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Collaboration Agreements

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this Chronicle we address the question of collaboration agreements. Collaboration agreements are a double-edged sword. On the one hand, anticompetitive cooperation between competitors is precisely what the antitrust laws are designed to prevent. On the other, the antitrust laws must foster efficiency and innovation, and sometimes collaboration is necessary to achieve these aims.

As a result, antitrust takes a nuanced approach towards collaboration agreements. Particularly in the COVID-19 world, an acute crisis can require unusual solutions, and antitrust will not seek to stand in the way of collaboration in healthcare or distribution that can alleviate immediate pressures, at least for the time being. But extraordinary measures for extraordinary times must remain just that, and COVID-19 cannot be used an excuse to permit anticompetitive practices under the guise of pandemic relief.

The contributions to this Chronicle address these issues, with a natural focus on measures to be adopted in light of the global pandemic. The pieces in this volume address these issues from the unique perspective of various jurisdictions around the world, while maintaining an eye on the overarching antitrust issues raised by collaboration under antitrust rules.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

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Open for Business: Cartel Enforcement and the Procurement Collusion Strike Force's Response to the COVID-19 Pandemic

By Chester C. Choi & Daniel W. Glad

A global pandemic and economic disruption make effective deterrence, detection, and prosecution of cartels more important than ever. While COVID-19 is a novel virus, the United States has a long track record of consistent enforcement of the antitrust laws even in times of great crises. Today, the United States has and is using even more tools to address pressing public needs arising from COVID-19. Chief among those tools is the U.S. Department of Justice's Procurement Collusion Strike Force. The Procurement Collusion Strike Force is designed as an inter-agency, virtual force multiplier that not only educates both buyers and sellers to deter antitrust crimes, but also uses traditional investigative tools and cutting-edge data analytics to detect and actively investigate allegations of criminal conduct.

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Pricing Algorithms and Collusion: Is There Clarity on What Corporations May Be on the Hook For?

By Rosa M. Abrantes-Metz & Albert D. Metz

A significant focus has been placed on whether pricing algorithms facilitate collusion and whether this should be the central focus of competition authorities. Opinions range from "making all tacit collusion illegal since pricing algorithms facilitate collusion" all the way to "there is nothing new here, nor anything that needs to be addressed." Our view is that a necessary, but currently missing, first step is to clearly define what collusion or actual coordination looks like in the context of pricing algorithms. What is a "collusive algorithm?" Would we know one if we saw it? Only with a working definition can we really begin a discussion of what, if anything, needs to be updated or addressed in the various legal frameworks, and only then can policymakers provide corporations with any sort of guidance for the development, implementation, and monitoring of non-collusive pricing algorithms.

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NFL v. Ninth Inning, Inc. – Should Section 1 Apply to Joint Ventures' Decisions on Distribution of Their New Products?

By Christopher J. Kelly

The Supreme Court's November 2, 2020 denial of certiorari in *National Football League v. Ninth Inning Inc.*, a challenge to the NFL's centralized distribution of game telecast rights, also saves for another day a more fundamental argument that a group of distinguished antitrust economists made in an *amicus* brief supporting the NFL: when a joint venture creates a new product that its members could not create efficiently by themselves, there is no useful role for Section 1 to play in evaluating the joint venture's distribution decisions. Here, the NFL's decision to distribute NFL Football telecasts centrally, rather than allowing member teams to sell their game telecasts independently, does not threaten "the proper concern of U.S. antitrust law": *ex ante* competition – competition that would or could have existed without the venture. The Economists add that antitrust scrutiny of such distribution decisions undermines incentives to invest in joint ventures by making them more vulnerable to, among other things, member free-riding.

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Cartels as Crisis Management: Why Collusion May Be Inevitable During Economic Downturns

By Jeffrey Martino & Darley Maw

The impact of the ongoing COVID-19 pandemic has been relentless, both from direct affliction with the virus itself and from the economic downturn devastating numerous industries. Though the novel coronavirus has ushered in a wave of economic fallout in the United States, it recalls past crises and the emergence of so-called crisis cartels, trying to brace the economic downswing. Given the economic effects of globalization and substantial growth of various industries, cooperation between individuals and companies became inevitable in order for them to survive, even as authorities warn that those who try to take advantage of times of crisis and circumvent anti-competition laws will be prosecuted. This article examines the periods following September 11, 2001, the 2008 financial crisis, and the current COVID-19 pandemic as times of economic distress in the U.S., when crisis cartels emerge.

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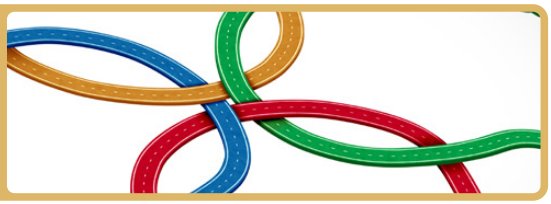

Competitor Collaborations During COVID-19

By Karen Hoffman Lent & Mike Keskey

Antitrust regulators worldwide have had to adopt novel strategies to address the emergency need for collaboration within certain industries to help combat the COVID-19 pandemic. In the United States, the Department of Justice and Federal Trade Commission have issued guidance to address acceptable forms of "procompetitive collaboration" to help respond to the pandemic. As a part of this guidance, the antitrust agencies pledged to expedite their individual guidance programs, FTC's advisory opinion program and DOJ's business review program. While businesses should not view the new guidance as relaxing or changing antitrust enforcement policies, they still may be able to take advantage of this increase in the usage of the business review programs to better their understanding of acceptable conduct and mitigate risk that stems from potential future collaborations.

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Competitor Collaboration in Mexico: The Case for Upgrading Regulation

By Carlos Mena Labarthe & Edgar Martin Padilla

Collaboration among competitors in Mexico is still significantly underdeveloped. As in other developing countries, legal uncertainty impedes companies to effectively and lawfully engage in efficient arrangements that would result in benefits for consumers. This is another example of how the innovative but incomplete competition framework that has been developed in Mexico is still insufficient to address the reality of the markets. A rigid approach to *per se* illegal conducts in the law, combined with the natural ambiguity of antitrust concepts creates enormous gray areas. Mexico is stuck on a formalistic tradition that is constantly tested by new business realities.

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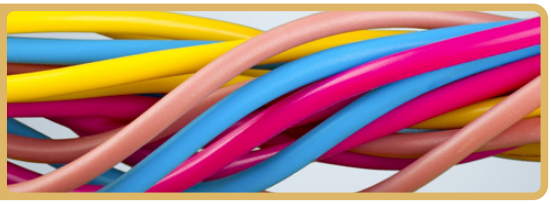

Professional and Trade Associations Back on the Antitrust Front

By Eduardo Frade

Trade and professional associations are a type of collaboration between competitors that generate several interesting and hard antitrust debates, still with diverging views on several topics. They can significantly foster competition but can also implicate serious concerns, from cartels, to concerted boycotts, exchange of sensitive information and market foreclosure. A central aspect related to these associations is countervailing power, which often allows for more flexibility on antitrust enforcement even in face of coordination of sensitive economic variables. Rising competition concerns in the labor market and EC's recent announcement in favor of more bargaining power to liberal professionals and self-employed individuals can bring trade and professional associations back to the antitrust front of debates. Finding the right balance of countervailing power, however, is an equation that is hard to solve.

WHAT'S NEXT?

For December 2020, we will feature Chronicles focused on issues related to (1) **Vertical Restraints**; and (2) **Patent Licensing**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES JANUARY 2021

For January 2021, we will feature Chronicles focused on issues related to (1) **GDPR v. CCPA**; and (2) **Telecommunications**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

OPEN FOR BUSINESS: CARTEL ENFORCEMENT AND THE PROCUREMENT COLLUSION STRIKE FORCE'S RESPONSE TO THE COVID-19 PANDEMIC

BY CHESTER C. CHOI & DANIEL W. GLAD[1]

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I. INTRODUCTION

A once-in-a-century pandemic sweeps across country. Televisions and news feeds are filled with stories of human suffering amid shortages of critical supplies. Medical professionals and first responders leap into action. The federal government responds with significant appropriations to provide personal protective equipment and medical supplies, as well as additional stimulus funds to address the economic devastation wrought by the pandemic. During a time of twin crises, does antitrust law matter? Government contractors and vendors may ask, will the government be closely scrutinizing the flood of contracts awarded in response to the COVID-19 emergency? Is there a role for criminal antitrust enforcement? To all three questions, the Department of Justice (the "Department") responded quickly and clearly with an emphatic yes.

II. A RECENT HISTORICAL PERSPECTIVE

COVID-19 isn't the first crisis the United States has faced in recent memory, and it certainly isn't the first time the Department of Justice, Antitrust Division (the "Division") has played a role in responding during times of economic upheaval and uncertainty. Indeed, the Division's prioritization of COVID-related conduct is consistent with its historical focus on protecting taxpayer dollars through criminal prosecutions following natural disasters, wars, and other national emergencies. For instance, in 2008, the Division, working with the Department of Justice's Criminal Division, obtained convictions of a former U.S. Army contracting officer and several of his family members for participating in a bribery- and money-laundering scheme related to contracts awarded in support of the Iraq war.[2] The ringleader of the scheme, a former Army contracting officer in Kuwait, accepted more than $9 million in bribes from Army contractors in exchange for awarding contracts for goods and services, including bottled water, delivered to troops in Iraq. The ringleader was sentenced to 210 months in prison, and was ordered to pay $9.6 million in restitution.

Similarly, the Division and the U.S. Attorney's Office for the Eastern District of Louisiana, working together through the Hurricane Katrina Fraud Task Force (now the Disaster Fraud Task Force), convicted a former sand and gravel sub-contractor and two former contract employees of the U.S. Army Corps of Engineers on conspiracy and bribery charges.[3] The sub-contractor paid bribes to the two former U.S. Army Corps of Engineers contractors in exchange for their attempt to steer dirt, sand, and gravel subcontracts to the defendant sub-contractor related to a $16 million project involving the Lake Cataouatche Levee, located south of New Orleans. The defendants received prison sentences ranging from 60 to 70 months. The Division continues to conduct training to various audiences — law enforcement; federal, state, and local procurement officials; and auditors — in identifying procurement collusion and fraud in the wake of hurricanes, tornadoes, wild fires and other natural disasters through the Disaster Fraud Task Force.[4]

Moreover, in response to the last major economic crisis in 2009, the Division launched an initiative dedicating significant resources to assisting federal, state, and local agencies receiving stimulus funds through the American Recovery and Reinvestment Act (the "ARRA") in detecting and deterring criminal antitrust offenses.[5] The ARRA, signed into law on February 17, 2009, provided billions of dollars of stimulus funds to government agencies to make investments in infrastructure, education, health care, and renewable energy. Through this initiative, from 2009 to 2013, the Division conducted more than 250 training sessions on detecting antitrust crimes for more than 25,000 individuals in 20 federal agencies, 36 states, and two U.S. Territories receiving ARRA funds.[6] A decade later, the Division's work continued with the conviction of two individuals on charges stemming from bribery and fraud in connection with the U.S. Department of Treasury's Blight Elimination Program.[7] There, the Division, the U.S. Attorney's Office for the Eastern District of Michigan, the Special Inspector General of the Troubled Asset Relief Program, and the FBI worked jointly to investigate and prosecute the Detroit city official who disclosed competitors' bids to a contractor, and the contractor

2 Press Release, U.S. Dep't of Just., Army Officer, Wife and Relatives Sentenced in Bribery and Money Laundering Scheme Related to DOD Contracts in Support of Iraq War (Dec. 2, 2009), https://www.justice.gov/opa/pr/army-officer-wife-and-relatives-sentenced-bribery-and-money-laundering-scheme-related-dod.

3 Press Release, U.S. Dep't of Just., Former Sand and Gravel Subcontractor Sentenced to 5 Years in Prison After Conspiracy and Bribery Conviction in Connection with a Levee Reconstruction Project (Aug. 26, 2009), https://www.justice.gov/opa/pr/former-sand-and-gravel-subcontractor-sentenced-5-years-prison-after-conspiracy-and-bribery.

4 U.S. Dep't of Just., Disaster Recovery, https://www.justice.gov/atr/disaster-recovery.

5 Press Release, U.S. Dep't of Just., Antitrust Division Announces Initiative to Help Protect Recovery Funds from Fraud, Waste and Abuse (May 12, 2009), https://www.justice.gov/opa/pr/antitrust-division-announces-initiative-help-protect-recovery-funds-fraud-waste-and-abuse.

6 U.S. Dep't of Just., Criminal Program Update 2012, Division Update Spring 2012 (last updated Aug. 17, 2015), https://www.justice.gov/atr/criminal-program-update-2012.

7 Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Mich., Former City of Detroit Building Authority Official and Former Executive at Adamo Group Plead Guilty to Bribery Conspiracy in Connection With the Detroit Demolition Program (Apr. 9, 2019), https://www.justice.gov/usao-edmi/pr/former-city-detroit-building-authority-official-and-former-executive-adamo-group-plead.

who paid the bribe. As a result of their scheme to subvert the competitive process, both defendants were sentenced to 12 months in prison.[8]

Thus, consistent with Department-wide policy and the Division's history of protecting taxpayer dollars in times of emergency, government contractors should expect to see close scrutiny and prosecutions for many years to come from the Division for any COVID-19 related collusion and fraud.

III. CRIMINAL ANTITRUST ENFORCEMENT REMAINS CRITICAL DURING COVID

On March 16, 2020, Attorney General William Barr issued a memo directing prosecutors to prioritize the investigation and prosecution of COVID-19 related fraud.[9] Shortly thereafter, the Department announced the creation of the COVID-19 Hoarding and Price Gouging Task Force, which was tasked to work closely with the U.S. Department of Health and Human Services to identify medical supplies and equipment that were scarce or in need, and therefore covered by the Defense Production Act ("DPA"). This would allow federal prosecutors to prosecute companies and individuals for hoarding or price gouging of these items under the DPA. The Division was directed to provide assistance as needed, and each United States Attorney's Office, as well as relevant Department components, designated an experienced attorney to serve as a member of the task force.[10] A little more than a week later, on March 24, 2020, Deputy Attorney General Rosen directed all federal prosecutors, including Division prosecutors and U.S. Attorneys' Offices, to focus their attention on, among other offenses, conspiracies to fix prices, rig bids, or allocate markets with respect to COVID-19 materials; monopolization or anticompetitive conduct related to critical materials needed to respond to COVID-19; and all other fraudulent or illegal schemes related to COVID-19.[11] The Department and several U.S. Attorney's Offices have already charged several cases alleging price gouging, hoarding, and fraud related to COVID-19.[12] The Department has also focused on prosecuting those who exploit federal relief programs, with a total loss amount in charged cases exceeding $227 million.[13]

On the same day as Deputy Attorney General Rosen's directive, the Division and the Federal Trade Commission (the "FTC") issued a joint statement providing guidance for businesses working to protect the health and safety of Americans during the COVID-19 pandemic. In the statement, the agencies recognized that individuals and businesses would need to act quickly and collaboratively to meet the demands of the COVID-19 pandemic, and that some of these collaborations may provide pro-competitive benefits and be consistent with antitrust laws. The agencies also committed to providing businesses and individuals expedited review of their joint collaborative efforts in response to the COVID-19 pandemic to ensure their efforts comply with federal antitrust laws. However, the statement makes clear that any effort to subvert competition or cheat the American consumer would not be tolerated, and that the Division will criminally prosecute businesses and individuals for conspiracies and agreements to fix prices and wages, rig bids, or allocate markets. Finally, consistent with the Department of Justice's overall COVID-19 guidance, the Division's criminal sections have prioritized the investigation and prosecution of antirust crimes and fraud related to COVID-19.

8 Press Release, U.S. Dep't of Just., Former City of Detroit Building Authority Official Sentenced for Bribery Conspiracy in Connection with the Detroit Demolition Program (Sept. 23, 2019), https://www.justice.gov/opa/pr/former-city-detroit-building-authority-official-sentenced-bribery-conspiracy-connection; Press Release, U.S. Dep't of Just., Former Executive at Adamo Group Sentenced for Conspiracy to Commit Honest Services Fraud in Connection With the Detroit Demolition Program (Sept. 10, 2019), https://www.justice.gov/opa/pr/former-executive-adamo-group-sentenced-conspiracy-commit-honest-services-fraud-connection.

9 Memorandum from the Att'y Gen. to All Heads of Dep't Components and Law Enf't Agencies and All U.S. Att'ys (Mar. 24, 2020), https://www.justice.gov/file/1262776/download.

10 *Id.*

11 Memorandum from the Deputy Att'y Gen. to All Heads of Law Enf't Components, Heads of Litigating Div., and U.S. Att'ys (Mar. 24, 2020), https://www.justice.gov/file/1262771/download.

12 See e.g. Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D.N.Y., Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0; Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D.N.Y., Licensed Pharmacist Charged With Hoarding And Price Gouging Of N95 Masks In Violation Of Defense Production Act (May 26, 2020), https://www.justice.gov/usao-sdny/pr/licensed-pharmacist-charged-hoarding-and-price-gouging-n95-masks-violation-defense.

13 Press Release, U.S. Dep't of Just., Department Of Justice Is Combatting COVID-19 Fraud But Reminds The Public To Remain Vigilant (Oct. 15, 2020), https://www.justice.gov/opa/pr/department-justice-combatting-covid-19-fraud-reminds-public-remain-vigilant.

IV. THE ROLE OF THE PCSF IN THE DIVISION'S COVID RESPONSE

The Department's increased scrutiny on procurement collusion and related fraud in response to the COVID-19 pandemic coincided with the Department of Justice's creation of the Procurement Collusion Strike Force ("PCSF"), in which the Division has a lead role.[14] Officially launched in November 2019, after two years of planning and design, the PCSF is an interagency partnership formed among the Antitrust Division, 13 United States Attorneys' Offices, the FBI, and four federal Offices of Inspectors General. Leveraging the combined capacity and expertise of the partners, the PCSF has two core objectives. The first is to deter and prevent antitrust and related crimes on the front end of the procurement process through outreach and training. This includes providing training to the "buy side" of the procurement, i.e. federal, state, and local procurement officials, on spotting the "red flags" of collusion and fraud, as well as to the "sell side," i.e. general contractors, trade associations, and the procurement bar, on antitrust criminal violations and potential penalties. The second objective is to effectively detect, investigate, and prosecute procurement collusion and fraud through better coordination and partnership in the law enforcement and inspector general communities.

The launch of the PCSF has been welcomed by federal, state, and local agencies and the law enforcement community. Indeed, all 13 PCSF district teams have expanded to include additional law enforcement partners active in the USAO district and several PCSF district teams have more than 10 federal law enforcement partners; together, there are more than 45 different agencies engaged in this effort at the district level, and the average cohort of each district team is 15 different agencies. Furthermore, the PCSF expects to make announcements on its first anniversary in November 2020 about its composition and planning for its second year.

The PCSF's formation is a recognition of the importance in protecting federal spending, and ultimately the American taxpayer, from fraud and collusion. Roughly one out of every 10 dollars of federal spending is allocated to government contracting.[15] In fiscal year 2019, more than $586 billion, or about 40 percent of all discretionary spending, was spent on contracts for goods and services, and more than $721 billion was spent on grants to state and local governments.[16] And 63.5 percent of government-wide spending was awarded competitively during fiscal year 2019.[17] The OECD estimates that eliminating bid rigging and other forms of collusion could reduce procurement costs by 20 percent or more.[18] Thus, creating a more coordinated and effective enforcement model to combat procurement collusion and fraud could potentially save the American taxpayer tens of billions of dollars per year. Indeed, as is often seen after the disruption of a cartel that targets public spending, prices drop as real competition is restored.[19] Finally, the need for effective deterrence of potential bad actors, and successful detection and prosecution of actual bad actors, during and after the pandemic is particularly acute. As of August 2020, the United States government had spent more than $100 billion on goods and services in response to COVID-19.[20]

When the PCSF launched, roughly one-third of the Division's open investigations related to procurement or government victims, making the Division a natural leader for this initiative. And in 2018 and 2019, the Division prosecuted and obtained convictions of five South Korean suppliers that conspired to rig bids on fuel supply contracts to U.S. military bases in South Korea. In total, the companies agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements. The Division also indicted seven individuals in this case for conspiring to rig bids and to defraud the government, and one executive was also charged with obstruction of justice.[21]

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14 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., Remarks as Prepared for Delivery at the at the Procurement Collusion Strike Force Press Conference (Nov 5, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike; Press Release, U.S. Dep't of Just., Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

15 *The Office of Federal Procurement Policy*, Office of Management and Budget, https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#_Office_of_Federal_3 (last visited Oct. 19, 2020).

16 *A Snapshot of Government-wide Contracting for FY 2019*, U.S. Government Accountability Office: WatchBlog (May 26, 2020), https://blog.gao.gov/2020/05/26/a-snapshot-of-government-wide-contracting-for-fy-2019-infographic/; The Office of Federal Procurement Policy, Office of Management and Budget, Historical Tables, at 255 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/hist_fy21.pdf.

17 U.S. Government Accountability Office, *supra* note 16.

18 *Fighting Bid Rigging in Public Procurement*, Organisation for Economic Co-Operation and Development, https://www.oecd.org/competition/cartels/fightingbidriggininpublicprocurement.htm (last visited Oct. 19, 2020).

19 See, e.g. Robert Clark & Decio Coviello, Bid Rigging in Public Procurement (Competition Policy International 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/04/CPI-Clark_Coviello-.pdf.

20 *The Federal Response to COVID-19*, U.S.A. Spending Data Lab, https://www.usaspending.gov/disaster/covid-19 (last visited Oct. 19, 2020).

21 Richard A. Powers, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., Remarks as Prepared for Delivery at the American Bar Association Public Contract Law Section's 2019 Procurement Symposium (Oct. 25, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar.

The PCSF's mission to combat procurement collusion and fraud is not a new enforcement priority. The Division's mission has always prioritized public procurement, and requires it to seek redress for any criminal antitrust conspiracy that victimizes the federal government and, therefore, injures American taxpayers.[22] What is particularly notable about the prosecutions of the Korean fuel suppliers is that the Division obtained the civil fines pursuant to Section 4A of the Clayton Act, which allows the United States to obtain treble damages when it is the victim of an antitrust violation.[23] In commenting on the civil settlements, Assistant Attorney General Makan Delrahim warned that the settlements "will serve as a blueprint for future cooperation efforts within the Department as it expands its Section 4A recovery efforts. Where antitrust violators target the United States Government — and, by extension, the U.S. taxpayer — we will not hesitate to bring civil and criminal charges and seek damages using these tools."[24]

Thus, contractors that provide goods and services to government agencies in the current environment should keep in mind the following: (1) they face increased scrutiny in the era of COVID-19 relief and with the formation of the PCSF; (2) the Division is committed to a more coordinated, collaborative, and effective enforcement model with our U.S. Attorney partners, the FBI, and Inspector General community in order to combat procurement collusion and fraud through the PCSF; and (3) in addition to criminal fines and potential incarceration of culpable employees, the Division will continue to seek treble damages where the United States is the victim of an antitrust crime. All of this should further deter contractors from engaging in collusion and fraud in government procurement, or, at very least, incentivize contractors to self-report violations as quickly as possible in order to seek leniency or the benefits of early cooperation.[25]

V. THE PCSF IN ACTION

Since its launch in late 2019, the PCSF has been active in both of its core objectives. With respect to the first objective — education, training, and awareness — the PCSF has been particularly successful. More than 60 federal, state, and local government agencies sought training and assistance from the PCSF thus far. The PCSF — and more to the point, the prosecutors and agents that make up the PCSF — has led over two dozen interactive virtual training programs for more than 6,000 criminal investigators, data scientists, and procurement officials; just since the start of the pandemic. The PCSF is also bringing together data scientists with federal agents and economists to discuss best practices and blue-sky ideas for identifying red flags of collusion in the federal government's vast procurement datasets. The PCSF is also working with the Pandemic Response Accountability Committee ("PRAC")[26] and the federal OIGs responsible for oversight of COVID spending to ensure the COVID data analytics models are designed to identify the red flags of collusion affecting these critical contract awards. Indeed, PRAC's first goal is to work with federal oversight partners to identify cross-agency risks using data analytics.[27]

While the PCSF's 13 districts are all obviously in the United States, its focus is not exclusive to government contracts awarded in the United States and several PCSF partners including the Antitrust Division, the FBI, and the Department of Defense's Office of Inspector General Defense Criminal Investigative Service have a track record of successful cartel investigations affecting U.S. purchases made abroad. Indeed, the FBI stood up its International Corruption Unit (the "ICU") in 2008 to address concerns about fraud against the U.S. government around the globe.[28] These concerns stemmed from overseas U.S. government spending during the wars in Afghanistan and Iraq. These cases typically involve bid rigging, collusion, conflicts of interest, bribery, contract extortion, and corporate and individual conspiracies at various levels of U.S. government operations. Misuse of U.S. funds overseas poses a threat to the United States and other countries by promoting corruption within the host nation, damaging diplomatic relations, inadvertently supporting insurgent activity, and potentially strengthening criminal and terrorist organizations.

22 U.S. Dep't of Just., Antitrust Div., Antitrust Division Manual, Ch. 3, § B.1 (updated July 2019), https://www.justice.gov/atr/file/761166/download.

23 15 U.S.C. § 15a (2018).

24 U.S. Dep't of Just., A Message from the AAG: Looking Back, Looking Forward, Division Update Spring 2019 (last updated Mar. 27, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/message-aag.

25 *See* U.S. Dep't of Just., Antitrust Div., Leniency Policy (1993), https://www.justice.gov/atr/leniency-program. The Division's Leniency Program is its most important tool for detecting cartel activity. Under the Leniency Program, corporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid criminal conviction, criminal fines, and prison sentences if they meet the requirements of the program. The Leniency Program, its policy documents, frequently asked questions, policy speeches, and model documents are available to the public at https://www.justice.gov/atr/leniency-program. Additionally, corporations that successfully apply for leniency can avoid joint and several liability and treble damages under the provisions of the Antitrust Criminal Penalty Enhancement and Reform Act, which was recently reauthorized. See Press Release, U.S. Dep't of Just., Department Of Justice Applauds President Trump's Authorization of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act (Oct. 1, 2020), https://www.justice.gov/opa/pr/department-justice-applauds-president-trump-s-authorization-antitrust-criminal-penalty.

26 *Pandemic Oversight*, Pandemic Response Accountability Committee, https://www.pandemicoversight.gov/ (last visited Oct. 19, 2020).

27 Pandemic Response Accountability Committee, Strategic Plan 2020-2025, at 4 (2020), https://www.pandemicoversight.gov/sites/default/files/2020-07/PRAC-Strategic%20Plan-July-2020.pdf.

28 *Public Corruption*, Federal Bureau of Investigation, https://www.fbi.gov/investigate/public-corruption (last visited Oct. 19, 2020).

Entering into its second year, the PCSF anticipates expanding its international reach and the Assistant Attorney General for the Antitrust Division has showcased this partnership in recent presentations delivered to our international counterparts at the OECD[29] and the ICN.[30]

Turning to the second objective of the PCSF — the detection, investigation, and prosecution of procurement collusion and fraud — the PCSF's work has resulted in the opening of nearly two dozen grand jury investigations across the United States. Further details regarding these investigations cannot be provided at this time, naturally, but the PCSF expects this work to result in criminal charges. When that time comes, the PCSF expects to use all of the available tools to fight fraud and collusion, including Title 15 charges, Title 18 charges, criminal fines, restitution, civil actions for treble damages under Section 4A of the Clayton Act, and, where appropriate, terms of incarceration for convicted individuals.

A recent prosecution, which predates the PCSF model, is instructive of what to expect from the inter-agency model in the future. The Division, the U.S. Attorney's Office for the Eastern District of Louisiana, and the U.S. Department of Energy Office of Inspector General recently teamed up to investigate and charge a company for conspiring to corrupt and impair the procurement process.[31] There, the company, a subcontractor working on the U.S. Strategic Petroleum Reserve, obtained non-public pricing and cost information in order to get an unfair advantage and win awards and payments, and in exchange provided financial benefits to the prime contractor.[32] The company agreed to plead guilty[33] to conspiring to violate the Procurement Integrity Act.[34]

VI. CONCLUSION

In the past several months, the novel coronavirus has presented seemingly novel challenges. In the field of antitrust law, however, the economic disruption the pandemic has wrought presents parallels to past crises. The Division has drawn on its past experience enforcing antitrust laws in times of great challenges and has deepened its relationships with agencies throughout the federal government. Together, the Division and its partners have developed a plan to make clear that antitrust laws still matter — and will be enforced — during the pandemic. And the PCSF is a large part of that plan. In less than a year, the PCSF has delivered the message that the government will not tolerate criminal activity that seeks to profit unfairly at the expense of the taxpayers, and especially now during the COVID-19 pandemic. The PCSF has also been active in building an inter-agency infrastructure to combat this activity. In the coming year, the PCSF expects to make good on its foundational promise — going after cartels that cheat the government like never before.

29 https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-presents-procurement-collusion-strike-force.

30 Press Release, U.S. Dep't of Just., Assistant Attorney General Makan Delrahim Presents Procurement Collusion Strike Force to the International Competition Community (June 16, 2020), https://www.justice.gov/atr/page/file/1317471/download.

31 Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. La., Louisiana Company Charged With Conspiracy to Defraud Government and Violate the Procurement Integrity Act (July 2, 2020), https://www.justice.gov/usao-edla/pr/louisiana-company-charged-conspiracy-defraud-government-and-violate-procurement.

32 Factual Basis (ECF No. 23), *United States v. Cajan Welding & Rentals, Ltd.*, E.D. La. No. 20-CR-61 (Sept. 8, 2020), https://www.justice.gov/atr/case-document/file/1316861/download.

33 Plea Agreement (ECF No. 24), *United States v. Cajan Welding & Rentals, Ltd.* E.D. La. No. 20-CR-61, https://www.justice.gov/atr/case-document/file/1316856/download.

34 41 U.S.C. § 2102 *et seq.*

PRICING ALGORITHMS AND COLLUSION: IS THERE CLARITY ON WHAT CORPORATIONS MAY BE ON THE HOOK FOR?

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I. MOTIVATION

What are pricing algorithms? Put simply, pricing algorithms are computer models that suggest the optimal (generally "profit-maximizing") price given various inputs. These inputs may include factors controlling for prevailing market demand and supply conditions as well as prices actually charged (or expected to be charged) by competitors for similar (substitutable) or complementary goods.[2]

Historically, some academics and policymakers have suggested that pricing algorithms could be used as signaling mechanisms to invite and potentially facilitate tacit or even express coordination among competitors. Yet, as algorithmic behavior becomes more prevalent in many markets, especially when open and notorious, the conduct begins to look more like some form of information exchange or "benchmarking exercise" among competitors, rather than simple unilateral behavior. From that perspective – and setting aside explicit collusion – one could treat the pervasive use of algorithms as a form of industry or market collaboration.

Much like information exchanges, it may be pro- or anti-competitive under the rule of reason outlined in the 2000 US Department of Justice (DOJ) and Federal Trade Commission (FTC) "Antitrust Guidelines for Collaborations Among Competitors" (DOJ/FTC Guidelines).[3] For the European Union, this guidance is provided by the 2011 European Commission (EC) "Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements,"[4] also extending to more general exchanges of information among competitors. Similarly, for several Central and South American countries, guidelines on this topic are from 2013 and authored by Abrantes-Metz.[5]

A significant focus has been placed on whether pricing algorithms facilitate collusion and whether this should be the central focus of competition authorities. Opinions range from "making all tacit collusion illegal since pricing algorithms facilitate collusion" all the way to "there is nothing new here, nor anything that needs to be addressed." Our view is that a necessary, but currently missing, first step is to clearly define what collusion or actual coordination looks like in the context of pricing algorithms. What is a "collusive algorithm?" Would we know one if we saw it? Only with a working definition can we really begin a discussion of what, if anything, needs to be updated or addressed in the various legal frameworks, and only then can policymakers provide corporations with any sort of guidance for the development, implementation, and monitoring of non-collusive pricing algorithms.

II. PRICING ALGORITHMS, COMPETITION, AND COLLUSION

A. Pricing Algorithms and Benefits to Competition

In principle, any business can develop and use a pricing algorithm. Usually, however, there is a connotation that pricing algorithms can *quickly* change prices, given *quickly* changing information. Due to this, it is not practical for a brick-and-mortar retailer to retag all their products during the day, even if a pricing algorithm were to suggest that the market would support a higher price during the lunch hour rush. It is also not practical to send an employee to other brick-and-mortar stores to survey what their prices are throughout the day. While these traditional retailers could use programs and econometric models to aid in setting their prices over time, and while such models could fairly be called "pricing algorithms," these models are not the sort of application most people have in mind when using the term.

Instead, when we talk about "pricing algorithms," we usually think of an internet application of some sort. An internet retailer, for example, could alter prices moment-to-moment as their algorithms consider (i) how many customers have recently browsed those items and (ii) how many browsing customers decided to make a purchase at the old prices. The retailer could deploy "bots" – artificial intelligence (AI) programs that continuously scour competitors' websites to see what prices they are charging.

2 In November 2018, Abrantes-Metz had the privilege of participating in the Federal Trade Commission's (FTC) Hearings on Consumer Protection and Competition. The panelists were Ai Deng, Joe Harrington, Kai-Uwe Kühn, Sonia Kuester Pfaffenroth, Maurice E. Stucke, and Rosa Abrantes-Metz, with Ellen Connelly and James Rhilinger as moderators. The video for this panel (available at https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-7-nov-14-welcome-remarks-session-1-algorithmic-collusion) illustrates the divergence of opinions on how to address pricing algorithms from an antitrust perspective.

3 US Department of Justice and Federal Trade Commission, 2000. "Antitrust Guidelines for Collaborations Among Competitors," available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. We note that we are not commenting on whether such conduct meets the agreement standard for Section 1.

4 European Commission, 2011. "Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements," Official Journal of the European Union, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

5 Rosa M. Abrantes-Metz, 2013. "Regional Competition Center for Latin America: Antitrust Guidelines for Exchanges of Information Among Competitors," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3291659.

Pricing algorithms provide many potentially procompetitive effects, enhancing both static and dynamic efficiencies. For example, they improve price transparency, facilitate the collection and organization of information, and generally enhance efficiency. By facilitating price discovery, these algorithms can help markets reach equilibrium more efficiently, which redounds to the benefit of both producers and consumers.

But, as with most of antitrust, the nuances matter. A very simple pricing algorithm could be set to "determine what my competitors are charging, and set my price to be $1 lower than the lowest." But it could also be, "determine what my competitors are charging, and set my price to the average." By making prices more formulaic, they become more predictable to the competition, which may allow competitors to reach a supra-competitive equilibrium more easily, whether through tacit or explicit collusion. How concerned should we be about this, and how, if at all, should policymakers respond to this concern? It is fair to say that a consensus has not yet emerged.

One reason people fear an increase in collusive outcomes from algorithmic pricing, and why people fear the current law may not be adequate to address it, is that pricing algorithms might *learn* to "collude" without any human explicitly programming them to do so. Some time ago, AI researchers developed a poker-playing AI. They did not teach it to bluff, but it learned to bluff by itself (pretty frightening!). Suppose, in all good faith, I develop a pricing algorithm. This algorithm learns that wherever I set my price, my competitor moves to it. It then comes to learn that it can keep raising prices without fear of competitive reprisal up until the elasticity of demand becomes large enough. The market thus reaches an equilibrium with supra-competitive prices and decreased output. How reasonable is this scenario? And how would current law address it?

It is well established in classical economics that we have "perfect competition" when a market has (infinitely) many competitors, the product is homogeneous, production functions are identical, there are no barriers to entry, and *there is perfect information*. The equilibrium price is the optimal price, and it is equal to the marginal cost of production. This is the socially desirable benchmark against which economists compare competitive effects from real market outcomes.

By allowing quicker dissemination of information in the market between relative supply and demand, and more rapid response to market conditions, pricing algorithms seem to be "an agent" of the "perfect competition" model – after all, perfect competition requires perfect information. As a general statement, therefore, it cannot be true that "more information" leads to non-competitive outcomes in the presence of the other features of perfect competition when the perfectly competitive outcome assumes complete information.

In our view, pricing algorithms should not, as a general rule, be feared as instruments that can somehow convert an otherwise competitive market into a non-competitive one. Quite the opposite: We should expect them to enhance competition. But what if the market structure is fundamentally "non-competitive," to begin with?

B. Pricing Algorithms and Possible Collusion

If pricing algorithms increase the likelihood of collusive outcomes in markets prone to collusion (which has yet to be shown), then there is a social welfare concern. Further, if such outcomes are considered legally tacit, since they are reached absent the sort of explicit human interaction we have historically associated with illegality, then there may be a legal issue to address and, arguably, the law may need to change to address this new reality. But, in the context of Section 1 jurisprudence, that is a big ask. It would have to take on the subject of non-coordinated interdependent behavior as well as the remedial challenges in that context.

Some market features are traditionally seen as facilitating collusion, such as having a small number of competitors, high barriers to entry, and product homogeneity, among others. It is at least possible that pricing algorithms – by providing greater transparency, more frequent information sharing (or interactions), and high trading frequency – may facilitate the signaling and implementation of common pricing policies. They would certainly seem able to facilitate the monitoring and punishment of deviations from collusion. If so, pricing algorithms may well increase the likelihood of tacit collusion, not only in oligopolistic markets with high barriers to entry and high degrees of transparency, but potentially also in other markets where, to date, collusion may have been harder to achieve and sustain over time.

This is a concern many experts raise, and it cannot be easily dismissed. However, there are mitigating considerations. For example, *all else equal*, demand elasticity is higher for internet-based shopping for fairly homogeneous products, which *decreases* the profitability of charging higher prices. This follows from the consumers' very low internet search costs.

With a traditional brick-and-mortar retailer, a consumer might be willing to pay more for the convenience of *not* getting back into their car and searching (perhaps unsuccessfully) for a better deal somewhere else. In that instance, "better" needs to consider the net of their time and transportation costs. As another example, grocery stores can offer loss-leaders that get people into the store, and can then charge higher

prices for other items once customers are relatively captive. Yet there is no perfect analog to "loss-leaders" on the internet, where searching for competitive prices and availability is virtually costless. That decreases market power and enhances competition among internet retailers relative to brick-and-mortar retailers.

On the supply side, *all else equal*, are barriers to entry weakened by the availability of big data and pricing algorithms? It is not clear. On the one hand, pricing algorithms enhance incumbents' ability to identify potential market threats more quickly and easily, allowing them to pre-emptively acquire possible entrants or to react more aggressively to potential entry. On the other hand, the availability of more pricing data may prove useful to potential entrants looking to improve their predictions and lower entry costs, thereby enhancing the likelihood of successful entry.

As a result, it is theoretically ambiguous whether pricing algorithms will lead to higher prices. What is the empirical record? How large are the net profit margins for the retail sector, for which so many companies provide web-based trade? And how have retail net profit margins evolved in the last few decades in comparison to other sectors that are less directly affected by web-trading?

Each year, the S&P 500 releases industry-specific returns on equity and net margins, and, each year, the retail industry is among the least profitable, with decreasing margins over time. This is particularly true for web-only retailers, which often see margins as low as 0.5–3.5 percent. The internet has made it easier than ever before for consumers to compare prices around the world. It has also made it easier for suppliers to observe each other's prices and react promptly to competitors' pricing. Pricing convergence does seem to be occurring, but to a *lower* price level with *decreased* market power.

The market evolution in commodities trading also provides important data. Over the last few decades, trading has been moving from over-the-counter (OTC) to exchanges. Detailed market-wide trading information, such as volumes and prices, is not as easily available to all market players when products trade OTC, which is usually done through financial intermediaries who do not disclose such information. In contrast, when products trade on an exchange, detailed market-wide data are readily and publicly available to all market participants. Market players can see the whole market at every moment in time, reflecting high market transparency. They can use the larger amount of data to develop their pricing algorithms to a larger extent than in OTC trading with more limited data availability. What is the empirical evidence on this higher market transparency and higher incidence of pricing algorithms?

Despite exchange trading adding additional fees (for example, to operate the exchange) that do not exist in OTC trading, bid-ask spreads are generally narrower in exchange trading than in OTC. This provides evidence of higher market efficiency and lower profit margins in exchanges. While collusion may still happen in exchange trading (as evidencing of spoofing cases in metals futures, for example), it has been in OTC trading that many instances of widespread systematic collusive conduct, either alleged or actually uncovered in the last several years, has occurred. Of course, this does not mean that collusion will not occur through pricing algorithms, only that it seems less likely, *all else equal*.

But are these more likely to be the exception or the rule? That is what needs to be studied.

III. WHAT WOULD "COLLUSIVE ALGORITHMS" LOOK LIKE?

Let us set aside the possibility that the algorithm will "learn to collude by itself" in this section.

As Justice Stewart famously said in an altogether different context, "I know it when I see it." Is that true for collusive pricing algorithms as well? Is there an algorithm we could look at and agree was "collusive" in nature? What does that really mean? Should not corporations know what authorities regard as a "collusive algorithm?"

In general, competitors could collude[6] on numerous parameters. For example, they could agree not to purchase from a supplier, or not invest in developing a new product feature. They could agree to divide up the market or customers. And, of course, they could agree on price. Broadly speaking, price collusion can take two forms. There is price fixing: Agreeing to charge $10 for widgets, not $9. Moving away from that extreme, competitors can also agree not to undercut each other on price. This is evidenced by equal prices, but also by non-decreasing prices over time.

To fix a price, algorithms need to be able to exchange information with one another. The algorithm from Company *A* (Algorithm *A*) would need to be able to send a proposed price to Algorithm *B* at Company *B*, which would need to be able to send a response back to Algorithm *A*. To us (as non-computer scientists), it would be fairly straightforward to know if algorithms had the necessary transfer protocols to exchange information. As economists, we would ask if there would ever be a legitimate need for any such protocol.

6 By "collude" we simply mean to coordinate expressly in an anticompetitive way, leaving aside the question of legality.

What about the non-compete form of collusion, though? That might be difficult to discern. If Algorithm *A* amounts to, "Replicate Price *B*" and vice versa for Algorithm *B*, is that problematic? After all, the economic model of perfect competition is that each firm takes the price as given. Implementing that as an algorithm would essentially be precisely that: Checking what the price is and replicating it. Declaring such algorithms to be anti-competitive might seem almost paradoxical. And yet, a non-compete algorithm may look very much the same.

This is where things get tricky. "Collusion" seems to imply that a firm is foregoing some kind of profitable opportunity at least some of the time. If my competitor is selling its widgets for $10, why am I not selling mine at $9 and making a great deal of profit by luring away my competitors' customers? Because I promised I would not. But that promise is only binding or constraining on my behavior if I would, in fact, profit from a $9 price. This suggests that one testable characteristic of a collusive algorithm – as distinct from a non-collusive algorithm in this context – is that it foregoes a lower price *when that lower price would increase profit*.

But wait, not so fast. I presumably made that promise to maintain the $10 price in order to maximize my profits. After all, why else collude except to raise profits? This is not a contradiction; it is balancing short- and long-term profits. In that case, a very smart pricing algorithm could reach the same conclusion: Even though this quarter's profits might be maximized by setting a price of $9, discounted lifetime profits would not be. No real collusion is necessary to achieve an identical outcome.

But then, perhaps a collusive price agreement also involves a punishment mechanism: We agree not to undercut each other's price with an understanding that if one of us does, the other may retaliate. Perhaps this is a testable characteristic. The algorithm responds to a lower price from a competitor by setting its price below the profit-maximizing price in another form of foregone profits.

Yes, perhaps, but again, not so fast. Suppose I program my algorithm as follows: Match Price *B*, but if Price *B* ever decreases, then set my price to 50 percent below *B*. I do this, trusting that Algorithm *B* will eventually learn that lowering its price is not profit-maximizing. In this scenario, Algorithm *B* is completely innocent in every way. Is there anything illegal, or should there be anything illegal, about Algorithm *A*? Maybe, but this is not an example of collusion.

In yet other cases, collusion could be characterized as a different objective function: Competitors *A* and *B* work together to maximize their aggregate profit, not their individual profit functions. For instance, this could mean that Competitor *A* foregoes $1 in profit so that Competitor *B* can earn an extra $2 in profit. It agrees to this arrangement only because Competitor *B* manages to make a $1 side payment back to Competitor *A*. Looking at both Algorithms *A* and *B* might reveal that, by working together, they maximize joint profit while foregoing some of their own profit.

The lesson may – and we stress the word "may" – be that collusive algorithms can only be identified in sets. Perhaps no one algorithm, in isolation, could be categorized as "collusive" in nature.

Competitive firms seek to maximize profit; collusive firms also seek to maximize profit. The difference is that collusive firms ultimately maximize profit by reducing output and raising price. Collusive firms – if successful – achieve greater profit. But an innocent pricing algorithm – if successful – should lead to greater profit as well. Identifying what is *algorithmically different* about a "collusive" algorithm from a "non-collusive" algorithm remains an open question.

IV. THE NEED FOR PRACTICAL GUIDANCE FOR CORPORATIONS

As discussed above, what a collusive pricing algorithm may look like falls into a somewhat gray and undefined area. Pricing algorithms could be seen as coordination among competitors, which could be potentially collusive. But do the current FTC/DOJ 2000 Guidelines offer enough guidance in this regard? As explained by the FTC when addressing "Dealings with Competitors:"

> "In today's marketplace, competitors interact in many ways, through trade associations, professional groups, joint ventures, standard-setting organizations, and other industry groups. Such dealings often are not only competitively benign but procompetitive. But there are antitrust risks when competitors interact to such a degree that they are no longer acting independently, or when collaborating gives competitors the ability to wield market power together.
>
> For the most blatant agreements not to compete, such as price fixing, bid rigging, and market division, the rules are clear. The courts decided many years ago that these practices are so inherently harmful to consumers that they are always illegal, so-called per se violations. For other dealings among competitors, the rules are not as clear-cut and often require fact-intensive inquiry into the purpose and effect of the collaboration, including any business justifications. Enforcers must ask: what is the purpose and effect of dealings among competitors? Do they restrict competition or promote efficiency?"[7]

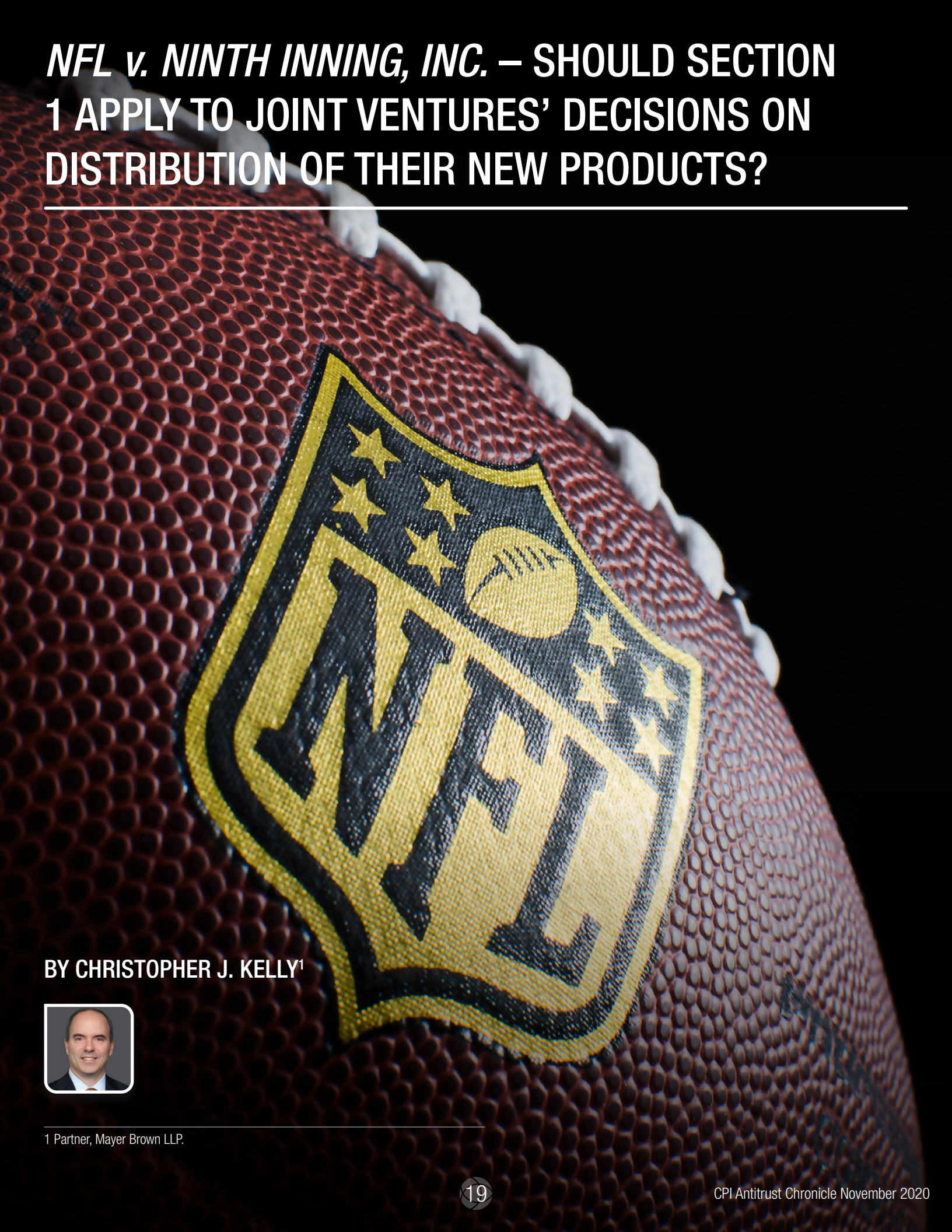
When broadly seen, the Guidelines provide a general framework of analysis for all forms of coordination among competitors. But if we are not sure what a collusive pricing algorithm really looks like (short of literal information transfers), how are we going to be able to apply the framework provided?

Let us also not forget the question of whether pricing algorithms could learn to collude by themselves, without "direct/explicit" human influence. Is there liability, and, if so, where does it lie? What is the "proof" of explicit collusion, and who will be going to jail?

Corporations need guidance on all of these questions and others. Official "Best Practices" for pricing algorithms would be welcome so that corporations are not suddenly caught off-guard for conduct for which a clear standard has not been established. Given the rapid adoption of pricing algorithms across a multitude of industries, this is better provided sooner rather than later.

7 See https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors.

NFL v. NINTH INNING, INC. – SHOULD SECTION 1 APPLY TO JOINT VENTURES' DECISIONS ON DISTRIBUTION OF THEIR NEW PRODUCTS?



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I. INTRODUCTION

When the Supreme Court denied certiorari in *National Football League v. Ninth Inning, Inc.*, No. 19-1098, 592 U.S. ___ (Nov. 2, 2020),[2] the immediate upshot was that the antitrust challenge to the NFL's centralized distribution of game telecasts would proceed. The denial of cert left intact the Ninth Circuit's decision that the plaintiffs' complaint against that distribution system and the league's decision to license out-of-market game telecasts exclusively in the United States through DirecTV's Sunday Ticket package alleged facts sufficient to survive a motion to dismiss. See *In re National Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136 (9th Cir. 2019). An accompanying statement from Justice Kavanagh, however, suggests that the case might meet a very different fate should it return after a judgment on the merits. Noting blandly that "denial of certiorari should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals," Justice Kavanagh then cut the legs out from under[3] plaintiffs' entire case, which "appears to be in substantial tension with antitrust principles and precedents." 592 U.S. at ___ (slip op., at 2). In particular, Justice Kavanagh points out, "antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights." *Id.*[4]

II. THE QUESTIONABLE APPLICABILITY OF SECTION 1 TO JOINT VENTURE PRICING OF NEW JOINT VENTURE PRODUCTS

Justice Kavanagh's observation, which goes not to whether plaintiffs adequately pled a rule of reason claim but rather to whether such a claim could exist at all against the NFL's distribution of game-telecast rights, appears to pick up on the central point of an amicus brief that a distinguished group of antitrust economists (the "Economists") submitted in support of the NFL's cert petition.[5] While the brief supported the NFL's argument that the plaintiffs had failed to allege facts sufficient to plausibly support a rule of reason claim under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, it identified a more fundamental economic problem with the plaintiffs' case: the only competition that the allegedly anticompetitive agreement restrained was *ex post* competition – competition that existed only by virtue of the creation of the joint venture product, NFL Football. Consequently, this case presented an opportunity for the Supreme Court to confirm for once and for all that, as the economists put it, "a venture that creates a venture product – which no venture member has created, or can create efficiently, by itself – may control how to distribute and sell the venture product *without implicating Section 1*." *Amicus* Br. at 1-2 (emphasis added).

As the brief explains, a joint venture's decisions on how to distribute its venture product should not be subject to Section 1 scrutiny because, by definition, they cannot affect "the proper concern of U.S. antitrust law: *ex ante* competition among the venture members" – the competition that existed or was reasonably likely to exist absent the joint venture. *Id.* at 2. In this case, because NFL Football exists only by virtue of the NFL joint venture, the same is true as to the telecasts that distribute the NFL Football product worldwide. Without the NFL joint venture, there would be no NFL Football telecasts. There is thus no *ex ante* competition as to NFL Football telecasts that a decision on how to make telecasts available could affect.

In contrast, the Economists point out, subjecting a joint venture's distribution decisions to Section 1 scrutiny imposes a real cost on venture formation, one that inevitably discourages the efficient and procompetitive joint ventures that U.S. antitrust law means to encourage. In particular, discouraging ventures from controlling the distribution of their products through the possibility of antitrust liability makes them vulnerable to free riding by individual members, meaning that ventures and their members are less able to ensure that they capture the value that their investments have created. The inevitable result of this vulnerability to self-destructive free riding is diminished incentives to invest in joint ventures that are necessary to develop and produce products that individual firms cannot.

Although one will not find the Economists' proposed rule stated in the case law with such clarity, it is not a new idea. To the contrary, it is inherent in the notion that the antitrust laws do not create liability for not creating as much competition as one might have. See, e.g., *United States v. Westinghouse Elec. Corp.*, 648 F. 2d 642, 648 (9th Cir. 1981) (affirming dismissal of Section 1 claim based in part on license of non-U.S. patents but not of U.S. patents; "no court has held that a patentee must grant further licenses to potential competitors merely because he has

2 Available at https://www.supremecourt.gov/opinions/20pdf/19-1098_j426.pdf.

3 Here and throughout this article, the reader is welcome to replace the printed text with any number of football clichés. Because, for many readers, one sports pun is one too many, the author has chosen not to risk outkicking his coverage, except in this sentence.

4 Justice Kavanagh also points out that the plaintiffs, as indirect purchasers of the NFL telecasts, "may not have antitrust standing to sue the NFL and the individual teams." *Id.*

5 Brief of Expert Antitrust Economists as *Amici Curiae* in Support of Petitioners, Case No. 19-1098 (April 8, 2020) ("*Amicus* Br."), available at http://www.supremecourt.gov/DocketPDF/19/19-1098/141187/20200408154828856_19-1098acExpertAntitrustEconomists.pdf. The author is counsel of record for the Economists, but this article reflects his own views, not necessarily those of the Economists.

granted them *some* licenses") (emphasis added). If one brings a product to market, the antitrust laws do not create liability for decisions on how to price the product, where to sell it, to whom to sell it, or at what quality level to design the product. Those decisions do not implicate *ex ante* competition. Thus, the Antitrust Division/FTC IP licensing guidelines state that "[t]he Agencies ordinarily will not require the owner of intellectual property to create competition in its own technology," and thus hold IP owners liable for not licensing as broadly as they could. *Antitrust Guidelines for the Licensing of Intellectual Property* § 3.1 (rev. 2017).[6] Rather, the agencies concern themselves with whether licenses "harm[] competition among entities that would have been actual or potential competitors . . . in the absence of the license" — *ex ante* competitors. *Id.* The agencies' 2000 competitor-collaboration guidelines do not offer such a broad assurance. To the contrary, they suggest that the agencies may separate joint ventures and other collaborative relationships into multiple "relevant agreements" and analyze each individually. *Antitrust Guidelines for Collaborations Among Competitors* § 2.3.[7] At the same time, they recognize that in some instances, what might otherwise be considered separate "relevant agreements" are "so intertwined that they cannot meaningfully be isolated," and thus are analyzed together. *Id.* That this approach may extend to fundamental distribution decisions as to a jointly produced product is evident in one of the Guidelines' examples, in which a joint venture "to jointly develop and market" a new product, "with expenses and profits to be split equally," is "an efficiency-enhancing integration of economic activity that promotes procompetitive benefits" — antitrust-speak for "okay" — without any suggestion that the joint marketing and cost-and-profit sharing threatened any competitive harm. *Id.* Example 6.

Similarly, the rule the Economists' brief proposes has been implicit in federal antitrust case law of the last several decades. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979), the Court recognized the absurdity of treating BMI's pricing of a blanket license, combining its members' disparate music performance rights into a new composite product, as price fixing by its members, observing that "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." Indeed, "the agreement on price is necessary to market the product at all." *Id.* at 23. The Court reiterated the point in Texaco, *Inc. v. Dagher*, 547 U.S. 1, 6 (2006), concluding that a joint venture's distribution decisions as to its joint product are generally no different from a single firm's decisions as to its own product – those decisions are not "restraints in the antitrust sense."

By contrast, in *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), the Court showed what kind of products do *not* merit that approach: products that, like the teams' separately-owned logos and other intellectual property, exist separately from, and possibly even predate, the venture product and can be sold in competition with other venture members without undermining the venture. In fact, a deconstruction of the Court's articulation of the "relevant inquiry" as to whether the joint team-IP licensing was "concerted action" subject to Section 1 shows that the Court's ultimate concern is exactly that of the expert Economists. The inquiry, the Court said, was "[1] whether there is a 'contract, combination, . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' . . . *such that* [2] the agreement 'deprives the marketplace of independent centers of decision making,' *and therefore* [3] of 'diversity of entrepreneurial interests,' *and thus* [4] of actual or potential competition." 560 U.S. at 195 (citations omitted and emphasis added). That "actual or potential competition" of which the agreement would "deprive[] the marketplace" (*id.*) is, of course, *ex ante* competition. Indeed, the Court confirms this in citing Professor Hovenkamp's observation that the "'central evil addressed by Sherman Act § 1'" is the "'elimin[ation of] competition that would otherwise exist.'" *Id.* (quoting 7 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1462b, p. 193–194 (2d ed. 2003)). In other words, the ultimate reason that the NFL teams' joint IP licensing is "the sort of 'combination' that section 1 is intended to cover" is not that it "deprive[d] the marketplace of independent centers of decision making" (560 U.S. at 195), but because it therefore affected *ex ante* competition — "the proper concern of U.S. antitrust law" (*Amicus* Br. at 2).

Thus, the Economists' simple question of whether *ex ante* competition is at risk is exactly *American Needle's* "relevant inquiry," except that it cuts to the chase, clearing out the single-firm-or-multiple-firm intermediate steps that can drive readers of *Dagher* and *American Needle*, especially in tandem, to despair. Perhaps Justice Kavanagh had something like this in mind when, just after saying that "antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights," he cited *American Needle* for comparison. See 592 U.S. ___ (slip op., at 2) (citing *American Needle*, 560 U.S. at 202). In drawing that comparison, Justice Kavanagh appears to be making precisely the Economists' point. In *American Needle*, unlike with telecasts and with the underlying games, ex ante competition was at stake, and thus Section 1 had a role to play.

The same point is evident even in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). Considering the NCAA's output controls over telecasts of college football games, the Court had little doubt that Section 1 applied: "there can be no doubt that the challenged practices of the NCAA constitute a 'restraint of trade' in the sense that they limit members' freedom to negotiate and enter into their own television contracts." *Id.* at 98. But football is hardly the only college sport on television, particularly in March. The telecasts of other

6 Available at https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

7 Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

NCAA sports were not before the Court, of course, but the Court's reference to them suggests that there would be little cause for antitrust concern. Noting that the NCAA "has not undertaken any regulation of the televising of [non-football] athletic events," the Court adds offhandedly that "Presumably, however, it sells the television rights to events that the NCAA itself conducts." *Id.* at 87 and n.2. That is the end of the discussion. If those centralized sales, which would seem to resemble the NFL's distribution of television rights, presented any potential of a Section 1 issue, would the Court ever have mentioned them so matter-of-factly? That the NCAA's centralized television-rights activity as to the events that it created did not even warrant a caveat of some kind — e.g. "but that is for another day" — suggests that the Court realized that the centralized dissemination of television rights for events the NCAA produced — like NFL Football — simply did not raise a potential issue; it was no more than the sale of a product.

III. CONCLUSION

If the NFL and DirecTV eventually need to take Justice Kavanagh up on his invitation to "raise [their] legal arguments again in a new petition for certiorari, as appropriate" (592 U.S. at ___ (slip op., at 2)), the Economists' core point may be back before the Court along with other issues that arise under the rule of reason. And at that point, perhaps we will see whether the point resonates with the entire Court as much as it seems to have with Justice Kavanagh. In the meantime, possibly other courts, including the district court and the Ninth Circuit in this case, will have a chance to enrich antitrust case law with their analysis of whether Section 1 should apply to joint ventures' distribution decisions as to their jointly developed new products.

CARTELS AS CRISIS MANAGEMENT: WHY COLLUSION MAY BE INEVITABLE DURING ECONOMIC DOWNTURNS

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All around the globe, the impact of the ongoing COVID-19 pandemic has been relentless, both from direct affliction with the virus itself and from the economic downturn devastating numerous industries. Given the increased demand for items such as personal protective equipment (PPE), medical devices and supplies, and basic household items, the U.S. government announced an expedited antitrust procedure for the creation of joint ventures for new goods or services made in response to the pandemic. Still, authorities have made it clear that they continue to remain vigilant, warning companies and individuals who may try to take advantage of the current health crisis and circumvent anti-competition laws that they will be prosecuted. Though the novel coronavirus has ushered in a wave of economic fallout, it is not the first time industries have felt a shock wave. The current health pandemic recalls past crises and the emergence of so-called crisis cartels. These cartels are made up of cohorts of competitors trying to withstand the storm of a torrential economic downswing. In the past couple of decades, as a result of a tighter, globalized economic community and substantial growth of various industries, such cooperation between individuals and companies became inevitable in order for them to survive; even the line between permitted collaboration and unlawful activities has become blurred. This article examines the periods following September 11, 2001, the 2008 financial crisis and the current COVID-19 pandemic as times of economic distress, which is when such crisis cartels emerge.

Following the 9/11 terrorist attacks, U.S. airlines witnessed a slump in the demand for air travel. Several airline companies filed for bankruptcy as the losses worsened. Even with a $15 billion[2] bailout from the government, the airline industry's downturn created permanent changes to the market. In response to the sharp decline in demand for air travel, the industry banded together, leading to the extraordinary consolidation of multiple carriers. In fact, several decades prior to the attacks, following deregulation of the airline industry in 1978, competition in the airline industry already seemed superficial.[3] The mammoth mergers and consolidations that took place in the 2000s produced a cartel of airline carriers in response to the dip in demand for U.S. carriers and new competition from airlines based in the Middle East and Asia.[4] As a result, the U.S. government granted immunity from U.S. antitrust laws to several airlines that were participants in international alliance agreements.[5] The rationale was that immunity would allow the carriers to provide benefits to passengers by allowing them to travel to more destinations at lower cost. Of course, this also meant less competition among the carriers. Regardless, the government advocated for consolidation, hoping for an increase in profitability and fewer airlines filing for bankruptcy.[6] Despite the immunity protection, several airlines still unlawfully colluded to fix prices on passenger and cargo fuel surcharges, and following investigation by the Department of Justice (DOJ), they faced severe fines and ongoing cooperation with government authorities, including continued inquiry into the conduct of individual executives.[7]

Similarly, following the 2008 recession, the financial market became another industry that felt collusion would be necessary to cope with the economic chaos, and the transatlantic London Interbank Offered Rate ("LIBOR") scandal emerged. LIBOR had been used as a benchmark to assess bank health. As a global market interest rate reference, LIBOR was based on the rates submitted by banks showing at what rate they were willing to lend money in multiple currencies through a self-policing committee, and it was used to determine short-term interest rates.[8] In 2012, a large-scale investigation revealed that bankers were reporting false interest rates in an attempt to profit from or hide financial weaknesses. Several major financial institutions were investigated for colluding to fix LIBOR, going back to 2003.[9] Indeed, the bankers conspired to manipulate LIBOR by intentionally submitting false borrowing costs in order to prove that their institutions were not exposed to risk despite the unpredictable environment. And for many bankers, rigging the rates was one way they could exert control as market health plunged.[10] Consequently, the institutions involved suffered massive financial penalties and were obligated to pay substantial settlements for their participation in the rate

2 Paul A. Cleveland and Michael D. Tucker, "The Futility of the Government Airline Bailout," The Freeman, Foundation for Economic Education (Dec. 1, 2005), available at https://fee.org/articles/the-futility-of-the-government-airline-bailout/.

3 Paul A. Cleveland and Michael D. Tucker, "The Futility of the Government Airline Bailout," The Freeman, Foundation for Economic Education (Dec. 1, 2005), available at https://fee.org/articles/the-futility-of-the-government-airline-bailout/.

4 Hubert Horan, "How Alliance Carriers Established a Permanent Cartel," Promarket (University of Chicago Booth School of Business) (May 5, 2020), available at https://promarket.org/2020/05/05/how-alliances-carriers-established-a-permanent-cartel/.

5 William Gillespie and Oliver M. Richard, "Antitrust Immunity and International Airline Alliances," discussion paper, U.S. Department of Justice, Antitrust Division (Feb. 1, 2011), available at https://www.justice.gov/atr/antitrust-immunity-and-international-airline-alliances.

6 Holman W. Jenkins Jr., "The Airline Cartel That Isn't," Wall Street Journal (July 10, 2015), available at https://www.wsj.com/articles/the-airline-cartel-that-isnt-1436569728.

7 Kevin Done, Michael Peel and Stephanie Kirschgaessner, "Fallout begins over airline price-fixing," Financial Times (Aug. 1, 2007), available at https://www.ft.com/content/e58fccd6-4069-11dc-9d0c-0000779fd2ac.

8 Liam Vaughan and Gavin Finch, "Libor scandal: the bankers who fixed the world's most important number," The Guardian (Jan. 18, 2017), available at https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number.

9 James McBride, "Understanding the Libor Scandal," Council on Foreign Relations (Oct. 12, 2016), available at https://www.cfr.org/backgrounder/understanding-libor-scandal.

10 *Supra* note 7.

fixing. Individuals also were held accountable, as both U.S. and European authorities prosecuted more than 20 bankers.[11] In addition to the LIBOR scandal, several traders were also found to have participated in a foreign exchange conspiracy. Just this September, a foreign exchange trader was sentenced to eight months in prison and ordered to pay a fine of $150,000 for his role in the conspiracy, fixing prices on trades for Central and Eastern European, Middle Eastern, and African currencies, while his co-conspirators pled guilty to their involvement.[12] In connection with the foreign exchange rigging scandal, six banks were ordered to pay $5.6 billion to U.S. authorities for their roles in the conspiracy, which evidently took place from the end of 2007 to the beginning of 2013.[13] On top of that penalty, the European Union also fined five of those banks the equivalent of approximately $1.2 billion.[14] The U.K.'s Financial Conduct Authority, which was established to investigate and regulate the financial industry within the U.K., began the transition away from using LIBOR as a benchmark reference following the LIBOR and currency fixing revelations, eventually requiring firms to use alternative benchmark rates prior to the end of 2021.[15]

Now, during the current COVID-19 pandemic, while the global economy by and large has contracted at a record rate,[16] demand for certain household items, PPE and medical equipment has soared. With the onslaught of the novel coronavirus, consumers rushed to purchase protective face masks, hand sanitizer and gloves to prevent the spread of the virus. Unsurprisingly, this led to hoarding and price gouging. On March 23, President Trump signed an executive order seeking to prevent price gouging and the hoarding of certain supplies in the fight against the novel coronavirus. The executive order invoked the Defense Production Act (DPA) and made it a misdemeanor for individuals and companies to acquire these items either (1) in excess of reasonable needs or (2) for the purpose of selling them in excess of prevailing market prices. Attorney General William Barr has reiterated that antitrust laws will continue to be enforced during this time and that any agreements concerning supply chain or prices could be considered per se violations of the Sherman Act, potentially resulting in criminal prosecution. The day after Trump signed the executive order, the DOJ and the Federal Trade Commission (FTC) issued a joint statement to announce that the agencies would expedite requests for business review letters and advisory opinions, and that cooperation between federal, state and local governments and among private businesses would be necessary to fight the virus, emphasizing that procompetitive collaboration that does not violate antitrust rules is possible. In addition, nearly all states have implemented special measures to address the surging prices of high-demand products during the ongoing health crisis. As emergency declarations were announced on both the federal and state levels, price-gouging laws went into effect in at least 38 states and the District of Columbia, while other states without such regulations confronted the rising prices through executive orders and other state consumer protection laws.[17] In order to avoid running afoul of the price-gouging rules, companies have to be careful not to mark up prices of certain products, but at the same time, they must avoid sharing any pricing information with competitors, as that could possibly lead to violating federal or state antitrust laws. Suppliers of essential and high-demand products must therefore tread carefully or risk facing federal or state penalties.

Additionally, the DPA was reactivated, granting the Department of Health & Human Services authority to ramp up production of ventilators.[18] Trump also issued another executive order, setting up an administrative process that could result in the granting of narrow antitrust immunity to companies engaged in "voluntary agreements" to respond to COVID-19. For immunity to be granted, either the president or an appointee would have to find that "conditions exist which may pose a threat to the national defense or its preparedness programs" and, with industry participants, devise a written plan of action or voluntary agreement to be submitted to Congress and to certify that the plan is necessary to respond to such threat. The DOJ, upon consultation with the FTC, also would have to certify that the plan is narrowly tailored. If approved, the collaboration as envisaged by the plan is to be monitored by the attorney general and the FTC chairperson.

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11 *Id.*

12 Stewart Bishop, "Ex-JPMorgan Trader Gets 8 Months For Forex-Rigging," Law360 (Sept. 17, 2020), available at https://www.law360.com/newyork/articles/1311381/ex-jpmorgan-trader-gets-8-months-for-forex-rigging-; Kadhim Shubber, "Former JPMorgan trader charged with conspiring to fix currency prices," Financial Times, (May 10, 2018), available at https://www.ft.com/content/6451fd0c-5489-11e8-b3ee-41e0209208ec.

13 Gina Chon, Caroline Binham and Laura Noonan, "Six banks fined $5.6bn over rigging of foreign exchange markets," Financial Times (May 20, 2015), available at http://ig-legacy.ft.com/content/23fa681c-fe73-11e4-be9f-00144feabdc0#slide0.

14 Foo Yun Chee and Kirstin Ridley, "EU fines Barclays, Citi, JP Morgan, MUFG and RBS $1.2 billion for FX Rigging," Reuters (May 16, 2019), available at https://www.reuters.com/article/us-eu-antitrust-banks/eu-fines-barclays-citi-jp-morgan-mufg-and-rbs-1-2-billion-for-fx-rigging-idUSKCN1SM0XS.

15 Financial Conduct Authority, "Transition from LIBOR," (Jan. 7, 2020), available at https://www.fca.org.uk/markets/libor.

16 Press release, "COVID-19 to Plunge Global Economy into Worst Recession since World War II," World Bank (June 8, 2020), available at https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii.

17 Ann O'Brien and Brady Cummins, "The Price of Price-Gouging Laws," The Antitrust Source (June 2020), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_obrien_6_17f.pdf.

18 Press release, "HHS Announces New Ventilator Contracts, Orders Now Totaling Over 130,000 Ventilators," U.S. Department of Health & Human Services (Apr. 13, 2020), available at https://www.hhs.gov/about/news/2020/04/13/hhs-announces-new-ventilator-contracts-orders-now-totaling-over-130000-ventilators.html.

The DOJ's Antitrust Division also has issued several responses to requests for business review letters from companies seeking to collaborate in order to work swiftly to boost the manufacture and distribution of certain supplies needed to contain the spread of the novel coronavirus. For example, PPE and medical distributors McKeeson Corp., Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc. and Henry Schein Inc. jointly requested that the DOJ issue a business review letter, where other government agencies had asked the companies to use their collective expertise in the supply chain industry to address shortages and other supply chain issues necessary to address in the fight against COVID-19.[19] Recognizing that the "pandemic will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety," the DOJ conducted an expedited review and announced that it did "not intend to challenge the Requesting Parties' efforts to expedite and increase manufacturing, sourcing, and distribution of PPE and medications."[20] Similarly, the DOJ also confirmed it would not challenge AmerisourceBergen's proposal to respond to the current health pandemic by "identify[ing] global supply opportunities, ensur[ing] product quality, and facilitate[ing] product distribution of medications and other healthcare supplies."[21] And in a truly expedited fashion, merely eight days after the request was submitted, the DOJ also issued a business review letter to pharmaceutical manufacturers Eli Lilly, AbCellera Biologics, Amgen, AstraZeneca, Genentech and GlaxoSmithKline allowing them to proceed with sharing information about manufacturing facilities to speed up production of certain antibody treatments for the purposes of treating COVID-19.[22] Still, since the DOJ and FTC's joint statement pledging expedited review was announced in March, only four public review letters have been issued through this process.[23] Notably, the requests were submitted by large corporations in the medical and supply industries. Other companies and industries may not have such similar resources to vet carefully their policies and procedures to avoid antitrust violations. Indeed, some businesses desperate to survive in the current pandemic may see no other option than to band together despite the consequences from enforcement authorities.

It is unclear when the reach of the virus will finally wane. What is more apparent, however, is the detrimental impact on the economy, which has already begun. Based on past events, cartels are likely to arise in times of crisis and panic. These crisis cartels seem to occur as a knee-jerk reaction in order to provide stability in an uncertain time. Such cooperation within industries occurs in an effort to assuage public fears and to demonstrate financial vigor. But these efforts often can shroud unlawful antitrust agreements and price fixing, which inevitably lead to more instability. The government, particularly the DOJ's Antitrust Division, seems to have acknowledged this pattern of crisis cartels sprouting up during times of crisis and recognizes that collaboration is sometimes necessary, efficient and critical during such uncertainty, particularly during a health pandemic as the one we are grappling with now. By permitting certain collaborations – which of course are narrowly tailored and subject to the scrutiny of authorities – businesses are given some bandwidth to discuss matters with other members in their industry in hopes that they will not feel compelled to turn to collusion and anti-competitive conduct to survive the economic onslaught. If they do so, companies should be aware of the DOJ's guidance on its business review process and must understand that it should not be used carte blanche to skirt anti-competitive laws in times of emergency. Indeed, businesses and industries should recall that the spirit of antitrust laws is to protect competition, not the competitors themselves.

19 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to Lori A. Schecter, exec. vice pres., chief legal officer and general counsel, McKesson Corp.; Michael S. Ettinger, sr. vice pres., corp. and legal affairs, and chief of staff, Henry Schein Inc.; Alex Liberman, general counsel, Medline Industries Inc.; Jessica L. Mayer, exec. vice pres. and chief legal and compliance officer, Cardinal Health Inc.; and Nicholas J. Pace, exec. vice pres., general counsel and corp. secretary, Owens & Minor Inc. (Apr. 4, 2020), available at https://www.justice.gov/atr/page/file/1266511/download.

20 *Id.*

21 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to John G. Chou, exec. vice pres., chief legal officer and secretary, AmerisourceBergen Corp. (Apr. 20, 2020), available at https://www.justice.gov/atr/page/file/1269911/download.

22 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to Thomas O. Barnett. (July 23, 2020), available at https://www.justice.gov/atr/page/file/1297161/download.

23 See DOJ, business review letters and request letters, available at https://www.justice.gov/atr/business-review-letters-and-request-letters.

COMPETITOR COLLABORATIONS DURING COVID-19

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Antitrust regulators worldwide have had to adopt novel strategies to address the emergency need for collaboration within certain industries to help combat the COVID-19 pandemic. As issues arose involving, for example, the timely distribution of medicine, or further downstream, business closures delayed critical supply chains, COVID-19 changed the way most industries must do business. As a result, many businesses have found that they can work together to more effectively respond to the pandemic. Antitrust enforcers recognized this need for collaboration and have issued public statements discussing increased antitrust tolerance for collaborations between competitors if these combined efforts can help provide necessary products and services that may otherwise be unavailable. This arguably more lenient view of collaboration extends beyond the immediately relevant medical and pharmaceutical companies, as regulators have indicated an understanding that the pandemic has produced downstream effects on many industries that may benefit from increased collaboration.

In the U.S., the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued a joint statement in March 2020 to address the ways firms can engage in "procompetitive collaboration" to help respond to COVID-19.[2] In this statement, the agencies discuss acceptable joint activities that companies could undertake to address the pandemic conditions while not running afoul of the antitrust laws. Some of these lawful activities include sharing "technical know-how" and collaborating on research and development. The agencies explained that they will "account for exigent circumstances in evaluating the efforts to address the spread of COVID-19 and its aftermath" where those efforts are "necessary to assist patients, consumers, and communities" and "provide Americans with products or services that might not be available otherwise." This guideline signals an understanding that the COVID-19 pandemic may have widespread consequences that extend beyond the medical industry and may require collaborations that would typically attract a higher level of antitrust scrutiny. As a part of their guidance, the antitrust agencies pledged to expedite their individual programs: the FTC's advisory opinion program and the DOJ's business review program.

I. THE BUSINESS REVIEW PROGRAM

The DOJ's business review program provides businesses with insight into how the enforcer may respond to proposed business conduct. The process begins with a written request from a business (or group of businesses) to the Assistant Attorney General. Each request must be accompanied by additional relevant information, including background details, copies of all operative documents and detailed statements of all collateral oral understandings (if any).[3] The DOJ can also request additional information or conduct an independent investigation. If the DOJ chooses to write a business review letter in response to a request, it can take one of three positions: (i) it does not presently intend to bring an enforcement action against the proposed conduct; (ii) it declines to state its enforcement intentions; or (iii) it will file suit against the companies if they engage in the proposed conduct. Even if the DOJ issues a business review letter stating that it does not intend to bring an enforcement action against certain conduct, it reserves the right to do so in the future, as each business review letter states only the DOJ's intentions as of the date of the letter. Significantly, however, when the DOJ has stated an intention not to bring suit, it has never subsequently brought a criminal action if full disclosure was presented at the time the request.[4]

The DOJ touts the business review program as beneficial to both the DOJ and the business community because the DOJ can analyze and comment on the possible competitive impact of proposed business conduct, potentially avoiding later lawsuits or other actions. The review process typically takes several months to complete from the time a business submits a request; from 2010–2019, the average number of days between submission of a request and the date of the DOJ response letter was 127 days. Under the new guidance, the DOJ announced it will aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing "public health and safety" within seven calendar days of receipt of all necessary information.

2 Joint Antitrust Statement Regarding COVID-19, DOJ (Mar. 24, 2020).

3 28 C.F.R. §50.6.

4 See Introduction to Antitrust Business Reviews, DOJ (Nov. 3, 2011).

II. INCREASE IN BUSINESS REVIEW LETTERS DURING PANDEMIC

Unsurprisingly, requests for business review letters have increased in the months since the DOJ released its guidance. Over the 15-year period of 2004–2019, the DOJ released an average of approximately two business review letters per calendar year. In the eight months ending in August 2020, the DOJ released seven business review letters, including four using the expedited process.

The first expedited business review letters of 2020 were directly related to the pandemic and involved the distribution of medicine and medical equipment. First, on April 4, 2020, the DOJ issued a business review letter to a group of distributors of personal protective equipment ("PPE"), including McKesson and Cardinal Health, announcing that it would not challenge the collaboration between the companies to address COVID-19-related supply chain problems affecting distribution of their products.[5] The requesting parties had proposed that they would work with the Federal Emergency Management Agency ("FEMA") to accelerate manufacturing and distribution of PPE and medication. The DOJ pointed to many of the participants' proposed competitive safeguards, including their promises not to use the collaboration to raise prices, reduce output or reduce quality, and noted that the collaboration is unlikely to harm competition because it is "limited in scope and duration ... and will not extend beyond what is required to facilitate the availability of needed supplies."[6] With these proposed safeguards, the DOJ stated it did not believe the conduct would be anticompetitive.

Shortly after issuing the first expedited letter, the DOJ issued another on April 20, 2020, to AmerisourceBergen Corporation announcing that it would allow the company to coordinate with FEMA, the U.S. Department of Health & Human Services and other federal agencies to distribute medicine nationally.[7] Amerisource proposed limiting its collaborations to efforts related to COVID-19 and continuing such arrangements as long as was necessary to help combat the pandemic. Much of the framework proposed by Amerisource was substantially similar to the framework presented by the DOJ in the McKesson letter,[8] with the DOJ noting the importance that Amerisource's proposed collaboration would be "specifically intended to further U.S. government policy and efforts."[9] In both letters, the DOJ credited the requesting parties' proposed competitive safeguards, including "limiting what information is exchanged and how long it will be exchanged or kept, to minimize the risk that [the parties'] conduct might harm competition." For these reasons, the DOJ stated it did not intend to challenge the collaboration.

The DOJ's next expedited business review letter, released in May 2020, illustrated that the authority understood that the pandemic has effects in many industries outside of the medical and pharmaceutical space. On May 15, 2020, the DOJ announced that it would allow the National Pork Producers Council ("NPPC"), a trade association of U.S. pork producers, to share information regarding the recommended best practices for euthanizing unmarketable hogs.[10] The NPPC explained in its request that pork producers use standardized equipment that can only process hogs of a certain size, and many producers had been forced to decrease production at their facilities due to the pandemic. This decrease in production resulted in an oversupply of live hogs in the U.S. — with nowhere for farmers to sell their hogs, eventually the animals became too large to process. In response to this problem, the U.S. Department of Agriculture ("USDA") created a program to euthanize these unmarketable hogs, and NPPC members offered to assist farmers in following best practices for doing so. The DOJ's business review letter to NPPC emphasized the importance of the fact that the conduct would be occurring at the direction of a government agency (the USDA). Further, like it did in the Amerisource and McKesson letters, the DOJ highlighted that the collaboration was narrowly targeted to solve the specific problem of pandemic-related capacity reductions resulting in an overpopulation of unmarketable hogs.[11] For these reasons, the DOJ saw no risk for competitive harm and stated it would not challenge the proposed conduct.

The fourth (and final, so far) expedited business review letter issued by the DOJ involved the pharmaceutical industry. On July 23, 2020, the DOJ issued a business review letter to a group of pharmaceutical manufacturers, including Eli Lilly and Amgen, regarding the manufacturers' proposed information exchange relating to manufacturing and production of certain COVID-19 treatments.[12] Citing the need for expedited

5 See McKesson Corporation Business Review Letter, DOJ (Apr. 4, 2020).

6 *Id.* at 9.

7 See AmerisourceBergen Corporation Business Review Letter, DOJ (Apr. 20, 2020).

8 See *id.* at 10 ("The Department recently applied this same framework in evaluating the proposed collaborations by the PPE Distributors responding to the COVID-19 pandemic under the direction of FEMA.").

9 See *id.* at 11.

10 See National Pork Producers Council Business Review Letter, DOJ (May 15, 2020).

11 See *id.* at 4 ("The Department further understands that the conduct will not be used as a mechanism to depopulate more hogs than necessary, i.e. the conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant capacity.").

12 See Eli Lilly Business Review Letter, DOJ (July 23, 2020).

production of any approved COVID-19 treatment, the requesting parties, some of which compete with each other in the production of biologics, asked to share information regarding "manufacturing facilities, raw materials, and supplies" that could be used to produce COVID-19 treatments and "reduce the lead time necessary to prepare their facilities for the production of these treatments." In its business review letter, the DOJ explained that because the proposed information exchange was limited to production capacity specifically related to COVID-19 treatments, it was "unlikely to result in collusion or harm competition."[13] As the DOJ did in the other expedited review letters, the authority emphasized the fact that the requesting parties agreed only to "exchange and use information for the strictly limited purpose of facilitating the production of COVID-19 treatments."[14]

The DOJ has also released three business review letters in 2020 through the nonexpedited process.[15] First, in January 2020, the DOJ issued a business review letter to the American Optometric Association ("AOA"), a trade association of optometrists,[16] which operates a group purchasing organization ("GPO") through which its members can purchase non-optometric products like insurance, credit card processing and general medical supplies. The AOA uses a third-party health care GPO as its agent to negotiate discounts on products and services. The AOA requested a business review from the DOJ regarding potentially expanding its GPO to include the purchase of optometric products, contending that allowing the GPO to negotiate prices on optometric equipment would better position its members to compete with large retail stores and vertically integrated manufacturers. The AOA proposed a number of competitive safeguards to ensure the expansion was not anticompetitive, including that GPO members would be allowed, but not required, to make their purchases through the GPO; that an independent third party would be conducting the negotiations; and that any discussions between the GPO and individual members regarding pricing/costs would be kept confidential from the other GPO members.

Next, in April 2020, the DOJ issued a business review letter to the Association of Independent Commercial Producers ("AICP"), a trade association representing companies that produce commercials on various media platforms for advertisers and advertising agencies, regarding a proposed bidding platform that AICP was developing[17] through its wholly owned subsidiary AICP Services, Inc. ("ASI") to allow subscribers (primarily advertisers and advertising agencies) to solicit and receive bids from production and post-production companies for commercial advertisements. AICP represented that it would not share information regarding bids, pricing or other competitively sensitive information outside of the specific members invited to participate in the bids, and that the platform would not be used to facilitate communication between subscribers or bidders.[18] Additionally, participation in these services would be nonexclusive for all AICP members.

Finally, the most recent business review letter was issued on July 28, 2020, to Avanci, LLC regarding its proposed joint patent-licensing pool for use with 5G technologies used in automobiles.[19] Avanci offers a licensing platform that aggregates patents declared essential to 2G, 3G and 4G standards, which are then licensed to manufacture connected vehicles and smart meters. Avanci proposed to implement a similar program for 5G cellular technologies. In its request, the company proposed a number of competitive safeguards to ensure the patent-licensing pool did not have anticompetitive effects, such as excluding substitute patents from the pool, permitting independent licensing outside of the pool, making the license agreements available to all interested licensees and limiting access to competitively sensitive information.[20]

13 *Id.* at 6.

14 *Id.* at 9.

15 In September 2020, DOJ updated a business review letter it originally issued to The Institute of Electrical and Electronics Engineers in 2015. This update addressed concerns "raised publicly by industry, lawmakers, and former department and other federal government officials that the 2015 letter has been misinterpreted, and cited frequently and incorrectly."

16 See American Optometric Association Business Review Letter, DOJ (Jan. 15, 2020).

17 See Association of Independent Commercial Products Business Review Letter, DOJ (April 16, 2020).

18 See *id.* at 3.

19 See Avanci Business Review Letter, DOJ (July 28, 2020).

20 See *id.* at 12–21.

III. GOING FORWARD — "NO RELAXATION" OF ANTITRUST ENFORCEMENT

While the FTC and the DOJ may be allowing for quicker reviews of proposed conduct related to COVID-19, the antitrust agencies are not relaxing their enforcement or allowing companies to coordinate in violation of the antitrust laws. In an April 2020 panel at the annual spring meeting of the American Bar Association's Antitrust Law Section, Ian Conner, the Director of the FTC's Bureau of Competition, reiterated the agency's commitment to vigorous antitrust enforcement. "We're not changing our enforcement priorities or our enforcement standards. So if you want to take advantage of the crisis to try and price fix or fix wage prices, those are the things we will still prosecute. So there's no relaxation of antitrust rules here." In a separate statement, Mr. Conner explained that the expedited antitrust review process "is just going to be expedited for things that likely would have been cleared anyway." In contrast, both the DOJ and the FTC have also made clear that certain practices will be particularly scrutinized during the pandemic, including "anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked," especially in industries involved in the public health response to COVID-19.[21]

Thus, businesses should not view the new guidance as changing antitrust enforcement policies, but might consider taking advantage of enforcers' increased use of the business review programs, considering that the DOJ released more business review letters so far in 2020 than it did in any single year since 2002, and more than in the last five years combined. Even excluding this year's expedited letters, the three regular business review letters released by the DOJ in 2020 tally more than in any single year since 2013. As the review process gets more exposure during the pandemic, companies may become more comfortable using either the expedited or the regular program to gain insight into proposed conduct before implementing it.

Further, considering the agencies' explanation that the expedited business review process has only been approving conduct that would have been approved under the normal review process, businesses may be able to use these letters as data points generally indicating the types of conduct that antitrust agencies are unlikely to challenge. If a business is looking to collaborate with other businesses in a manner that is similar to approved conduct from a previous business review letter, it can have some comfort that the antitrust agencies would view that conduct similarly from an enforcement perspective.

IV. CONCLUSION

The COVID-19 pandemic will have long-lasting effects on nearly every field of law, and competition law is no different. As we have already seen, the pandemic has forced lawmakers and regulators to consider designs outside traditional antitrust arrangements, resulting in a more dynamic and unpredictable regulatory space. This makes undertaking collaborations with a certainty of avoiding antitrust concerns more difficult than ever for businesses. Through the business review process, antitrust agencies have shown a willingness to accept creative collaborations between competitors as long as those collaborations are sufficiently targeted and as brief as necessary. The agencies have and will continue to release guidance discussing acceptable collaborations, and businesses will be able to use this guidance to help make their own decisions regarding collaborations with competitors. As always, it remains important for businesses to affirmatively demonstrate how their collaborations will benefit consumers (or, in the case of the COVID-19 response, public health). If businesses are able to demonstrate these advantages in advance, they may be able to use the antitrust agencies' review programs to help mitigate risk and ensure their conduct will not violate antitrust laws.

21 Joint Statement Regarding COVID-19 and Competition In Labor Markets, DOJ (Apr. 13 2020).

COMPETITOR COLLABORATION IN MEXICO: THE CASE FOR UPGRADING REGULATION

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Collaboration agreements are insufficiently addressed in the Mexican antitrust legislation. The rigidity of the legal design to categorize *per se* illegal conduct versus that which admits a *rule of reason* approach, as well as the broad merger control regime, may play against the understanding, promotion, and regulation of agreements between competitors, despite their benefits to consumers.

In June 2018, an effort to adopt specific guidelines for collaboration agreements that would have provided minimum legal certainty to economic agents, did not pass the debate on COFECE's Plenum of Commissioners. The conclusion was that it was duplicative with the existing guidelines for information exchange among economic agents. Meanwhile, COFECE has suggested that -to achieve sufficient certainty- collaboration agreements may be reviewed using the merger control procedure.

In this article, we argue that the reasons to avoid an open discussion on collaboration agreements might be more closely related to the fear of opening a broader discussion on the implications of an overly strict definition of cartel activity and *per se* offenses under the Mexican Law. We also suggest alternative approaches from other jurisdictions to facilitate the implementation of collaboration agreements to economic agents and reap the benefits of such agreements on the overall economy.

I. WHAT BROUGHT US HERE?

Although since 1857 the Mexican Constitution proscribed monopolies, real enforcement started in 1993 with the entry into force of a competition law which was, in part, the result of the negotiations of NAFTA and the interest of Mexico in becoming a member of the Organization for Economic Cooperation and Development ("OECD"). A process of harmonization of the U.S. and Mexican commercial laws invigorated the application of a modern and enforceable antitrust framework, informed by mature legislations such as the United States ("U.S.").[2] A clear example was the explicit inclusion of the long-term debate in U.S. courts between the application of a *per se* approach to conduct that always -or almost always- has anticompetitive effects, and a different and comprehensive *rule of reason* approach to the rest of the potentially unlawful behaviors. Elegantly, and perhaps mindful of the formalistic tradition of Mexican law, the new competition law categorized in one section those "absolute" monopolistic practices that should be investigated as *per se* offenses and, in a different section, those "relative" monopolistic practices that should be prosecuted and judged according to economic understanding of both the potential damages and overall efficiencies to the consumers.

Even when the terminology may sound strange to outsiders, the strict division between absolute and relative monopolistic practices has proven useful to a greater extent for antitrust practitioners and economic agents in Mexico. Having clarity on those cases in which the authority would use one standard or another is a true relief in the context of Mexico's tight and legalistic tradition, where the rule of law is still also an enormous challenge. In addition, the antitrust cases in Mexico are always driven by the regulators themselves as private litigation is still very underdeveloped. Therefore, the usual American critiques to the *rule of reason* pleading requirements[3] or the tricky methods of analysis by the courts[4] are not necessarily relevant to our reality.

Nevertheless, that practical separation of conduct in the Mexican Law was challenged by economic reality. For example, cases of boycotts or joint market power have proven complicated to prove and sanction. The same happens with interactions among competitors in the context of a collaboration agreement, where real life cases have tested the flexibility of the Mexican law to efficiently manage the gray areas between a *per se* approach and a more comprehensive reasoning.

One may argue that many collaboration agreements among competitors may not have the "*purpose or effect*" of hindering competition, thus, they should not be considered as an "absolute monopolistic practice" under Article 53 of the Federal Economic Competition Law.[5][6] In fact, most of the collaborations bring benefits to competition in the market and opportunities for consumers. But the broad scope of the catalogue of conduct listed and described in Article 53 creates a significant area of risk for economic agents that want to efficiently collaborate with competitors for the benefit of consumers and may create an unintended "chilling effect" for economic activity. Many collaborations that happen in other jurisdictions are not structured as such in Mexico because of the competition law risk.

2 Crawford, James E. (1997) "The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance?," Indiana Journal of Global Legal Studies: Vol. 4: Iss. 2, Article 6. Available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1099&context=ijgls.

3 Bork, Robert H. (1966) "the rule of reason and the per se concept: price fixing and market division), The Yale Law Journal, Vol. 75, No. 3. Available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4159&context=fss_papers.

4 Carrier, Michael A., (2019), "The Four-step rule of reason," Antitrust Magazine, Spring 2019, Vol. 33, No.2. Available at https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf.

5 Federal Economic Competition Law. Published on Mexico Federal Economic Gazette on May 23rd, 2014. Available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_270117.pdf An English version is available at https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf.

6 Such definition capturing both the "*aim and the result*" seems also to feed itself from the U.S. tradition, in particular *United States v. Trenton Potteries, Co.*

II. UNTYING THE KNOT

As discussed above, the Mexican Antitrust Law of 1992 which entered into force in 1993 and subsequent laws[7] reflected the U.S. tradition of dividing anticompetitive behaviors into *per se* offenses and those to be evaluated under a "rule of reason." Article 9 of this Law included a catalogue of conduct considered as plain *cartel activities* and thus seen as anticompetitive *per se*. Moreover, conduct considered to be an *abuse of dominance* was listed in Article 10, which explicitly established conditions for those behaviors to be considered as unlawful and also stated the possibility for the defendants to argue efficiencies. Embodying in the law such historical distinction from U.S. courts when assessing monopolistic behavior has been widely regarded as a good choice for the foundation of the modern era of the Mexican antitrust system.[8]

Nonetheless, any foreign legal appropriation has its limits. As discussed by Hovenkamp (2018), the lack of clarity in the U.S. laws as regards the formation of specific antitrust rules of illegality makes the court's role "unusually important in the development of antitrust rules."[9] The determination of which conduct is a *per se* offense in the U.S. was not set in stone but has evolved throughout the years based on: (i) cost-efficiency criteria; (ii) the knowledge of the type of agreements to be reviewed; and (iii) the factual evidence, as analyzed on a case-by-case basis. While some conduct like price fixing or bid rigging are generally considered as *per se* offenses in the U.S., the analysis is generally more flexible than in the Mexican Antitrust Law. Furthermore, our legal system is far less reliant on precedents and almost addict to the letter of the law. The dynamism and constant court feedback of the U.S. and other advanced jurisdictions´ legal systems is in contrast with the Mexican one, in which the lack of trust in the rule of law creates a more arthritic tradition, full of formalism and timorous of creative interpretations of the law, especially from the government agencies which are always worried of internal investigations for minor departure from legal formalities.

The above has been made quite clear by the antitrust courts in Mexico. In the *Amparo 46/2014* the specialized tribunal stated that absolute monopolistic practices are "unreasonable" in all cases as they "*illegally restrict the competition process*," and always lack "*any economic justification; they are illegal per se*."[10] In the context of such interpretation, it is worth reflecting on the possibility of collaboration agreements among competitors not being considered as *per se* illegal in Mexico. As discussed above, an initial argument would be that in the vast majority of cases such agreements do not have the purpose or effect of restricting competition in any way. Nevertheless, the list of conduct is so broad that it would be very risky for the parties to completely rule out any possibility of fitting in one of their paragraphs.

Considering this situation, the Investigative Authority of COFECE proposed in June of 2018 Draft *Guidelines for Collaboration Agreements among Competitors* (the "Draft"). The Investigative Authority correctly expressed that given the frequency with which these agreements are carried out and the uncertainty of the situations in which they may constitute an illegal conduct, it was important to provide specific guidelines for economic agents on this important topic. The Commission opened this draft for comments from the public, which in general were supportive of the effort and created a good debate around the specific issues discussed in the draft. Unfortunately, the proposal was not adopted as a guide by the Plenum of Commissioners of COFECE, who argued that the guidelines were to some extent duplicative of the current *Guidelines of Information Exchange among Competitors* (the "Guidelines for Information Exchange").[11] The debate at the Plenum level also evidenced a fear of overcommitting to some legal interpretations that could signify a departure from formalistic legal interpretations.

In our view, the Investigative Authority of COFECE was right on the need for having guidelines on collaboration agreements among competitors. While the *Guidelines of Information Exchange among Competitors* indeed mention the existence of some situations in which competitors may collaborate and explains the importance of having the necessary protocols to avoid unlawful exchanges of competitively sensitive informa-

7 Since 1857 the Mexican Constitution Law proscribed monopolies, however, it remained largely unknown and unforced until the last decade of the 20th century. In 1992 the first Competition Law was enacted but it remained largely unknown for a long time. Important reforms to the Mexican Constitution were enacted in 2013 and a new competition law was enacted in 2014. Such process of reform also resulted in the current Federal Economic Competition Law of 2014. For a historical review of the reforms please refer to http://dei.itam.mx/archivos/REFORMAS_A_LA_LEY_DE_COMPETENCIA_ECONOMICA_DE_MEXICO.pdf. Cfr. Mena-Labarthe, Carlos (2017), "The new competition policy in Mexico," Competition law and policy in Latin America : recent developments / edited by Paulo Burnier Da Silveira, Kluwer Law International, 2017.

8 Slottje, Daniel J, et al, (2001). "*Antitrust Policy in Mexico*," 7 Law and Business Review of the Americas, Volume 7, Number 3, Article 6. Available at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1833&context=lbra.

9 Hovenkamp, Herbert J., (2018), "The Rule of Reason," Faculty Scholarship at Penn Law. 1778. Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty_scholarship.

10 PRÁCTICAS MONOPÓLICAS ABSOLUTAS. SON ILEGALES, *PER SE*. Amparo en revisión 46/2014. Avícola Pilgrim's Pride de México, S.A. de C.V. 6 de mayo de 2016. Unanimidad de votos. Ponente: Óscar Germán Cendejas Gleason. Secretario: Agustín Ballesteros Sánchez. Época: Décima Época: Registro: 2012166; Instancia: Tribunales Colegiados de Circuito; Tipo de tesis: Aislada; Fuente: Gaceta del Semanario Judicial de la Federación, Libro 32, Julio de 2016, Tomo III, Materia: Constitucional; Tesis I.1o.A.E.162 A (10a), Página 2182.

11 See pages 26 and 27 of COFECE's Board of Commissioners' Plenum discussion from June 7, 2018. Available at https://www.cofece.mx/wp-content/uploads/2018/07/VEP_20180607_21.pdf.

tion, it helps very little to understand the limits of such collaboration to avoid an interpretation of wrongdoing. It is also true that the Draft had areas of opportunity -notably the lack of concreteness and specificity- but two years have passed and there is no indication of upgrades, or of the possibility of discussing a new document.

Considering the strict *per se* approach of the Mexican Antitrust Law, having at least some guidelines on competitors' lawful collaborations becomes critical. In Mexico, a "straightforward" collaboration among competitors could be considered very risky and it is worth to better explain to economic agents what conduct is considered to have the "purpose or effect" of affecting competition. Also, it is important to understand the cases in which the authority may consider a collaboration to be a *concentration* under the definition of the law.[12] Although there is always the possibility for firms or individuals to self-assess their collaboration and structure it in a way that the risk of illegal conduct diminishes greatly, some uncertainty remains. The Draft prepared by the Investigative Authority of COFECE was inspired by other jurisdictions' documents, in particular the "*Antitrust Guidelines for Collaborations Among Competitors*" ("U.S. Guidelines") issued by the Federal Trade Commission and the U.S. Department of Justice.[13] COFECE's Draft explicitly replicates the idea that collaboration agreements among competitors can provide benefits to competition as long as they do not fall under the scope of an unlawful concentration or agreements challenged as *per se* illegal. In this regard, it emphasized the fact that collaboration agreements among competitors could be seen as *per se* illegal agreements, therefore, as in the U.S. Guidelines, it provided economic agents with information regarding the key elements to take into account prior to executing a collaboration agreement.

As in the U.S. case, COFECE's Draft also provided a section explaining different types of collaboration agreements that are typically created by economic agents (i.e. production collaborations, marketing collaborations, buying collaborations, etc.). Interestingly, it included a section on *joint purchasing agreements*, expressly stating that COFECE suggests economic agents to notify these type of agreements as "concentrations," even if the agreement does not trigger a mandatory pre-merger filing. In fact, there are precedents in Mexico of buyer's clubs which were indeed notified to COFECE.[14]

But the Mexican Draft also had to cope with legal limits. Even when it would have benefited from a more concrete approach in its guidance, for example, about "safe harbors" as in the U.S. Guidelines, COFECE considered it impossible to adopt them without a legislative change. It is also important to bear in mind that the Mexican Antitrust legislation lacks a procedure of consultation like the one described in the Canadian Guidelines for Collaboration Agreements which could also greatly benefit the system.

Regulating collaboration agreements may open the door for a more flexible understanding of *per se* offenses in Mexico. In the absence of a "living law" that is constantly informed by precedents or, from time to time, upgraded by expert legislators, there is a risk of mismatches with the complex and dynamic business reality. The rejection of the Draft presented to the Commissioners was attributed to the duplicity with other available documents and the risk of overstepping the law, but it might also be the case that the regulator still feels like releasing such a document (or further regulating agreements among competitors) may be going too far as creating the perception of a blank cheque to circumvent the law.[15] After all, the same limitations in our formalistic legal system may play for and against the regulator.

But the need for orientation was evidenced during the beginning of the pandemic and the problems that it created for the subsistence of many companies in Mexico. COFECE released several communications insisting that collaboration among competitors in the context of the extraordinary circumstances were not going to be prosecuted. It also invited economic agents to voluntarily submit those agreements to the Investigative Authority to rubber stamp them before its implementation. Nevertheless, there was very little appetite from economic agents to approach the authority through this proceeding and this could be partly fueled by the uncertainty in this area.

And then, what to do to have legal certainty of collaboration agreements among competitors in Mexico? COFECE's response has been clear: you can make a self-assessment and run the risk of an investigation, or you can submit them as *concentrations* under the pre-merger control procedure. Both in the Draft and in the previous Guidelines for Information Exchange, COFECE has suggested that for economic agents to have full certainty, collaboration agreements must be treated as concentrations and be subject to the same procedure, which is a long, document-intensive one. Although almost no collaboration agreement has the nature of a concentration, we must also understand that subjecting

12 Article 61 of the Federal Economic Competition Law states that: "*For the purposes of this Law, a concentration shall be understood as a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other Economic Agent.*"

13 "*Antitrust Guidelines for Collaborations Among Competitors*," Section 3.32: Relevant Markets Affected by the Collaboration, pg. 16. Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

14 In 2017 COFECE approved the purchasing club of G500 in the retail of gasoline in Mexico. Further information available in the link https://www.cofece.mx/nuevo-comunicado-g-500/.

15 See https://www.cofece.mx/postura-cofece-ante-emergencia-sanitaria/.

them to a lengthy revision may destroy the value of the business strategy. For example, in the aviation industry, COFECE's recommendation not only for joint ventures but even for light forms of collaboration among economic agents is to submit them as a *concentration*, which does not seem to be appropriate in all cases.[16] Many firms are deciding to run the risk, establishing clear safeguards for information exchange and documenting the pro-competitive nature of the business arrangements. In any case, the system is difficult to explain, especially to international companies when most other relevant jurisdictions have established clear and predictable systems to deal with these challenges.

III. FIGURING A WAY OUT

First and foremost, we believe that COFECE should revisit the idea of releasing clear and concrete guidelines for collaboration agreements among competitors. Several jurisdictions like Canada, New Zealand, or the U.S. have released such type of orientation with the purpose of helping economic agents to self-assess their interactions with competitors and also to boost such type of efficient arrangements for the benefit of the economy.

We have a very tight legal framework, an underdeveloped case law, and a weak rule of law in Mexico. Under such circumstances, we cannot afford to have this level of uncertainty in such an important area. Furthermore, the existence of guidelines promotes self-assessment on economic agents, which creates a positive cycle of self-regulation and removes pressure from the system.

In this regard, it is interesting to see the recommendation to Brazil in the OECD *Peer Reviews of Competition Law and Policy: Brazil 2019* which stated that "*the CADE should publish more substantive guidelines to improve transparency, predictability and legal certainty of companies and to improve the coherence of the approach at the domestic level. Possible issues that would benefit from further guidance are: (…) horizontal cooperation between competitors.*"[17] Following this advice, Brazil now has an expedited review of collaborations among competitors that does not follow the burdensome rules of merger control proceedings, but rather a very specific and concise procedure to analyze collaborations that gives certainty to the parties.

Implementing a quick review process of collaboration agreements should also be considered by COFECE. Treating them as concentrations seems to be a very limited strategy to capture the nature and benefits of collaboration among competitors. In practice, parties have spent months convincing the authority just on the specific issue of how the proposed transaction is to be considered a merger and should be analyzed through the merger control proceeding. Conversely, the Canadian strategy to assess these types of collaborations may be beneficial for countries like Mexico. The Canadian Competition Bureau explicitly includes a quick procedure in the *Competitor Collaboration Guidel*ines stating that "*firms contemplating collaborations with competitors are encouraged to seek advice regarding specific issues that may arise. Guidance regarding future business conduct can be obtained by requesting a binding written opinion from the Commissioner under section 124.1 of the Act.*"[18]

Finally, a bolder option is to also seek more flexibility with the approach to *per se* offenses in Mexico. In this regard, it is interesting to review the approach of the Chilean regulator, which faced the same tension when enacting their current law. Practitioners were worried that establishing an explicit *per se* approach to certain conduct may unintendedly discourage or forbid collaboration among competitors that were considered to be efficient and pro-competitive. But the Chilean tribunals were up to the challenge when analyzing a joint venture in the aviation industry. Similar to the U.S. Court in *Broadcast Music, Inc. v. Columbia Broadcasting*,[19] the Chilean Tribunal determined that they could not apply a straightforward *per se* approach for the analysis, since they simply lacked the experience and knowledge of the particular type of agreement to be analyzed.[20] Therefore, it deserved a more comprehensive analysis of pro-competitive effects and competition risks, operating as a kind of reverse "*quick look*" approach.

16 COFECE (2016). "*Análisis de caso, acuerdo conjunto de cooperación entre Delta y Aeroméxico para sus vuelos entre México y Estados Unidos.*" Available at https://www.cofece.mx/wp-content/uploads/2017/11/AMX-DELTA-v2.pdf.

17 OECD. "*OECD Peer Reviews of Competition Law and Policy: Brazil 2019*," available at http://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf.

18 Government of Canada. "*Competitor Collaboration Guidelines*," available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html#ccg-1.1.

19 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979)

20 Jorge Grunberg Pilowsky, "Regla per se para carteles duros y acuerdos de colaboración entre competidores: un problema regulatorio aparente," Investigaciones CeCo (febrero, 2020), http://www.centrocompetencia.com/investigaciones.

The Mexican specialized tribunals and the regulators themselves may start using more creative approaches to better capture reality. Creative solutions will help companies, regulators and judges to navigate complexity and adjust to new challenges. Let us not forget that competition policy should be mindful not only of the net social costs of anticompetitive practices but also on the administrative costs of operating the enforcement system.[21] After all, having better rules and bolder interpretations will move the frontier of the antitrust law understanding in Mexico.

21 *Ídem*. Hovenkamp 2018.

PROFESSIONAL AND TRADE ASSOCIATIONS BACK ON THE ANTITRUST FRONT

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I. INTRODUCTION

CPI's Antitrust Chronicle on "Collaboration between Competitors" brought to mind several instances through which rivals may collaborate, often licitly. The classical joint-ventures, IP joint agreements and patent pools, standard-setting organizations, sharing of essential infrastructures, consortia to participate in public procurements, export agreements and the recently extensively discussed crisis cooperation agreements, due to the COVID-19 pandemic.

This article focuses on another type of collaboration between competitors. Curiously, many classical antitrust handbooks devote little space to discussing them. But the fact is that they are everywhere and have widespread competition implications in a variety of markets. They are important for a series of non-competition related reasons. They can foster competition but can also generate several types of antitrust concerns. In fact, in several jurisdictions, if one picks a convicted cartel at random, there is a very good chance that one of its kind will be somehow involved.

They are the humble but omnipresent trade and professional associations, that are now being brought back to the antitrust front of debates, due to rising competition concerns in the labor market and to the European Commission's recent announcement in favor of more bargaining power to liberal professionals and self-employed individuals (especially the ones connected to digital markets).

Trade and professional associations can be extremely useful and sometimes essential to ensure competitive markets. When playing this role, some incredibly interesting configurations of collaborative agreements and resulting competition policy discussions arise. Self-regulation by non-public agents, pro-competitive standard setting organizations, elimination of hazardous information asymmetries, private fostering of market development and joint lobbying for better legislation and regulation that, in many cases, are highly beneficial.

Nonetheless, theory and experience show that, if not properly managed, trade and professional associations can be one of the most prolific sources of antitrust violations (or debates), directly or indirectly. They often play a role, sometimes auxiliary and sometimes central, in cartel behavior. At the very least, they can encourage and facilitate the exchange of sensitive information between competitors, a difficult and increasingly important antitrust theme. Boycotts are a common (and classical) antitrust debate arising from such associations. Also, in recent times, the development of technologies that can generate tacit coordination between rivals, possibly employed within associations, has also been taking a central stage in competition policy debates.

Finally, discussions get even more complex when one realizes that professional associations are one of the few (if not only) cases in which antitrust law – always so rigid against rivals coordinating output, prices and market allocation – is willing to sometimes open an exception in favor of countervailing power represented by these joint unions of smaller players against companies' market power.

The topic of countervailing and bargaining power by professional associations gets greater importance as discussions of monopsony and oligopsony effects over the labor market become one of the central debates in current antitrust.[2]

Moreover, the theme of bargaining power has recently regained attention after the European Commission launched a public consultation on the Digital Services Act Package, that contains a section on "self-employed individuals and platforms." According to Executive Vice-President Margrethe Vestager, "we are launching a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules."[3]

Almost all of the above-mentioned discussions are grounds for controversy or gray areas within antitrust law and practice. In this sense, although trade and professional associations are one of the most ancient institutions of capitalism, dating as far back as the medieval guilds that started shaping commerce and commercial law as is,[4] competition law often still seems not to be quite sure what to make of them.

2 OECD, *Competition in labour markets*. 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

3 EC Addresses The Issue Of Collective Bargaining For The Self-Employed, *Competition Policy International*, July 3 2020, available at https://www.competitionpolicyinternational.com/ec-address-the-issue-og-collective-bargaining-for-the-self-employed/.

4 ANTUNES, José A. Engrácia. *Os grupos de sociedades: estrutura e organização jurídica da empresa plurissocietária*. 2. ed. ver. atual. Coimbra: Livraria Almeida, 2002.

II. THE APPLICATION OF COMPETITION LAW TOWARDS TRADE AND PROFESSIONAL ASSOCIATIONS

In several countries, freedom of association is protected as a fundamental right, for a myriad of reasons that go beyond competition, although it is also true that its existence as a means of protecting workers and individuals in general against concentrated market power is at the very core of trade and professional associations. Antitrust enforcement should not, and usually does not, forget that.

Divergences regarding the theme of competition law applied to trade and professional associations, however, start at their very meaning and scope. This often goes unnoticed in most discussions.[5]

In some jurisdictions, certain types of workers associations and, more specifically, certain types of behaviors carried by such associations are to a certain extent exempt from antitrust law. It is the case, for example, of agreements between workers with the objective of ensuring adequate employment conditions. Also, when unions of workers decide to go on strike, even if the purpose is to obtain better wages (meaning the price of their work, which is usually a sensitive variable for antitrust economics), such actions are usually governed by labor law, and not competition law.[6]

Having said that, law and experience show that this tolerance demonstrated by antitrust law is narrow and does not seem to apply equally when it comes to associations of liberal or self-employed professionals. On the contrary. There is therefore an explicit or implicit differentiation between classic unions and associations of liberal professionals. Also, conducts such as naked price fixing and market allocation, always so very dear to antitrust, also seem to be too much for several competition authorities to ignore, in any instance.

Therefore, the very notion of what exactly are the differences between unions, cooperatives, professional and trade associations for antitrust purposes is often unclear, as is the conclusion over which of them competition laws should or should not apply, and under which circumstances. This may change from jurisdiction to jurisdiction, but it is fair to say that the answers to these questions are many times unclear even within many countries' internal law and jurisprudence.

In general, however, one can say that there seems to be greater tolerance by antitrust when in face of workers' unions than associations of trade, self-employed or liberal professionals. Also, there is evidently greater tolerance to allow conducts and agreements that are not so close to antitrust greater evils (price fixing, market division and the likes). Nonetheless, although in many cases the rule of reason usually applies, trade and professional associations are often target of antitrust prosecution for less hard-core behaviors such as exchange of sensitive information and market foreclosure.

III. PRO-COMPETITIVE ASPECTS OF TRADE AND PROFESSIONAL ASSOCIATIONS

Trade and professional associations encompass many features that have positive effects over competition, directly or indirectly.

Education and training of its members and collaborators. Education and training increase the quality of products and services and foster innovation.

Diminishing information asymmetries. Although the unproper exchange of sensitive information within associations can lead to antitrust issues, economics and competition literature recognize that the wide dissemination of information throughout the market is an important booster of competition and entry.[7]

Information to consumers. The dissemination of market information is particularly pro-competitive when it reaches consumers and helps them chose. Many trade and professional associations play an important role in spreading useful information to consumers.

5 The OECD attempts an honorable effort to try and homogenize these discussions, but several questions remain open. See OECD, *Trade associations*, 2007, available at http://www.oecd.org/regreform/sectors/41646059.pdf; and OECD *Competition in labour markets*, 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

6 OECD, *Competition in labour markets*, 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

7 OECD, *Information exchanges between competitors under competition law*, 2010; MOTTA. Massimo. *Competition policy: theory and practice*. New York: Cambridge University Press, 2004.

Self-regulation and standardization. This can be an anticompetitive feature if not well managed, but if properly directed it provides a more levelled playing field that may increase competition, reduce costs and provide safety and better services to consumers.

Pro-competitive lobbying. Although lobbying can also be an anti-competitive tool, it is true that in many instances it represents a legitimate and positive way for trade and professional associations to call for better legislation and regulation that applies to the market in general, as a means to pro-competitively level trade practices and standards, prevent asymmetric regulation, diminish general industry costs and foster public policies that benefit players, workers and consumers.

Market development. Either by education and training, lobbying, funding, self-regulation, spreading information and other means, trade and professional associations can be a powerful fosterer of development within its target market and also upstream and downstream production chains.

Countervailing power. From a competition law perspective, this is perhaps the central role of trade and professional associations, and the reason why antitrust is willing to ponder in face of behaviors that would possibly not be allowed if arising from regular companies. Rendering bargaining power to individual professionals and small businesses of self-employed players against companies that hold much larger market power is a key feature and objective of laws that protect trade and professional associations. The right countervailing balance should, in theory, lead to pro-competitive results by diminishing companies' ability to abuse their market power. We will discuss the issue of such balance later in this article.

IV. POSSIBLE ANTICOMPETITIVE ASPECTS OF TRADE ASSOCIATIONS

A. Cartels

There is no doubt that trade and professional associations can offer a fertile ground for hard-core cartel behavior. They can simply play a passive scenario where competitors sometimes meet, which by itself is not illegal. But experience shows that in some cases these encounters end up leading to illicit coordination of prices, output, market allocation and so on. In certain situations, however, the associations themselves can play a much more active role in encouraging, designing and sustaining a cartel between its associated members, who are competitors. Practice shows that these cartels may include the whole spectrum of naked coordinated behaviors: price fixing, agreements to restrain or control output, allocation of costumers, division of geographical areas of trade and bid-rigging.

Take for example a jurisdiction such as Brazil. Over the past several years, the competition authority has trialed (and continues to trial) several cases in which cartel behavior is directly or indirectly associated with trade and professional associations.

In earlier years, prosecuted cases included examples of a profound use of associations in hard-core cartels, such as the *Sand Cartel*[8] and the *Gravel Cartel*,[9] in which involved trade associations served as a place for meeting, the designer of cartel rules and handbooks, training for the cartelists employees (on the cartel rules), holder of records of client division portfolios, hiring of consultants to establish the cartel prices and output, inspector against deviations from the agreement and so on. Cases such as these led to per se convictions in which the trade associations were also condemned for influencing and aiding the cartel. Although cartels with such hard features are appearing less and less, still a large part of cartels discovered in Brazil over the past years often had some type of involvement of trade associations.

Another prolific set of conducts are related to the establishment of price tables by professional associations, such as medical doctors,[10] accountants,[11] photographers,[12] lawyers,[13] real estate brokers,[14] and others. Unlike a usual hard-core cartel price fixing, these price tables were not hidden nor discussed in secrecy. On the contrary, in most of these cases the tables were advertised and professionals claimed that they had the right to establish minimum prices, in order to avoid the "deterioration" of their profession. Nonetheless, in the majority of cases the Brazilian

8 PA n. 08012.000283/2006-66, CADE.

9 PA n. 08012.002127/2002-14, CADE.

10 PA nº 08012.003893/2009-64, CADE.

11 IA nº 08700.006673/2015-82/PA nº 08012.000643/2010-14, CADE.

12 IA nº 08700.002566/2017-47/PA nº 08700.006965/2013-53, CADE.

13 PA nº 08012.006641/2005-63, CADE.

14 PA nº 08700.004974/2015-71, CADE.

antitrust authority, as in most similar cases in other jurisdictions, condemned the conduct considering it to be an infringement on competition law. The trial of some of these cases, however, did involve lively debates on whether these should be considered per se violations, or if the rule of reason should apply and call for verification of factors such as market power and whether the associated professionals were actually compelled to follow the price tables or not. Jurisprudence against such behaviors has in general been rigorous, and in most countries the per se rule applies[15], although the application of the rule or reason (or a softened version of the per se rule) in some jurisdictions shows that the competition law applied over professional associations is indeed far from a clear and uniform approach, even in face of such a sensitive variable as pricing.

Regardless of the approach, however, years of relatively heavy enforcement against cartels, price tables and the participation of trade and professional associations in these illicit agreements seem to have had some compliance effect. As stated by the OECD, "naked price fixing or customer allocation conspiracies orchestrated by a trade association are becoming rarer."[16] In its stead, the focus of concerns has shifted to conducts such as exchange of sensitive information that may lead to coordinate behavior and to restrictions that may affect entry or the ability of market players to compete freely.

B. Exchange of Sensitive Information

Exchange of sensitive information between competitors has been a hot topic in antitrust,[17] and trade and professional associations can offer real opportunities for it to happen.

Once again, the association can merely play a passive and non-illicit role of rendering competitors an opportunity to legitimately meet, and these meetings can then turn into a channel for the exchange of communications. Nonetheless, trade and professional associations can also take part in actively influencing and structuring these communications, by gathering sensitive market data from competitors and other agents, and by sharing this information among them.

Evidently, not every dissemination of information is problematic. On the contrary, as previously mentioned, lowering information asymmetries can be a powerful pro-competitive tool.

However, certain types of information obtained from competitors can in theory both encourage and allow for anticompetitive conducts, either by permitting that a rival unilaterally positions its strategies against or in coordination with its competitor's practices, or by facilitating collusive strategies by to two or more competitors, sometimes even tacitly.

The effectiveness of such anticompetitive results depends on the type of information available (for instance, confidential data on output and prices can be especially detrimental, according to applicable literature[18]), how recent or outdated it is, and whether it is detailed data or too aggregated to be made useful for anticompetitive purposes.[19]

The recipients of the information are particularly important. Data that is widespread to all rivals, but also potential entrants and consumers, can generate several pro-competitive results. On the other hand, sensitive data that is privately exchanged between selected competitors may result in several of the negative outcomes described, without its potential benefits to competition. If misused, a trade or professional association may precisely become a vessel for this type of information exchange.

15 OECD, *Trade associations*, 2007.

16 OECD. *Trade associations.* 2007.

17 FRADE, Eduardo; CARVALHO & Vinicius Marques de. New Approaches to Cartel Enforcement and Spillover Effects in Brazil: Exchange of Information, Hub and Spoke Agreements, Algorithms, and Anti-Poaching Agreements, *Competition Policy International*, November 2019, available at https://www.competitionpolicyinternational.com/new-approaches-to-cartel-enforcement-and-spillover-effects-in-brazil-exchange-of-information-hub-and-spoke-agreements-algorithms-and-anti-poaching-agreements/.

18 MOTTA. Massimo. *Competition policy: theory and practice.* New York: Cambridge University Press, 2004.

19 FRADE, Eduardo. *O direito societário e a estruturação do poder econômico.* São Paulo: Singular, 2016, p. 124.

C. Market Foreclosure and Restrictions to Competition

Although tools such as self-regulation and standardization by trade and professional associations can be pro-competitive, in many cases they may be used in an opposite direction, serving as a means to restrict competition in the market and often to deter the entry of new rivals. As stated by the OECD, the rule of reason usually applies:

> Both the US and the European approaches are founded on the acknowledgment that self-regulation by professional associations can be pro-competitive as long as there is a plausible efficiency-enhancing explanation for the restraint. (…) The restraint can be found unlawful if it is likely to raise price and restrict output in a manner that would be harmful to consumer welfare."[20]

Membership rules and access restrictions can sometimes be a powerful deterrent of competition, when becoming a member or receiving some kind of certification is a necessary or relevant variable for a player to practice in that particular market. This happens to be the case in many professions and trade practices, and therefore is a common anticompetitive use of these associations when such powers are used to impair new entries or avoid free competition. In 2015, for example, the U.S. Supreme Court, in FTC v. North Carolina Dental Assn, decided against a rule promulgated by a dentists' professional association which declared the service of teeth whitening to be a part of the practice of dentistry, with the result that only licensed dentists could practice it.

Self-regulation of technical aspects of the involved products or services can also be used as a competitive deterrent. For example, the design of industry technical requirements by the trade or professional association in a way that excludes potential competitors. In Brazil, for instance, the competition authority investigated claims that the standardization of certain technical requirements of steel rebars by a domestic association prevented Chinese products to enter the country.[21] Alleged unjustified technical requirements were also discussed as antitrust violations imposed by an association of gas heaters manufacturers in Radiant Burners, Inc v. People Gas Light & Coke Co, in the U.S.[22]

Restrictions on marketing and advertisement are also a common debate, that can be justified but also sometimes anticompetitive.[23]

D. Boycotts

Trade and professional associations are often the maestro when it comes to orchestrating boycotts against buyers (or sellers) that fail to comply with the demands of the associated professionals.

Once more, this is a hard subject in antitrust law and practice. The divergence exposed by Robert Bork over 40 years ago still seems to remain somewhat alive:

> According to conventional wisdom, boycotts (or agreements among competitors to refuse to deal) are illegal per se. But that proposition is easily shown to be false. Many agreements not to deal with others are perfectly lawful, and will certainly remain so, because they are indispensable to the conduct of the businesses involved.[24]

Concerted refusals to deal may be very rigorously assessed by antitrust authorities, especially if used as a means to impose coordinated prices, but in several cases there is also relatively large room to discuss efficiencies and justifications.[25] Such tolerance might be particularly applicable to trade and professional associations when enforcing efficient self-regulation[26] and eventually even in the context of collective bargaining against larger market power, although limitations apply.

The Brazilian case is an interesting one in this regard as well. CADE has trialed several cases of medical professional associations over the past years, in which doctors collectively negotiated with service acquirers, most of them with larger market power, such as health insurance

20 OECD. *Trade associations*. 2007.

21 PA nº 08012.001594/2011-18, CADE.

22 364 U.S. 656, 81 S.Ct. 365 (1961).

23 For example: California Dental Association v. FTC, 119 S.Ct. 1604 (1999).

24 BORK, Robert H. *The antitrust paradox: a policy at war with itself*. New Yorl: The Free Press, 1978.

25 HOVENKAMP, Herbert. *Federal antitrust policy: the law of competition and its practice*. Third Edition: Thomson West, 2005, pp. 226-233.

26 HOVENKAMP. *Ibid*, p. 234.

companies.[27] In most of these cases the medical associations were convicted for antitrust violations, because they held a large percentage of local doctors, aimed at imposing minimum prices and, as a tool to enforce its will, would apply concerted boycotts against companies that refused to accept it.

On the one hand, this goes to show that antitrust authorities are usually rigorous when it comes to the imposition of coordinated prices by professional associations. On the other hand, most of these cases were not framed as per se violations, and the antitrust discussions usually involved heavy debate on the associations actual market power and potential positive effects of bargaining power against larger companies. The cases were only convicted because the authority found that the professional associations had crossed the line. What initially constituted numerous independent competing doctors fighting its way alone against companies' significant buyer power became, through the articulation of a professional association, a unity that often accounted for all professionals of a certain medical specialty, completely inversing the game and enforcing monopoly power over companies. In the end of the day, the central debate focuses on the optimum balance of countervailing power.

V. FINAL CONSIDERATIONS: THE DIFFICULT ISSUE OF BALANCE IN COUNTERVAILING POWER

The never-stopping pendulum of antitrust has recently pointed to concerns with the labor market and how monopolies and monopsonies have affected and perhaps may have deteriorated labor conditions and wages. The concern evidently assumes that individual workers and professionals might be hurt by market power concentrated in large corporations. One of the possible considered solutions is to allow and foster countervailing power.[28]

This seems to be exactly the European Commission's plan, for example, in the launching of "a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules," as stated by Margrethe Vestager in the context of the public consultation on the Digital Services Act Package, that contains a section on "self-employed individuals and platforms."[29]

When it comes to bargaining power, trade and professional associations are usually a central player, and therefore antitrust discussions surrounding them become once more increasingly important.

As this article shows, there are several difficult discussions involving antitrust enforcement, competition policy and the use of trade and professional associations. In the end, several of these discussions directly or indirectly have to do with finding the right balance between large market power on the one side and countervailing power on the other side – an equation that is very hard to solve –, and at the same time trying to take the positive outcomes provided by these associations, leaving its anticompetitive implications out.

27 The latest trialed case when this article was wrote, in September 2020, was PA nº 08012.003893/2009-64, CADE.

28 HOVENKAMP, Herbert. *Note on Competition Policy and Labour Markets*. OECD, June 2019, available at https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf; OECD. *Competition in labour markets*. 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

29 EC Addresses The Issue Of Collective Bargaining For The Self-Employed, *Competition Policy International*, July 3 2020, available at https://www.competitionpolicyinternational.com/ec-address-the-issue-og-collective-bargaining-for-the-self-employed/.

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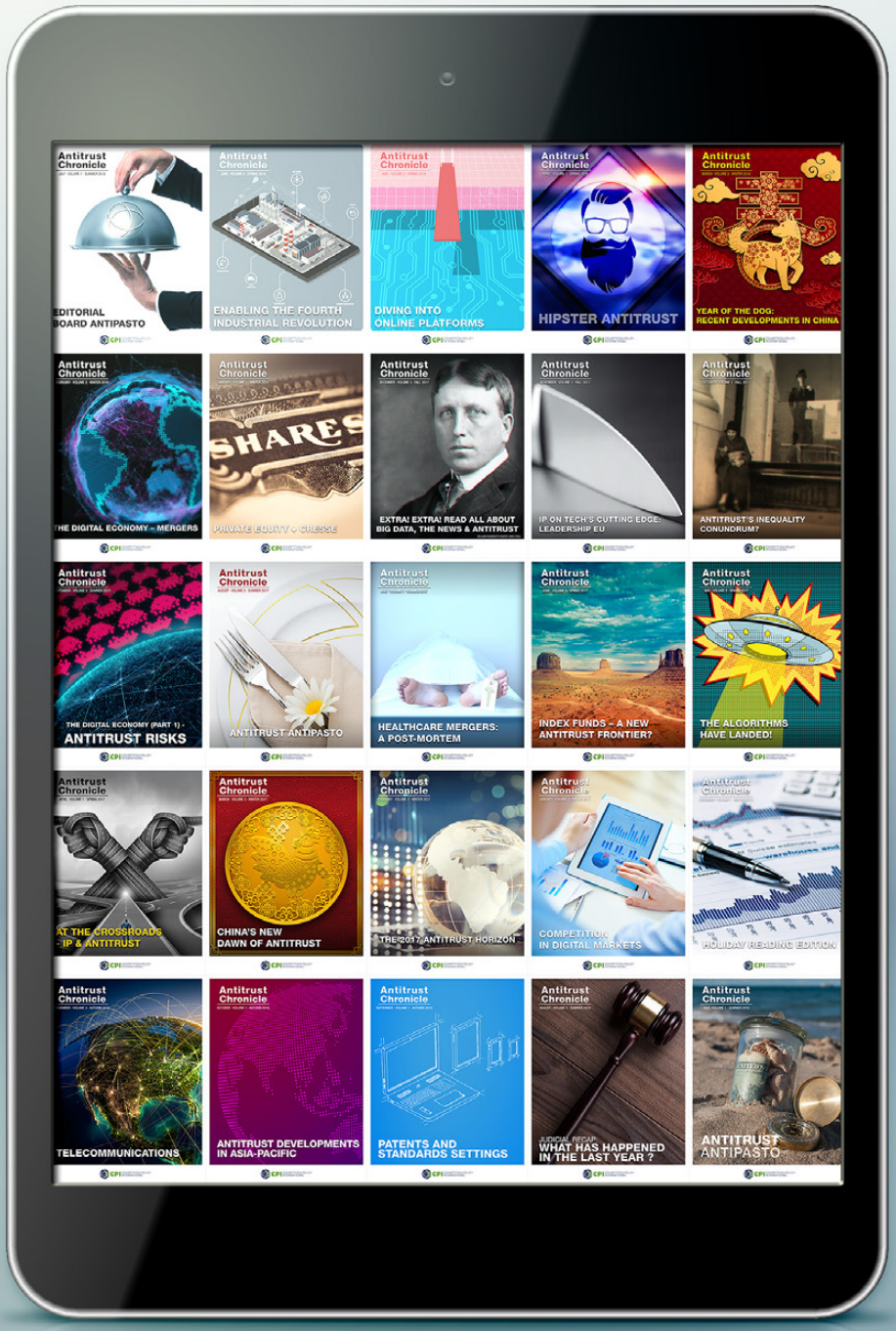


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