royalties being asked for were far too high and were really the result of the patent being included in the standard.

I think the U.S. courts have been doing a good job striking the right balance to both resolve the royalty disputes but also to allow injunctive relief when it’s appropriate. So overall, the system is working relatively well.

The other thing that’s very encouraging is that it appears that in most cases private parties have been able to negotiate the FRAND rates without having to resort to courts. I think it’s an important area for sure and there is more that could be done to clarify certain aspects of FRAND commitments, especially in the standard-setting organizations. But the courts seem to be making, in my view, very good decisions in this area.

**ANTITRUST SOURCE:** So you would leave it to the courts and the parties to decide?

**TERRELL McSWEENY:** I think the appropriate relief in most of these cases is a royalty. If the parties can’t agree, then they should go to courts. I won’t take off the table the fact that there could be a role for antitrust enforcers in this space though.

**ANTITRUST SOURCE:** In August of last year the FTC released a Statement of Enforcement Principles regarding the FTC’s authority to challenge unfair methods of competition under Section 5 of the FTC Act. Some have criticized the Statement’s brevity and argue that it provides insufficient guidance to the private bar. Others have defended the Statement and see it as an important achievement.

In what ways do you think the Statement can serve as a useful tool to private lawyers counseling clients, and what role do you see the Statement and Section 5 more generally playing in antitrust enforcement going forward?

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TERRELL McSWEENY: I think the Statement was a useful document that reaffirmed some of the guiding principles that we were already applying in the Section 5 context. It really reaffirmed the approach that Section 5 is a competition statute and that we ought to be using competition frameworks in applying it. It also reiterated, importantly, that we will continue to pursue invitation-to-collude cases as a standalone use of Section 5. I think that's an important use of it that's well established.

It has been about a year since we issued the Statement. I don't see any big changes in what we have been doing, but I wouldn't expect to because the Statement reflected the principles that we have been following all along. I think it was helpful in making sure that we were stating publicly for people the way in which we were approaching our use of that authority.

ANTITRUST SOURCE: You recently described Congress’s efforts to enact the SMARTER Act [Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015] as “a solution in search of a problem,” arguing that the DOJ’s and FTC’s merger review standards are interpreted the same way by courts and do not, in fact, lead to disparate results. If the two standards are not different in practice, what harm would be done by officially harmonizing the two standards and assuring the business community that merger review will be conducted fairly and consistently regardless of which agency oversees the review?

TERRELL McSWEENY: This is one of those situations where legislation would be appropriate if there was, in fact, a problem. But passing legislation in search of a problem can sometimes lead to its own uncertainty. What I mean by that is yes, it is the case that the language of the preliminary injunction standards is different. But in practice—and this is the important part—the agencies are applying them the same way and the courts are holding the FTC to the same standard as a practical matter. I don’t really see that there’s a problem. So there really isn’t a need to take what is, in my view, the drastic step of passing the law.

If we pass something like the SMARTER Act, we actually are introducing a whole new level of uncertainty. If Congress rewrites the FTC’s preliminary injunction standard, judges might conclude that there must have been some reason for that and perhaps the standards were different all along. That could potentially wipe out decades of valuable case law that the FTC has worked hard to establish—and which is frequently cited both by the FTC and DOJ in PI proceedings today.

More broadly, I am very concerned about the fact that there seem to be several legislative attempts to erode the FTC’s resources, its authorities, and to limit its use of its administrative process at a time when we are having a much broader conversation in our country about concentration and antitrust and the role of enforcers. I think weakening the FTC at this time would be a huge mistake.

ANTITRUST SOURCE: The Commission recently approved a consumer protection settlement that required the advertiser to pay consumer redress to the Commission over a considerable period of time (10 payments every 90 days). Do you think we will be seeing this happening more often, and how will the Commission decide whether to just look at the funds a company currently has available versus funds available over a more extended period of time?

TERRELL McSWEENY: Well, the short answer to that question is it depends on the facts of the case. When consumers have been harmed by an unfair or deceptive act or practice, our goal is always to make the consumers whole. So we try to maximize the amount of funds we can obtain to
achieve that goal. But we also assess the facts and circumstances of each case. Sadly, especially on the consumer protection side, very often the money that is gained through fraud or through scam or through deceptive advertising is gone by the time we are able to bring an action. There’s very little left usually. So we have to handle the situation as we find it, and we do take into account the individual facts and circumstances of a case. I think the Commission will continue to do that going forward.

**ANTITRUST SOURCE:** You’ve accomplished a tremendous amount already in your career. What advice would you give to a young antitrust lawyer who is starting out?

**TERRELL McSWEENY:** Antitrust is a really exciting field to be in. There are so many different and important things that you can do in antitrust, whether it’s coming into government and serving in one of the agencies, whether it’s working in private practice, or working in-house. I think competition is also important for innovation and important for our economy, so competition law provides a really interesting set of tools to bring into the broader policy conversation. So my recommendation would be to get as much experience as possible and to think about serving in one of the agencies or in the government somehow because you learn so much there. And to have fun.
Interview with Yuriy Terentyev, Chairman, Antimonopoly Committee of Ukraine

Editor’s Note: Yuriy Terentyev, Chairman of the Antimonopoly Committee of Ukraine, was appointed Chairman of the AMCU on May 19, 2015. He graduated from the Institute of International Relations of Kyiv National Taras Shevchenko University in 1998 with a Master’s degree in international law, and from the Faculty of Finance at the same university with a specialist degree in economics in 2000. He practiced law with DML-Law Consulting Ltd from 1995 to 1997. From 1997 until his appointment to AMCU, he was a lawyer and legal advisor for several international businesses in Ukraine, including U.P.S.A. Medicom Ukraine, Bristol-Myers Squibb International, CJSC JT International Company Ukraine, METRO CASH AND CARRY Ukraine, and PJSC ArcelorMittal Kryvyi Rih from 1997 to 2015. He was interviewed for The Antitrust Source by Hugh Holliman on April 6, 2016.

TH E A N T I T R U S T S O U R C E : Chairman Terentyev, thank you so much for being with us here today. I thought that a good place to start would be when you took over the reins of Ukraine’s Antimonopoly Committee back in May 2015. The Committee had just announced that it would investigate Gazprom for possible violation of the Ukraine competition legislation. I believe that the Ukrainian Cabinet of Ministers had asked the Antimonopoly Committee to initiate that investigation. That sounds like a tumultuous start to your tenure. Could you wind the clock back to that time and describe for us what it was like taking over as head of an agency in both a national and an international spotlight.

YURIY TERENTYEV: It was a big change in my professional life. My previous career was in corporate legal practice. I graduated in 1998 and since that time, I was working at multinational companies as in-house legal counsel. When this opportunity came up at the end of 2014, it was quite a hard decision for me, but I don’t regret it because the challenge is definitely very big. It is an intellectual challenge, it is an organizational challenge, it’s a political challenge, and it’s also a transformational challenge to make the Antimonopoly Committee a new and modern authority.

Talking about my feelings in May 2015, when I just started and the Parliament wanted to approve me as Chairman of the Antimonopoly Committee, I was overloaded immediately with issues that needed attention immediately. The first priority issue was to make the Antimonopoly Committee a transparent and well-functioning governmental body. The second priority was to address immediately the most critical economic problems and to start the work on concrete cases. With the limited resources of the Antimonopoly Committee, this was not an easy job.

The complexity related to dealing with such critical economic problems was that they not only were hard legal and economic cases, but also that they were quite sensitive politically and socially. Concrete areas of our attention were energy generation and distribution, fuel retail, distribution of pharmaceuticals, and tobacco products.

So Gazprom was one of such difficult subjects to start with. We are an independent body with the special status according to the Ukrainian law. The Cabinet of Ministers submitted to the AMCU a complaint about activities of Gazprom, which was not an instruction or an order to start an investigation. AMCU checked the substance of this complaint, and we opened the investiga-
tion in the summer of 2015 in relation to the activities of Gazprom as a supplier of natural gas to Ukraine and in relation to the transit of gas through high-pressure pipeline via the territory of Ukraine. Part of the investigation in relation to transit was completed at the end of 2015. Eventually a decision was taken on the transit case on January 22.

The second part of the Gazprom case regarding the sale and purchase agreement is still under investigation. So the Gazprom case itself comprises two elements. First, it is Gazprom’s monopolistic position as the only possible buyer of a service of transit of gas through Ukrainian territory, through high-pressure pipelines. The second part of the case regards a sale and purchase agreement.

ANTITRUST SOURCE: Perhaps we can go back, just quickly, to January, when the Antimonopoly Committee ending up fining Gazprom. I think that fine was for approximately $3.4 billion, and it was for abusing the dominant position in the Ukrainian gas transit markets. You had just started to speak about the underlying theories of harm, which I hope you can elaborate on. Could you also explain where you are currently in the investigation and what is happening today?

YURIY TERENTYEV: The investigation for the transit case has been completed with a decision recognizing the monopolistic position of Gazprom as a monopolistic buyer of a service from Naftogaz of Ukraine in the market of the transit of gas in high-pressure gas pipelines. The second element, as I said, is the sale and purchase agreement. The investigation regarding the sale and purchase agreement is still ongoing.

The topics we are looking at include the proper definition of geographical boundaries of the gas supply market, as Naftogaz was buying gas not from the territory of Ukraine but from Russian territory and the barriers that existed in 2014–2015, with regard to potential entry of other gas suppliers to the Ukrainian market and respective role of Gazprom in establishing those barriers.

The Antimonopoly Committee has historically been criticized for a lack of transparency in the way it was calculating penalties. For the new Antimonopoly Committee, it is critical to give clarity to the lawyers and businesses about our methodology of calculating penalties. We have developed and made public our methodology, which is based on the guidelines of the European Union.

In the Gazprom gas transit case the penalty was calculated based on this methodology, and we came up with a final figure of approximately 3.4 billion US dollars based on the amount of the turnover related to the violation. That served as a basis to calculate the base penalty amount. As a second step, we look at the presence of mitigating and aggravating factors. Gazprom was not cooperating with this investigation; this fact was included as an aggravating circumstance.

Therefore, the way the penalty was calculated was transparent, and it was announced publicly when the decision was taken on the case. It is the biggest fine in the history of Ukraine, and I think the biggest fine in Europe. We anticipate that Gazprom will challenge our decision in court, but we are prepared for litigation.

ANTITRUST SOURCE: Do you expect the challenge to be within the Ukrainian judicial system?

YURIY TERENTYEV: There are contractual relations between Gazprom and Naftogaz. Naftogaz is the main buyer of gas and the provider of transit service to Gazprom. The contract is subject to Swedish law with the arbitration in Stockholm.

The jurisdiction of the Antimonopoly Committee of Ukraine derives from the law. We investigated the violation, which took place on Ukraine's territory. There is no overlap between the con-
tractual dispute, which the parties may resolve in the Stockholm arbitration, and the antitrust case of AMCU, in which a decision was taken in January 2016. This decision may be challenged by Gazprom in the system of Economic Courts of Ukraine as the law prescribes. If Gazprom does not challenge the decision of the AMCU and still does not pay the penalty imposed, the AMCU will initiate the penalty collection proceedings via the Economic Court as well. In case AMCU would win in the litigation, there will still be a challenging task about execution of such a court decision abroad.

ANTITRUST SOURCE: Do you have a sense of timing?

YURIY TERENTYEV: Normally the law gives a period of two months for an undertaking either to pay the penalty or to file a lawsuit challenging the decision of the Antimonopoly Committee with the Court. This times starts to elapse from the moment the decision is received. Accordingly, this time will elapse within April. So, I think that in April 2016 we may see Gazprom’s legal position clearly articulated. It is quite difficult to predict how long litigation may take in Ukraine. It definitely will not last for two or three years. Just from my previous experience, I may anticipate that the proceedings in the three instances may take around a year and a half.

ANTITRUST SOURCE: To what extent do you actually coordinate with other sectoral regulators in bringing matters like this? For example, do you coordinate with any regulators within the gas markets?

YURIY TERENTYEV: Well, I would say that the word “coordinate” could be used in several senses. We have different types of interaction with sectoral regulators. We are an independent authority and sector regulators are also independent authorities. The acts of secondary legislation taken by sector regulators are subject to prior review by the Antimonopoly Committee of Ukraine.

Thus, we have intense routine interaction with all the sector regulators. And in this sense, we may say that we coordinate our activity because we give them advice on what should be changed in the legislation, for example, whether some of the actions taken by sector regulators can be deemed anticompetitive or as restricting competition. We also ask them for expert advice when we have cases related to their respective regulation. About 30 percent of the 5,000 complaints that we receive per annum are related to utilities and energy topics. Cases like Gazprom are not an exception in this regard. The National Energy Regulator and the Ministry of Energy and Coal were asked for their assessment of the situation in the market.

At the same time, in case we see that the actions of a regulator produce an anticompetitive effect, we may step in and issue recommendations or instructions to discontinue such practices, change acts of secondary legislation or to work out and approve them for the topics which lack clear regulation.

ANTITRUST SOURCE: When you started your tenure, what did you have in mind for the Committee? What were the main goals that you planned to focus on?

YURIY TERENTYEV: My main objective as the Chairman of the Antimonopoly Committee is to increase the efficiency of this body. Efficiency can be understood as external efficiency and internal efficiency. External efficiency is what we, the Antimonopoly Committee, need to do to produce the most impact for the economy. We want to quantify the impact we produce, evaluate it, and really bring about some good changes to the competitive environment in Ukraine.
Talking about internal efficiency means we are talking about really improving our internal processes and the improvement of the professional level of the staff. One of the objectives here is to have a function of economic analysis in the Antimonopoly Committee. Prior to quarter four 2015, there was no dedicated department that would work on deep economic analysis and the economic substantiation of our decisions. My personal objective from the moment I started was to work up the best international practice in this area.

I immediately started internal organizational changes so that the function of the chief economist would be integrated in the Antimonopoly Committee. The chief economist and his team should be involved in casework, strategy definition, and also in the definition of methodology for both for branches of the Antimonopoly Committee in the regions and the head office.

ANTITRUST SOURCE: You yourself came from the private sector. Were you recruiting from the private sector, or were you looking to other government agencies to build the ranks that you need?

YURIY TERENTYEV: We have announced a public contest for all new positions, and most of the people applying for these positions, for the time being, come from the private sector. Ukraine is undergoing big political changes. This is good for us because it means that there are many people with an enthusiasm to work and to be part of this change, sometimes even sacrificing private revenue, because salaries in the public sector are still quite modest.

ANTITRUST SOURCE: When you started your tenure, you said that you had some initial goals in mind. Have your goals changed over time since you have been at the agency? Did you have to perhaps rework or rethink tactics or ways in which you do things?

YURIY TERENTYEV: I would say that the key priorities remain the same because there were several things that needed to be done quite quickly. These priorities were shared with the legal community in Ukraine and they are reflected in the association agreement with the European Union. We are talking about changing things like merger control thresholds, transparency of decisions of the Antimonopoly Committee, methodological calculation of penalties, due process, and standards.

But apart from these practical things, which may not even be described as anti-monopoly reform but rather as fixing the dysfunction of a system, there is one big element that needs to be worked on. It is cooperation with other governmental bodies.

Protection of competition is done through enforcement of competition law by Antimonopoly Committee of Ukraine. However, when talking about the development of competition, we have relatively limited impact. We can advocate competition, but developing competition and helping bring new players into the market is the job of other governmental bodies, like the Ministry of Economy, the Ministry of Agrarian Policy, the Ministry of Infrastructure, and sector regulators. Therefore, in quarter four 2015 we started to work on the development of a comprehensive document on competition development in conjunction with the Ministry of Economy. We saw it as a basis for joint activities between the Antimonopoly Committee of Ukraine, ministries, and sector regulators, and thought it would help us align priorities and meet our strategic goals.

This is something that was my priority before I started and which remains my priority now. So, I cannot say that my objectives changed, I simply became a bearer of more problems, and I had to expand the list of issues that need to be dealt with. But the key priorities about systematic development of competition and increasing our external effectiveness and internal efficiency remain the same.
ANTITRUST SOURCE: I understand, after reading some of your past speeches, that integration with the EU and harmonization with EU competition laws is an important aspect of what you plan going forward. Are you primarily focused on EU competition laws? Does the EU operate as a flagship that you think represents best practices?

YURIY TERENTYEV: We are very open-minded about absorbing the best international experience. We are looking at what is happening in the United States, what is happening in Europe, and what is happening in emerging markets. For example, I am here to get to know the best and most up to date practices in the United States. There is a general political course, which Ukraine has taken, towards European integration. We need to align our legislation and our approaches with standards that exist in the European Union. However, this does not mean that we are looking only at EU practice and that we do not look at what is happening in our other jurisdictions.

ANTITRUST SOURCE: Could you describe your relationships with the OECD and the ICN. What value have those relationships provided to your Committee?

YURIY TERENTYEV: I think that our interaction with the OECD and UNCTAD are extremely helpful. With regards to OECD and UNCTAD, the peer review of Ukraine’s competition law and policy by OECD in 2008 and by UNCTAD in 2013 were very helpful. There were in total about 25 recommendations addressed to the Antimonopoly Committee, the government of Ukraine, and the parliament.

These recommendations serve as a roadmap for activities to align our work and practices with international standards. The majority of them we have fulfilled. OECD and UNCTAD recommendations help us work with other governmental agencies when we suggest respective legislative reforms. We essentially use the position of the OECD and UNCTAD as an expert view of the international organizations, which is very well received.

We shall extend our interaction with the ICN. We want to absorb the best international practices in competition policy and in competition enforcement, and the ICN is a very good platform for that.

ANTITRUST SOURCE: What aspects of the ICN do you think are most useful? I know that a lot of work product is produced and a number of the international teams put together manuals, etc., that can constitute best practices. What would you consider as most useful?

YURIY TERENTYEV: We use ICN products intensively in many aspects of our work. In particular the ICN best practices were used to define new thresholds for merger control.

We are also looking for ways to improve and evaluate the effectiveness of the authority. Topics of our specific interest are cartel investigations and dawn raid techniques. For all these topics I find ICN best practices extremely valuable.

ANTITRUST SOURCE: You have mentioned the changes to your merger law and I thought it might be useful for our readers to have some additional detail on the recent changes. An important milestone was passed in March when the amendments to the Law of Ukraine, “On Protection of Economic Competition,” was signed into law by the President. The previous merger law had been criticized by the EU and OECD, as under that law, a merging company that had a Ukrainian turnover of €1 million had to notify the authority. Now the test is that notification is required if the combined global value of the merging companies exceeded €30 million and the Ukrainian assets
or turnover of at least two of the parties exceeds €4 million. Also, a merger will need to be notified if one company has assets or turnover of more than €8 million in Ukraine and one of the other parties of the transaction has a value of more than €150 million.

One aspect that a number of competition experts have written about is the fact that the law is silent on whether the seller is included in the interpretation. Was that intentional? Also, it seems unclear whether the seller will indeed be included in the calculation going forward.

**YURIY TERENTYEV:** The law says that undertakings which are the parties to a concentration shall be looked at “with the consideration of relations of control.” This basically gave rise to concerns that the whole turnover of the group of the seller shall also be counted. We see that this was not the intention of the law and will correct the ambiguity with the secondary legislation of AMCU, as the law also provides that AMCU shall issue a document explaining the application of the thresholds. We plan to reflect in our secondary legislation that the group of the seller shall not be counted if the object is sold, and the group of the seller no longer has control of it. This will be our way to interpret that threshold are considered “with the consideration of relations of control.”

In the new merger control regime the concept of local nexus was implemented. We see that now a situation where a company that has limited operations in Ukraine and is buying some assets outside of the state of Ukraine and the transaction does not have any impact on competition and the economy in Ukraine, it will not have to be notified. Consequently, we anticipate that the number of notifications will go down significantly, at least by 50 percent.

However, if you look at the statistics of the previous years, we had approximately 1,000 notifications per annum. A big number of these transactions were foreign transactions not related to Ukraine. With the new changes in the law coming into effect, we anticipate the new annual number of notifications to be about 500, which is still way above the numbers which European authority member states have, but is quite a big improvement compared to the previous situation.

This is definitely not the end. We will see how the new system of merger control works and may subsequently propose new changes to this system if we see that there is a possibility to make more improvements.

**ANTITRUST SOURCE:** Do you have a sense of what some of those future proposals might be? I think one of your concerns was that the number of notifications is still very high. Do you have a sense that it might make sense to move the thresholds up even further? Is that something you have thought about?

**YURIY TERENTYEV:** There are some political aspects to this discussion. On one side, this regime needs to be liberalized and needs to allow companies to carry out transactions without excessive regulatory attention. On the other side, there are claims, accusations, or discontent from politicians and the population in general, with the level of monopolization in the Ukrainian economy and the growing and quite significant impact big financial groups have on the Ukrainian economy. So, I would say, let us see how this regime works in 2016 and 2017.

We definitely know that the same figures for thresholds for merger control notifications are significantly higher even in neighboring countries. But I think as the Ukrainian economy moves to be restored after the crisis, we will see the signs of growth and we will come up with proposals to increase them in order to be proportional to the identifications.

**ANTITRUST SOURCE:** Are there any particular areas within the Ukrainian economy that you think might benefit from a sector inquiry or that might make sense for your committee to focus on?
YURIY TERENTYEV: In fact, we started a sector inquiry in the energy sector in June 2015. Part of this sector inquiry was presented in December, particularly related to electricity generation. Again, this topic was very hot from the political perspective due to the accusations of the assets or companies that belong to some Ukrainian oligarchs and produce a dominant position.

Our objective for the sector inquiry was to really give objective legal and economic opinions about how this market works, which entities have market power, and whether some of the companies may have a dominant position.

This sector inquiry created a new standard in our work for transparency, openness, and also maybe for due process. Every stage of this sector inquiry was done in a very open manner, and we invited all the participants and companies working in the respective sectors to give their view about the situation and to comment on the preliminary findings of the Antimonopoly Committee. Some of the companies may not agree with our findings, but at least we do it in a very open manner. We are open to listening to the arguments of the other side and really have an objective to create a result that is accepted by businesses and by the public.

Parallel to the sector inquiry in energy, we started an investigation in the air transportation sector. Again, this is a sector where concentration is very high, but the big role, which some companies play, comes from the activity of the regulator, which distributes routes for international and domestic flights, and also from the general economic situation where a limited demand pushes players out of the market.

We are continuing this investigation. We are doing it in stages and we include all elements. We include not only all elements that eventually lead to the price of the ticket, like airlines, but also airports, the handling companies, and ticket booking systems. So we really look at the market comprehensively.

ANTITRUST SOURCE: The EC recently announced that they were looking into the aviation maintenance aftermarket. I was wondering whether that had come up at all in your airline sector inquiry.

YURIY TERENTYEV: Ukraine has limited production of aircraft. We are also looking at this air maintenance part of the sector, but currently we are collecting information and we have not yet completed our position.

Another investigation we are assessing involves fuel retail, a topic that was always on the radar of the Antimonopoly Committee but also a topic where we need to clarify our approach and make it public. In the past, the Antimonopoly Committee had a number of cases against fuel retail companies. These cases in 2014 were based on the concept of market definition on a regional level, assuming the regional dominant position of some fuel retailers in some regional markets. Currently, we are conducting a sector inquiry on fuel retail in order to have a clear picture about how markets for wholesale and for retail of fuel look on the national and regional levels. Our objective is to complete this sector inquiry in 2016.

ANTITRUST SOURCE: Earlier you also mentioned that your Committee had just approved recommendations for merger regime fines. As part of those recommendations, I believe the agency introduced a quasi-amnesty for merger filing violations, and that amnesty ends in September this year. What did you think the need, or perceived need, was for that amnesty period? Could you say whether you have managed to achieve your goals in that amnesty program?

YURIY TERENTYEV: I would say that our objective was to give to businesses a signal that we are open and transparent. Our objective as the Antimonopoly Committee is not to collect penalties.
Our objective is to help markets function in a more competitive way. In case some companies, like multinational companies doing foreign acquisitions, committed violations with regard to merger control regulations we are ready to look at such cases in a simplified regime and to impose a moderate fixed penalty of about 1000 US dollars.

It took some time for Ukrainian international business to believe that this commitment of the Antimonopoly Committee could be trusted. Now we see the number of these quasi-amnesty applications growing. We announced that for the initial period of six months, the penalty amount would be about $1,000, and for the subsequent six-month period, it would be around $5,000.

This period has not ended. We still encourage companies to use this opportunity because this is aimed at Ukrainian business groups that did not receive proper merger clearances from the Antimonopoly Committee. As a result, they may face problems if they want to restructure their business or try to attract international financing or international investors. The absence of merger clearances from the Antimonopoly Committee can be a major obstacle in the due diligence process. We wanted companies to understand that the Antimonopoly Committee can be trusted and that our job is not to make problems for relatively small and medium businesses, but to focus on big issues that have the most impact for the economy.

ANTITRUST SOURCE: You explained earlier, and I think that your discussion about amnesty illustrates that as well, that transparency and working with business communities is very high up on your list of priorities. In March, you met with representatives of the European Business Association and gave them an update on your committee’s objectives, activities, and achievements. Obviously, meetings like that go a long way toward improving transparency or showing transparency.

Is that something you would intend to do going forward? Are those types of meetings important to you? In addition, could you elaborate on what value you think that those types of meetings might generate for your Committee?

YURIY TERENTYEV: If we can communicate more with businesses and with the public, we should always use the opportunity. On one side, I see this as necessary. I personally would like to have meetings with big business associations at least once every three months to explain what the Antimonopoly Committee is doing and to receive feedback from the market about the perception of our activities.

On the other side, if you want to really be effective and really address the right topics, the best way to learn about them is from the businesses that encounter them. Therefore, on the one side there is communication about all major achievements and our work plans. However, on the other side, I encourage all of the Commissioners of the Antimonopoly Committee to communicate with the representatives of businesses on a regular basis for their particular work.

Whenever we start a new investigation or a market study, it is standard that we organize a roundtable or a public meeting with the representatives of the private sector. Our objective for such a meeting is to get as much information as possible about the problems we are working on and potential solutions. Again, it is worth mentioning that our new standard for phase two investigations is to make an official publication on the Website saying that a phase two investigation for a particular case has been started and that we invite the public to provide information about what might be relevant for this for particular analysis of the Antimonopoly Committee.

At the same time, we are very keen about observing confidentiality. So here we have a dilemma between being transparent and maintaining the confidentiality of our files and of information that is provided by our business undertakings. We should not compromise either.
ANTITRUST SOURCE: Well, it’s certainly walking a tightrope. I was hoping to ask you about the conflict with Russia and if you would say anything about how that impacts the work of the Antimonopoly Committee. Does that raise day-to-day issues for you?

YURIY TERENTYEV: Annexation of Crimea and the war in the Eastern Ukraine are very painful topics. These tragic events affected our daily work in many ways. The objective of the Antimonopoly Committee is to be an unbiased and independent authority. Indeed, the role of Russian business in Ukraine has been very substantial and remains substantial. As a competition authority, we act in compliance with the law, which does not establish any specific regime for the companies with Russian shareholders with regard to competition law topics. Some sector-specific legislation imposes limitations on the activities of Russian businesses in Ukraine, like the possibility to withdraw a business license or not to allow participate in privatization of state property.

ANTITRUST SOURCE: Before we go, is there anything else that you would like to share with our readers about your experiences generally as the head of the Ukrainian competition agency?

YURIY TERENTYEV: Firstly, this is a very challenging job. If you compare work in the public sector to work in the private sector, the main difference is definitely that your resources are very limited. However, I’m very happy that we have support from our foreign partners, especially from the Federal Trade Commission and the Department of Justice. We have very close relations with the European Union, which supports the development of institutional capacity of the Antimonopoly Committee.

So we have a huge challenge in front of us to make the Antimonopoly Committee a modern authority that works up to the highest quality international standards. And I hope that with our extensive international support, we will manage to do that.
DOJ’s Catch-22: Corporate Criminal Antitrust Targets Walk A Blurry Line with Culpable Employees

Craig P. Seebald and Brian D. Schnapp

In September 2014, Assistant Attorney General Bill Baer, then-head of the U.S. Department of Justice’s Antitrust Division, highlighted a “tension” that exists where companies continue to employ culpable executives while simultaneously arguing that they are compliance-oriented organizations:

Guilty companies sometimes want to continue to employ culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement, while at the same time arguing that their compliance programs are effective and their remediation efforts laudable. That creates an obvious tension.1

Recent DOJ policy, including the September 9, 2015 Memorandum from Deputy Attorney General Sally Yates regarding “Individual Accountability for Corporate Wrongdoing” (commonly known as the Yates Memo)2 and speeches delivered by Antitrust Division leadership create another related dilemma for companies under scrutiny. This tension exists between the Division’s desire for companies to fire or demote individuals who potentially engaged in wrongdoing and the DOJ’s demand that, “in order for a company to receive any consideration for cooperation . . . the company must completely disclose to the Department all relevant facts about individual misconduct.”3

Though the Antitrust Division has stressed that “[i]ndividuals commit the crimes for which corporate offenders pay,”4 the complete cooperation called for by the Yates Memo can only be successfully achieved by companies and company counsel having good relationships with those very same individuals from whom companies learn the key facts. Companies performing internal investigations must grapple with the reality that employees are less likely to be truthful if they know that by revealing their own culpability the government will require their termination or demotion. In other words, there is an inherent tension between the DOJ policy to, on the one hand, demand all relevant facts about individual misconduct, but, on the other hand, require that culpable individuals—who can provide these facts—be punished for a company to demonstrate its commitment to compliance. This tension, along with DOJ’s policy of identifying and prosecuting culpable individuals

3 Id. at 3.
as early as possible in an investigation, complicates the task of conducting a thorough internal investigation.

In light of these policies, companies must now consider two threshold questions. If employees engaged in potential wrongdoing are fired or demoted, how will all the relevant facts be gathered to enable the company to qualify for cooperation credit? And conversely, if employees are not fired or demoted, will a company be deemed to be anti-compliance, jeopardizing its ability to obtain significant fine discounts and risking appointment of a compliance monitor or a term of probation? Several additional issues, such as who are the “culpable” employees who should be punished, when should this punishment take place, and at what cost to collateral civil cases and cultural norms, are but a few of the unanswered questions raised by these policies. These tensions and questions lie at the intersection of DOJ’s current focus on individual accountability, compliance, and cooperation.

This article focuses on a typical corporate criminal antitrust investigation from the standpoint of a company that is considering cooperating with the government. A typical corporate antitrust investigation arises when a co-conspirator company cooperating with the government seeks to avail itself of the Antitrust Division’s Corporate Leniency Policy, which grants amnesty to companies that are first to report unlawful anticompetitive conduct. In this situation, company counsel often will have discussions with the DOJ Antitrust Division office handling the investigation, during which the DOJ will identify the names of company employees allegedly involved in the conduct, potentially including details on when they met with their competitors, what they discussed, and the anticompetitive agreements they struck.

After evaluating its path forward, analyzing whether it has any defenses to potential charges, and assessing the pros and cons of deciding whether to cooperate with the DOJ and eventually entering plea negotiations with the goal of reducing the company’s exposure, a company is faced with many competing considerations. As part of the company’s decision, it will want to analyze the deal it could likely reach as a result of plea negotiations as compared to the outcomes it faces by going to trial. There are many relevant factors that go into the calculation of a company’s penalty in a negotiated plea context—including potentially narrowing the scope of the conspiracy and the volume of affected commerce that would otherwise be charged by DOJ in a litigated context. In this article we primarily focus on one aspect of this calculation: “cooperation credit.”

**U.S. Sentencing Guidelines Calculation and the Value of Cooperation**

Fines negotiated with the Antitrust Division are calculated under several provisions of the U.S. Sentencing Guidelines. The main factors are: (1) the volume of commerce (VOC)—a measure of the sales of goods or services affected by the conspiracy; (2) the culpability score—determined by assessing various criteria, such as the size of an organization, its prior history, its acceptance of responsibility, and other criteria; and (3) cooperation credit. Factors (1) and (2) are applied to generate a Sentencing Guidelines fine range, and factor (3) is used to apply a discount to that range. Cooperation credit can have staggering effects on a corporation’s fine, in some cases decreasing a fine by hundreds of millions of dollars.

The sentencing of Yazaki Corporation, one of the first defendants to be sanctioned in the recent automotive parts industry investigation, provides a good illustration of how cooperation credit can impact fines. Yazaki was charged with price fixing as to a number of automotive parts, with a combined VOC of $2.11 billion. As set forth in the Sentencing Guidelines, the base fine is

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20 percent of VOC, or $422.6 million in the case of Yazaki. 6 The base culpability score of 5, as set forth in the Guidelines, was increased by 5 points, given that Yazaki had more than 5,000 employees, and was reduced 2 points under U.S.S.G. § 8C2.5(g)(2), given Yazaki’s acceptance of responsibility and cooperation. 7 The final culpability score of 8 yielded a fine range of $676.1 million to $1.35 billion (based on a formula set forth in the Guidelines). 8 Yazaki’s fine was further reduced 30 percent below this Guidelines range, to $470 million, given Yazaki’s “substantial assistance in the United States’s investigation of price fixing in the auto parts industry.” 9

The 30 percent reduction referred to as the “Cooperation Discount” understates the value of cooperation credit given to Yazaki. The 2-point reduction in culpability score in fact reflects additional credit. Companies that agree to plead guilty may be given a 1-, 2-, or 5-point reduction in culpability score, depending on when the company decides to cooperate and the extent of the cooperation. To receive a 1-point reduction in culpability score, a company must have “clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.” 10 Companies typically receive this by virtue of entering into a plea agreement with the government. The only additional specified requirement to receiving a 2-point reduction—which Yazaki received—is to “fully cooperate[] in the investigation.” 11 In other words, cooperation is a factor in the culpability score determination as well as providing an independent basis for a discount.

Had Yazaki not received this additional reduction—from 1-point to 2-points—it would have faced a fine in the range of $760.7 million to $1.52 billion. Therefore, the ultimate fine of $470 million reflects roughly a 38 percent reduction off the bottom of the potential Guidelines range, based on the extent of cooperation. Put differently, had Yazaki not earned the extra 1-point reduction in its culpability score but received the same 30 percent cooperation credit discount, its fine would have been $532.5 million, or $62.5 million higher than the fine it did receive. Earning cooperation credit—whether in the form of a reduction in culpability score or as a “discount” as applied to the Guidelines range—is extremely significant in reducing a company’s fine. And, given the potential value of cooperation credit as a percentage of potential fine, it can be extremely important for a cooperating company to maximize the cooperation credit it receives.

2014 and Beyond: Compliance, Culpable Individuals, and the Yates Memo
The DOJ and its Antitrust Division have become increasingly focused on individual accountability in corporate investigations, beginning with an uptick in late 2014, continuing through the September 2015 Yates Memo, and reiterated in a February 2016 speech by Antitrust Division Deputy Assistant Attorney General for Criminal Enforcement Brent Snyder. 12 As recently as March 11, 2016, another Antitrust Division official, Deputy Assistant Attorney General for Litigation David Gelfand, stated that the Division is even increasing the focus on individuals in the context of civil cases. 13 As DAAG Snyder stated in February, “This emphasis on individual accountability is fundamental to Antitrust Division prosecutors.” 14

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6 Id. at 3.
7 Id.
8 Id.
9 Id.
11 Id. § 8C2.5(g)(2).
12 Snyder, Individual Accountability for Antitrust Crimes, supra note 4, at 2.
14 Snyder, Individual Accountability for Antitrust Crimes supra note 4, at 3.
Recent DOJ policy creates heightened thresholds that companies must meet to be eligible for any cooperation credit. As Deputy Attorney General Yates noted in a speech last year:

In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That’s changed now. As the policy makes clear, providing complete information about individuals’ involvement in wrongdoing is a threshold hurdle that must be crossed before we’ll consider any cooperation credit. 15

At the same time the DOJ has focused on complete accounting of individual wrongdoing, it has likewise focused on individual accountability in the context of assessing an organization’s compliance policies and culture. Confirming that organizations have robust compliance programs has now become inextricably linked to a company’s corporate resolution with the Antitrust Division. In connection with this emphasis on compliance, recent Antitrust Division policy has highlighted that retaining potentially culpable individuals in key positions will be looked on unfavorably by the Division, in assessing the compliance policies of an organization.

**The Yates Memo: Focus on Individual Accountability.** The Yates Memo specifies that:

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. . . . That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. 16

The requirement to disclose “all relevant facts about individual misconduct” necessarily requires having access to many of the key individuals who were involved in the wrongdoing, as they are the ones who will have the most knowledge of the facts. In conducting an internal investigation, there is a wide variety of evidence that can be accessed by company counsel in order to learn many of an investigation’s key facts—emails, notebooks, hardcopy files, phone and text message records, calendars, and business card collections are just a small set of the materials available. While these materials are critical, often it is only through interviewing the key witnesses with knowledge of the relevant facts that the full story—or “all relevant facts”—can be known. This is especially true regarding long-term or old activity.

The need and desire to interview key individuals is universally recognized as an important aspect of conducting a thorough internal investigation. Thus, the Yates Memo’s implication that such interviews should take place is not especially noteworthy. However, it is the combination of needing to supply the DOJ with “all relevant facts” with the Antitrust Division’s policy requiring the removal of culpable individuals from key positions that makes achieving the goal of discovering “all relevant facts” so difficult.

**Antitrust Division Policy: Significance of Compliance Programs.** An increased focus on individuals has developed, not only with respect to an accounting of all facts related to their wrongdoing, but also to a forward-looking analysis of their continued role in company life. Since 2014,

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16 Yates Memo, supra note 2, at 3.
the Antitrust Division has increasingly focused on companies’ compliance programs, and the continued role of culpable individuals in company life is a key issue on the DOJ’s radar.

DOJ scrutiny of an organization’s compliance program can lead to positive or negative consequences for a company. Demonstrating that a company has a robust and effective compliance program can yield additional reductions in fines, whereas DOJ concern about the effectiveness of a company’s compliance program can lead to probation, independent compliance monitors, or both.

Last year the DOJ outlined, in the most detail to date, how a company can avoid onerous plea terms such as a compliance monitor and probation, and receive a reduction in its fine by implementing a strong compliance program. In its case against Kayaba Industry Co., Ltd., the Antitrust Division’s motion for a downward departure credited not only the substantial assistance Kayaba provided, but also Kayaba’s compliance program. 17 Though it is unknown how much of the downward departure credit can be attributed to the compliance program, the combination of the cooperation Kayaba provided and the evaluation of its compliance program netted Kayaba a 40 percent reduction below the minimum Guidelines fine. 18

On the negative side, the Antitrust Division has been clear that ineffective compliance programs can result in probation and even compliance monitors. As Snyder cautioned in September 2014: “[A]ctive refusal to accept responsibility, including resisting effective compliance, will result in probation and independent monitors. The Division will take a similarly hard line with companies that do not take their compliance programs seriously.” 19 Thus, companies have a strong incentive to demonstrate the efficacy of their compliance programs in any negotiation with the Antitrust Division.

Compliance Programs: Focus on Individuals. The strength of a compliance program closely tracks the factors enumerated in Section 8B2.1 of the Sentencing Guidelines. The factors include such things as establishing standards and procedures to prevent and detect criminal conduct, designating individuals at different levels of the organization to have specific compliance and ethics responsibilities, training employees, and promoting compliance and ethics standards. 20 Many of these activities can be categorized under the broad goal of promoting “an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” 21

A significant part of the Antitrust Division’s focus on compliance programs has involved an assessment of how companies treat culpable employees. Then-AAG Baer highlighted the attitude of the Antitrust Division on this issue in a major speech in September 2014, remarking that “[i]t is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable.” 22 Though the Antitrust Division has stated that it “has been departmental policy not to insert itself into the per-

18 Id. at 8, 11.
21 Id. § 8B2.1(a)(2).
22 Baer, supra note 1, at 8.
sonnel matters of companies by requiring the termination of culpable employees, and that has not changed,” 23 the Division is quick to point out that while this may not be a requirement, personnel action is expected. For instance, the day after Snyder stated that termination of culpable employees is not required, Baer outlined the following policy:

If any company continues to employ [culpable] individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company’s compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company’s commitment to implementing a new compliance program or invigorating an existing one. 24

While this policy does not require culpable employees to be terminated, it requires that, to allay DOJ’s doubts about a company’s commitment to compliance, culpable employees be removed from positions of “substantial authority” among others—a policy that invites some degree of ambiguity. Baer added that the Antitrust Division’s interpretation of the Sentencing Guidelines suggests that companies that do not remove employees from these positions “cannot be said to have an ‘effective’ compliance program.” 25 He noted that the Antitrust Division reserves the right to insist on probation, including using independent compliance monitors, to ensure the effectiveness of compliance programs—a prospect that carries a host of negative consequences for companies, not the least of which is financial burden.

Unanswered Questions

The new policy of encouraging the termination or requiring the reassignment of culpable employees may seem straightforward, but in reality the policy raises many difficult questions for companies in the middle of an investigation. Some of the key unanswered questions include:

**Who is a culpable employee?**
Thus far, there is no definitive guidance from the DOJ, and it is not an easy question to answer. The April 2013 changes to the Antitrust Division’s carve-out policy stated that individuals who are carved out, or excluded from, the non-prosecution protections of a plea agreement are those individuals believed to be “culpable” (whereas previously an individual could have been carved out for other reasons). 26 But, is this carve-out determination conclusive on the question of which employees are to be punished?

Take, for instance, the example of an employee who has individual counsel, was carved out of a plea agreement, but never prosecuted. Is this a culpable person who has to be terminated or demoted? On one hand, the DOJ identified this individual as someone involved in the conduct when it decided that the employee needed separate counsel and needed to be excluded from the corporate plea agreement. But, on the other hand, the DOJ ultimately decided not to prosecute the employee, presumably because the DOJ believed it lacked sufficient evidence to win a conviction.

Baer’s comments focus on punishing “culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement.” 27 At the same time, however, his and

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23 Snyder, Compliance Is a Culture, Not Just a Policy, supra note 9, at 6–7.
24 Baer, supra note 1, at 8.
25 Id.
27 Baer, supra note 1, at 8.
Snyder’s comments recognize that a carve-out decision reflects who is potentially culpable\(^28\) or believed to be culpable.\(^29\) Thus, is the implication that someone who is carved out, but not prosecuted, should still be punished by his or her employer? That situation raises serious process issues for a company that would be required to terminate, transfer, or demote an employee just because he or she was carved out and yet maintained his or her innocence.

Likewise, as Snyder points out, the DOJ has adopted new internal procedures to identify all “potentially culpable individuals as early in the investigative process as feasible.”\(^30\) Presumably, this means that at an early stage in the investigation, an employee can be unilaterally determined to be “potentially culpable,” but then by the resolution stage can be carved out and thus his or her status elevated to even-more-potentially culpable? Or carved in and thus no longer considered culpable? This leads to the next logical consideration: timing.

**At What Time Do You Punish “Culpable Employees”?** Carve out decisions are made very late in the plea process and are the subject of serious negotiation. At some point the company is supposed to take “responsible action” against those employees who may ultimately be carved out, even though an employee’s status is not known until late in the process. So waiting until a carve-out decision is made would seem too late in the process to satisfy the DOJ under the new policy, as this could signal a lack of commitment to compliance. Given the comments by Snyder that his offices will now make decisions early in an investigation about culpable employees, companies will seemingly have to make early decisions regarding how to punish employees.

But just because a company is under investigation does not necessarily mean the company or its employees are actually guilty of a crime. The new policy should have some flexibility to allow companies time to thoroughly investigate the underlying conduct and make rational decisions regarding the company’s fate and the fate of its employees. Companies should not be incentivized to make early and potentially rash decisions regarding the fate of employees. Conversely, companies should not be penalized for taking time to fairly and accurately investigate potential criminal conduct.

**How Can Companies Persuade Culpable Employees to Go to Prison Under This New Policy?** DOJ officials have talked about their commitment to ensuring that foreign nationals serve prison sentences.\(^31\) The new policy creates a Catch-22 situation for companies: is it better (a) to follow the new policy and terminate or otherwise punish employees, thereby losing all leverage to encourage the culpable employee to come to prison in the United States or (b) ignore the new policy and use leverage (including the promises of continued employment, financial support of families, and cash incentives) to encourage the employee to come to the United States? The Antitrust Division’s new policies may have the unintended consequence of causing fewer culpable employees residing overseas to serve time in prison, as companies will lack any meaningful leverage to force them to come to the United States. Alternatively, the policies may put companies in a situation where they are rewarding culpable employees and their families with support—a practical outcome that seems at odds with the DOJ’s compliance focus.

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\(^{28}\) Snyder, Individual Accountability for Antitrust Crimes, *supra* note 4, at 13. (“Those potentially culpable individuals are, as a matter of long-standing Antitrust Division practice, excluded from—or ‘carved out’ of—the nonprosecution protections of a corporate plea agreement.”).

\(^{29}\) Baer, *supra* note 26.


What Are the Sensitivities to Foreign Labor Laws and Cultural Issues? Many of the prosecutions in recent cases involve employees located in South Korea and Japan, where employment for life is considered extremely important and labor laws are much more favorable to employees than in the United States. In the statements from the DOJ thus far, there seems to be no recognition that there are cultural and legal barriers in foreign countries that may make it more difficult for companies to implement the new policy.

Should Companies Continue to Pay for Counsel for Punished, Culpable Employees? There is an assumption built into modern cartel enforcement that companies should pay for individual counsel for employees who are the subject of cartel investigations. This situation greatly benefits the DOJ, as it can communicate with sophisticated defense attorneys in the United States to try to convince counsel that the culpable employee should cooperate with the government.

The Antitrust Division’s new policies may seriously undercut this dynamic. Companies have been generally willing to pay for separate counsel for individuals the DOJ unilaterally identifies as potentially culpable, either because they had a contractual obligation to do so or because they think that having individual counsel will bring some benefit, through providing information to the company or otherwise coordinating with the company. If a company has to punish these employees because they are now considered “culpable,” then the company and the employee will be in an adversarial position. Since fired employees will no longer be concerned about their relationships with their former employer, companies may see little advantage in paying for individual counsel. Also, contractual rights to pay for individual counsel may be much different for current employees as compared to former employees. In other words, the new policy may have the unintended consequence of causing companies to reconsider paying for counsel for their employees.

What Is the Impact of Punishing Culpable Employees on Other Investigations and Civil Law Suits? In international cartel cases, DOJ fines can be small relative to fines in other jurisdictions and compared to civil liabilities. Defense counsel cannot consider the DOJ’s policies in a vacuum—those policies need to be considered in the overall context of investigations by other government authorities and civil exposure. By terminating or demoting culpable employees, a company may be making it harder to reduce fines in other jurisdictions and to defend future civil lawsuits because it will not have the same access to witnesses who could provide cooperation to foreign enforcement entities or potentially minimize civil claims.

Alternatively, from the regulators’ perspective, the policy might have the unintended consequence of actually helping the corporate defendant avoid civil liabilities. If a company fires culpable employees, especially those in foreign jurisdictions, the company no longer has control over those employees and can no longer be compelled to produce the employees as witnesses in civil cases. These terminated employees would now be third parties in civil litigation, and it will be extremely difficult, if not impossible, for plaintiffs to get needed testimony from these witnesses who reside in foreign countries.

Do You Get More Credit for Firing a Culpable Employee than for Reassigning the Employee? The guidance thus far from the DOJ does not make this distinction. It appears that a company can make the choice to reassign an employee or terminate the employee and still receive the same credit.

A Difficult Choice
The fact that firing or moving employees can create a roadblock to obtaining all the relevant facts in an investigation is recognized even by the Principles of Federal Prosecution of Business Organizations, the DOJ policy directive codified in the U.S. Attorneys’ Manual (USAM) that sets
forth, among other topics, the factors by which all federal prosecutors are to assess the extent of cooperation credit (“e.g., the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation”). As the “Comment” to Section 9-28.700 of the USAM notes, one of the reasons a corporation’s cooperation may be critical in identifying relevant facts is the difficulties prosecutors may face given the realities of corporate life. The USAM notes:

[A] prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation . . . . Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired.

Despite this recognition that firing or transferring employees can impede fact-finding, companies are being asked to do just that.

**What Should a Company Do?**

Until the DOJ revisits or begins to indicate a recognition of the competing incentives its policies create, companies must carefully weigh these issues when navigating an investigation and pursuing a resolution with the government. There are several factors that companies should bear in mind:

- **Timing:** Companies need to move quickly in an investigation to learn as many facts as possible before the government identifies culpable employees. Companies need to consider carefully when is the best time to make personnel decisions in the context of the overall investigation. Companies need to make such decisions after learning as much as possible from the culpable employees but before making a compliance presentation to the DOJ.

- **Protecting the Company:** Companies should consult local labor and employment counsel as part of the investigation. Companies must try to minimize exposure for wrongful termination cases and other issues that can come up in an international context.

- **Individual Counsel Issues:** If the DOJ does identify potentially culpable employees early in an investigation, it likely will be harder for the company to get information from those individuals after that because the DOJ will likely request individual counsel for such employees. As a result, companies may need to take a more aggressive position when the DOJ requests that the company obtain individual counsel for individuals. Companies should demand to know the basis of why the government thinks individual counsel is necessary and be prepared to push back if the explanation is lacking.

- **Consider Enhanced Warnings:** Since employees who are identified as potentially culpable are at risk of being terminated or demoted under the DOJ policy, counsel needs to carefully consider providing enhanced *Upjohn* warnings when interviewing these employees.

- **Have a Dialogue with the DOJ:** Many of these issues can be raised with the DOJ at various stages of the investigation and negotiation. Doing so with the right approach can have a major impact on the outcome.

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33 Id.

34 See Upjohn Co. v. United States, 449 U.S. 383 (1981). *Upjohn* warnings, or “corporate Miranda” warnings are notices given by corporate counsel to individual employees to inform them that counsel represents the company and not the individual, and that though communications with counsel are privileged, that privilege belongs to the company, not the individual, and can be waived by the company alone.
Conclusion
Given the financial significance, it is extremely important for companies engaged in plea negotiations with the Antitrust Division to make all efforts to secure cooperation credit. At the same time, being deemed non-compliant can have serious effects on the outcome of a company’s investigation, such as the imposition of a compliance monitor, periods of probation, and the loss of opportunity for a fine reduction.

With the competing DOJ policies in the Antitrust Division policy speeches and the Yates Memo in place, figuring out the best way to handle potentially culpable employees can be very difficult. Therefore, company counsel should recognize the impact of these competing policies on internal investigations and develop clear response plans to be in the best position to handle these issues throughout the course of an investigation and when the time comes to negotiate with the DOJ.
Applying the Non-Discrimination Requirement of FRAND When Rates Change

Allan Shampine

Standard-setting organizations (SSOs) incorporate patented technology into standards, such as those enabling cellular telephony. While there may have been alternatives to the patented technology prior to being included in a standard, once it is included in the standard, firms using the standard must then use the patented technology—it becomes standard essential. Holders of standard essential patents (SEPs) may be able to engage in strategic action, discriminate against some licensors, or hold up licensors by demanding payments related to access to the standard itself rather than the value of the patents. SSOs address these concerns by requiring firms whose patented technology may be included to agree to license those patents on fair, reasonable, and non-discriminatory (FRAND) terms. 1 This article will focus on the last of these requirements—that the license terms be non-discriminatory—more specifically, where license terms differ from previously negotiated arrangements.

There is general agreement today that the non-discrimination requirement of FRAND means that similarly situated firms should receive similar terms and conditions (or have access to the same range of terms and conditions). 2 When a new license is being negotiated, this provides clear guidance for the course of that negotiation. The terms and conditions should be non-discriminatory relative to existing licenses. However, that does not settle all possible questions. Are there any circumstances where rates might change? If so, that change creates discrimination relative to existing licensees. When is this permissible, and how should existing licensees be treated under the non-discrimination requirement of FRAND in such circumstances?

Discrimination concerns may arise after a license has been signed in at least two ways. First, a license might have been discriminatory relative to other licenses that existed at the time, but since license terms are often confidential, the licensee might not have known. If the licensee later discovered that fact, it could seek to remedy the situation by claiming that it was discriminated against in violation of a FRAND commitment. That remedy might include damages. Alternatively, the license might have been consistent with existing licenses when signed, but the licensor then gives more (or less) favorable terms to other licensees. That is, situations may arise where new licensees face substantially different terms and conditions than existing similarly situated licensees.

1 Dennis Carlton & Allan Shampine, An Economic Interpretation of FRAND, 9 J. COMPETITION L. & ECON. 531 (2013) [hereinafter Carlton & Shampine, Economic Interpretation].

2 See Richard Gilbert, Deal or No Deal? Licensing Negotiations in Standard-Setting Organizations, 77 ANTITRUST L.J. 855, 858-59 (2011) [hereinafter Gilbert, Deal or No Deal?]; Carlton & Shampine, Economic Interpretation, supra note 1. But see Anne Layne-Farrar, Non-discriminatory Pricing: Is Standard Setting Different?, 6 J. COMPETITION L. & ECON. 811, 815 (2010) (presenting a dissenting view that so long as licenses are made available to all firms seeking them, price discrimination between licensees should generally be permitted under FRAND).
Discrimination is defined relative to some benchmark—in this case, the terms and conditions under which firms have previously been, and may still be, licensed. In particular, when two otherwise similar firms are paying different rates at the same time, this may trigger the “N” in FRAND. As explained in more detail below, offering a new but otherwise similar licensee a different rate is discriminatory relative to the older licensees. Which party the discrimination is in favor of will depend on whether the new rates are higher or lower than the existing rates. However, licensors may claim that circumstances (e.g., market conditions) have changed over time in such a way that rates should also change. I discuss below the circumstances where such changes may arise and where they may still be consistent with the “reasonable” requirement of FRAND. If they do arise, and, in particular, if all new licensees are offered similar terms but other firms still have licenses under the older, different terms, does that raise a concern under the non-discrimination requirement of FRAND, and, if so, what should be done about it?

A simple and effective solution to enforcing non-discrimination is to require that terms and conditions, once determined in initial negotiations, be binding on future negotiations. This is the essence of Richard Gilbert’s approach in his seminal article on the topic. In this manner, if some licensees negotiate prior to a standard being set—prior to the elimination of competition through the standard-setting process and firms becoming locked in to the standard—the benefits of that competition can be extended into the future since the terms and conditions of those initial licenses that enjoy the benefits of competition are then preserved. While in an initial negotiation there may be a range of rates that are consistent with the “reasonable” requirement of FRAND, much of that flexibility disappears once initial licenses are signed, as further licenses must then be “non-discriminatory” relative to existing licenses. In this circumstance, licensors are justified in stating to prospective licensees that the rates on the table are compliant with FRAND, and the licensor is not at liberty to provide substantially different terms because of its non-discrimination commitment. The licensees must therefore pay those reasonable and non-discriminatory rates (or choose from the same menu presented to other licensees) or face litigation.

1 Licenses may differ in some ways without raising discrimination concerns. For example, two firms might make payments of the same value but in different form, such as one firm writing a check and the other making payment in kind. So long as both firms had the same choices of payment method available, the fact that they chose different payment methods is likely not of consequence. Nor is every difference in a license of economic interest. Two licenses may specify payment through different banks, for instance, but again such differences are likely not of economic interest.

2 Rates are often discussed here as a simple and intuitive measure of difference, but changes in other terms and conditions can also be discriminatory.

3 See Gilbert, Deal or No Deal?, supra note 2, at 876.

4 See Janusz Ordover & Allan Shampine, Implementing the FRAND Commitment, ANTITRUST SOURCE (Oct. 2014, at 5, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ordover_10_21f.authcheckdam.pdf) [hereinafter Ordover & Shampine, FRAND Commitment]. As noted above, this does not mean that every license must be identical. For example, the form of payment may vary substantially even where the value of the payment does not.
A firm implementation of non-discrimination can thus help protect licensees from “hold-up” (where licensees are charged higher rates because of the ability to exploit lock-in to a standard) and ensure a level playing field among competing licensees, and also protect licensors from “hold-out” (where licensees extract lower rates “by constructive refusal to negotiate a FRAND license with the SEP [standard essential patent] owner”). As Professor Gilbert notes, the effect of such a policy is that there is a loss of ability to respond to changes in market circumstances or for later licensees to obtain discounts, since granting such discounts to one firm would then require granting them to all other similarly situated firms as well. Of course, non-discrimination by definition limits the exercise of price discrimination and therefore limits a licensor’s flexibility as to terms.

While this principle is straightforward, licensors may nonetheless wish to change the terms they offer over time, either raising or lowering rates. To the extent there are licenses negotiated prior to standards being set, allowing rates to change over time would undermine the ability of the non-discrimination requirement to extend the benefits of competition to future licensees. However, there may be no such licenses to serve as benchmarks or a licensor might be able to demonstrate that the proposed new rates are still “reasonable” under the FRAND requirement. (I discuss circumstances where licensors might wish to raise or lower rates further below.) However, if there are still existing licenses on substantially different terms than those offered to new licensees, then those new terms are, by definition, discriminatory. Should such changes ever be allowed, and, if so, how should those changes impact existing licensees? Professor Gilbert’s point is that even if there are no current licensees at the previously established rates, the same (or more favorable) terms must continue to be offered in order to preserve the benefits of the no longer present competition. In a similar vein, in our article, Dennis Carlton and I suggest that a reasonable approach from a public policy perspective would be to allow decreases but not increases in rates. While I discuss rationales for allowing or disallowing rate changes, the primary question addressed here is, if rate changes do occur and there are existing licensees paying different rates than new licensees, how should that discrimination be addressed?

One question is whether non-discrimination provides any protection to a licensee after it signs a license. That is, while enforcement of non-discrimination means extending the terms of existing licenses forward in time, one might claim that so long as a license was non-discriminatory when signed, then the licensee has no further protection under the non-discrimination requirement of FRAND, or that non-discrimination protects new licensees from facing worse terms than existing licensees but should not prevent the new licensee from obtaining better terms. However, it would

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9 Carlton & Shampine, Economic Interpretation, supra note 1, at 535; Ordover & Shampine, FRAND Commitment, supra note 8, at 1–2.
11 Gilbert, Deal or No Deal?, supra note 2, at 879, 881.
12 There is general agreement that discrimination requires some commonality among the firms being compared, such as their being “similarly situated.” Some firms are sufficiently unrelated to one another that differing terms and conditions do not raise economic concerns such as unequal playing fields between competitors. For example, two firms might make products that are in entirely separate industries and do not compete with one another (wireless cardiac monitors and mobile phones). The question here might be interpreted as to whether firms that are otherwise identical but sign licenses on different dates are still similarly situated.
13 Carlton & Shampine, Economic Interpretation, supra note 1, at 551–52.
be very peculiar if non-discrimination provided a remedy only for one particular order of signing even though the competitive impact on the two parties is the same either way.\(^\text{14}\)

The non-discrimination requirement of FRAND by its nature involves comparisons between licensees. A firm can only be discriminated against relative to some other firm’s license. The fact that one of the two firms is obtaining more favorable terms does not negate the harm to the firm receiving less favorable terms, and this is the case regardless of the order the licenses are signed in. Furthermore, this harm is independent of the “reasonable” requirement of FRAND. For example, “fair and reasonable” may cover a range, but if one firm is at the top end of the range and another is at the bottom, the discrimination between the two is problematic for the firm receiving the less favorable terms. In this respect, firms may care more about non-discrimination than about reasonableness. That is, all firms might be paying unreasonably high rates, but at least they would not be competitively disadvantaged relative to one another.\(^\text{15}\) Again, the problem exists regardless of the order of signing.

If it were made clear that later licensees might obtain substantially more favorable terms with no relief available to the existing licensees under a FRAND commitment, then licensees would be understandably reluctant to enter into long-term licenses or even to enter into licenses at all. Conversely, when terms on initial licensees are understood to be binding on other licensees going forward, then the benefits of ex ante negotiations can be extended to protect later licensees against hold-up and licensors are better positioned to resist hold-out. That is, there is a strong economic case that rates should not change over time, or at least should not rise, particularly in the presence of ex ante licenses that can be used as benchmarks. Such a policy provides protection to both licensees and licensors. If licensors nonetheless wish to change rates, there are some practical and policy differences between raising and lowering them.

**Can FRAND Compliant Rates Rise over Time?**

This question touches on both the reasonable and non-discrimination requirements of FRAND. The immediate concerns are that the holder of SEPs may be attempting to hold up the new licensee as well as placing the new licensee at a competitive disadvantage relative to prior licensees (i.e., discriminating against the new licensee). If the value of SEPs were to rise over time,\(^\text{16}\) the SEP

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\(^{14}\) Of course, setting aside the FRAND commitment, such behavior might rise to the level of violating Section 2 of the Sherman Act or Articles 101 or 102 of the Treaty of the Functioning of the European Union.


\(^{16}\) The likelihood of this happening depends on how the “reasonable” aspect of FRAND is defined. Given the interpretation advocated by the Federal Trade Commission, for example, where the value of the SEPs is evaluated based on the competitive landscape prior to the standard being set, it may never happen. See FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307/patentreport.pdf at 22–23 (stating that “A definition of RAND based on the ex ante value of the patented technology at the time the standard is chosen is necessary for consumers to benefit from competition among technologies to be incorporated into the standard.”). If, however, the ex ante approach is taken as meaning that the maximum rate should be determined based on a hypothetical negotiation involving current market conditions but assuming no sunk costs and that the competitive constraints present prior to the standard being set were still present, then that could well vary over time. That is, a licensor may claim that rates should rise because market conditions have changed. But what does that mean? If it means that licensees’ profits are higher because of unrelated innovations and the licensor wishes to extract some of those rents, that is not an acceptable justification given a FRAND commitment. If it means that demand factors have changed in such a way that, even if ex ante competition were still present the patented technology would command a greater premium over alternatives than in prior years, then rate increases might be justifiable. The potential difficulty in distinguishing between reasonable and anticompetitive explanations is one justification for policy makers to discourage or disallow rate increases. Carlton & Shampine, Economic Interpretation, supra note 1, at 551–52.
holder might well be justified in asking for a higher royalty. That is, such an increase need not necessarily violate the “reasonable” requirement of FRAND. However, allowing such increases would lead to much dispute as to whether it actually was hold-up or was allowable and would likely be hard to identify in a non-controversial manner. Further, the licensee being asked to pay for higher rates than existing licensees is likely to argue that while such a change might be allowed under the “reasonable” requirement of FRAND, it is not allowed under the “non-discriminatory” requirement of FRAND if the licensee’s competitors are continuing to pay lower rates under existing licenses. Both concerns are particularly likely where monitoring is difficult (e.g., where it is difficult to determine what the ex ante value of the patents is, such as when an entire portfolio is being licensed or where there is a lack of transparency as to licensing terms). Allowing the possibility that each new licensee might be asked to pay a higher rate would then undermine both the reasonable and non-discrimination protections of FRAND.

A reasonable approach from a public policy perspective, therefore, would be never to allow rates for FRAND-encumbered patents to rise. However, as a matter of theory (depending in part on the interpretation of “reasonable” and the ex ante framework), such rate increases may be justifiable in some circumstances, and if a licensor does raise rates, it is then necessary to decide what to do with existing licensees. I address this in the next section after discussing the rationale for whether rates can fall over time.

Can FRAND Compliant Rates Fall over Time?
If rates are allowed to change at all, then just as it is conceivable that the upper limit for a “reasonable” rate might increase over time, it is also conceivable that it might decrease over time, and thus failure to reduce rates, or a rate reduction that failed to fully capture the reduction in the upper limit on “reasonable” rates, might be exercises of hold-up. However, unlike a rate increase, a new licensee being offered lower rates than prior licensees is unlikely to object. Other licensees might object, but may not even be aware that a new licensee has been offered more favorable terms. This raises certain practical questions as to the context in which the new license is being negotiated.

A key point noted by Professor Gilbert is that a new, lower rate granted only to a new licensee is discriminatory and disadvantages the existing licensees. Enforcing the non-discrimination requirement implies at a minimum that new licenses going forward will benefit from the new, lower rate (or, if rates were allowed to rise, would use the new benchmark established). However, the question remains as to what to do with respect to existing licensees.

If Rates Change, How Should Existing Licensees Be Treated?
This is the central question of the article. As a matter of principle, the terms and conditions for existing licensees should be adjusted so as to preserve non-discrimination. However, there are practical impediments. If rates were to rise, it is not clear what mechanism a licensor could use to adjust existing licenses’ terms. The FRAND commitment is between the licensor and the SSO, and licensees are third-party beneficiaries. Even if the “reasonable” rate were to become higher over time, the existence of licenses at lower rates would pose a problem for the licensor under the non-discrimination requirement. While the licensor might wish to ratchet up all terms, if there

17 For further discussion, see Carlton & Shampine, Economic Interpretation, supra note 1, at 551–52.
18 Gilbert, Deal or No Deal?, supra note 2, at 876, 880.
were no contractual mechanism in place to do so, the existence of the FRAND commitment does
not offer any obvious way to do so either, and the licensee being asked for higher rates would like-
ly challenge those rates as discriminatory if existing licensees were continuing to pay lower rates.
That does not entirely preclude the possibility of raising rates, however, as I discuss further below.

If rates were to fall, the situation is not entirely symmetric because new licensees—the ones
clearly aware of the new terms and conditions—are unlikely to challenge lower rates to them-
selves, and a licensor that wishes to ratchet down existing licenses to remain non-discriminatory
with a new license could likely do so with the willing cooperation of the existing licensees. Indeed,
not doing so is likely to be challenged if existing licensees become aware of the discrimination
against them. Existing licensees can claim that as third-party beneficiaries of the FRAND com-
mitment to non-discrimination, if the licensor chooses to nonetheless discriminate and provide
new licensees with lower terms, then existing licensees are entitled to those terms as well. It is for
precisely this reason that Professor Gilbert notes that licensors will be reluctant to provide dis-
counts relative to existing licensees. So, in principle, existing licensees’ rates should be adjusted
to provide a level playing field amongst competitors, i.e., that similarly situated firms should be
paying similar rates at any given point in time. However, the practical concerns raised should be
taken into account as well.

Revising existing licenses because of an external commitment—the FRAND commitment—is
not something to be done lightly. The situation can, and should, be avoided entirely by not offer-
ing discriminatory terms to begin with. But if a licensor does offer terms that are discriminatory rel-
ative to existing licensees, how is that best handled? If there is an existing contractual mechanism
to handle such adjustments, then again the matter can be settled simply. For example, if well-
specified most-favored-licensee clauses are in place, then the overall licensing scheme may be
adjusted with little difficulty. 19

If there are no such provisions in place, the situation may still be of no practical significance.
The difference in terms and conditions may be small, existing licensees may be near the end of
their license terms, or some combination of the two may be present so that the economic impact
is not significant. In these circumstances, the existing licensees will negotiate new terms in short
order, and those terms can reflect the newly established benchmark. The time and effort involved
in enforcing the non-discrimination requirement of FRAND in such a situation likely exceed the
potential gains to the licensees. 20

If, however, there are licenses that are not set to expire for a lengthy period of time, and the dif-
fERENCE IN TERMS IS
substantial, then the
situation may be of
great significance, not
only to the individual
firms impacted, but to
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between them.

If, however, there are licenses that are not set to expire for a lengthy period of time, and the dif-
ference in terms is substantial, then the situation may be of great significance, not only to the indi-
vidual firms impacted, but to the competition between them. This could arise in several ways. First,
even if all license periods are for just a few years, if licenses are negotiated in close proximity to
one another, and the first few licensees end up with terms that are substantially less favorable than
the next licensee or licensees, then those initial licensees face the prospect of years of differential
treatment. Second, if existing licenses are for relatively long terms, then again the licensees
may face the prospect of years of differential treatment even fairly late into the life of the licenses.
What then?

19 See Carlton & Shampine, Economic Interpretation, supra note 1, at 552.
20 This is true whether a rise or fall in rates is contemplated. That is, if the change in rates is small, then no party has much incentive to bear
the transaction costs of a renegotiation or the litigation costs of a legal challenge. Similarly, if most or all existing licenses have little time
remaining, then it is possible for rates to remain generally non-discriminatory whether the overall level rises or falls, simply by all rates being
adjusted in a similar time frame.
If the economic significance of the new, discriminatory terms is substantial, then the rates for the existing licensees should be adjusted on a going-forward basis to ensure the non-discriminatory terms required by a FRAND commitment. This could be done through voluntary renegotiation or through litigation.

**What About Retroactive Adjustments?**

Enforcement of the non-discrimination requirement of FRAND is most appropriately done on a going-forward basis. If a firm is being discriminated against, it can and should seek relief, initially through negotiations with the licensor and, failing that, through litigation.\(^2\)\(^1\) Such relief can help ensure the level playing field among competitors that non-discrimination provides for. However, there may be circumstances where a licensee does not realize that it is being discriminated against and its challenge is delayed. The fact that a firm was discriminated against for some period of time before obtaining relief raises the possibility of damages. The ability to obtain damages in such a case depends in large part upon legal questions, such as the relevant statute of limitations. As a matter of economics, there is an unfortunate lack of transparency as to licensing terms that makes it difficult for licensees to determine whether they are being discriminated against, making this situation more likely than it might otherwise be. Awarding damages in instances where challenges were delayed due to a lack of transparency caused by the licensor would help discourage efforts to disguise or obfuscate discriminatory behavior.

To be clear, licensees have no ability under FRAND to unilaterally challenge an existing license absent some basis in the licensor’s actions. A licensee cannot simply say it does not like the current license and demand new terms (although it could certainly ask if the licensor was willing to renegotiate, just as the licensor could ask the same of the licensee). The only basis for demanding a change to an existing license under the FRAND commitment is through the licensor’s actions—if, for example, the licensor has done something to discriminate against the licensee. If a licensee finds at some point that it is being discriminated against it can then seek relief under the non-discrimination requirement of FRAND. That could occur because a licensee realizes that it has been discriminated against for some time and did not realize that fact or because the licensee becomes aware of a new license that is discriminatory relative to the licensee’s own license. Challenges should occur in as timely a manner as possible, but given the lack of transparency of many licensors, they may be delayed for years, assuming the licensees ever become aware that they were discriminated against.

In summary, the point of non-discrimination is to extend the protection of benchmark licenses across different licensees and through time and to provide a level playing field amongst competitors. Licensors should not be engaging in discrimination and there is a strong economic case that rates should not change over time, or at least should not rise, particularly in the presence of ex ante licenses that can be used as benchmarks. Such a policy provides protection to both licensees and licensors. If rates do change and remain “reasonable,” licensees with higher rates can seek relief so that they are not discriminated against relative to their competitors. A key element of this is that similarly situated firms should not be paying substantially different rates to one another at the same time, even if they signed their licenses on different dates. If licensors wish to adjust rates over time, they must consider how those adjustments will affect existing licensees. For

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21 Although either party should be free to seek relief through litigation at any point should they feel it necessary to do so. Ordover & Shampine, *FRAND Commitment*, supra note 8, at 4–6.
example, licensors may wish to adjust rates when all or most licenses are up for renewal. Providing a significantly different rate to a single licensee relative to its competitors can be problematic under the non-discrimination requirement of FRAND. Nonetheless, as a practical matter, if there are no contractual mechanisms in the licenses themselves that can provide relief, the transaction costs involved in a licensee seeking such relief through the FRAND commitment can be substantial, so it is only efficient to seek such relief when the economic effects of the discrimination are significant—the degree of discrimination is relatively large, and will have an effect on the disadvantaged party for a non-trivial period of time. Otherwise, it is simpler and more efficient to let existing licenses expire and address the new terms and conditions at that time.
A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner’s Perspective

Alexander (Alexi) Maltas, Tony Lin, and Robert F. Baldwin III

Many headline-grabbing transactions in recent years have involved communications companies, such as Charter’s acquisition of Time Warner Cable and Bright House Networks (2016), AT&T’s acquisition of DIRECTV (2015), Comcast’s abandoned attempt to acquire Time Warner Cable (2015), AT&T’s abandoned attempt to acquire T-Mobile (2011), or Sirius’s merger with XM Radio (2008). These transactions, both successful and unsuccessful, have drawn attention to the process by which the U.S. government approves or blocks mergers and acquisitions in the communications and broadband Internet industries.

Typically, before a transaction in those sectors may proceed, at least two federal agencies must clear it: the Federal Communications Commission and an antitrust agency, commonly the Department of Justice. Review by these agencies differs in several key categories: (1) their standards for evaluating transactions, including who bears the burden of proof; (2) their procedures; and (3) the types of remedies that each agency is likely to pursue as a condition to approval. In addition, many other subtle differences can affect the merger review process, such as the methods of discovery employed by each agency. Understanding the similarities and differences between the agencies can help practitioners representing communications companies better navigate the review process and guide clients to a favorable outcome.

Different Standards for Merger Review

One of the more noteworthy differences between the agency review processes is the standard by which each agency analyzes the proposed merger. The DOJ focuses on the competitive effects of a transaction; the FCC, by contrast, applies a broader “public interest” standard that looks beyond competitive effects. The burden of proof for satisfying each agency’s standard is different, too. The DOJ bears the burden of proof to establish why a transaction should be blocked, while the merging parties bear the burden of proof to establish why the FCC should approve the transaction.

DOJ Review. Section 7 of the Clayton Act prohibits mergers “the effect of which . . . may be substantially to lessen competition, or tend to create a monopoly.”

1 This article does not address the transaction review processes of any applicable state agencies.

2 15 U.S.C. § 18. In principle, both the DOJ and Federal Trade Commission have jurisdiction over all sectors of the economy. However, these agencies typically divide industries between them, with the FTC often handling media and broadcast cases and the DOJ focusing on telephony, broadband Internet, and cable and satellite television. See, e.g., Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), https://www.justice.gov/atr/memorandum-agreement-between-federal-trade-commission-and-antitrust-division-united-states. The FTC’s lack of jurisdiction over common carriers, which includes providers of “telecommunications services,” in part explains why the agencies have made this division, but that is beyond the scope of this article. For convenience, this article describes DOJ’s processes and refers to the agencies collectively as the DOJ.
authorizes the DOJ to seek an injunction to block an acquisition.\(^3\) The burden is on the DOJ to demonstrate by a preponderance of the evidence that the merger will violate the antitrust laws.\(^4\) To establish a violation, the DOJ must establish that the transaction is reasonably likely to cause anticompetitive effects.\(^5\)

For horizontal mergers (between actual or potential competitors), the DOJ in conjunction with the Federal Trade Commission has established enforcement guidelines that provide that such mergers “should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.”\(^6\) The DOJ focuses on whether the transaction may lead to lessened competition through unilateral effects (i.e., exercise of single-firm dominance) or coordinated effects (i.e., collusion). That analysis often but not always entails the DOJ defining relevant product and geographic markets, calculating market shares for the parties and all other current producers/sellers (including firms that could easily and quickly enter without incurring sunk costs), and then assessing whether a transaction will lessen competition.\(^7\)

The DOJ will also consider whether any risk of lessened competition may be diminished due to new entry into the market that is timely (within two years), likely (given minimum viable scale and potential for profitability at pre-transaction prices), and sufficient to deter anticompetitive dominance or collusion. Thereafter, the DOJ will consider whether any remaining potential for anticompetitive effects is outweighed by cognizable and verifiable transaction-specific efficiencies.\(^8\)

For a vertical merger (e.g., between a supplier and a downstream customer), the DOJ’s primary concern is whether a transaction could allow the combined company to foreclose competition from its competitors by denying access to necessary suppliers or customers.\(^9\) To determine the risk posed by a vertical transaction, the DOJ looks at many of the same facts as in a horizontal merger: the number of suppliers and customers; concentration in the defined markets; and the easy of entry and exit into those markets.\(^10\) The DOJ is not likely to pursue an enforcement action when there are adequate numbers of suppliers and customers in a post-transaction market.

**FCC Review.** Under the Communications Act of 1934, as amended, the FCC is required to review all mergers or transactions involving the assignment or transfer of control of FCC licenses or authorizations.\(^11\) The FCC’s review thus is limited to transactions involving FCC licenses or authorizations, and is mandatory for the agency; the DOJ, by contrast, often has more discretion in its review, such as whether to pursue a second request or to investigate a transaction for which no HSR filing was required.

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\(^7\) See id. § 4.

\(^8\) 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 343ff (7th ed. 2012). The DOJ may elect not to challenge an otherwise problematic transaction that involves a failing firm or division whose assets would exit the market absent the proposed transaction, but this exception is very narrow.

\(^9\) See 1 ANTITRUST LAW DEVELOPMENTS, supra note 8, at 350–60.

\(^10\) See id. at 377ff.

In an FCC merger proceeding, the burden is on the applicants to prove by a preponderance of the evidence that the transaction would serve the “public interest, convenience, and necessity.”12 Under this “public interest” standard, the Commission first assesses whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission’s rules.13 The Commission next considers whether the proposed transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.

In evaluating whether the transaction serves the public interest, the FCC’s analysis is “informed by, but not limited to, traditional antitrust principles.”14 The FCC, like the DOJ, evaluates the competitive effects of the merger, but its analysis takes into account a number of considerations that the DOJ’s competitive analysis might not. The FCC considers among other things whether a transaction would promote “the broad aims of the Communications Act,” an assessment which has included, among other things, evaluating whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, increase the availability of children’s programming and Public, Educational, and Government programming.15 For example, the FCC has required merging entities to offer standalone, discounted Internet services for low-income customers, without finding that bundled services would violate the antitrust laws or that Internet prices would rise absent the condition.16 The FCC also regularly states that one difference between its standard and that of the DOJ is that it will consider “whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”17 This may be a difference more of description than substance, as the FCC has not challenged a transaction on the ground that it merely preserved but did not enhance competition.

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14 See, e.g., AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9140, ¶ 20; SoftBank-Sprint Order, supra note 13, 28 FCC Rcd. at 9651, ¶ 25.
15 See, e.g., AT&T-DIRECTV Order, supra note 13, 9141 ¶ 21 (“[T]he DOJ review is . . . limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.”); In the Matter of Applications of Comcast Corp., General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, 26 FCC Rcd. 4238, 4248, ¶ 23 (2011) [hereinafter Comcast-NBCU Order]; Sirius-XM Order, supra note 13, 23 FCC Rcd. at 12364, ¶ 31. Despite the FCC’s articulation of its standard as different from the DOJ’s, some of the supposed differences, such as a focus on improved service quality or diversity of information sources, may also be part of the DOJ’s evaluation, for example, as potential efficiencies. Thus, in practice, the standards may overlap significantly. As discussed in more detail below, perhaps the most notable difference is that the FCC may impose conditions on transactions more frequently than does the DOJ, and in doing so it often points to its desire to promote the goals of the Communications Act.
17 AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9141, ¶ 21.
Despite the different standards of review between the FCC and DOJ, disagreement between the agencies is rare. Close coordination between the agencies during the review process typically avoids any overt disagreement. Nonetheless, the FCC’s public interest standard, of which antitrust analysis is only one component, could allow it to reach a different conclusion from the antitrust agencies.18

Agency Process and Timing
The DOJ and FCC review transactions in parallel, but each agency follows its own procedures. Among the most notable differences is that, while parties to a proposed merger may publicly disclose that the deal is subject to DOJ review, the review process itself is conducted largely behind closed doors, unless and until the DOJ files a lawsuit seeking to block a transaction. By contrast, the FCC reviews major transactions via a publicly docketed proceeding and invites the public to participate, although the proceedings are subject to protective orders that limit access to confidential information. In addition, there are a variety of other differences in the agencies’ procedures. Understanding some of the key differences can facilitate the review process.

Initial Submissions
DOJ Filings. The Hart-Scott-Rodino (HSR) Act requires parties to notify the DOJ and FTC before closing on certain acquisitions of voting securities, non-corporate interests, and assets.20 Generally, these premerger filings are triggered when the parties have revenues or assets in the United States of a certain size, and the value of the transaction exceeds a certain U.S. dollar threshold, subject to statutory exemptions.21 The filing describes the key terms of the transaction and contains basic data on each party’s U.S. revenues, subsidiaries, minority holdings, overlapping products or services (where applicable), and documents discussing competition-related aspects of the transaction. The filing triggers a 30-day statutory waiting period (15 days in the case of cash tender offers or acquisitions in bankruptcy) that must lapse before the parties close the transaction. Parties may also request “early termination” of the waiting period.

For the significant majority of transactions before the DOJ, the HSR waiting period lapses without further inquiry, or early termination is granted, and the parties have the antitrust approval necessary to close their transaction. In some cases, the DOJ may conduct limited inquiries into the relevant products or services affected by the transaction, and may request voluntary submissions of documents to provide background information during the initial waiting period. The parties may also proactively engage with DOJ staff to address any initial questions or concerns. The DOJ may also contact each party’s competitors and customers for interviews and other information.

At the conclusion of the HSR waiting period, the DOJ must determine whether to close its investigation and allow the parties to proceed with closing the transaction. If the DOJ has not resolved

18 As a practical matter, the agencies have the ability to avoid public disagreement were they ever to reach different conclusions about a transaction’s merits. For example, in the unlikely event that the DOJ wanted to challenge a transaction over which the FCC had no concerns, the FCC could delay taking action on the pending FCC application. Conversely, the DOJ need not take any public action if it approves a transaction. In all events, the coordination between agencies makes these scenarios more theoretical than realistic.

19 See 18 U.S.C. § 18a(h).

20 15 U.S.C. § 18a. The DOJ can (and sometimes does) investigate the competitive effects of transactions that do not require the submission of an HSR filing.

21 The relevant values and thresholds are adjusted annually. As of February 2016, a premerger filing may be required in transactions valued at more than $312.6 million without regard to the parties’ sales or assets in the United States. For transactions valued between $78.2 million and $312.6 million, both parties must also satisfy the “size of person” test, which requires one party to have more than $156.3 in sales or assets and the other party to have sales or assets of at least $15.6 million.
its concerns with the transaction through dialogue with the parties, it will issue a Request for Additional Information, commonly known as a “Second Request.” A Second Request results in an extensive, time consuming, and costly discovery process.

If parties believe that the DOJ’s investigation may require more than 30 days, but perhaps could be resolved without a Second Request, they have the option to “pull and refile” their HSR submissions, which effectively extends the waiting period by an additional 30 days.

**FCC Filings.** Entities seeking the transfer or assignment of FCC licenses or authorizations must seek FCC approval prior to consummating the transaction. Formally, these entities are required to submit written applications on various FCC forms specific to the licenses or authorizations to be assigned or transferred. The FCC forms are accompanied by a narrative public interest statement by the parties that describes the parties (including detailed ownership information), the mechanics of the transaction (e.g., whether it is an asset sale or stock transaction), the public interest justifications, and the competitive impact (including satisfaction of any applicable FCC-specific competition analysis). For large transactions, the FCC application narrative is likely to consist of a much more significant submission than the initial HSR filing. It is not uncommon for applicants to include an economist’s analysis with the application, whereas that would usually come later in the DOJ process.

After receipt of the applications and verification that all necessary administrative documents have been submitted (including the adequacy of the parties’ public interest statement), the FCC will issue a public notice announcing the receipt of the applications and the opening of a public docket. For major transactions, the FCC typically issues a public notice several weeks after the application is filed that establishes a public, docketed proceeding with an informal 180-day “shot clock.” The public notice also will set forth the ex parte rules that will apply to the proceeding; for major transactions, the FCC typically designates the proceeding as “permit-but-disclose,” meaning that the applicants and interested parties may make presentations to decision-making personnel at the FCC, so long as the presentations are disclosed by filing a letter in the record describing the substance of the meeting and naming the participants.

Although the FCC tries to complete its review within the 180-day period, it is not required to do so, and the FCC frequently stops the clock. There are a variety of reasons it does so, including non-timely responses to information requests, extension of notice/comment filing periods, delay resulting from issues pending before other agencies or law enforcement, and receipt of new information or a substantial amendment to the application. Some complex or controversial transactions have taken a year or more to resolve. For example, in the Sirius-XM transaction, the FCC issued its public notice initiating the transaction review in March 2007, but did not vote to approve the transaction until late July 2008.

**Third Party Participation in Merger Proceedings**

**DOJ.** For public transactions, the DOJ is likely to receive unsolicited information from third parties, including the parties’ competitors and customers, and industry interest groups, such as trade associations. While the information supplied by these contacts may be beneficial, the DOJ

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22 In many cases, entities engage with FCC staff informally prior to the submission of the applications, both to provide advance notice and to gauge the initial responses of FCC staff. There are typically no public records of such meetings or discussions, and nothing stated in those meetings by the FCC is binding.

23 See [https://www.fcc.gov/reports-research/guides/review-of-significant-transactions](https://www.fcc.gov/reports-research/guides/review-of-significant-transactions). Non-major transactions may not have a shot clock but generally are acted on in due course and within 180 days.

24 See 47 C.F.R. § 1.1206.
may view complaints by competitors with a degree of skepticism, since the interests of competitors may diverge from the interests of consumers.25

Third parties also continue to play a role before and during a Second Request. Not wanting to rely solely on the parties’ representations about the competitive dynamics in their relevant markets, the DOJ often receives additional information and testimony through voluntary requests and compulsory process from private parties, especially customers and competitors. Private parties may also proactively reach out to the DOJ to complain about a transaction or advocate for a proposed remedy. For transactions with localized market effects, state attorneys general may conduct investigations in parallel with the DOJ. In addition, for cross-border transactions, the DOJ will coordinate with foreign competition authorities also investigating the transaction.

**Document and Data Discovery Procedures**

**DOJ Second Request.** If the DOJ has not resolved its concerns with the transaction through discussion with the parties, it will issue a Second Request. Compliance with a Second Request can be burdensome, requiring a significant expenditure of time and resources to address, and typically can take 3–6 months or more to comply. Parties frequently produce hundreds of thousands of documents related not only to the transaction but also other relevant areas of the parties’ businesses, and prepare narrative responses to a variety of questions concerning the relevant product and geographic markets that cause the DOJ concern. The DOJ staff may also depose company executives during this time, as well as continue to interview and collect statements from third-party competitors and customers.

Document requests either require a search of certain employees’ files for all documents relating to specific topics or require the parties to locate and produce specific documents, such as a copy of promotional materials. Document requests also commonly include requests for the company’s organizational charts, promotional materials and marketing plans, strategic plans and financial projections, pricing documents, documents analyzing competitors and competition, competitive analyses, and all documents related specifically to the transaction. Parties often negotiate with the DOJ staff regarding the number and identity of document custodians and search parameters for the document production.

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25 See Horizontal Merger Guidelines, supra note 6, at 5–6. One example that the agencies note is that “customers normally lose, but rival firms gain, if the merged entity raises its prices.” Id. at 5.
Interrogatories require the parties to answer questions in writing and often are used by the DOJ to obtain specific information without having to sift through thousands of documents. Typical interrogatory requests include a description of the relevant product/service as defined by the DOJ, aggregated sales information, detailed sales/revenue data, bidding data or win-loss reports, a description of competitors and their market shares, a list of recent and potential entrants into the relevant market and a detailed description of the costs and time for entry, and a description (and quantification) of the merger-specific efficiencies and benefits that will flow from the transaction. Parties often hire an economist to aid in the preparation of these submissions.

FCC. Throughout the FCC process, but often after the comment cycle is completed, the agency may issue information requests to the applicants, as well as to competitors and industry stakeholders. FCC information requests in major transactions typically are issued well after the DOJ has issued its Second Requests. Parties receiving requests for information from the FCC typically have two to three weeks to respond, although full compliance with large information requests may take longer. The requests often raise many of the same procedural issues as in a Second Request, such as the number and identity of custodians and search parameters for any requested document production. Like the DOJ requests, these may be negotiated with the agency, and the greater the consistency between search parameters, such as the custodians and time frames for review, the more efficient the review process is likely to be.

The substance of some of the information requests often overlaps substantially with the requests of the DOJ, especially with respect to competitive analysis. But, as explained above, the FCC’s inquiry is broader than the DOJ’s, and accordingly it may seek answers to substantively different questions, adding to the complexity, time, and cost of the combined review processes. It is not uncommon for the FCC to seek documents from additional custodians as well. While the inquiries will not overlap completely, close coordination between outside lawyers representing clients before the DOJ and FCC on their e-discovery strategy—before the process begins—will help avoid duplication of efforts, and enable the applicants to leverage work done for one agency in order to respond to the other. Well-designed discovery protocols ideally will require custodians’ files to be searched and collected only once, and should minimize duplicative review of documents.

Confidentiality of Documents and Data

DOJ. Any information including documents submitted to the DOJ during the HSR clearance process is treated confidentially and is exempt from disclosure under the Freedom of Information Act, even from third parties who protest the transaction to the DOJ. The DOJ interprets the confidentiality requirements of the HSR Act to prohibit disclosure of HSR filings and other submissions to other independent federal agencies unless the filing party agrees to permit disclosure. If, however, DOJ sues to enjoin the merger, documents may be produced as part of the litigation, subject to appropriate protective orders.

FCC. FCC proceedings are presumptively public, but parties, including not only the applicants but also affected third parties, may seek confidential treatment for information submitted in the proceeding. To ensure that the review of sensitive information by other entities does not harm the merger applicants, the FCC has established a practice of issuing protective orders governing review of “confidential information” (typically limited to counsel and outside experts not engaged in competitive decision-making) and “highly confidential information” (typically limited to outside

counsel and other outside consultants not involved in competitive decision-making).28 As a result, the general public will have relatively easy access via the FCC’s website to information, such as the application, public interest statement, and exhibits including economist reports, but access to confidential business information may not be readily available, or available at all.

Resolution of Agency Proceedings

DOJ. Parties may be able to resolve the DOJ's concerns through effective advocacy and more limited data and document submissions without fully complying with a Second Request, or they can seek modifications to the Second Request to limit its scope. Once the parties have certified that they have substantially complied with the Second Request, a second 30-day waiting period begins during which the DOJ reviews the additional information received to determine whether to close its investigation or proceed to litigation.

Because the DOJ cannot adjudicate mergers itself, if the DOJ concludes that an acquisition may substantially lessen competition, the agency may seek a preliminary injunction in federal court under Section 15 of the Clayton Act that would prevent parties from consummating the transaction.29 This requires the DOJ to meet the four-part legal standard for preliminary injunctions by demonstrating that: (1) the plaintiff will suffer irreparable harm if the injunction does not issue; (2) this injury to the plaintiff outweighs the harm to the defendant if the injunction is granted; (3) the plaintiff has a substantial likelihood of success on the merits; and (4) the injunction comports with the public interest.30

As a practical matter, the DOJ and FCC typically coordinate carefully, and any efforts to block a transaction likely will reflect that coordination, with one or the other agency taking the lead. For example, in the 2002 proposed combination of DIRECTV and DISH, the FCC initially designated the transaction for a hearing before an administrative law judge for additional fact-finding and, less than two weeks later, the DOJ filed a lawsuit to block the transaction. In the 2011 AT&T-T-Mobile proposed transaction, the DOJ initially filed a lawsuit to block the transaction, and the parties swiftly withdrew their application from the FCC; the FCC nevertheless released a “Staff Analysis and Findings” that reflected the FCC staff’s draft order designating the transaction for a hearing.31 Parties often abandon transactions that face significant delay or where litigation becomes imminent.

As an alternative to litigation, the DOJ may use a variety of tools to reach an agreement with the merging parties that resolves its concerns. The DOJ may, for example, negotiate a settlement that contains certain conditions. The settlement agreement typically takes the form of a consent decree that is filed in court and, upon entry by the court, becomes a binding order. The DOJ also may accept a voluntary remedy proposed by the parties that allows the merger to proceed with modifications that restore or preserve competition. In the past, the DOJ has generally preferred

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one-time structural remedies, such as divestitures, over ongoing behavioral requirements to avoid the costs and complexities associated with continuously monitoring a firm’s activities and ensuring compliance. However, guidelines released in 2011 by the DOJ endorse a variety of conduct remedies to address concerns in vertical mergers and, in more limited circumstances, in horizontal mergers.32

In communications transactions, conditions imposed by the DOJ may also be the product of coordination with FCC staff. Thus, in the Charter-Time Warner Cable-Bright House transaction, the parties entered into a consent decree with the DOJ to prohibit Charter from entering into or enforcing contractual terms that prevent video programmers from distributing content online, a decree that the FCC described as the product of “close coordination” between the agencies.33

**FCC.** When the FCC has competitive or other concerns regarding a proposed transaction, it too can impose conditions to its approval of the transaction. Additionally, acting under its public interest authority, the FCC routinely imposes and enforces transaction-specific conditions to a grant of an application to ensure that the public interest is served. Moreover, because the parties bear the burden of demonstrating that their transaction satisfies the FCC’s public interest standard, and the FCC has no mandatory timeline for action, applicants often offer “voluntary” conditions to proactively resolve any FCC concerns and accelerate approval. FCC-imposed conditions may include forward-looking conditions relating to the merged entity’s future conduct. The FCC’s greater willingness to impose such “behavioral” conditions stems from its authority to maintain ongoing oversight of the entity, as an FCC licensee, and from its broader merger review standard, which includes promoting the policy goals underlying the Communications Act.

As an example, the Commission imposed a number of conditions in the 2015 AT&T-DIRECTV merger to address potential competitive concerns. To remedy the possibility that AT&T post-merger would have less incentive to deploy Fiber-to-the-Premises (FTTP) (i.e., fiber optic cable installed directly to the home), which could cannibalize video subscription revenues from DIRECTV, the Commission conditioned its approval on AT&T deploying FTTP to 12.5 million locations within four years.34 In the 2016 Charter-Time Warner Cable-Bright House transaction, the FCC adopted conditions that sought to prevent the merged company from discriminating against online video in favor of its own cable TV packages. The conditions, among other things, prohibited the merged entity from employing data caps or usage-based pricing, mandated a generous “settlement-free” Internet interconnection policy under which data was exchanged with many other entities at no charge, and required it to deploy high-speed broadband to 2 million additional homes.35 FCC conditions can also pertain to non-competition related considerations; in that same merger, the FCC imposed a condition requiring the combined entity to make available an affordable standalone broadband service to low-income consumers.36

If the FCC concludes that it cannot approve the proposed transaction based on the record before it, the FCC will designate the application for hearing before an administrative law judge for...
additional fact-finding.\textsuperscript{37} As a practical matter, the Commission’s designating an application for hearing often leads to the applicants’ withdrawing their application, as was the case in the 2002 proposed merger of DIRECTV-EchoStar, as well as in the 2011 AT&T-T-Mobile and the 2015 Comcast-Time Warner Cable proposed transactions, in which the parties withdrew their applications upon the FCC staff’s recommendation that the transactions be designated for hearing. The reasons for withdrawing a transaction application may include the regulatory uncertainty of the hearing process, which creates costs and risks that parties may be unwilling to assume; the potentially lengthy duration of a hearing, which may not be completed within the time frame specified in a merger agreement or consistent with financing considerations; and the possibility of fighting parallel challenges from two regulatory agencies. As one former Commissioner has stated, “Mergers are never put to hearing in order to approve them. . . . they are designated for a hearing in order to kill them.”\textsuperscript{38}

Parties seeking merger approval should also appreciate that any adverse FCC determination will be difficult to challenge. The Supreme Court “has repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”\textsuperscript{39}

Conclusion

Merging parties in the communications sector must obtain approval from two federal agencies, each applying different standards that overlap in some respects but not others. The dual review has the potential to increase the burdens and costs of obtaining clearance for transactions. An appreciation of agencies’ similarities and differences, both substantive and procedural, can help make the process more efficient and promote successful outcomes.

\textsuperscript{37} See, e.g., AT&T-Plateau Wireless Order, supra note 13, 30 FCC Rcd. at 5111–12, ¶ 9.


\textsuperscript{39} See, e.g., FCC v. WCN Listener Guild, 450 U.S. 582, 596 (1981); see also FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946)(“[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served . . . [a]nd the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter.”).