# Antitrust Chronicle

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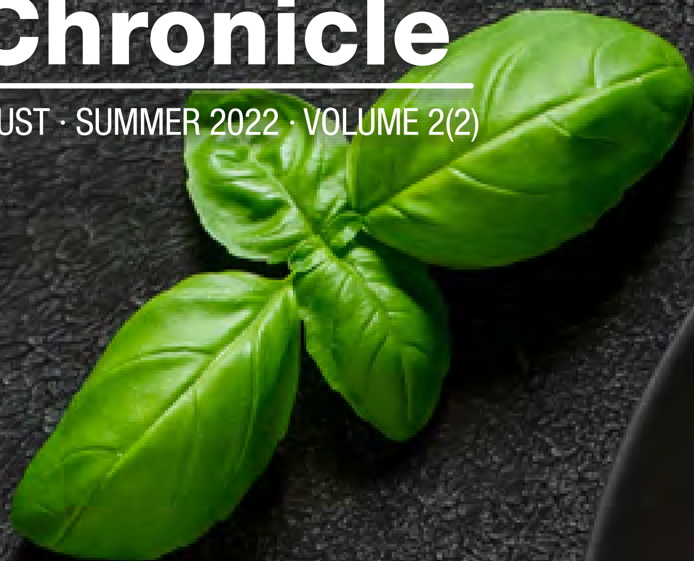

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CPI COMPETITION POLICY™ INTERNATIONAL

# TABLE OF CONTENTS


04 **Letter from the Editor**

05 **Summaries**

07 **What's Next?**
**Announcements**

08 **SOME REFLECTIONS OF A FORMER COMPETITION AGENCY HEAD**
*By Rod Sims*

18 **UNDERSTANDING BASIC PRINCIPLES AND FACTS ABOUT ANTITRUST TO CREATE A BASIS FOR SOME (ANY?) CONSENSUS**
*By Dennis W. Carlton*

27 **THE AMENDMENT OF CHINA'S ANTI-MONOPOLY LAW**
*By Xu Guangyao & Adrian Emch*

36 **CONSORTIA AND COMPETITION LAW**
*By Kyriakos Fountoukakos & Kian O'Connell*

42 **THE EU GENERAL COURT CONFIRMS THE CHANGE IN ARTICLE 22 EUMR REFERRAL POLICY**
*By James Killick & Peter Citron*

48 **LOOKING BACKWARDS AND FORWARDS: WHAT DOES 25 YEARS OF COMPETITION ENFORCEMENT IN THE UK TELL US ABOUT THE FUTURE?**
*By Rachel Brandenburger, Christopher Hutton & Stelios Charitopoulos*

55 **THE LEGISLATIVE FRAMEWORK AND COMPETITION POLICY IN AUSTRALIA**
*By Allan Fels AO*

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# LETTER FROM THE EDITOR

Dear Readers,

As per tradition, this August 2022 edition of the Antitrust Chronicle features articles from members of the CPI Editorial Advisory Board.

This set of articles covers a variety of jurisdictions and a diversity of antitrust topics including, among other things, reflections on the basic principles of antitrust law from practical and theoretical perspectives, recent amendments to the Chinese anti-monopoly law, the treatment of consortia under competition rules, the EU General Court's approach to jurisdictional referrals under EU competition law, the evolution of UK competition law, and equitable remedies under antitrust law at the U.S. State level.

At the macro level, **Rod Sims** opens with his unique reflections as the experienced former head of the Australian ACCC. He draws on his years of experience in the role (as well as his past incarnations in the private sector) to draw out various insights that will be vital reading for practitioners in the public and private sector alike. **Allan Fels AO** similarly provides his insights on the legislative framework in operation in Australia and discusses recent proposals for reform. These observations are complemented by **Dennis W. Carlton**'s thoughts on recent (somewhat extreme) positions staked out by participants in ongoing debates over antitrust reform. In his view, although there are many improvements that can be made in antitrust doctrine and enforcement, the claims by a growing number of academics, politicians, and government officials (often referred to as "Neo-Brandeisians") that antitrust needs to be radically redirected and that certain core principles should be jettisoned, these views are wrongheaded, and would lead to undesirable policy outcomes.

**Xu Guangyao & Adrian Emch** comment on the June 24, 2022 revision of the Chinese Anti-Monopoly Law ("AML"), the country's main antitrust statute. The revised AML entered into force on August 1, 2022. The paper examines a number of key takeaways from the AML revision and concludes that although the plan was to make a "small amendment," its impact on businesses, government bodies and other stakeholders in the Chinese antitrust community is profound.

**Kyriakos Fountoukakos & Kian O'Connell** examine the European Commission's draft revision of the horizontal cooperation guidance published on March 1, 2022, which for the first time includes a specific section on the assessment of consortia agreements. Up to now, there has been very limited guidance in case law and in the existing horizontal cooperation guidelines. The article examines the role of consortia in procurement processes (tenders) and in M&A and discusses their assessment under EU competition rules.

**James Killick & Peter Citron** analyze the July 13, 2022 judgment of the General Court of the European Union on the *Illumina/Grail* transaction following a referral pursuant to Article 22 EUMR. The judgment is an important endorsement of the EC's recent change in its Article 22 referral policy, and may embolden the EC to call in for review of more transactions where it may have concerns (in particular suspected so-called "killer acquisitions") even where the transaction does not fulfill the standard EU merger control thresholds.

August 2022 marks the 25th anniversary of the publication of the draft Competition Bill in August 1997. **Rachel Brandenburger, Christopher Hutton & Stelios Charitopoulos** provide a retrospective of its effectiveness so far. Although there have been significant reforms and institutional changes since 1997, the fundamental building blocks of this framework have remained consistent. This article highlights some key developments and reflects on what the past may tell us about the future of competition law enforcement in the UK.

As always, many thanks to our Editorial Advisory Board for their ongoing efforts and this selection of articles.

Sincerely,

**CPI Team**

# SUMMARIES

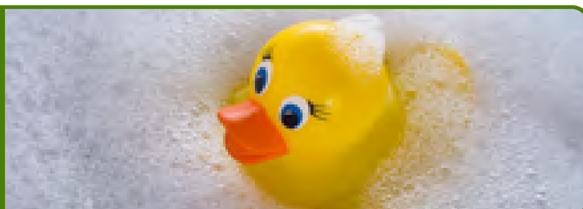
08

## SOME REFLECTIONS OF A FORMER COMPETITION AGENCY HEAD

*By Rod Sims*

After 11 years as Chair of the Australian Competition and Consumer Commission in this article Rod Sims reflects on a range of antitrust issues, emphasising their importance to our economy more broadly. There is much here to promote reflection and discussion within the antitrust community. He takes a broad look at the objective of antitrust, wonders why antitrust takes so little account of corporate strategy logic and experience, and argues competition agencies should bias towards over enforcement if they are to be effective. He then argues that merger laws around the world need to change towards greater focus on the industry concentration flowing from the merger and less on predicting future conduct. He discusses the role of economists in antitrust, what to do about the significant limitations of court processes in antitrust and looks at the different approaches being considered to the regulation of large digital platforms. Finally, he asks why competition law practitioners apparently interested in consumer welfare have such disdain for consumer law, and he argues that competition agencies need to be the champions of competition across all its dimensions.

18



## UNDERSTANDING BASIC PRINCIPLES AND FACTS ABOUT ANTITRUST TO CREATE A BASIS FOR SOME (ANY?) CONSENSUS

*By Dennis W. Carlton*

The debates around antitrust reform have sometimes involved participants taking extreme positions. In some sense, this is good because it helps attract attention and there has been lots of attention from politicians, policy makers, academics, and the public. But it is not good if the debate winds up creating myths that are unhelpful in forging a path forward. I am convinced that there is a sufficient body of evidence to establish that, although there are many improvements that can be made in antitrust doctrine and enforcement, the claims by a growing number of academics, politicians, and government officials (often referred to as "Neo-Brandeisians") that antitrust needs to be radically redirected and that the core principles that have guided it for the past half century should be jettisoned are wrongheaded and would lead to undesirable policy outcomes. My goal in this short essay is to explain a few key points that I hope many will see as obvious. I first start out with some basic theoretical/philosophical observations, and then move on to empirical ones. After setting a common theoretical and empirical background, I discuss whether there is a need for change and, if so, what change, for the major antitrust doctrines concerning cartels, mergers and exclusionary behavior. I then go on to discuss some possible improvements in how economics can be used in antitrust matters, as well as other ways in which we can better obtain the benefits of competition without, in effect, throwing the baby out with the bath water.

27

## THE AMENDMENT OF CHINA'S ANTI-MONOPOLY LAW

*By Xu Guangyao & Adrian Emch*

On June 24, 2022, China's legislature enacted the revision of the Anti-Monopoly Law ("AML"), the country's main antitrust statute. The revised AML entered into force on August 1, 2022. In this paper, we examine a number of key takeaways from the AML revision – ranging from an expansion of the cartel prohibition; a potential liberalization in the resale price maintenance area; a number of rule tweaks for platform operators; minor changes to the AML's "administrative monopoly" chapter; incorporation of the fair competition review system into the AML; stronger procedural powers for China's antitrust authority; and heavier and broader sanctions for antitrust infringements. Although the plan for the AML revision was to make a "small amendment," its impact on businesses, government bodies and other stakeholders in the Chinese antitrust community is profound.

36

## CONSORTIA AND COMPETITION LAW

*By Kyriakos Fountoukakos & Kian O'Connell*

The European Commission's draft revision of the horizontal cooperation guidance published on March 1, 2022, for the first time includes a specific section on the assessment of consortia agreements. Up to now, there has been very limited guidance in case law and in the existing horizontal cooperation guidelines. The article examines the role of consortia in procurement processes (tenders) and in M&A and discusses their assessment under EU competition law, looking at the limited guidance provided by case law and the new draft guidelines. It concludes with practical tips on issues to consider when assessing consortia collaborations.

# SUMMARIES

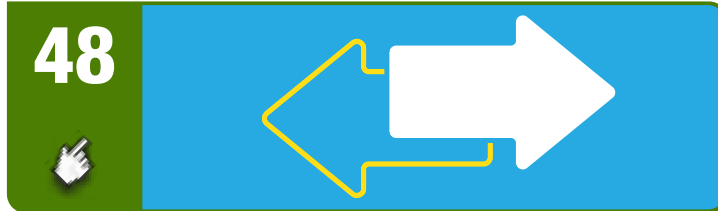
42

## THE EU GENERAL COURT CONFIRMS THE CHANGE IN ARTICLE 22 EUMR REFERRAL POLICY

*By James Killick & Peter Citron*

On July 13, 2022, the General Court of the European Union confirmed the European Commission's jurisdiction to review the *Illumina/Grail* transaction following a referral pursuant to Article 22 EUMR. The judgment is an important endorsement of the EC's recent change in its Article 22 referral policy, and may embolden the EC to call in for review of certain transactions where it may have concerns (in particular suspected so-called "killer acquisitions") even where the transaction does not fulfill any merger control thresholds in the EU.

48



## LOOKING BACKWARDS AND FORWARDS: WHAT DOES 25 YEARS OF COMPETITION ENFORCEMENT IN THE UK TELL US ABOUT THE FUTURE?

*By Rachel Brandenburger, Christopher Hutton & Stelios Charitopoulos*

August 2022 marks the 25th anniversary of the publication of the draft Competition Bill in August 1997. Passing into law the following year, what became the Competition Act 1998 introduced into UK law the Chapter I Prohibition against anticompetitive agreements and the Chapter II Prohibition against the abuse of a dominant position. Although there have been significant reforms and institutional changes since 1997, the fundamental building blocks of this framework have remained consistent and the Competition Act 1998 has been a key pillar of the public enforcement of competition law in the UK for nearly 25 years. This article highlights some key developments and reflects on what the past quarter-century of enforcement under the Competition Act 1998 may tell us about the future of competition law enforcement in the UK.

55

## THE LEGISLATIVE FRAMEWORK AND COMPETITION POLICY IN AUSTRALIA

*By Allan Fels AO*

This article reviews the legislative framework which underlies Australian competition law and policy. First, the Australian Constitution plays a key although often unrecognized role in preventing interstate restrictions on competition. Second, Australia's famed National Competition Policy which comprehensively reviewed and removed unnecessary legislative and other government restrictions on competition over a ten-year period from the mid-1990s is now largely dormant. Third, Australia's Competition and Consumer Act 2010 continues to provide a sound framework for the application of competition and consumer law but requires improvement including the introduction of a divestiture power, greater simplicity, the introduction of compulsory pre-merger notification and, in light of court interpretations of the merger law, a refinement of its statutory provisions.

# WHAT'S NEXT?

For September 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Vertical Agreements**; and (2) **State AGs**.

# ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, 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 October 2022**

For October 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Private Equity**; and (2) **Merger Guidelines**.

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.

# SOME REFLECTIONS OF A FORMER COMPETITION AGENCY HEAD

BY ROD SIMS[1]

1 Rod Sims was Chair of the ACCC from August 1, 2011 to March 20, 2022. He is now a Professor in the Crawford School of Public Policy, at the Australian National University. He is also Chair of the Steering Committee of the Competition Research Policy Network at the Centre for Economic Policy Research, Paris. This article has benefitted from comments by former ACCC Chair Allan Fels, current ACCC Chief Economist Graeme Woodbridge and just retired CMA CEO Andrea Coscelli, on an earlier draft. They are not, of course, responsible for any errors or the opinions in this article.

# I. INTRODUCTION

Antitrust sits quietly to the side of mainstream economic debates yet is so fundamental to them. This is my main take away from 11 years as agency head at the Australian Competition and Consumer Commission ("ACCC"). It prompts me to offer some reflections.

While an economist by training, I came to the ACCC not as a competition economist but as someone who had extensive experience in public policy and corporate strategy — an interesting combination. As the Deputy Secretary (Economic) in Australia's Department of the Prime Minister and Cabinet, I was in charge of macroeconomic, microeconomic and social policy as well as the Cabinet Office; and for two years I was the Principal Economic Advisor to Australia's Prime Minister. For over 15 years I was a senior partner in a commercial corporate strategy consultancy advising companies in virtually all sectors of the economy on where and how to compete.

There is increasing focus in mainstream economic debate about both low economic growth and inequality and the impact of these on our economic direction and our politics. While antitrust does not target such indicators it does, nonetheless, have an important influence on them.

Rising industry concentration and market power are being nominated by influential organizations such as the International Monetary Fund and The Economist newspaper as playing an important role in slowing productivity and so economic growth and rising inequality.

In the introduction to a 2019 book, Martin Wolf, the chief economics commentator for the London Financial Times, and widely recognized as one of the world's foremost economic thinkers, said:

> *"Slowing growth and rising inequality have become a toxic combination in western economies….This combination threatens the survival of liberal democracy itself. Why has this happened? Some blame an excess of free market capitalism…..(but) the precise opposite is the case. What has emerged over the last 40 years is not free-market capitalism, but a predatory form of monopoly capitalism. Capitalists will, alas, always prefer monopoly. Only the state can restore the competition we need…."*[2]

Strong words.

A market-based economy, of course, is one where decisions regarding investment, production and distribution to consumers are guided by the price signals created by the forces of supply and demand. An underlying assumption is that there are many suppliers competing to meet consumer demands. Alternatively put, Adam Smith's "invisible hand" of market forces can only be effective if there is sufficient competition

Market concentration in many economies is increasing, and there is discussion about whether this is technology driven or due to a reduction in competition. But with the usual accompaniments in many countries of the profit share of Gross Domestic Product rising at the expense of the wage share, and productivity slowing, a decline in competition in our economies seems an important contributor. Antitrust, therefore, needs to be more central to the wider economic debate.

My perspectives that follow are driven by this realization. Ten high-level perspectives follow. They are reflections from a well-placed insider, not scholarly analysis, and largely raise questions rather than answers, which I may attempt in future offerings.

# II. TEN REFLECTIONS ON COMPETITION LAW

### *1. What is the Proper Goal of Antitrust?*

Over the last century the goal of antitrust has fluctuated from not wanting companies to become too large and influential, to wanting to maintain sound market structures given the likely consequences of unhealthy ones, then to the current dominant focus on the consumer welfare standard. The latter can be interpreted broadly or narrowly and owes much to the Chicago School of economic thinking.

The history of economics, and public policy, is full of pendulum swings. Problems are found and, instead of simply being corrected, we see problems arise in the opposite direction. Concerns about too much focus on market failure, for example, and too little focus on government

2 Jonathan Tepper, *The Myth of Capitalism*, Wiley, 2019.

failure, saw concern with the latter come to dominate debate. Likewise, debate has moved backwards and forwards about how self-correcting markets are: consider Marshall, Keynes, and Friedman for a start.

This issue has profound significance in antitrust as we see with the pre and post Chicago school influence. The Chicago school, at its theoretical height, while bringing many important insights, got to the point where its belief in self-correcting markets was a triumph of hope over experience. Other fields of economics seemed to appreciate this faster than antitrust.

The debate we are now having about the proper goal of antitrust owes a lot to Lina Kahn, the current Chair of the US Federal Trade Commission who, remarkably as a student, argued that the consumer welfare standard was too narrow. As all readers of this article know, in her 2017 article "Amazon's Antitrust Paradox," she argued that:

> *"Antitrust law and competition policy should promote not welfare but competitive markets. By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws. It would also promote actual competition—unlike the present framework, which is overseeing concentrations of power that risk precluding real competition."*[3]

At a high level there is much to be said for this observation. She certainly drew out in her article some of the theoretical arguments of the Chicago School in relation to self-correcting markets that defy commercial reality.

Overall antitrust success should not be measured in the outcomes from cases, however important these may be, but by the contribution antitrust is making to maintaining robust competition in our economies. Antitrust should seek to prevent market power gained by other than competition on the merits. We need to understand whether this objective has been met. There are many observations and some analysis that suggest it has not, but more detailed analysis may be needed.

One concern with the consumer welfare standard is that it demands so much more than identifying harm to the competitive process; it wants considerable proof of harm to consumers. While there is logic to this, and it can encourage useful analysis, it raises issues of evidentiary burden.

In my experience, courts are most reluctant to make commercial inferences and would often accuse the competition agency of being "theoretical" when it did so (see below); courts would place great weight on what the self-interested leaders of the accused companies would say; and any uncertainty would count against the competition agency.

In Australia we had a recent example where the Government of the State of New South Wales ("NSW"), in order to maximize the sale proceeds from the privatization of the State-owned Sydney container port, entered into agreements that saw the port sold to a private company with effective financial prohibitions to there being a competitor container port established in NSW over the following 50 years. The ACCC launched court proceedings arguing the agreements substantially lessened competition. Among other things, the court found that the ACCC did not prove that a competitor port would be viable despite the owners of the Port of Newcastle (some 170 km from Sydney) saying they wanted to build a competitor container port and spending millions of dollars in preparatory work, and even though the Port of Newcastle needed to change its current focus over coming years from being the largest coal export port in the world.

The competitive process was clearly interfered with, another player wanted to compete and had strong reasons for doing so, but the court needed much more to rule the agreements anti-competitive.

Further difficulties arise in merger cases where the competition agency must prove what will happen in the future if the merger were to proceed. Facts about the future are hard to come by, as it has not happened yet, particularly when documents are sanitized, or when the courts allow leaders of the merging companies considerable leeway in explaining why past pre-merger documents are no longer relevant.

In my view, debate about the goal of antitrust is closely linked to the issue of evidentiary burden. Should the goal of antitrust be to prevent harm to the competitive process? Of course, some level of harm to the trading parties on the other side of the market, usually but not always consumers, also needs to be shown. This is to check the analysis of the effects of the conduct on the competitive process and to determine the materiality of the effect.

3 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710 (2017), 737.

The question, however, is how much evidence of this harm should be needed once harm to the competitive process has been clearly demonstrated?

### *2. Why is the Discipline of Commercial Strategy So Little Regarded?*

On my very first day of corporate strategy training I was told that while having good products, services and systems was necessary for commercial success it was by no means sufficient. Some form of market power was needed. I was told that too much competition would harm returns, profits from a competitive market were insufficient, and high entry barriers were crucial (Warren Buffet calls them "moats"). This was all common sense and was summarized in Michael Porter's 1979 article describing his Five Forces.[4] Because it is simply common sense, at a high level it is as relevant today as it was when it was written in terms of how so many businesspeople and their strategy advisers think and behave. The Porter model has been refined, but not in too many ways relevant to businesspeople.

What struck me on joining the ACCC was that competition lawyers and economists, particularly those working for companies alleged to have breached the law, and businesspeople wanting ACCC approvals, appeared to completely ignore commercial corporate strategy. It was as if in contemplating a merger the benefits of reduced competition never occurred to anyone. In my commercial strategy days it was often one important driver of the transaction.

Of course, from my private sector days I knew that care was taken to ensure these benefits were never written down to be discoverable by the ACCC.

While I was at the ACCC, conversations with companies generally had an air of unreality about them.

To be clear, just because a merger or some form of exclusive dealing reduces competition does not mean it should be opposed by a competition agency. There is much else to consider, such as the level of competition remaining and the height of entry barriers to new entrants.

Companies do wish to be in markets with less competition rather than more, they do seek to construct entry barriers, they want a dispersed range of suppliers, they do seek ways to lock in consumers, they will leverage market power from one market into another, and so on. All this behavior is commercially rational. It is not, as seems often assumed, an aberration.

This is not to decry this behavior, as it is part of what makes businesspeople and companies succeed. You cannot pick and choose how businesspeople seek to succeed.

What is striking, however, is the following:

- First, absent difficult-to-get facts, suggestions that companies will act in a way fitting Porter's framework are often treated by the courts as "mere theory," "speculation" or, worse, "fanciful." Comments such as these can seem naive to those from the commercial world.

- Second, it is sometimes said that the competition agency's explanation for what drove certain behavior is wrong and that there are good commercial reasons for what happened. But this suggests wanting to reduce competition or raise entry barriers is not commercial behavior; it is indeed the very essence of commercial behavior.

The line between acting commercially and breaching the law can be quite thin. Corporate strategy and competition policy are often pulling in opposite directions.

### *3. A Surprising Question; Are We Trying Too Hard to Avoid Benign Conduct Wrongly Being Considered Illegal?*

Coming to the ACCC from over 15 years in the private sector I was surprised at how often concern was expressed about "chilling" investment or innovation. Often it seemed as if the speaker had never worked in the private sector; that is, in the room when business decisions are taken. Being a competition lawyer or economist consulting to the private sector may not count in this regard as often they come in when the business decision has been taken and the issue is how to gain regulatory approval.

4 Michael E. Porter, "How Competitive Forces Shape Strategy," Harvard Business Review, May 1979 (Vol. 57, No. 2), pp. 137–145.

The "animal spirits" mentioned by Keynes always seemed more apt. Businesspeople pursuing profit are not easily disturbed or dissuaded.

It therefore seemed to me that wrongly considering conduct illegal that turns out to be benign conduct, while to be avoided wherever possible, will rarely be disastrous for the business or the economy.

Allowing anti-competitive conduct to go unpunished, however, will more often do harm as market power is usually hard to unwind once gained, say, through a merger. And businesspeople have every incentive and will work hard to ensure it is not unwound. Likewise, anti-competitive agreements or unilateral conduct can see competitors lost forever and new ones dissuaded.

There is another consideration. The cost of gaining competition agency approval is often trivial to businesses in comparison to the financial consequences of the issue at hand. Businesses can employ way more resources than the agency can on each specific matter, and there is often no limit to the per diems that can be afforded. These facts, all else equal, mean the system is more likely to generate situations where anti-competitive conduct goes unpunished than the reverse.

Competition agencies should aim always to arrive at the right answer. But if agencies aim at never stopping what turns out to be benign behavior they will under enforce, which brings higher costs to the economy than over enforcement.

Competition agencies need, therefore, to put most effort into avoiding leaving anti-competitive behavior unpunished if they are to be effective at maintaining competition.

### *4. Do We Need a New Approach to Mergers?*

Let's start with a thought experiment. The usual commercial logic, to which most businesspeople would adhere, is that some form of pricing power comes when there are less than four players in a market. Coordinated conduct is more likely to increase prices, and there is much less chance of one business seeking to gain share by reducing prices as they know this will only lead to retaliation, not extra share, and lower profits all round. Obviously, there are exceptions to this general rule, particularly in high fixed cost businesses.

Such well-accepted commercial logic, of course, appears to have no place in a courtroom. It is seen as "theoretical." But it is so strongly based in commercial experience and economic logic that it can form the basis of a strong starting structural presumption in merger laws.

Suppose, for example, that further concentration from when there are four main players in the market is going to see market power exercised, likely in the form of higher prices, 90 times out of 100. Analysis by John Kwoka is consistent with this assumption.[5] A case-by-case approach, based on detailed analysis and evidence as happens now in most jurisdictions, could see, say, 9 of these anti- competitive mergers cleared by the courts, or 10 percent of the 90. Stronger merger laws based on some structural presumption, on the other hand, could see 1-2 of the 10 benign mergers blocked. So, in this clearly made-up situation we have 9 mergers approved under the current case-by-case approach that were anti-competitive, compared to 1-2 prevented when they were in fact benign or perhaps even pro-competitive under stronger merger laws based on some form of structural presumption.

Is our economy better off with merger laws with a strong structural presumption, based on commercial experience and logic, or an approach based on no starting presumption and detailed arguments in court each time trying to determine if competition will be substantially lessened? The answer with my made-up numbers is clear, but competition regimes do not take this more commercial economy-wide approach into account.

What makes all this more of a problem is that competition issues in the future are hard to prove with facts rather than commercial logic. As previously mentioned, most businesspeople know not to write down the full commercial rationale for a merger lest it be used against them in court. Having to prove what has not yet happened loads the dice towards anti-competitive mergers gaining approval.

Another problem is creeping acquisitions, where market power is gained in small increments such that it is hard to find the market power tipping point. Supermarkets, say, making continuing small acquisitions, have been difficult to oppose in Australia such that we now have the two main supermarkets having 70 percent of the grocery market. Many 1-2 percent acquisitions were hard to oppose except where there would be a monopoly in a narrowly defined local market.

5 John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America*, Competition Policy International, 2020.

Related to this is the enormous number of acquisitions undertaken by the large digital platforms. Small companies are constantly being purchased for a complex mix of reasons; to gain skill and ideas, to gain access to new markets, and to take out potential competitors early. Acquisitions of so-called nascent or potential competitors requires even more imagining by courts of what an uncertain future world would look like.

While the large digital platforms innovated their way to their initial success, they have expanded and entrenched their market power through acquisitions which competition agencies have not been able to prevent except in the UK CMA's very recent *Facebook* (now *Meta*)/*Giphy* case.

Where would Google be today without DoubleClick, Android, YouTube and so on, which were all acquired?

It is fair to say that competition agencies are struggling everywhere to deal with notions of "potential competition" from the continuing massive number of early acquisitions by the large digital platforms. Unless competition agencies can deal with issues of potential competition effectively then market structures may be entrenched as new entrants do not get the space to grow.

Perhaps the recent *Facebook/Giphy* court decision in the UK can help address this issue.

There is also the difficult issue of conglomerate effects. Businesses with significant positions in many markets which can seem largely unrelated, but which can bring the ability to extend and entrench market power.

Then we have the issue of vertical mergers. I was surprised to find that many antitrust regimes currently treat mergers that involve vertical integration as usually benign. Of course, vertical integration is often commercially justified by eliminating inefficient transaction costs in the vertical chain, or by bringing synergies that are hard to gain through contracts. But vertical integration is also often justified by the ability to leverage market power from one market into another and to foreclose competitors.

It is not at all clear why vertical mergers are not treated in the same way as horizontal ones. The analysis will be different, but there is no reason I can see why competition agency scrutiny and appropriate skepticism should be different.

So, what might a strong structural presumption look like to deal with all of the above? In a speech I gave in August 2021 as Chair of the ACCC I proposed "that a new deeming provision should apply specifically to acquisitions where one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended."[6] That is, the acquisitions would then be deemed anti-competitive.

Under Australian law more than one firm in a market can have "substantial market power." The test is their ability to act to some extent independently of competition by being able, say, to raise prices above competitive levels.

This suggestion was made to promote a debate. But what should be put in place in terms of future merger law reform around the world must involve some focus on the concentration that is occurring as a result of the acquisition, rather than simply seeking to prove what conduct will occur in the future.

A focus on concentration in merger assessment would, of course, only affect a small minority of mergers. Further, the ACCC blocked several mergers only to see the vendor sell to another party that did not raise competition concerns. Such a possibility was often specifically ruled out by the merger parties when seeking merger clearance.

Finally, think of the benefits to our economy if more firms sought to grow by competing with their rivals rather than by buying them.

### *5. The role of Economics: Are We Being Ruled by Exceptions?*

As an economist by training, I have taken a particular interest in the role of competition economics and its difference from other areas of economics. What follows is some high-level generalizations; there are clear exceptions.

Much competition economics comes from defenses to allegations of anti-competitive behavior. It often seeks to explain why, say, a three-to-two merger in a given market is not an issue, when usually it is. It is, therefore, not seeking to explain what usually happens, but why, with assumptions, what might seem like problematic behavior is in fact in this particular case benign.

6 *Protecting and Promoting Competition in Australia*, ACCC, August 27, 2021.

Competition economics, in general, gets into considerable detail, which is a result of the case-driven workload. Such detailed analysis can bring benefits, but it also risks missing the bigger picture, can raise uncertainty, and increase the risk of not challenging anti-competitive behavior.

I was in a meeting with agency head colleagues some months before I left the ACCC and the issue of structural presumptions in mergers was raised. One agency head surprised me by saying that economists would consider this bad economics. Why, I asked? As discussed in section 4 above, there can be sound economic reasons for such an approach. Different economists will have a range of sensible views on this but it is not inherently bad economics. Is competition economics so focused on case detail that it can miss the bigger picture?

A final point. Sometimes I see economic arguments which defy commercial reality. When this happens, I think the economics is wrong. You cannot change commercial reality; it should be integral to economic thinking and models.

I must, of course, add immediately that there are many economists, usually academics but sometimes economic consultants, who do focus on the bigger picture. Their output needs to be absorbed by competition agencies.

### *6. How Can We Focus on the "Right" Answer When Preparing for the Courtroom?*

This might seem like a strange question, certainly to lawyers who think that courts do provide the right answer.

Courts cannot always provide this. Who wins the case will depend on the range of admissible evidence, how witnesses perform on the day, and the talent of the legal representatives on either side, for starters. Courtrooms can be a search for truth, but trumping this is the desire of both sides legal representatives to win.

Competition law is economic law involving complex economic concepts. Lawyers understandably can struggle to understand the concepts but perhaps more so to fit them into the legal process. Economists are often in a worse position as their approaches and logic struggle with the legal setting. Having courts rule on antitrust matters is a bit like democracy; it is a flawed system but there seems no better alternative.

Those agencies with administrative decision-making think they are in a better position than those with prosecutorial regimes, such as we have in Australia. Prosecutorial regimes see endless arguments on disclosure, often some years before a matter gets to court, and then intense argument and considerable deliberation before there is a court ruling. And then we have the old argument of "justice delayed is justice denied." How many unilateral conduct cases, for example, see the would-be entrant disappear before we have the outcome of the case?

So, what to do? One suggestion is that agencies, particularly in prosecutorial regimes, must always initially seek to determine the right answer from all the facts they get and analysis they do, taking economic and commercial considerations into account, and only then seek to work out the court strategy. The latter is crucial, of course, but overly focusing on it initially can limit an agency's assessment of the issues.

It may also be that the logic of taking the case is strong even if it will be difficult to prove in court. Messages can be sent to the corporate sector even if the case is lost.

### *7. How Much Market Power can There be in Data?*

Competition occurs across many dimensions. This issue arises significantly in relation to digital platforms and data.

Google and Meta, for example, have devised clever business systems. They provide services without monetary cost, which is attractive to consumers, but then they harvest an enormous amount of user data from first- and third-party sources and use this to sell highly targeted advertising. This business model has yielded trillion-dollar companies in a short period of time.

Potential competition issues abound. At its most basic, Google pays what is thought to be around $10 billion annually to be the default search engine on Apple devices, and also pays large sums for this on Android devices.

How much competition could be being blocked? As the easiest example, DuckDuckGo competes with Google by offering a search engine which does not engage in data-driven targeted advertising, so promising greater privacy, something that an important number of consumers value.

Google's dominance may also see it increasingly offering paid search results rather than organic results. And it may limit innovation so as not to cannibalize the value from its current business model.

Google and Facebook have cookies on an enormous number of third-party apps as well as huge amounts of first party data directly from their own services. What can be done with so much data about individuals and what constitutes anti-competitive unilateral conduct in relation to data?

How concerned should we be, for example, with discriminatory pricing which decreases consumer surplus and increases the producer surplus? How concerned should we be with a company using its overall data position to dominate a particular market in ways no other player can?

Some argue that data does not confer market power, and that it is available everywhere for those who want to seek it out and combine various sources. To me this ignores the large quality and quantity differences between data sets.

These are all complicated issues that need a lot of new thinking and analysis. The use of data will only grow, particularly with advances in artificial intelligence and the so-called metaverse. Data has been described as the "new oil." Not only can we not dismiss non-price and particularly data issues in competition analysis, they must also now play a central role in what all competition agencies do.

There is a further point. Data is not just a competition issue; it is also a consumer, a privacy and a political (think Cambridge Analytica) issue. Companies who know all about your internet activity can paint a picture of you that can bring benefits, but also has scope for enormous harm. Competition agencies need to work with other agencies on these complex issues and not in a silo.

### *8. How Should We Go About Ex Ante Regulation of the Large Digital Platforms? Are There Wider Lessons Here?*

The current debate largely centers around the EC's Digital Markets Act ("DMA") approach versus the UK's Special Market Status ("SMS") legislation that will, when passed, allow the UK's CMA to set Codes that will guide digital platform behavior in particular markets. The German ex ante regime applying to digital platforms is somewhere between these and, of course, is more advanced. Other countries have some specific ex ante laws, such as Korea and Japan, and the U.S. has several relevant Bills before Congress.

The DMA could, for example, be seen as turning its unilateral conduct provisions into a series of per se prohibitions, with no need to prove a substantial lessening of competition. Much like cartel provisions. They will, of course, need to be enforced just like existing competition law, albeit there may be more up-front discussion about obligations and compliance.

The SMS's Codes will be more akin to traditional regulation, and will follow extensive consultation. Just like other forms of regulation, enforcement will also be necessary.

Despite these differences, what has driven both initiatives is the view that the traditional competition law enforcement tools cannot address the many competition issues in a range of dynamic digital markets where market power is entrenched and achieved in many ways.

In markets that competition law usually deals with, effective enforcement can often stop the behavior. In the ad tech market, as just one example, Google's market power is so multifaceted that action in one area will not address the competition issues. Cases take a long time from start to finish and, more importantly, must narrow down on particular behavior to be successful. Numerous cases would need to be taken, likely beyond the capacity of any agency. In any event, at completion, Google could then find new ways to keep its dominance. So, the new tools are needed.

Considering new tools is not new. All countries have regimes for specific industries; energy and telecommunications quickly come to mind. In Australia, for example, the ACCC has the power to declare a communications asset and then to regulate the price and other terms on which it sold. This can apply to the copper wire, exchanges, and some messaging traffic. So new ground is not being broken here.

Also, I do not think we should be concerned that different approaches are being taken in Germany, Japan, Korea, the EC, the UK, soon Australia and potentially the U.S. Our grasp of the economics of digital platforms is still not sufficient to know what the best approach is. Countries will collaborate and learn off each other.

Finally, thinking about digital platforms has enlivened the debate about having divestiture as part of competition agency toolkits. It will come into play if the U.S. antitrust agencies win some current cases, and the UK can call on this also. Whether other countries consider divestiture as a way of dealing with entrenched digital platform issues remains to be seen.

An interesting issue is whether other competition areas need more explicit rules, or strong starting presumptions, for example with mergers in general as discussed above. Much depends on whether we think we are succeeding in achieving the level of competition our societies need.

Whenever we have entrenched market power traditional competition law may not be able to deal adequately with the problems that arise. Regulation to promote competition or even divestiture may be required, and it is a key role of competition agencies to point this out to governments. See point 10 below.

### *9. Why do Competition Practitioners Look Down on Consumer Law?*

One of my great surprises on arriving at the ACCC was the disdain often shown towards consumer law by competition law practitioners.

Misleading behavior can be every bit as damaging to consumers and the economy as anti-competitive behavior. For example, there were instances of prices doubling when consumers were misled about the qualities of a product, yet we rarely saw prices double as a result of a cartel.

Competition law is supposed to follow a consumer welfare standard. The focus is on consumers, just as with consumer law. We are worried about companies gaining market power by anti-competitive means and charging higher prices as a result. Why are we not equally concerned by companies gaining an unfair advantage over their competitors and causing consumer harm by misleading consumers about the characteristics of what they are buying?

In Australia in recent years we achieved legislative change so that penalties for breaches of consumer law are now equal to those of competition law, a change of which I am most proud; that is, consumer law penalties can now be the higher of $10m, three times the profit gained or, if this cannot be determined, 10 percent of turnover. In addition, the companies the ACCC takes to court under consumer law are usually larger and more influential than those taken to court for competition law breaches.

All our economies would be much better served if penalties were aligned between competition and consumer law. This would be a major change in virtually all countries, but particularly in the U.S. and the UK who currently have no penalties for consumer law breaches. This surely must change if the concern is with the welfare of consumers.

### *10. Who is the Champion for Competition if not Competition Agencies?*

Protecting and promoting competition must always be about more than enforcing competition law. Anti-competitive laws can sometimes cause more problems than anti-competitive behavior, and existing poor market structures may see damaging economic outcomes that are beyond existing competition law's ability to deal with.

Competition advocacy and market studies are essential tools for competition agencies. While central government policy departments are concerned with competition, they have much else to focus on and, of course, they rarely have a public voice.

Ranged against promoting and maintaining competition are businesses and other sections of the community seeking to gain from reduced competition. Governments can also want to make changes which damage competition, as for example when they are privatizing assets and see that selling an entity with market power will increase the sale proceeds.

Competition is vital to the success of a market economy. Promoting or protecting it also requires specialist expertise. What seems obvious to a competition agency may not even occur to others without the appropriate expertise.

If governments want successful market economies, they should empower their competition agencies to be explicit competition champions.

# III. CONCLUSION

I hope these reflections are helpful to others. The work of competition and competition agencies is never ending. It is a noble cause with wide implications for our economies and societies.

# UNDERSTANDING BASIC PRINCIPLES AND FACTS ABOUT ANTITRUST TO CREATE A BASIS FOR SOME (ANY?) CONSENSUS

BY DENNIS W. CARLTON[1]

1 David McDaniel Keller Professor of Economics, Emeritus, Booth School of Business, University of Chicago, and National Bureau of Economic Research. I frequently consult on antitrust matters through Compass Lexecon. I thank Ken Heyer, Mark Israel, Daniel O'Brien, Gregory Pelnar, Sam Peltzman & Theresa Sullivan for helpful comments.

# I. INTRODUCTION

The debates around antitrust reform have sometimes involved participants taking extreme positions. In some sense, this is good because it helps attract attention and there has been lots of attention from politicians, policy makers, academics, and the public. But it is not good if the debate winds up creating myths that are unhelpful in forging a path forward. I am convinced that there is a sufficient body of evidence to establish that, although there are many improvements that can be made in antitrust doctrine and enforcement, the claim by a growing number of academics, politicians, and government officials (often referred to as "Neo-Brandeisians") that antitrust needs to be radically redirected and that the core principles that have guided it for the past half century should be jettisoned are wrongheaded and would lead to undesirable policy outcomes.

My goal in this short essay is to explain a few key points that I hope many will see as obvious.[2] I first start out with some basic theoretical/philosophical observations, and then move on to empirical ones. After setting a common theoretical and empirical background, I discuss whether there is a need for change and, if so, what change, for the major antitrust doctrines concerning cartels, mergers and exclusionary behavior. I then go on to discuss some possible improvements in how economics can be used in antitrust matters, as well as other ways in which we can better obtain the benefits of competition without, in effect, throwing the baby out with the bath water.

# II. BASIC THEORETICAL/PHILOSOPHICAL PRINCIPLES

Let me explain some basic principles in this section- principles that seem compelling to me, but that seem likely to generate vigorous disagreement from today's Neo-Brandeisians.

*Principle 1: Vilification does not advance the debate about the usefulness of economics, and economic principles should form the foundation for sound antitrust policy.*

Although I understand the debating value of discrediting one's opponent, I think little is gained by antitrust's critics from demonizing Robert Bork, the Chicago School, or economists (and economics) in general. What people mean when they talk about "Chicago" is often unclear, or worse, a serious mischaracterization. I define "Chicago School," or at least the Chicago School related to economics, as the rigorous application of microeconomic theory combined with empirical evidence to test the theory. I am sure some will disagree with that definition, but that is what my experience over the last 45 years on the faculties of the business school, economics department, and law school at The University of Chicago has taught me.

Kovacic (2020) has made clear the contribution of scholars from many universities, including Harvard, to the use of economics in order to understand and help guide antitrust policy.[3] The principle that economics has something useful to say about antitrust policy should not be controversial. Economists, especially industrial organization economists, have for many years been studying how firms do or do not compete. No doubt there is much more to be learned, but it is also true that there has been much that already *has* been learned. Ignoring what economists have learned would be throwing away that knowledge and not likely to produce desirable policy. Indeed, the poorly decided antitrust cases of 40 or more years ago well illustrates the danger of ignoring economics.

To figure out how antitrust policy should be formulated, one needs to have an objective in mind for antitrust policy. Although I understand that others may want to pursue goals such as the preservation of small firms, there is only one goal that makes sense to me for a policy that is presumably focused on competition.

*Principle 2: The objective of antitrust should be to enable firms to compete with each other.*

But, of course, one must define what " to enable firms to compete" means. I would define it as a process that produces certain desirable economic outcomes. When firms compete with each other, certain desirable outcomes generally emerge. When firms compete with each other, firms have an incentive to minimize their costs, and competition forces them to pass on those low costs to consumers. Inefficient (i.e. high-cost)

2 I have explored many of these topics in depth in prior academic articles and my textbook. I refer the readers to some of that work for more detailed discussions. See, e.g. Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed. 2005); Dennis W. Carlton, *Does Antitrust Need to be Modernized*, 21 J. ECON. PERSP. 155-176 (2007); Dennis W, Carlton, *Market Definition: Use and Abuse*, 3 COMP. POL. INT. 3-27 (2007); Dennis W. Carlton, *Transaction Costs and Competition Policy*, 73 INT. J. IND. ORG. 102539 (2020); Dennis W. Carlton & Ken Heyer, *The Revolution in Antitrust: An Assessment*, 65 ANT. BUL. 608-627 (2020); Dennis W. Carlton & Mark Israel, *Effects of the 2010 Horizontal Merger Guidelines on Merger Review: Based on Ten Years of Practical Experience*, 58 R. IND. ORG. 213-234 (2020).

3 William E. Kovacic, The Chicago Obsession in the Interpretation of US Antitrust History, 87 U. CHI. L. REV. 459-494 (2020).

firms will find it hard to survive since the price that they can charge cannot cover their costs. This elimination of inefficient firms is not a "harm to competition" that should be prevented since the resulting outcome of the competitive process produces benefits to both firms and consumers. Innovative firms have an incentive to develop a new product to benefit consumers because the firms can reap profits from the sales of that product. Even though those firms may earn high profits, consumers are better off. Those high profits provide an incentive for firms to enter and drive prices of the new product down which further benefits consumers. Firms competing for workers raise wages. These desirable economic outcomes—low prices. innovative products, and high wages are not the result of some magical theorem in economics, as the next principle explains.

*Principle 3: Economic theory does not prove that competition necessarily produces the socially optimal prices or mix of goods. For example, in the presence of uncertainty, market power, imperfect information, a lack of complete markets, externalities or high transaction costs-the outcome of the competitive process can certainly depart from the welfare maximizing ideal of introductory economics textbooks*

Though Principle 3 is not (or should not be) controversial even among the most fervent advocates of laissez faire, it is a grievous error to jump from it to the conclusion that government intervention, in this case through antitrust policy, can be expected to improve outcomes. Many years ago, Harold Demsetz made this point quite clearly when he explained what has become known as the "Nirvana fallacy."[4] Just because in an ideal world-which does not exist- one can theorize that matters could be improved by an omniscient planner, that does not mean that government intervention will actually achieve these desired outcomes. Indeed, the empirical evidence indicates that government regulation or government intervention in markets to "improve" outcomes often makes matters worse.[5] Some have labelled this phenomenon as "government failure," which creates harms to the economy just like the more often cited-to "market failure."

The preference of economists for not interfering in markets comes from the empirical recognition that desirable outcomes typically arise when firms compete in the real world even if that world is not the one of introductory economics textbooks. This does not mean that regulation or government intervention is never needed, but that one needs to ask not only whether some form of government intervention might be able to improve outcomes in theory, but also whether there is good reason to believe that it will do so in practice.[6] So this leads to Principle 4.

*Principle 4: Absent special circumstances, competition among firms is desirable.*

Recently there has been a lot of discussion about whether to broaden the goals of antitrust policy beyond merely the desirable economic effects of competition on prices, wages, and innovation that I have just discussed. This leads to Principle 5.

*Principle 5: Using antitrust policy to pursue goals other than achieving the desirable economic effects of competition—however worthy those other goals may appear to be — would be a mistake.*

There are many effects that arise as a consequence of competition even when competition is serving to bring about desirable outcomes such as low prices, high wages, and innovative products. For example, competition can lower the wealth of a firm's owners because it leads to lower prices. Should it matter for antitrust policy whether the owners are "deserving" or "greedy"? If competition drives down prices of say, cigarettes, should the health hazards from additional smoking be considered in formulating antitrust policy? If so, should we let the cigarette firms form a cartel to reduce smoking through high prices? (Wouldn't it be better not to subvert competition by allowing a cartel and instead have competition but tax the firms?) Suppose competition encourages firms to use cheap fuel that pollutes, or to produce and sell consumers more and more goods and services, potentially contributing to global warming? Should that matter for antitrust policy? Should it matter whether some inefficient firm employs lots of workers and needs protection from competition to survive?

It is beyond debate that each of these effects can raise legitimate policy concerns, but those concerns, in my view, are not well- suited to antitrust policy. Can any of these effects be deemed a "restraint of trade"? Antitrust policy is premised on the central idea that competition is good, not bad. It is the job of other government policies to deal with all these other policy issues that competition might or might not affect. If antitrust policy is turned into a tool to achieve every desirable goal imaginable, then there is no guidance at all as to what the tradeoff among these differing goals should be.

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4 Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW & ECON. 1-22 (1969).

5 See, e.g. NANCY ROSE (ED.), ECONOMIC REGULATION AND ITS REFORM (2014), and Clifford Winston, *Back to the Good—or Were They the Bad—Old Days of Antitrust? A Review Essay of Jonathan B. Baker's* The Antitrust Paradigm: Restoring a Competitive Economy, 59 J. ECON. LIT. 265-284 (2021).

6 I note that even when antirust intervention occurs, it rarely takes the form of explicit regulation such as price setting.

A policy that considers everything in its decision making is a policy doomed to fail and one that is likely to turn antitrust policy into a political weapon to be wielded against disfavored firms or individuals, untethered from any well- defined principle, or to lead to court decisions that depend on the idiosyncratic preferences or political leanings of the judges and juries. I suspect that the current desire to use antitrust policy to pursue goals other than the protection of competition comes from the political gridlock currently facing the United States in which Congress seems unable to accomplish much with respect to these other goals. Although it is understandable why some find this gridlock frustrating, diverting antitrust from its central focus of competition would likely make matters worse.[7]

There can still be complications in understanding the effects of certain conduct on consumers (or input suppliers such as workers) even if one focuses on just the economic effects that I have discussed. Consider a merger and for simplicity, focus on price. There can be winners and losers among consumers after the merger if the merger affects prices charged to different consumers differently. Suppose, for example, that an airline merger leads an airline to move capacity from one route to another, leading to much lower fares and greatly expanded output on one route but slightly higher fares and slightly reduced travel on the other. How should that be handled?

One could try to weight the harm to one group against the gain to another with the weights depending on how "deserving" each group is deemed by the policy maker. A less discretionary, and far more practical, approach would be to calculate the net gain overall to all consumers (or, more generally, to all affected parties including input suppliers such as labor) and determine whether it is positive.[8] This is the approach for example that the DOJ typically follows in evaluating airline mergers. That seems sensible to me and avoids placing arbitrary "value weights" on different consumers.[9]

Let me end my discussion of basics with a topic that has received disproportionate attention. That topic is the difference between total and consumer surplus.

*Principle 6: The difference between total surplus and consumer surplus is of little practical import for U.S. antitrust policy.*

There is of course a difference between the two concepts and economists trained in cost benefit analysis are likely to naturally use total surplus. [10]The difference between the two depends on the profits earned by firms. Consumer surplus is the roughly triangular area bounded above by the demand curve, below by the horizontal line at price, and by the vertical price axis. Producer surplus is the roughly triangular area bounded above by the horizontal price line, below by the supply (marginal cost) curve, and by the vertical price axis. Total surplus is the sum of consumer plus producer surplus. An interference with competition can result in a deadweight loss, a loss of total surplus.

Although the famous Williamson 1968 paper makes clear the tradeoff between efficiency and deadweight loss (using total surplus), there is no reason one could not also use consumer surplus in that analysis.[11] An efficiency in that setting would exonerate conduct only if consumers were better off. And that is how U.S. antitrust authorities have typically dealt with conduct such as a merger that could harm consumers.

Some claim that the use of total surplus to evaluate antitrust conduct is a huge mistake because it credits the effects on firms' profits, but the truly huge mistake is thinking that this claim is of any practical import. The reason is that I have rarely (never?) come across a U.S. case where the use of total versus consumer surplus matters to a policy outcome! Specifically, I am unaware of any U.S. case where the antitrust authority allowed some activity such as a merger or exclusionary behavior because it generated huge efficiencies and simultaneously harmed consumers.[12] If I am correct, the difference between consumer and total surplus is a good topic for students to think about to test their knowledge, but it is a topic that has little practical import.

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7 Though as a theoretical matter, taking "everything" into account and calculating social welfare sounds reasonable as a way to make decisions, my view is that it is not practical when agencies, judges and juries have limited expertise. One could try to infer the trade-offs among various goals by empirically examining government decisions, but I see that as introducing more uncertainty into the decision process and I doubt it would be appealing to critics who already complain that even the economic models in use today, which do not take "everything" into account, are too complicated. A wholesale restructuring of regulation, antitrust and social welfare policies into one "super" agency that takes everything into account may be appealing in theory but, from my viewpoint, not practical, at least not now. In any event, it is way beyond what critics of antitrust are asking for and beyond the scope of this paper. I note that the optimal structuring of government agencies is an important topic for research.

8 Rather than calculating economic gains and losses to each consumer and aggregating across consumers, one could adopt the simpler (and less accurate) procedure of asking what happens to total output and average price.

9 I note that anticompetitive conduct in one market can also cause harm in related markets (e.g. for complementary goods) where market power exists and that deadweight loss should matter to antitrust policy decisions.

10 There has been utter confusion of language because Bork used the term "consumer welfare" when he likely meant total surplus.

11 Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18–36 (1968).

12 But see Ralph Winter & Roger Ware, *Merger Efficiencies in Canada: Lessons for the Integration of Economics into Antitrust Law*, 61 ANT. BUL. 365-375 (2016).

For those who adopt a consumer surplus standard because they are uncomfortable adopting a total surplus standard that could allow a firm to profit even if consumers are harmed, but are still troubled by prohibiting a transaction that increases total surplus, there may be a way to eliminate this tension. As long as transaction costs are low enough, even if the policy standard is consumer surplus, then a merger, for example, that generates efficiencies and increases total surplus but harms consumers, can be transformed through non- linear pricing into one that increases consumer surplus. Hence, it is possible for that merger to be approved, assuming the non-linear pricing can be contractually guaranteed.

Those who claim that antitrust should pay attention only to consumer surplus are clearly mistaken, and would be advocating policies in tension with what are likely to be their preferences for greater competition by purchasers of labor services. Economists decry harm to competition on either the buying side or selling side. For example, a cartel of consumers that lowers price benefits consumers but causes a harm of no less economic significance than the harm caused by a cartel of sellers. One is monopsony, the other is monopoly. Both harm the competitive process, restrict output and create deadweight loss. [13]

Now that I have gone through what I hope most will regard as compelling basic principles, let me state a few important empirical facts about which I hope there is general agreement.

## III. IMPORTANT EMPIRICAL RESULTS OF RELEVANCE TO ANTITRUST

**Increased industry concentration is often good**. Demsetz, long ago, pointed out that the reason that some industries see increased concentration is because the most efficient firms grow and replace inefficient ones.[14] Recent empirical findings bear this out. Autor et al. (2020) and De Loecker et al. (2020) both find that although the median firm in an industry has seen little change in its markup, the biggest firms in each industry have seen large increases in their markups.[15] Research shows that these large firms are typically the most efficient in the industry so that productivity growth and increased industry concentration go hand in hand. Surprisingly, the price in these industries has not fallen, consistent with higher margins for the most efficient firms.[16] De Loecker et al. (2020) and others find that the average price cost margin has increased since 1980.

**Prices sometimes rise and sometimes fall post- merger**. There is significant evidence that in many (though by no means not all) consummated mergers that presented close calls about whether an agency should sue, prices have risen nontrivially post-merger. Importantly, however, it can be hard to identify those adverse cases *ex ante*. It is also true that in many cases, prices do not rise and instead fall post-merger. The fact of many examples of price increases, together with evidence that in many (though by no means all) such mergers, remedies did not work as effectively as hoped, have induced calls for more strenuous antitrust treatment of mergers.

However, no one, as far as I know, has figured out the extent to which more stringent antitrust policy toward merger activity might inhibit actual efficiency enhancing mergers from even being attempted. (Nor, for that matter, has one been able to determine whether mergers that were successfully challenged, or were abandoned due to Agency opposition, sacrificed efficiencies and benefits that might have redounded to consumers). Without knowing the answer to that question, it is hard to figure out an optimal enforcement policy. Perhaps the best one can say is that if one did not expect to see such evidence of many post-merger instances of price increases, then one should increase the bar for allowing mergers—particularly, perhaps, in industries where this has formed a pattern — but it is an area deserving of more research.

**The claim that industries in the U.S. have become much more concentrated is overstated**. First, to credit the evidence put forth by those claiming that markets have become much more concentrated over time, one must accept that the national data using NCAIS or SIC classification define an antitrust market, even though the data ignore (among other things) imports, local markets and demand substitution from products made with different technologies. Second, if one looks at, say manufacturing, one would see that although there has been an increase in concentration, it is not true that that level of concentration is very high (say HHI>1500) for the vast majority of industries. See my 2019 CPI article

13 Monopsony in, say, the labor market leads to a lower wage and less employment than under competition. This reduction in employment leads to reduced output and higher output prices.

14 Harold Demsetz, *Industry Structure, Market Rivalry and Public Policy*, 16 J. LAW & ECON. 1-9 (1973).

15 David Autor, David Dorn, Lawrence Katz & Christina Patterson, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645-709 (2020); and Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and The Macroeconomic Implications*, 135 Q. J. ECON. 561-644 (2020). For additional discussion and citations, see Dennis W. Carlton, *Some Observations on Claims that Rising Market Power Is Responsible for U.S. Economy Ills and that Lax Antitrust is the Villain*, 2(1) CPI ANTITRUST CHRONICLE 10-21 (2019).

16 See, e.g. Sam Peltzman, Productivity, Prices, and Concentration in Manufacturing: A Demsetzian Perspective, 65 J. LAW & ECON. S121-S153 (2022).

summarizing this evidence.[17] Finally, growing industry concentration need not be the result of any failure of antitrust policy towards mergers (or more generally towards anticompetitive conduct). Organic growth of efficient firms surely matters in the explanation for increasing concentration.

**Entry is not easy in many industries**. In a classic paper on entry, Dunne, Roberts & Samuelson (1988) showed how difficult it was for a firm to enter into a new manufacturing industry, defined as 4 digit SIC code.[18] The cumulative failure rate for an entrant was very high on average after 5 years (around 60 percent) and 10 years (around 80 percent). Subsequent studies have shown how hard it is on average for entrants to build up demand over time. Any reliance on a general presumption that entry will quickly remedy lax antitrust policy or enforcement seems misplaced.

## IV. WHAT AREAS OF ANTITRUST, IF ANY, NEED CHANGE?

With the common theoretical and empirical background of the prior sections, I now evaluate whether any areas of antitrust need change. My view is that although antitrust reasoning by the courts can and should be improved in several areas, there is no need for new antitrust legislation. The common law system seems adequate to deal with the deficiencies in the major antitrust areas I discuss. But I am not a lawyer, so I confine my discussion mainly to economic matters, focusing on where existing antitrust doctrine could be improved.

**Cartels** on the buying side or selling side are bad.Naked agreements among independent firms to restrict output and raise price and naked agreements among independent firms to not compete for inputs such as labor are bad. It is hard to conceive that this statement would be controversial. The DOJ has used its leniency program combined with its ability to criminally charge conspirators with the threat for fines and jail sentences to create incentives for firms to reveal the existence of cartels. More recently, it has pursued firms engaged in no- poach agreements to restrict their competition for workers.[19] Both seem like correct policies to pursue. It is of course true that there are always subtleties that generate exceptions. For example, some agreements to restrict labor mobility may be justified by a need to protect trade secrets or to provide firms with incentives to train workers, while some agreements to fix price (e.g. BMI) may be justified in order to create a new product.[20] But courts have shown that they can deal with such exceptions successfully. Exceptions should not be used to defang a per se prohibition on naked cartels on either the buying or selling side.

**Horizontal mergers** that create market power and raise prices or lower wages or reduce innovation are bad. Again, it is hard to believe this is controversial. Where the controversy arises is not on the theoretical side but on the empirical side. It is hard enough to predict when a merger might increase price but can be extraordinarily hard to predict which firms will produce and market successfully a new product in the future. But predicting which firm will have the next new great product absent a merger is the task that is required if one wishes to stop mergers involving nascent competitors. One might simply wind up preventing small firm acquisitions, leading to a decline in small firm start- ups.

I am skeptical in general of the claim that, other than in specific cases such as pharma—where one often knows the drugs that are actually under development by potential entrants—one can make very accurate predictions of who will invent what in the future, especially in rapidly changing industries. That suggests that aggressive actions to stop mergers in a general rather than targeted attempt to prevent acquisitions of “nascent “competitors is likely to stop acquisitions of start-ups and thereby deter the creation of start- ups that hope to be acquired, with little or no positive benefit to competition. Unless evidence clearly establishes both that the “nascent” competitor is a likely entrant AND that it is somehow unique (i.e. that there are not a number of others who can serve the same role), a broad policy of attacking such acquisitions seems likely also to impede the ability of firms to obtain desirable synergies through merger, while at the same time reducing the incentive for start- ups to form in the first place.

Some commentators have questioned whether horizontal mergers generate any (merger-specific) efficiencies. If there are no efficiencies then there is no harm in stopping horizontal mergers. As one might expect, there is evidence of efficiencies from specific mergers and also evidence showing that mergers do not always create efficiencies. I agree that it is important to figure out the efficiencies from any horizontal

17 See, Carlton, *supra* note 14. See also C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets* (NBER, Working Paper No. w28745, 2021).

18 Timothy Dunne, Mark J. Roberts & Larry Samuelson, *Patterns of Firm Entry and Exit in U.S. Manufacturing*, 19 RAND J. ECON. 495-515 (1988).

19 I would be puzzled by any claim that either economists don't care about monopsony or that the antitrust laws do not apply to buyer cartels. I attribute the lack of more cases regarding monopsony to the only relatively recent empirical findings showing that monopsony power, especially in labor, is more prevalent than previously thought. I discuss these more recent findings later.

20 *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

merger and this is a current area of research. But anyone who has ever looked at the number of mergers over time in what looks like a relatively competitive industry would wonder why there are so many transactions if not driven by some efficiency motive. So adopting a position that horizontal mergers generate no efficiencies strikes me as extreme. There is a debate as to where the legal burden should be on showing harm versus showing an efficiency. My economic view is that an economist should give the best prediction as to the net harm or net benefit that a merger will create. It is not obvious to me why either gross harm or gross efficiency should receive more attention than the other.

As already discussed, the empirical evidence does show that many consummated mergers have led to price increases. The evidence also shows that many mergers did the opposite and led to lower prices. It is the ability to predict price increases ex ante that should be the focus of research. But, assuming that our analytic methods have some validity, and in light of the evidence on adverse price impacts of many mergers, there is no reason to be timid in attacking mergers whose predicted price effects are positive, absent clear evidence of offsetting benefits of some sort.

There are at least three research areas worth mentioning in regard to horizontal mergers. First, a literature on common ownership has shown that among publicly traded firms, it is often the case that a few large institutional shareholders (e.g. Vanguard index fund of the total stock market) own shares in all the major rivals in some industry. Some claim that this common ownership creates an incentive for the common owner to influence the rivals in an industry to compete less vigorously against one another in order to raise industry profits. There are many flaws in this claim as a matter of theory – for example, an increase in the price of one product will raise the costs to firms in other industries that use this product and that would depress the value of stocks held by the institutional shareholders in a total stock market fund- but there may be some theoretical plausibility to the theory under some circumstances.[21] Although the empirical demonstration of the mechanism of harm is still a subject of debate, as well as whether common ownership has any effect at all on prices, this research bears watching. Common ownership is similar enough to overlapping directorates to make it worthwhile to keep this topic on the radar screen when evaluating horizontal mergers.

Second, there is a growing literature on the existence of market power in the hiring of labor. Ashenfelter et al. (2021) discusses how labor economists have been amassing evidence that labor markets are less competitive than once thought.[22] That means that mergers that reduce the number of firms that hire a specific type of labor could harm competition for those workers. For example, in a merger of hospitals, there could be harm in the labor market for nurses who suffer lower wages and employment as a result of the merger. Such harms from mergers should not be ignored.

A third area of research deserving more attention is coordinated behavior. Much research in merger analysis over the past couple of decades has focused on unilateral behavior, in which the merging firm takes account purely of how it can coordinate the pricing of its products with those of the firm it is merging with. But much less attention has been focused on how a reduction in the number of firms in an industry could improve oligopolistic coordination, in which a few firms do not aggressively compete against each other because they realize such competition will ultimately make them all worse off, once rivals react. This area of research deserves more attention

**Vertical mergers** raise different issues than horizontal mergers and raise competitive concerns only under special circumstances. Unlike a horizontal merger which combines substitute products, a vertical merger combines complements. The combination of complements, assuming market power in their provision, creates an efficiency by eliminating double marginalization (or more generally the Cournot complements problem). It can also create a harm by creating an incentive for the merged firm to raise the price of an input to a rival. It is the combined effect of these forces that one must examine in order to figure out whether a particular vertical merger is desirable. The empirical literature on vertical mergers is more limited than that on horizontal, but the results generally seem to show no large harmful effects. Indeed, a detailed study of the only litigated vertical merger case in over 40 years shows that there were no harmful effects from a vertical merger *(ATT/TW)* that the Department of Justice tried unsuccessfully to block. (See Carlton *et al.* (forthcoming).[23])

I see no reason, at least from an economic viewpoint, why current antitrust law and practice are not adequate to handle both horizontal and vertical mergers. As evidence mounts from retrospective analyses of past mergers, presumptions can change, but the economic methods currently in use seem sufficiently flexible to handle new situations that might arise. If presumptions do change so that antitrust authorities investigate and/or challenge more merger cases, then it follows that the agencies must have expanded budgets to carry out their duties I discuss below some suggestions to help make the evolution of presumptions more accurate.

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21 For a critique of the literature on common ownership, see, e.g. Daniel P. O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less than We Think*, 81 ANT. L.J. 729-776 (2017).

22 Orley Ashenfelter, David Card, Henry Farber & Michael Ransom, *Monopsony in the Labor Market: New Empirical Results and New Public Policies*, (NBER, Working Paper No. w29522, 2021).

23 I was the expert for ATT. Dennis Carlton, Giorgi Giozov, Mark Israel & Allan Shampine, *A Retrospective Analysis of the AT&T/Time Warner Merger*, J. LAW & ECON. (forthcoming). See also Carl Shapiro, *Vertical Mergers and Input Foreclosure: Lessons from the AT&T/Time Warner Case*, 59 R. IND. ORG. 303-341 (2021).

**Section 2/ Exclusionary conduct cases** are harder to discuss because the possible conduct is so varied. But, as I have explained elsewhere,[24] there are at least two areas of antitrust law that could be substantially improved from an economic perspective. One area is the tie-in sale doctrine. A tie-in sale is often no more than the efficient bundling of product characteristics together for efficiency. A car is a tie-in of a motor, wheel and tires etc. Creating liability for engaging in such a tie would be obviously foolish. But tie-ins can serve other purposes. One standard reason for tying is to meter usage so that heavy users pay more than light users. This is a form of price discrimination and generally has no effect on the competitive process. Indeed, if a monopolist engages in the behavior, there can be, by assumption, no competition among rivals to harm.

In contrast, if a firm has market power in product A, then a tie of product A with B can, under some circumstances, lead the firm to acquire market power over consumers of product B. The key to understanding whether a tie results in competitive harm is identifying whether the tie enables the firm to gain market power over a group of consumers over whom it would not otherwise have market power. As far as I can tell, current antitrust doctrine on tie-ins fails to pay sufficient attention to the different reasons that firms engage in tying and fails to identify clearly those ties that cause competitive harm and those that do not.

The second area where improvement is needed involves so called "two-sided markets". The Court's decision in Amex ruled that the antitrust standards for evaluating the legality of exclusionary conduct depend on whether the market under analysis is two-sided or one-sided.[25] Two-sided markets arise when there are indirect network externalities so that the total number of consumers on one side matter to the other side and perhaps vice-versa. Examples include a dating bar , a transaction platform, and a newspaper that serves readers and advertisers. My article with Ralph Winter explains why the Court's decision in *Amex* was a mistake.[26] The Amex decision has led to subsequent cases in which defendants are exonerated even though the findings indicate competitive harm. The mistake in *Amex* was an overreliance on the formalism of market definition. I will return to this topic below when I discuss market definition and the ignoring of evidence of actual harm.

Finally, one reason for much of the conduct that is often attacked under Section 2/exclusionary conduct is to create an incentive to provide sales effort when there is a free rider problem where a firm other than the one providing the sales effort can enjoy the benefit of the sales effort. Consider, for example, a manufacturer whose product is distributed by retail firms. That manufacturer may want to use exclusive territories in order to enhance sales effort by its distributors. In the absence of exclusive territories, one retail firm providing selling effort such as advertising may increase the sales of its rival across the street and reap no benefit from its sales effort.

With exclusive territories, the sales effort is likely to generate increased sales in the territory of the firm providing the sales effort, thereby rewarding the firm providing the sales effort and eliminating the free rider problem. But digital technology has greatly expanded the ability to monitor who is providing sales effort and to whom and whether that sales effort ever ultimately results in a sale. If that sales effort can be monitored, that lessens the need to have vertical restrictions since the manufacturer can use these other methods of monitoring to directly reward the provider of the sales effort that results in a sale. In other words, the ability to write and monitor more complete contracts lessens the need for vertical restrictions.

**Over- reliance on market definition**. It is wrong to think that market definition is anything other than a crude construct that may help one think about a matter, but it is no alternative to more detailed analysis. It is a place to begin, not end, an analysis. Unfortunately, because of the heavy reliance on market definition in antitrust cases, my experience is that defendants want to argue that the market is broad so as to be able to say that shares are so low that there can be no harm while plaintiffs want to do the reverse. Although reasonable as an initial simplification, any notion that products are either "in" or "out" of a market, rather than that they exert differing levels of competitive influence on the sale of another product is a simplification that can lead to error if relied on to the exclusion of direct evidence. For example, suppose one can show that certain conduct had the sole effect of raising price or making entry more costly. Then, arguing that the market is broad and demanding that a case be dismissed because of that, is using market definition to ignore the relevant economic evidence. That is exactly what happened in *American Express*, discussed earlier. I would caution against over-reliance on market definition to decide cases and use it instead as a crude measure – at most a first step to determine whether a further analysis is plausibly needed. But if the evidence shows that the effect of some conduct is to harm competition, using market definition instead of using the direct evidence makes little sense.

**Process improvements in antitrust cases**: I have been involved in many antitrust matters in the U.S. and in other countries. At trials in the U.S., especially jury trials, I find that economic evidence is not well presented in the sense that the experts often testify far apart in time from

24 See Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 J. LAW & ECON. 215-251 (2018); Dennis W. Carlton & Michael Waldman *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194-220 (2002); Dennis W. Carlton & Ken Heyer, *Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single Firm Conduct*, 4 COMP. POL. INT. 285-305 (2008). The classic paper is Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837-859 (1990).

25 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

26 Carlton & Winter, *supra* note 22.

each other and use complicated models, so it is often hard for a judge or jury to figure out what the economists are saying and to identify why the experts come to different conclusions. I have found that a "hot tub" in which opposing experts appear at the same time can improve the presentation of evidence. I would recommend that hot tubs should be more widely employed, with the goal of helping explain to judges ,arbitrators or a jury why the two opposing experts disagree. Were they told to make different assumptions? Do they use the same assumptions but different models? Are they simply repeating what some company witness told them? Judges, arbitrators or jurors should be able to ask questions of each expert.

In matters before the federal agencies, an open dialogue between the opposing economists can help clarify points of disagreement. I have noticed a reluctance sometimes to let the economists talk to each other for fear of losing some litigation advantage. That is not a good way to run a transparent government, in my view. If the attorneys are worried about losing some litigation advantage, they could enter a stipulation that the economists can talk to each other openly but nothing communicated can be used in a trial should litigation ensue.

Finally, more retrospective studies of merger and other antitrust decisions are needed. This involves not only asking whether price (or wages or innovation) rose or fell after a merger (or some other conduct) was allowed or not allowed, but also asking what the models of the opposing experts predicted at the time the merger (or other conduct) was being evaluated. Who was right and why or why not? The failure to examine what the opposing economists at the time were saying impedes any attempt to improve the economic analysis of mergers or other cases. I would be in favor of a rule that said that the expert reports in either an adjudicated case or in an investigation that does not go to trial should be made public subject to redaction to preserve confidentiality. That means the models' predictions (though perhaps not all the underlying data) can be evaluated. Only then will one be able to figure out which type of models best predict outcomes.

**Promoting competition**: Both the FTC and DOJ have an important role to play not just in using the antitrust laws to preserve competition, but in explaining to state legislatures and other regulators and political bodies why competition is desirable and should not be thwarted. One area where there could be substantial benefits to enhancing competition is from the elimination of the many barriers to competition that states have erected to protect various industry groups. For example, many states restrict the sale of automobiles except through franchises, many states inefficiently restrict how franchisors can deal with franchisees, many states restrict competition in the distribution of alcoholic beverage or soft drinks, state licensing boards often restrict who can compete in provision of medical services, certificate of need restrictions in a state impede entry into hospital markets, and there are an incredibly large number of state licensing restrictions on industries ranging from flower arranging to haircut provision, to mention just a few areas.

Even if sometimes such regulations can promote economically desirable outcomes, the danger of restricting competition should be taken into account. Unfortunately, it does appear that state legislatures are often unable to resist powerful interest groups who wish to protect themselves from competition. Any action on the part of the government agencies, including information campaigns that would hopefully constrain the ability of states to create barriers to competition, would be desirable and consistent with the central theme of antirust policy that competition is desirable.

# THE AMENDMENT OF CHINA'S ANTI-MONOPOLY LAW

BY XU GUANGYAO & ADRIAN EMCH[1]

1 Xu Guangyao is Professor at Guangxi University Law School, with a doctorate in law; Adrian Emch is partner at Hogan Lovells in Beijing.

# I. INTRODUCTION

On June 24, 2022, China's legislature passed the amendment of the Anti-Monopoly Law ("Revised AML"), originally promulgated in August 2007. The Revised AML entered into force a few days ago, on August 1, 2022.

The AML amendment is a response to the problems that have arisen in administrative and judicial law enforcement in practice. At the same time, the Revised AML aims to address novel issues – in particular conduct by Internet players – which have emerged over recent years.

In this paper, we highlight a number of key takeaways from the Revised AML. We will go through these takeaways mainly in the order they appear in the Revised AML.

# II. RESHAPING THE AML'S GOALS

There has long been a discussion on the ultimate goals of antitrust laws on a global level.[2] In China, this discussion had a specific "legal basis" insofar as the pre-2022 reform AML ("2007 AML") set out a broad range of goals. According to Article 1 of the Revised Law:

> "This law is enacted for the purposes of preventing and prohibiting monopolistic conduct, protecting fair market competition, *encouraging innovation*, enhancing efficiency of economic operations, safeguarding consumer interests and the public interest, and promoting the healthy development of the socialist market economy."[3]

As the text shows, the AML is not aimed at a single goal, but pursues a number of goals. The Revised AML added a further goal – "encouraging innovation."

In essence, the 2007 AML pursued three key goals – competition, efficiency, and consumer welfare.[4] However, rather than all pulling in the same direction, these goals can be in conflict, and when the conflict occurs, some goals need to take precedence over others. Rather than being three goals at the same level (juxtaposition), the goals may be deemed as being in progression – in the order indicated in Article 1: ensuring competition in the marketplace would lead to an efficient outcome. In turn, promoting efficiency would result in consumers' welfare being protected.[5] In other words, the protection of competition is meant to promote efficiency, and the promotion of efficiency is in turn aimed at protecting consumer welfare. The progressive relationship would then be: competition → efficiency → consumer welfare.

Now, as if the multiple goals of the 2007 AML were not complicated enough, the AML revision adds another goal – "encouraging innovation" – rather than simplifying Article 1 or explaining the relationship between the various goals.

It is difficult to identify a clear relationship between competition, innovation, efficiency, and consumer welfare. We think the best would be for AML implementing rules to be enacted to clarify the relationship between goals. However, the current SAMR draft regulations do not address this point.

So if we were to use the progressive relationship between the AML's goal identified through the interpretation made above, where would "encouraging innovation" fit in?

In fact, it may be possible to interpret "encouraging innovation" into the progressive relationship between AML goals. Innovation could be put on the same level as efficiency. Economic literature suggests there are two types of efficiencies – static efficiency and dynamic efficiency.[6]

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2 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, Notre Dame Law Review, 2008, p.191-244; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, Boston College Law Review, 2012, p.551-630; or Ye Weiping, *The Value Structure of Antitrust law*, China Legal Science (03), 2012, p.135-146 (in Chinese).

3 AML, art. 1 (emphasis added to highlight the change compared to the 2007 AML).

4 For this analysis, we focus on the more directly economic concepts, leaving aside the goals of safeguarding the public interest and promoting the healthy development of the socialist market economy.

5 *See* Xu Guangyao, *Substantive Amendment or Formal Amendment? The Main Content of the Revised Anti-Monopoly Law and Commentary* (2022), available on Wechat at https://mp.weixin.qq.com/s/AAQgxxnKBf0c-N-D4LI--w (in Chinese).

6 Static efficiency – also: output efficiency – refers to an increase in output without a change in operational productivity. Dynamic efficiency – also: innovation efficiency – refers to an increase in operational productivity. *See* Xu Guangyao, *Economic Analysis on Antitrust Law*, Price: Theory & Practice, 2015, p. 26-29 (in Chinese).

Against this background, post-revised AML, the progressive relationship for the goals would be competition → innovation/efficiency → consumer welfare.

## III. HORIZONTAL AGREEMENTS – CARTEL PROHIBITION EXTENDED TO "ORGANIZERS"

The "monopoly agreements" chapter in the Revised AML starts with a new provision, Article 16, defining the term "monopoly agreement" as an agreement, decision or other concerted practice which eliminates or restricts competition. The novelty of this provision is not its content – which remains unchanged – but its location in the AML chapter. Its new place indicates its function as a general definition applying to all kinds of agreements. In the 2007 AML, the same provision was in the second paragraph of a provision which applied to horizontal agreements only.

Articles and 17 and 18 contain prohibitions of horizontal and vertical monopoly agreements respectively. The horizontal agreements provision remains unchanged relative to the 2007 AML.

In contrast, Article 19 is brand-new. Although its scope is not explicitly limited to horizontal agreements, its focus lies clearly on them. It reads:

> "Business operators are prohibited from organizing the conclusion of a monopoly agreement by other business operators or providing other business operators with substantial assistance for concluding a monopoly agreement."

This provision responds to the concern that there can be third parties which are not part of an anti-competitive agreement but play a supporting role in the conclusion of the agreement. Under the 2007 AML, such third parties were not caught by the horizontal agreements provision, which only prohibited anti-competitive agreements between "business operators in a relationship of competition."

Now the draft Regulation Prohibiting Monopoly Agreements ("Agreements Regulation") – which implements the Revised AML in the monopoly agreements area – puts forward additional guidance on what is to be understood by "organizing" or "providing substantial assistance" to the members of an anti-competitive agreement.[7]

In particular, a company is deemed to "organize" an anti-competitive agreement if it plays a leading role for the scope, the content, or the implementation of the agreement.[8] Beyond this general description, the draft Agreements Regulation puts forward a specific scenario of "organizing" an anti-competitive agreement – namely, a typical "hub and spoke" situation – where a company (most often, a supplier) signs agreements with trading partners (most often, its distributors) and intentionally facilitates a "meeting of minds" or information exchange between them.

The draft Agreements Regulation also provides some guidance on what "providing substantial assistance" means. This may be the case where a company provides support for the conclusion or implementation of an anti-competitive agreement; which has a "cause effect relationship;" and the company's role is evident.[9]

If a company is found to "organize" or "provide substantial assistance" to the parties to an anti-competitive agreement, then Article 56(2) of the Revised AML provides for clear sanctions: they are subject to the same penalties as the parties to the agreement themselves.

From the above description it becomes clear that Articles 19 and 56(2) apply to a broad range of situations where a third party organizes or facilitates an anti-competitive agreement for others. "Hub and spoke" between a supplier and its distributors is just one of the possible scenarios. Many others are possible, like a consultancy organizing a cartel for a number of its clients. In that sense, the 2007 AML's rules applicable to the conduct of trade associations are quite similar.[10] Of course, "hub and spoke" is not itself an unlawful constellation. Only if the "hub and spoke" situation leads to the conclusion and implementation of an anti-competitive agreement does the AML kick in.

7 SAMR, *Announcement of the State Administration for Market Regulation on Public Consultation on the Draft Regulation Prohibiting Monopoly Agreements*, June 27, 2022, available at https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348157.html.

8 *Id.* art. 17.

9 *Id.*

10 AML, art. 21.

The scope of Articles 19 and 56(2) is quite broad – theoretically, they could even cover vertical agreements. As noted above, Article 19 is inserted after the horizontal and vertical agreements prohibitions. This means that a third party like a consultancy could also be deemed to have organized an illegal resale price maintenance agreement for a company.

## IV. VERTICAL AGREEMENTS – THE INTRODUCTION OF A "SAFE HARBOR"

Article 14 of the 2007 AML targeted anti-competitive vertical agreements. However, only one type of agreement – resale price maintenance ("RPM") – was listed as a prohibited vertical agreement, while a catch-all clause allowed the antitrust authorities to find other types of anti-competitive vertical agreements. In 14 years of enforcement of the 2007 AML, the authorities never used this catch-all clause as a legal basis to sanction a company.

The main content of this prohibition has been taken over into the Revised AML in Article 18. Therefore, RPM remains the only explicitly outlawed vertical agreement, and the catch-all clauses is left untouched.

However, two additional paragraphs have been added to Article 18 (as compared to the 2007 AML) which could significantly change the approach towards RPM in China:

- According to Article 18(2), RPM is not prohibited if the company in question is able to prove that the agreement does not restrict competition.

- According to Article 18(3), RPM is not prohibited if the company is able to prove that its market share is below the threshold and fulfils the other conditions stipulated by the antitrust authority, the State Administration for Market Regulation ("SAMR").

To an extent, the AML revision brings the law in line with the requirements established by the judiciary. In the *Yutai* judgment, the Supreme People's Court basically ruled that RPM should be subject to a "rule of reason" standard (even if the antitrust authority can presume anti-competitive effects to exist).[11]

Unfortunately, there is no specific guidance in the AML or the draft Agreements Regulation on how to evaluate what a restriction to competition is. For example, it is not clear whether the prevention of "free-riding" conduct justifies an RPM arrangement. In contrast, similar to antitrust cases and academic research internationally, rules in China suggest that this could be a valid defense for a company accused of RPM.[12]

Beyond the lack of detailed guidance, there is even a discussion among academics in China on the basic principles – i.e. as to whether the safe harbor option can apply to RPM at all or whether it is merely meant to guide enforcement of the catch-all clause (if and when this happens).[13]

Paragraphs (2) and (3) of Article 18 of the Revised AML may be intended to give smaller companies an opportunity to defend themselves against allegations of illegal RPM conduct.

Low market shares would indicate a lower likelihood that the RPM practice has an anti-competitive effect. In contrast, if the initiative to have an RPM arrangement in place comes from distributors, there could be horizontal aspects to the RPM arrangement and the above-mentioned "hub and spoke" rule may come into play.

The draft Agreements Regulation provides some additional guidance on how to interpret Articles 18(2) and (3) of the Revised AML.

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11 Supreme People's Court, *Yutai v. Hainan Price Bureau*, December 18, 2018, [2018] Xing Shen No. 4675.

12 *See*, for example, Anti-Monopoly Guidelines for the Automotive Sector of the Anti-Monopoly Commission under the State Council, [2019] Guo Fan Long Fa No. 2, art. 6(2)(1).

13 For a view that it applies to RPM: Shi Jianzhong, *A Comprehensive Explanation on the Revised Anti-Monopoly Law* (2022), available at https://mp.weixin.qq.com/s/7M-LM9MqSxUaLid4k0M3lxA (in Chinese); for a view that it only applies to the catch-all clause, Wang Xiaoye, *Revised Anti-Monopoly Law Completed: Encouraging Innovation as Goal, Safe Harbor and Fair Competition Review Incorporated* (2022), available at https://m.mp.oeeee.com/a/BAAFRD000020220625697128.html?wxuid=ogVRcdKuXpk10m-clkX-5C1YFsgzl&wxsalt=b01923 (in Chinese).

First, the market share threshold is set at 15 percent.[14] This seems is quite low compared to the 30 percent market share benchmarks for safe harbors for vertical agreements in the Anti-Monopoly Guidelines for the Automotive Sector and the prior IPR regulation.[15]

Second, a company wanting to avail itself of the market share safe harbor as a defense (when investigated by SAMR) will not only need to prove that its market share is below the threshold but also that "the agreement will not eliminate or restrict competition in the relevant market."[16]

This requirement may respond to the possibility in Article 18(3) of the Revised AML for SAMR to stipulate "other conditions" for exempting RPM. However, if companies need to prove the absence of restriction to competition, then this seems to be quite an onerous requirement. For example, it is not clear what a restriction to competition is in this context. Is this concept focused on inter-brand competition only? If it were also focused on intra-brand competition, then it would be a very high burden of proof for the company, as RPM by definition eliminates intra-brand price competition (but not intra-brand competition based on other parameters of competition).

Unless there is specific guidance by SAMR on how to apply the market share safe harbor and the "other conditions" – for example, which factors to consider – companies may decide it is safer not to rely on the safe harbor due to the high uncertainty. In our view, this would be a pity, as the Revised AML provides for a possibility of taking a different, potentially more liberal, approach to RPM, which would then be left unused by companies.

## V. NEW RULES FOR PLATFORM OPERATORS

Two new provisions related to platform operators were added to the Revised AML.

First, Article 9 states that companies "shall not use data and algorithms, technology, capital advantages and platform rules to engage in monopolistic conduct prohibited by this law."

Second, Article 22(1) prohibits dominant enterprises from engaging in abusive conduct and provides a non-exhaustive list of the main types of abusive conduct. Now, with the AML reform, a second paragraph was added to Article 22:

> "A business operator in a dominant market position shall not use data and algorithms, technology, and platform rules to engage in conduct abusing a dominant market position as stipulated in the preceding paragraph."

The content of this paragraph is already included in Article 9, and is repeated here (except for the reference to "capital advantages") for abuse of dominance conduct in particular. The likely reason for the repetition is that many investigations in the Internet field take the form of abuse of dominance cases (as for example the *Alibaba* and *Meituan* cases attest[17]).

Both Articles 9 and 22 refer to other rules – i.e. "monopolistic conduct prohibited by this law" and abuse of dominance "as stipulated in the preceding paragraph." In that sense, Articles 9 and 22 do not change the substance of the AML provisions. The provisions' main effect is to draw the attention to the use of big data and other high tech-related parameters of competition. Indirectly, they indicate a sector enforcement priority.

## VI. CHANGES TO THE "ADMINISTRATIVE MONOPOLY" CHAPTER

There are relatively minor changes to the AML's "administrative monopoly" chapter. To recall, this chapter prohibits government bodies and bodies which were entrusted with public authority powers from adopting decisions and engaging in activities which distort competition in the marketplace.

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14 Draft Agreements Regulation, *supra* note 8, art. 15.

15 Anti-Monopoly Guidelines for the Automotive Sector, *supra* note 13, art. 4; and Anti-Monopoly Guidelines in the Field of Intellectual Property Rights of the Anti-Monopoly Commission under the State Council, [2019] Guo Fan Long Fa No. 2, art. 13.

16 Draft Agreements Regulation, *supra* note 8, art. 16(1)(3).

17 *Alibaba*, SAMR Administrative Penalty Decision [2021] Guo Shi Jian Chu No. 28, April 10, 2021; and *Meituan*, SAMR Administrative Penalty Decision [2021] Guo Shi Jian Chu No. 74, October 8, 2021.

In academia, research in the past mainly focused on "regional administrative monopolies" – where the government action prevents non-local companies to compete on equal footing with local companies. Indeed, historically, legislation and enforcement has long focused on "regional administrative monopolies." When the AML was enacted in 2007, geographical discrimination may have been relatively prevalent, so the attention of the legislature was on this issue. Indeed, the focus on distortions of competition based on the location/residence (within Mainland China) of the business can be traced back to the very origins of Chinese competition law.[18]

In the 2007 AML, the heavy focus on location was exemplified by Articles 33-35, which prohibited administrative bodies and other organizations endowed with administrative powers from discriminating against non-local companies, including in terms of sale of products, bidding processes, and establishment of branches.

Now, Article 40 of the Revised AML appears to acknowledge that discrimination can be more diverse than criteria merely based on location. The Revised AML shows that, today, the concept of discrimination must be interpreted more broadly, including possible discrimination based on ownership, tax capacity, etc.

Article 40 thus helps to re-focus the discrimination prohibition away from the local v. non-local dichotomy to catch a broader concept of discrimination.

This new provision prohibits government bodies from obstructing market entry or implementing unfair treatment in general. To an extent, this provision enshrined an obligation of "competitive neutrality" on government bodies.[19]

## VII. INCORPORATION OF THE FAIR COMPETITION REVIEW SYSTEM INTO THE AML FRAMEWORK

When the AML was enacted in 2007, the fair competition review system ("FCRS") was not yet on the table.

The FCRS was established only in 2016 through a separate policy adopted by the State Council – the Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System.[20]

The FCRS is a mechanism to require all governmental bodies in China to self-screen their own rules and practices which relate to economic activities, for their compatibility with the principle of competition.

At the same time, Chapter 5 of the AML on "administrative monopoly" conduct contains other rules applicable to government bodies in China. This chapter features a number of specific prohibitions on government or quasi-government bodies from abusing their administrative powers to distort competition. In general, with the exception of Article 45 of the Revised AML, the prohibitions in Chapter 5 are more focused on "specific administrative acts" (i.e. acts applicable to an identified number of addressees), not "abstract administrative acts" (i.e. acts which apply generally to an unidentified number of addresses).

Article 45 applies to abstract administrative conduct, as government or quasi-government bodies are prohibited from abusing their administrative powers "to set rules with content eliminating or restricting competition."

In contrast, the FCRS seems more focused on generally applicable rules (that is, "abstract administrative acts").

In that sense, the AML's Chapter 5 and the FCRS are complementary.

18 See State Council Interim Regulation on the Development and Protection of Socialist Competition, October 17, 1980; and State Council Regulation on Prohibiting Regional Blockade in Market Economic Activities, [2001] State Council Order No. 303, April 21, 2001.

19 Other amendments in the AML's administrative monopoly chapter include the (slight) changes to the wording. In particular, there is a prohibition on government entities to adopt discriminatory rules or actions in "disguised" form. This confirms that – as in other areas of the AML – the analysis of the restrictive conduct looks at the substance – at the effect – not the form.

20 State Council Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System, [2016] Guo Fa No.34, June 1, 2016.

In addition, there are other differences. Procedurally, the obvious difference is that the FCRS is based on a self-assessment, while the enforcement of Chapter 5 is done through investigation by SAMR. The Revised AML actually confers more powers on SAMR in this respect.[21]

Even from a substantive perspective, there are differences between Chapter 5 and the FCRS. In particular, Chapter 5 does not seem to contain any possibility to "exempt" government conduct distorting competition, while the FCRS contains a list of justifications: to safeguard national economic security, cultural security or involved in the building of national defense, or to achieve social objectives such as poverty alleviation and development, disaster relief and assistance, saving energy, or protecting the environment).[22]

At the same time, economic efficiencies are not one of the justification reasons listed in the FCRS.

Of course, government bodies have regulatory and other administrative functions, and their mandate goes beyond achieving efficiencies in the marketplace. For this reason, we do not question that some of their potentially anti-competitive measures may be duly justified for other (e.g. social) reasons.[23]

That said, we find that Chapter 5 and the FCRS are drafted differently, and we are not sure that the different approach is due to a deliberate strategy, rather than reflecting different authors and different moments of drafting the legal texts.

## VIII. STRONGER PROCEDURAL POWERS FOR SAMR

Under the 2007 AML, SAMR already had very far-reaching investigative powers, including the power to conduct a "dawn raid" at companies' premises. The Revised AML keeps the list of SAMR's investigative powers intact, and strengthens them on a number of limited points.

As far as investigations against companies are concerned, the Revised AML raises the maximum fine on companies for obstructing an investigation from RMB 1 million (around USD 150,000) to 1 percent of the company's annual revenues.

In addition, the Revised AML empowers SAMR to request meetings with a company's legal representative or "responsible person" to discuss potential rectification measures.[24] The idea may be to hold these discussions before SAMR has launched a full-blown investigation. At present, however, it is not clear from the Revised AML and the draft implementing regulations on how this provision relates to the general principle that a company can choose its representative/interlocutor with government.

As far as investigations against government entities for possible breaches of the AML's "administrative monopoly" provisions are concerned, the Revised AML makes a breakthrough change: as noted, it explicitly provides a legal basis for SAMR to conduct an investigation.[25]

Of course, other government bodies are reluctant to be the target in an intergovernmental investigation. As a result, in the past, SAMR faced some resistance when investigating "administrative monopoly" breaches by other government bodies. The difficulties for SAMR were quite substantial, as the government entities under investigation did not necessarily take the view that SAMR had jurisdiction to conduct a proper investigation. The Revised AML now changes this.

## IX. HEAVIER FINES FOR AML VIOLATIONS

The sanctioning regime has been significantly strengthened under the Revised AML. Many of the existing levels of fines on companies are increased. In addition, the Revised AML created new categories of sanctions.

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21 AML, art. 54. In particular, SAMR obtains formal powers to investigate other government bodies and confers it a co-decision right to accept "remedies" which the infringing government bodies propose. The investigative powers include the possibility to request the head of the respective government body and its hierarchically superior organ to appear for discussions/interview.

22 State Council Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System, *supra* note 21, part 3(4).

23 The benchmark for assessing the legality of corporate behavior should be whether it restricts competition (and, by extension, reduces efficiency and harms consumer welfare). *See* section 1 of this paper. In contrast, the benchmark for assessing the legality of government conduct, arguably, is whether it impacts on the fairness of competition, not the competitive market structure itself.

24 AML, art. 55.

25 *Id.* art. 54.

### *A. Higher corporate fines*

Fines are already very high for anti-competitive agreements and abuse of dominance under the prior AML – 1-10 percent of the annual revenues of the infringing company, and confiscation of illegal gains is also possible.[26]

The Revised AML tweaked some of the "supplementary" fines provision, in particular it raised the fine for concluding a monopoly agreement which is not implemented from RMB 500,000 to RMB 3 million (around USD 450,000). The same increase was made for fines on trade associations which organize cartels for their members.

In the merger control area, the corporate fines were noticeably increased. There are now two types of fines punishing a failure to file reportable transactions: if the transaction at issue does not have anti-competitive effects, the fine is increased from RMB 500,000 to RMB 5 million (around USD 750,000); if the transaction does have anti-competitive effects, then a fine of up to 10 percent of annual revenues can be imposed.

Most importantly, Article 63 creates a general "fine uplift mechanism" for particularly egregious antitrust offenses. The provision states that SAMR can apply a multiplier of 2 to 5 to the fines for anti-competitive agreements, abuse of dominance, anti-competitive mergers, and obstruction of the investigation "if the circumstances are especially serious, the impact is especially adverse, or the consequences are especially serious." This means that the maximum fine for a substantive infringement of the AML can be up to 50 percent of annual revenues and up to 5 percent of annual revenues if a company obstructs SAMR's investigation.

Therefore, compared to the 2007 AML, the maximum fine level is much higher, and the deterrent effect of the AML's sanctions much stronger. This amendment reflects the changed attitude of the legislator – and possibly a larger group of policymakers and stakeholders – that antitrust infringements need to be sanctioned more heavily.

At the same time, the circumstances are relatively unclear as to when the "fine uplift mechanism" applies, because the concepts used (especially serious circumstances, adverse impact, or serious consequences) remain vague without further guidance.

We understand that SAMR will likely want to use this mechanism cautiously. We agree that there must be clear standards and criteria to make this option work in practice. In our view, we believe SAMR could optimize its use of other sanctions provisions as a priority. For example, the range of fines between 1-10 percent revenue for anti-competitive agreements and abuse of dominance is already quite high – SAMR could provide more guidance on how it sets the fine within that range, as past practice has been relatively uneven. In addition, unlike other antitrust regulators (in Europe for example), the AML allows SAMR to confiscate the illegal gains of the infringing companies. Again, SAMR has not consistently sought to obtain repayment of such illegal gains in past cases – mainly due to the understandable challenges in calculating the amount of such gains.

In our view, however, further research and guidance on when illegal gains are confiscated and how they are calculated would be a more natural way for SAMR to step up its sanctioning practice, rather than to use the "fine uplift mechanism" to sanction companies.[27]

### *B. New Types of Sanctions*

While the 2007 AML focused mainly on fines against corporations, the Revised AML provides for a broader spectrum of sanctions.

First, the Revised AML provides for fines of up to RMB 1 million (around USD 150,000) on the infringing company's legal representative, major responsible person, or the direct responsible person if they are found to have personal responsibility for the conclusion of an anti-competitive agreement. However, neither the revised AML nor the Agreements Regulation provides further guidance on the standard to judge if the employees have personal responsibility.[28] It is not clear whether the employees need to have been personally involved or at least have known about the illegal agreement, or if a simple omission (by negligence) for example can be enough.

On their face, the personal sanctions apply to any kind of anti-competitive agreements, potentially covering hardcore cartels, "hub and spoke" situations, resale price maintenance as much as other types of anti-competitive horizontal agreements (such as R&D cooperation etc.).

26 However, confiscation of illegal gains is not consistently implemented in practice in actual cases (see more below).

27 *See* also past attempts to provide further guidance on fine levels and streamline the illegal gains confiscation practice, in particular National Development and Reform Commission, *Guidelines on the Setting of Illegal Gains by Monopoly Conduct from Business Operators and the Determination of Fines (Consultation Draft)*, June 17, 2016, available at https://www.ndrc.gov.cn/hdjl/yjzq/201606/t20160617_1165959.html?code=&state=123.

28 Draft Agreements Regulation, *supra* note 8, art. 39.

Second, the Revised AML mandates registration in China's social credit system of any SAMR decision finding companies to have breached the AML as well as the publication of that registration decision.[29] Although the building of the social credit system is still a "work in progress," many companies take this issue very serious and would be concerned about any downgrading of their social credit ranking.

Third, according to a newly added provision in the Revised AML, criminal liability is to be sought if a violation of the AML constitutes a crime.[30] This provision works as a general reference, and does not create new law. At the moment, certain types of bid rigging are the only substantive antitrust offenses prohibited under the Criminal Law. That said, however, the new provision in the Revised AML hints at the possibility of future amendments to the Criminal Law to add other antitrust infringements. If so, this will further strengthen the AML's sanctioning regime.

## X. CONCLUSIONS

The revision to the AML reflects a significant moment in China's still young antitrust history. The Revised AML provides a starting point for a new phase of antitrust enforcement in the country.

In this paper, we examined the key takeaways from the AML revision –an expansion of the cartel prohibition; a potential liberalization in the RPM analysis; a number of rule tweaks for platform operators; minor changes to the "administrative monopoly" chapter; incorporation of the FCRS; stronger SAMR procedural powers; and heavier and broader sanctions.

Although the plan for the AML revision was to make a "small amendment," its impact on businesses, government bodies and other stakeholders in the Chinese antitrust community is potentially very significant.

At the same time, many of the AML amendments need to be further clarified in order to ensure their precise meaning and prevent abuse – in particular (but not only), the criteria for applying the "fine uplift mechanism," which hangs over companies' heads, need to be laid out through implementing rules.

Looking forward, we can hopefully expect numerous implementing rules to further enrich the new scope of the revised Chinese antitrust regime.

29 AML, art. 64.

30 *Id.* art. 67.

# CONSORTIA AND COMPETITION LAW

BY KYRIAKOS FOUNTOUKAKOS & KIAN O'CONNELL[1]

1 Kyriakos Fountoukakos is the Managing Partner of Herbert Smith Freehills LLP, Brussels and the Regional Head of Competition, Regulation, and Trade, EMEA. Kian O'Connell is a Legal Adviser (Stagiaire) at Herbert Smith Freehills LLP, Brussels. Special thanks also to Luca Donatella, Summer Vacation Scheme Student at Herbert Smith Freehills LLP, Brussels, for his assistance.

# I. INTRODUCTION

Consortia are a regular feature of bidding markets and in mergers and acquisitions ("M&A"). Companies often get together and form a consortium to bid on a particular tender because they have complementary skills or wish to share the risk of a very large project. Companies also often get together to form consortia to bid in M&A situations and own the acquired assets jointly or split the assets post-acquisition.

Even though the EU has for a long time issued guidance on collaboration agreements between competitors, the guidance on collaboration in the context of consortium agreements was minimal: a couple of sentences in the horizontal cooperation guidance.[2]

Now, for the first time, the EU has published significant new (still draft) guidance on consortia agreements and their treatment under competition law. In this paper, we will look at consortia and the competition issues they potentially raise, past case law, and the European Commission ("EC")'s new draft guidance and will offer some high-level views on practical issues to consider in a consortium collaboration.

# II. CONSORTIA COLLABORATIONS IN TENDERS AND IN M&A DEALS

Bidding consortia are a form of joint bidding whereby two or more parties cooperate in submitting a combined bid in a public or private procurement process, typically through a specific legal entity (vehicle) created for the purpose of the tender process. If the bid is successful, the performance of the contract will be divided between the consortium members.

Consortia are also widely used for M&A, where several parties enter into an agreement to join forces to acquire a company. Typically, a consortium of this kind is achieved by forming a bidding vehicle in which each party has an equity interest.

Some recent examples of M&A deals that involved consortia include the following:

- The May 2019 acquisition of Merlin Entertainments by a consortium comprising a wholly owned subsidiary of KIRKBI A/S (the ultimate owner of the LEGO® brand), Blackstone, and the Canada Pension Plan Investment Board for a value of GBP 4.77 billion[3];
- The October 2019 acquisition of Nestlé Skin Health by a consortium led by EQT and a wholly owned subsidiary of the Abu Dhabi Investment Authority for a value of CHF 10.2 billion[4]; and,
- The December 2019 acquisition of Inmarsat by a consortium composed of Apax, Warburg Pincus, the Canada Pension Plan Investment Board, and the Ontario Teachers' Pension Plan Board for a value of GBP 2.6 billion.[5]

# III. WHAT ARE THE COMPETITION ISSUES INVOLVED IN CONSORTIA COLLABORATIONS?

Consortia can be and often are pro-competitive. In a tendering context, consortia agreements could benefit both the buyer and the potential sellers involved as they may allow a wide range of firms with different areas of expertise to deliver what the buyer is looking for jointly. They could potentially increase competition by giving a wider choice of bids from the buyer's perspective since more firms may be able to participate in a tender as part of a consortium where they cannot meet the requirements set out in the tender criteria on their own. In the procurement of goods and services, a potential bid may also become more attractive to the buyer due to the pooling of resources and economies of scale on the producer side.

In the M&A context, consortia can also enhance competition for the target company or assets by enabling companies to share the risk of major transactions and participate in a transaction that they could not otherwise participate in individually. In addition, a consortium can bring

2 Communication from the Commission: Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements, OJ (2011) C 11/1 (Horizontal cooperation guidance), recital 237.

3 *KIRKBI, Blackstone, and CPPIB agree terms of a recommended offer for Merlin Entertainments Plc*, KIRKBI Press Release (June 28, 2019), https://www.kirkbi.com/media/tk2nqciu/kirkbi-blackstone-and-cppib-agree-terms-of-a-recommended-offer-for-merlin-entertainments-plc_.pdf.

4 *Nestlé closes the sale of Nestlé Skin Health*, Nestlé Press Release (October 2, 2019), https://www.nestle.com/sites/default/files/2019-10/press-release-nestle-skin-health-closing-en.pdf.

5 *Warburg Pincus Completes Acquisition of Inmarsat*, Warburg Pincus News Release (January 3, 2020), https://warburgpincus.com/2020/01/03/warburg-pincus-completes-acquisition-of-inmarsat/.

together acquirers with complementary skills that bring to the table not only joint financial capabilities but also skills such as expertise in running companies in the sector in question, local expertise in the relevant geographic region, etc.

Consortia, given their potentially pro-competitive nature, must be distinguished from bid-rigging, which is a distortive practice whereby firms illegally (and usually secretly) collude to negatively influence the outcome of any competitive process in which bids are submitted. The practice of bid-rigging constitutes a restriction of competition by object, one of the most serious restrictions of competition alongside other forms of hard-core cartels within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), such as price-fixing, market sharing, customer allocation and the exchange of sensitive commercial information.

While consortia are most often perceived as a common business practice and seen as a legitimate means of cooperation that firms often avail themselves of, they also carry significant competition risks. These risks arise when tenderers who were in a position to submit their own competing bids expressly agree not to compete, be it on the basis of submitting a consortium bid or not to submit an independent bid in competition with the consortium.

The risk is that consortium members who could bid for the same tender or target/assets individually, in essence, agree not to compete and instead collaborate and bid jointly. There is, therefore, an inherent risk that competition is restricted directly. It results in a less competitive situation and a worse bid outcome from the perspective of the tenderer. Another inherent risk, even in more legitimate situations, is that the parties to a consortium bid may also run the risk of needing to exchange commercially sensitive information to agree on the various elements of the bid in the course of preparing a bidding consortium. This can raise suspicions of collusion that go not only to the specific bid in question but may extend to other activities (other bids) the parties may be participating in independently.

Under the EU competition rules, bidding consortia (that are not secret collusive secret bid-rigging collaboration) therefore need to be analyzed to assess whether they fall completely outside Article 101(1) TFEU (if the parties are not competitors for the relevant tender/assets at all). However, they may benefit from the exemption provided for in Article 101(3) TFEU if they can prove that the efficiencies they bring to customers and consumers outweigh any restriction of competition.

## IV. LIMITED GUIDANCE AND CASE LAW PRIOR TO THE NEW EC (DRAFT) GUIDANCE

The EC's current horizontal cooperation guidance states that commercialization agreements do not generally raise competition concerns where they are objectively necessary to enable a party to enter a market that it would not have been able to enter individually, for example, because of the costs involved. More specifically, the EC considers that this applies to *"consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually."*[6] It clarifies that for such agreements to fall outside the scope of Article 101(1) TFEU, it is essential that the parties to the agreement are not regarded as *"potential competitors for implementing the project."*[7]

However, while this may provide a starting point from which to assess bidding consortia, it fails to provide any guidance as to when undertakings should be considered objectively incapable of bidding independently. It also does not provide further guidance on how an analysis ought to be performed under Article 101(3) in a situation where the undertakings concerned are considered competitors.

There is very little substantive case law on how the competition rules ought to apply to bidding consortia. The *Ski Taxi* judgment,[8] which came before the EFTA Court in 2016, is a rare example of a case in which such a competition analysis was carried out. This concerned a consortium bid submitted by two taxi companies in Norway, Ski Taxi and Follo Taxi, in the context of two tender procedures conducted by the contractor, Oslo University Hospital, for transporting its patients. The consortium bid was conducted through a joint venture known as Ski Follo Taxidrift ("SFD"), in which both taxi companies participated. In this respect, the bids were submitted by SFD, not by the taxi companies themselves, as was made clear in the shareholding agreement, according to which both companies were aware that *"there will be less competition between them in the market than previously. This applies to both pric[ing] policy in tenders and other strategic measures in relation to the market. Should this changed situation require permits from public authorities, such permits must be obtained."*[9]

6 Horizontal cooperation guidance, recital 237.

7 *Id.*

8 Case E-3/16, *Ski Taxi SA, Follo Taxi SA, and Ski Follo Taxidrift AS v. The Norwegian Government* (2016).

9 *Id.* para 8.

Oslo University Hospital conducted two tender procedures for the award of framework agreements for the supply of patient transport services. The first tender procedure was canceled due to the lack of competitors. In the second tender procedure, SFD submitted a consortium bid resulting in the two taxi companies winning the award of the framework agreements in question.

The Norwegian Competition Authority subsequently launched an investigation into the consortium bid carried out through SFD. This culminated in a decision by the Norwegian Competition Authority, which found that Ski Taxi and Follo Taxi could have submitted separate bids in the two tendering procedures.[10] This meant that Ski Taxi and Follo Taxi ought to be considered competitors, leading to the conclusion that the consortium in question had the object of restricting competition. Therefore, the consortium was in breach of Section 10 of the Norwegian Competition Act, equivalent to Article 53(1) of the Agreement on the European Economic Area ("EEA") (and, by analogy, Article 101 TFEU).

The consortium members appealed the decision to the local district court and eventually to the Norwegian Supreme Court. The Norwegian Supreme Court, in turn, asked the EFTA Court for an advisory opinion to obtain clarification on the applicable test for determining whether a joint bid for a public contract constitutes a restriction of competition by object under the Norwegian Competition Law, corresponding to Article 101 TFEU.[11]

Before the EFTA Court, the taxi companies argued that the consortium bid constituted a restraint ancillary to the operation of SFD, whereby *"[its] submission […] was part of a wider scheme, which entailed the establishment of SFD as a provider of administrative tasks for Ski Taxi and Follo Taxi."*[12] The EFTA Court rejected the parties' arguments by underlying that, in order for the submission of a consortium bid to escape the prohibition of Article 53(1) EEA (and, by analogy, Article 101 TFEU) by virtue of being ancillary to the main operation that is not anti-competitive in nature *"that restriction [must be] proportionate to the underlying objectives of the operation."*[13] The EFTA Court held that *"[t]he fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the "objective necessity" required for it to be classified as ancillary."*[14]

As the parties had *"cooperated on price, quality and capacity"*[15] and had *"agreed on the price offered to the contracting authority"*[16] in their consortium bid, it came as no surprise that the EFTA Court found that the consortium bid at issue amounted to a form of price-fixing. The EFTA Court, therefore, held that the consortium bid amounted to a restriction of competition by object in violation of Article 53 EEA (and, by analogy, Article 101 TFEU).

It is interesting to point out that the EFTA Court had ultimately ruled that the competition assessment of bidding consortia in more general terms must be carried out on a case-by-case basis, considering *"the substance of the cooperation, its objectives, and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor."*[17] *It further acknowledged that "since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint."*[18]

In addition, the EFTA Court had separately held that, although openly submitting a joint tender (without any element of secrecy or concealment) may reveal a lack of an anti-competitive intention, this is not in itself a decisive factor for determining whether an agreement restricts competition by its object.[19]

10 *Id.* para 19.

11 *Id.* para 24.

12 *Id.* para 86.

13 *Id.* para. 99.

14 *Id.*

15 *Id.* para 91.

16 *Id.*

17 *Id.* para 101.

18 *Id.* para 102.

19 *Id.* para 108.

Finally, it may also be appropriate to look briefly at an example of a consortium cleared by a competition authority, albeit a national competition authority of an EU Member State. By way of illustration, in *ÁB-Aegon/Allianz Hungária/Generali-Providencia/OTP Garancia/Uniqua*,[20] the Hungarian Competition Authority found that a consortium agreement between Hungarian insurers bidding for the provision of public insurance for children and young people could benefit from an individual exemption under Hungarian competition law. In its initial analysis, the Hungarian competition authority observed that the consortium bid at issue was restrictive of competition, as the companies could have participated in the public tender on an individual basis. It considered that such a consortium could only be excluded from being classified as a competition infringement if there were objective economic reasons for its creation, which was not the case in that instance. However, the Hungarian Competition Authority concluded that the consortium fulfilled the conditions for exemption under Hungarian national law, as it established a much larger number of contact points for potential claimants, which made it easier for young people to use the system at a lower cost. The scheme also allowed insurers to spread their risks better, enabling them to offer a lower price for their products, well below the price of general insurance.

In balance, it would therefore appear from the EC's current horizontal cooperation guidance and the EFTA Court's *Ski Taxi* judgment that there remains a certain degree of ambiguity as to the competitive assessment of bidding consortia under EU and EEA competition law. Nonetheless, it seems likely that such agreements would only be deemed to restrict competition following an individual assessment of both the context and the content of each consortium.

## V. THE NEW EC DRAFT GUIDANCE

For the first time, the EC has now published guidance through a new section on bidding consortia included in the EC's draft revised horizontal cooperation guidance,[21] which was published for consultation on March 1, 2022. Although these guidelines are still subject to change and will not come into force until January 2023, they are nevertheless a particularly useful tool in providing an insight into how the EC views consortia agreements in the context of its competition analysis.

The section on bidding consortia in the draft horizontal cooperation guidance clarifies that such agreements do not restrict competition if they allow their participants to undertake projects that they would not be able to undertake individually.[22] As an addition to the current guidance, this section also provides much-needed guidance on the assessment of consortia agreements between parties who would be able to undertake the project individually.[23]

The EC begins by providing clarification on the distinction between consortia tendering and bid-rigging. As mentioned above, bid-rigging refers to illegal (and usually secret) agreements between economic operators to distort competition in contract award procedures. Bid-rigging is regarded as a form of cartel and thus constitutes some of the most serious restrictions of competition by object. This can take various forms, such as rival bidders fixing the content of their bids (including price) in advance to influence the outcome of the procedure, refraining from submitting a bid, or allocating bidding efforts according to geography.[24]

The draft then goes on to address the issue of when undertakings should be considered objectively unable to bid independently by referring to two possibilities. First, a bidding consortium will not restrict competition when the undertakings involved provide different services that are complementary for the purposes of participation in the tender. Second is that there will be no restriction of competition when the undertakings involved, although all active in the same markets, cannot carry out the contract individually, for example, due to the size of the contract or its complexity.[25]

The EC clarifies that the mere theoretical possibility of each party carrying out the contractual activity alone does not automatically make the parties competitors. A realistic assessment must be conducted, on a case-by-case basis, considering whether an undertaking will be capable of completing the contract on its own, considering its size, abilities, and future capacity in light of the contractual requirements. In this respect, an important element of the assessment is to consider the tender rules themselves. In cases of calls for tenders where it is possible

20 Hungarian Competition Authority, *ÁB-Aegon Általános and Ors* (Vj-149/2003/23).

21 Draft guidance on the applicability of Article 101 of the TFEU to horizontal cooperation agreements.

22 *Id.* recital 391.

23 *Id.* recital 392.

24 *Id.* recitals 387 – 388.

25 *Id.* recital 391.

to submit bids on parts of the contract (lots), undertakings that have the capacity to bid on one or more lots – but assumedly not for the whole tender – have to be considered competitors.

Following this assessment, if it cannot be excluded that the parties could each compete individually in the tender, the bidding consortium may restrict competition by object or by effect under Article 101(1) TFEU.[26]

Where the bidding consortium does restrict competition, the next step is to assess whether such a consortium may benefit from an exemption under Article 101(3) TFEU. Generally, a specific and concrete assessment will be necessary based on various elements such as the parties' position in the relevant market, the number, and the market position of the other participants in the tender, the content of the consortium agreement, the products or services involved, and the market conditions. The Article 101(3) TFEU criteria can generally be fulfilled if the bidding consortium allows the parties to submit an offer that is more competitive than the offers they would have submitted individually (in terms of prices and/or quality) and if the benefits for consumers and the contracting entity outweigh the restrictions of competition. Crucially, any efficiencies must be passed on to consumers; if they only benefit the parties to the bidding consortium, Article 101(3) TFEU does not apply.[27]

Finally, it is important to note that the draft guidance (in the more general commercialization section, which includes the part on bidding consortia) specifies that in commercialization agreements, there is a heightened risk of collusive effects due to information exchanges. In a joint consortium situation, it is evident that the parties will need to exchange a lot of sensitive commercial information. It is, therefore, necessary to verify whether the information exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the co-operation. For example, even if the parties are not competitors for the particular tender in question, they may be competitors for other similar tenders. Any information exchange should therefore be assessed to ensure it does not result in wider collusive effects between the participating consortium members.

## VI. CONCLUSION AND PRACTICAL TIPS

The draft revised horizontal cooperation guidance provides welcome clarification on bidding consortia for companies wishing to pool their respective expertise and capabilities to bid jointly in tenders or bid for assets/targets in an M&A context.

Bidding consortia can be beneficial by promoting cooperation between bidders of differing sizes or capabilities. For example, a bidder with substantial financial resources lacking the required industry expertise may benefit from joining forces with a smaller co-bidder already operating in the relevant industry.

However, the EC's assessment in practice cannot yet be predicted with certainty, given the limited application and case law to date. Considering the competition risks involved (the consortium could be seen as restricting competition; information exchanges could result in wider collusion), companies wishing to participate in a consortium should consider careful assessment, preparation, and safeguard measures. Parties wishing to participate in a consortium would need to assess not only whether participation in the consortium is legitimate but also whether any information exchange measures need to be adopted. For example, they will need to ensure that any information exchange in the context of the consortium is limited to what is necessary for the specific bid/acquisition in question. If information is potentially commercially sensitive such that it could reduce strategic uncertainty and disclose bidding strategy or influence bidding behavior in other projects where the parties may be competitors, adopt specific safeguards such as clean team and ring-fencing arrangements.

Finally, consortium participants may also need to consider whether the creation of the consortium may trigger merger control filings. This is because in some jurisdictions, the creation of the special purpose vehicle in itself may need to be notified as a concentration and obtain clearance in addition to any clearances required for the actual bid itself.[28] Careful assessment and preparation can mitigate the difficult competition risks that arise in consortia situations and ensure the consortium remains pro-competitive for the benefit of the parties as well as the tendering body or seller.

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26 *Id.* recital 392.

27 *Id.* recitals 395 – 397.

28 See, for example, in the People's Republic of China, its Anti-Monopoly Law and the Guiding Opinions for the Notification of Concentration of Undertakings, as amended, provide that a joint venture set up to acquire a target is notifiable to the State Administration for Market Regulation if it meets the notification thresholds. See also, for Ukraine, the Antimonopoly Committee of Ukraine evaluates ex post as to whether a vehicle qualifies as a non-full function joint venture after the notifying party has filed both the main transaction and the establishment of the vehicle pursuant to paragraph 23 of its of its Guidelines on Consideration and Clearance of Mergers Amounting to the Establishment of Joint Ventures of September 27, 2019.

# THE EU GENERAL COURT CONFIRMS THE CHANGE IN ARTICLE 22 EUMR REFERRAL POLICY

BY JAMES KILLICK & PETER CITRON[1]

1 Respectively Partner and Counsel at White & Case, Brussels.

On July 13, 2022, the General Court of the European Union confirmed the European Commission's jurisdiction to review the *Illumina/Grail* transaction following a referral pursuant to Article 22 EUMR. The judgment is an important endorsement of the European Commission ("EC's") recent change in its Article 22 referral policy, and may embolden the EC to call in for review of certain transactions where it may have concerns (in particular suspected so-called "killer acquisitions") even where the transaction does not fulfill any merger control thresholds in the EU.

# I. CHANGE IN EC REFERRAL POLICY

In March 2021, the EC published a guidance paper[2] (the "Guidance Paper") that, with immediate effect, encouraged national competition authorities to refer certain transactions to the EC for review even where they do not meet the national merger control thresholds of the referring Member States.

Under Article 22 of the EU Merger Regulation ("EUMR"), a Member State may request the EC to review a transaction (not meeting EU or national merger control thresholds) that:affects trade between Member States; and threatens to significantly affect competition (established on a *prima facie* basis).

Article 22 EUMR, that has been in force since the entry into force of the EUMR in 1990, was originally designed to deal with the situation of Member States that, at that time, had no merger control rules. With the progressive implementation of national merger control regimes in all Member States (apart from currently Luxembourg, although it is expected to introduce a merger control regime), the EC had a longstanding practice of discouraging referral requests under Article 22 EUMR from Member States that did not themselves have power to review the transaction at stake under their own national rules.

In March 2021, the EC decided to change this practice and adopt a new policy. The driver behind the policy change was to address a perceived enforcement gap regarding the review of so-called "killer acquisitions" that fall below the thresholds at EU or Member State level (acquisitions by incumbents of start-ups or nascent competitors that might otherwise have played a significant competitive role in the market, especially in the pharma and digital industries where such start-ups or nascent companies may not yet generate substantial turnover to trigger any merger filing requirements). The EC initially considered amending the EUMR's merger control thresholds to include a transaction value threshold in order to address the perceived enforcement gap, but instead decided to implement this policy change with respect to Article 22 referrals that required no amendment to the EUMR.

# II. TRANSACTIONS TARGETED BY THE GUIDANCE PAPER FOR REFERRAL

The Guidance Paper states that transactions will be appropriate for an Article 22 referral where the turnover of at least one of the parties "does not reflect its actual or future competitive potential". In its assessment, the EC may take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.

According to the illustrative list in the Guidance Paper, cases suitable for referral include transactions where the target:

- is a start-up or recent entrant with significant competitive potential;
- is an important innovator or is conducting potentially important research;
- is an actual or potential competitive force;
- has access to competitively significant assets (raw materials, infrastructure, data, or intellectual property rights) and/or provides products or services that are key inputs/components for other industries.

# III. REFERRAL OF *ILLUMINA/GRAIL* TO THE EC

As the first case under the new Article 22 referral policy, the EC invited national competition authorities to request a referral of the *Illumina/Grail* transaction. France made a referral request in March 2021, and this request was joined by Belgium, Greece, Iceland, the Netherlands, and Norway.

2 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.

Illumina is a supplier of next generation sequencing ("NGS") systems for genetic and genomic analysis (including NGS instruments, consumables, and ancillary services). Grail is a customer of Illumina and develops blood tests for the early detection of cancer (using the NGS systems). The USD 7.1 billion transaction did not meet the review thresholds the EUMR or any national merger control rules, since Grail had no sales in the EU at all. Illumina founded Grail in 2016 and owns 14.5 percent of the company.

In July 2021, the EC opened an in-depth phase II investigation on the basis of concerns about the impact of the transaction on the development and supply of NGS-based cancer detection tests. The EC's concerns were based on non-standard theories of harm, namely threats to future competition in a vertical context. The EC was concerned that Illumina could engage in vertical input foreclosure strategies given its leading position in the NGS systems that are crucial inputs for the development and commercialization of NGS-based cancer detection tests such as those offered by Grail. In particular, the EC appears to have had concerns that Illumina might have the ability and incentive to limit innovation efforts that could lead to alternatives to Grail's technology.

While the EC's review of the transaction was ongoing, the parties closed the transaction in August 2021. Subsequently, the EC started a gun-jumping investigation against Illumina for infringing the EUMR's standstill obligation. The EC also imposed interim measures that require Grail to be kept separate from Illumina and be run by an independent hold separate manager.

In April 2021, Illumina, supported by Grail challenged before the EU's General Court ("GC") the EC's decision to accept jurisdiction to review the transaction pursuant to Article 22(3) EUMR, and sought its annulment under an expedited procedure.

Illumina also filed legal proceedings in France and the Netherlands to try to stop the national competition authorities in these countries from requesting a referral, but in both jurisdictions these proceedings failed.

**Snapshot overview of key dates**

| | |
|---|---|
| **September 21, 2020** | Public announcement of the *Illumina/Grail* transaction. |
| **December 7, 2020** | EC receives a complaint concerning the transaction. |
| **February 19, 2021** | EC sends a letter to the EU Member States (the "invitation letter") inviting them to send a referral request under Article 22. |
| **March 9, 2021** | French competition authority sends a referral request. (Subsequently joined by Greek, Belgian, Norwegian, Icelandic, and Dutch competition authorities) |
| **March 11, 2021** | The EC informs Illumina and Grail of the referral request (the "information letter"). |
| **March 31, 2021** | EC publishes Article 22 guidance. |
| **April 19, 2021** | EC accepts referral requests. |
| **June 16, 2021** | The proposed transaction is notified to the EC. |
| **August 18, 2021** | Illumina announces that it has completed the acquisition of Grail. |
| **August 20, 2021** | EC announces that it has decided to open an investigation for gun-jumping. |
| **October 29, 2021** | EC adopts interim measures. |

# IV. GENERAL COURT RULING

### *A. Admissibility*

The GC clarified that an EC decision accepting a referral request is an act that can be challenged as such, including because the transfer of jurisdiction to the EC could delay the implementation of the concentration unduly if it was unlawful. In the context of the French proceedings, the French courts found that the referral request by a national competition authority cannot be challenged by the undertaking concerned before the national courts because such referral cannot be severed from the EC's merger review.

### *B. Confirmation of Jurisdiction under Article 22*

Illumina, supported by Grail, argued that the EC could not accept a referral request under Article 22 where the Member States making that request are not entitled, under their national merger control rules, to examine the transaction which is the subject of that request.

The GC applied a literal, contextual, teleological, and historical interpretation, concluding as follows:

- Article 22 provides for the following four cumulative conditions that must be met: (i) the request must be made by one or more Member States; (ii) the transaction must satisfy the definition of "concentration" without meeting the thresholds for European dimension; (iii) the transaction must affect trade between Member States; and (iv) the transaction must threaten to significantly affect competition within the territory of the Member State or States which made the referral request.

- The wording of Article 22 (1), in particular the use of the expression "any concentration", makes it clear that a Member State is entitled to refer any concentration to the EC which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules.

- Although the referral mechanism the EC established was originally to be used in respect of Member States without their own merger control system, its applicability is not limited to that situation alone. The legislature's intention was to strengthen the application of EU competition law to transactions with cross-border effects, to strengthen the "one-stop shop" principle, and to alleviate the problem of multiple filings.

- The extent of the EC's power to review mergers depends primarily on the fulfilment of the turnover thresholds which define European dimension, but also, in the alternative, on the referral mechanisms under Article 22.

- Referral mechanisms are "an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which merit examination at European level." Article 22 provides the flexibility necessary for the examination, at EU level, of concentrations which are likely to significantly impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States.

- The EC's interpretation does not disregard the principle of conferral of competences, the principle of subsidiarity, or the principle of proportionality. The GC states that the referral mechanism under Article 22 constitutes only a subsidiary power enabling "in certain specific cases and under very specific conditions" a transaction to be examined by the EC as a corrective mechanism.

The EC rejected as "unsubstantiated" the argument that there would be a high number of transactions which do not have a European dimension and do not fall under a national merger control system which would be affected by the EC's current interpretation of Article 22.

### *C. Referral Request Made in Due Time*

Illumina, supported by Grail, argued that the referral request was submitted out of the 15 working day time limit prescribed by Article 22.

The GC rejected the plea, holding as follows:

- A referral request under Article 22 must be made within 15 working days of the concentration being "made known" to the Member State concerned, if no notification of that concentration is required.

- "Making known" should be understood as the active transmission of information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral (in particular whether the concentration affects trade between Member States and threatens to significantly affect competition) have been satisfied. This view is consistent with the findings of The Hague Court when Illumina challenged the Dutch competition authority's decision to join the French authority's referral request.

- The invitation letter in this case constituted "making known" referred to. The referral request was therefore made in due time.

Illumina argued that the EC's delay in sending the invitation letter was contrary to the fundamental principle of legal certainty and the principle of good administration.

The GC also rejected this plea, albeit being sympathetic to the delay. It held:

- The EC is required to comply with a reasonable time limit, particularly in the context of merger control, given the fundamental objectives of effectiveness and speed underlying the Merger Regulation.

- Although there was no time limit for the EC to do so, the period of 47 working days between the complaint and the invitation letter was unreasonable.

- However, since it had not been established that the EC's failure to comply with a reasonable time limit affected the undertakings' concerned capacity to defend themselves effectively, this delay could not justify the annulment of the contested decision.

- The GC rejected Illumina's arguments made at the hearing that its rights of defense had been breached by the EC exceeding a reasonable time limit on the grounds that the EC should have contacted the merging parties and heard their views in the period prior to sending the invitation letter so that they could submit comments and correct certain information. The GC considered that these explanations were "vague", and not sufficient to establish an infringement of the rights of defense. It stated that the invitation letter was merely a preparatory act in the context of the procedure leading to the adoption of the decision to accept the referral request, and that the merging parties were in a position effectively to make known their views before the decision to accept the referral request was adopted.

### *D. No Breach of the Protection of Legitimate Expectations and Legal Certainty*

Illumina, supported by Grail, claimed that the decision to accept the referral request infringed the principles of protection of legitimate expectations and legal certainty. It claimed that Commissioner Vestager was clear in a statement (made in a policy speech on 11 September 2020) that the EC would not change its policy until it had published its Article 22 guidance, and that the guidance was eventually adopted only after the invitation letter was sent, i.e. in March 2021.

The GC rejected the pleas.

- In order to rely on the principle of the protection of legitimate expectations it is for the party concerned to establish that he or she received precise, unconditional, and consistent assurances, originating from authorized, reliable sources, such as to lead him or her to entertain well-founded expectations.

- In the present case, Illumina failed to demonstrate the above circumstances. For instance, the September policy statement of Commissioner Vestager was made in a speech which concerned only the EC's general policy and did not mention specifically the *Illumina/Grail* transaction, which was only announced subsequently. In her speech, Vestager stated that the EC had a practice of "discouraging" national authorities from referring cases which they did not have the power to review at national level, but she did not expressly preclude the referral of such transactions in the speech. Indeed Vestager had even in the same speech emphasized that the EC's previous referral practice was never intended to stop the EC from dealing with cases that could seriously affect competition in the single market.

### *E. Practical Implications*

Although Illumina has already announced that it will appeal, the GC ruling will likely encourage the EC to use its new Article 22 referral policy more frequently to review certain transactions that fall outside the thresholds of the EUMR or national merger control thresholds where competition concerns could potentially arise.

The EC may choose to apply a low standard for fulfilling the requirements for an Article 22 reference: namely arguing that the transaction affects trade between Member States and threatens to significantly affect competition, without necessarily providing evidence at an initial

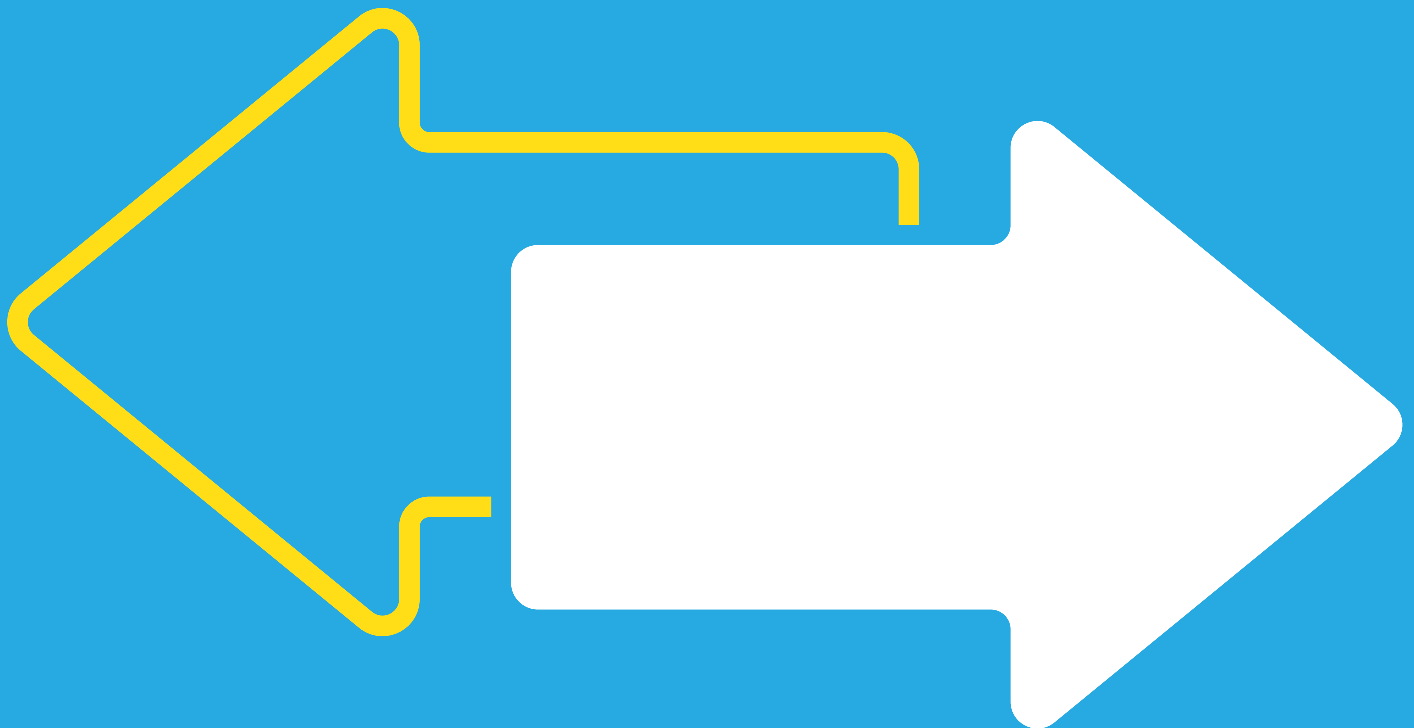
stage that this is the case and pushing creative and not necessarily robust novel theories of harm. There is also a risk that such theories of harm remain untested before the EU Courts because in the EU merger control architecture effective court redress against prohibitions simply comes too late and companies have been at least until recently reluctant to challenge merger control decisions.

In the current landscape, merging parties are advised to factor in carefully and at the outset the possibility of an Article 22 referral in transaction timetables, closing conditions and risk allocation provisions in the deal documents.

In particular, the GC's findings on the deadline for when a referral request must be made raises complex procedural and timing issues for merging parties. The GC's definition for when a transaction is "made known" means that, in practice, parties may have to consider sending "mini-notifications" to all 27 EU Member States to make the transaction known and manage the risk of a referral and the initiation of the 15-day deadline (although the deadline may not be triggered until the Member State considers that it has enough information to make an assessment). The gun-jumping risk can be addressed by closing prior to the EC informing the parties that a request for referral was made (as the standstill obligation does not apply before that moment), but this may raise other risks, such as the EC imposing interim measures and possibly eventually prohibiting the transaction and requiring that it be unwound.

For the avoidance of unnecessary regulatory uncertainty, it is hoped that the new policy will in practice only be used in a few specific cases and under very specific conditions, and not lead to an avalanche of transactions that fall below merger control thresholds being called in for review by the EC. However, there is a question as to how this plays out for example for digital transactions: the Digital Markets Act, which is expected to enter into force in October 2022, includes a requirement for large online platforms (so-called "gatekeepers") to inform the EC of all intended acquisition of tech companies or any transactions that enable the collection of data. The information provided will be relayed to national competition authorities. The DMA explicitly states that the national competition authorities may use the information it has received to request the EC to examine a transaction under the Article 22 EUMR referral mechanism. Hence, in the digital field alone, this new approach may trigger a large number of additional referrals.

# LOOKING BACKWARDS AND FORWARDS: WHAT DOES 25 YEARS OF COMPETITION ENFORCEMENT IN THE UK TELL US ABOUT THE FUTURE?



BY RACHEL BRANDENBURGER, CHRISTOPHER HUTTON & STELIOS CHARITOPOULOS[1]

1 Rachel Brandenburger is a Senior Advisor and Foreign Legal Consultant (admitted in England & Wales) to Hogan Lovells US LLP, and a Visiting Research Fellow, Institute of European and Comparative Law, University of Oxford. Christopher Hutton is a Partner at Hogan Lovells International LLP. Stelios Charitopoulos is an associate at Hogan Lovells International LLP.

# I. INTRODUCTION

As the UK celebrated the 70th anniversary of the accession of Queen Elizabeth II, many within the UK competition community will have been preparing to celebrate another imminent anniversary. August 2022 marks the 25th anniversary of the publication of the draft Competition Bill in August 1997. Passing into law the following year, what became the Competition Act 1998 ("CA98") introduced into UK law prohibitions against anticompetitive agreements ("Chapter I Prohibition") and the abuse of a dominant position ("Chapter II Prohibition", together "Prohibitions"). Amongst the other reforms introduced was the establishment of what later became the Competition Appeal Tribunal ("CAT").

The two Prohibitions were deliberately modelled on Articles 85 and 86 of the Treaty of Rome (now Articles 101 and 102 of the Treaty on the Functioning of the European Union, the "TFEU"), but the nod to Europe did not stop there. The regime for the public enforcement of the Prohibitions was also designed to broadly reflect the European model.

In the subsequent 25 years, the CA98 has remained a key pillar of the public enforcement of competition law in the UK. However, it has not been immune to change. There have been significant reforms, including institutional changes and the introduction of measures to increase individual accountability for breaches of competition law. There was even a short-lived review into whether the regime should move away from an administrative and towards a prosecutorial model of enforcement. Nevertheless, the fundamental building blocks of the Prohibitions and the accompanying public enforcement regime have remained consistent, and there is no expectation of immediate fundamental reform.

In this article, we do not attempt to summarize all of the procedural, institutional and jurisprudential changes that have occurred in the UK over the past quarter-century. Nor do we attempt to describe all of the (many) highs and lows. Instead, we highlight some key developments, and reflect on what the past 25 years of enforcement under the CA98 may tell us about the future of competition law enforcement in the UK.

# II. OVERDUE, BUT NOT UNCONTROVERSIAL, REFORM

Before the Prohibitions were introduced by the CA98, restrictive trade agreements were governed by a set of rules (contained within the Restrictive Trade Practices Act 1976) which was widely seen as *"slow, bureaucratic and ineffective."*[2] But even that regime appeared advanced compared to the approach to addressing market power. There was no prohibition, but instead the Fair Trading Act 1973 and the Competition Act 1980 created a complex investigative regime allowing the Monopolies and Markets Commission ("MMC") to intervene at the end of protracted investigations if conduct *"may* [have been] *expected to operate against the public interest."*

By 1997, reform was long overdue, and had been debated for nearly two decades. However, it was not until the reforming zeal of the (then) new Labour Government, which came into power in May 1997, that reforms were finally introduced. Even then, despite the consensus on the need for reform and the extensive consultations undertaken, the substance of the reform remained controversial.

In retrospect, and given the multiplicity of regimes across the globe modelled on the European enforcement regime, it seems inevitable that reform would lead to a UK public enforcement regime that broadly reflected the European model. However, that was not always the plan. The previous Conservative Government had been wary of a wholesale adoption of the European model. Indeed, one of the most prominent criticisms of the Competition Bill was that, by reflecting the European model, the UK gave *"a lot of ground to Brussels. In many important cases the British jurisdiction now just acts as a lobbyist or observer of the European competition authorities."*[3] However, in the end, the Prohibitions, and the public enforcement regime, intentionally replicated in large part the European model.

One of the most significant aspects of the Competition Bill which distinguished it from previous proposed reforms was the inclusion of the Chapter II Prohibition. This was controversial, with poll findings that *"two thirds of economists* [were] *opposed to the Bill's Chapter II Prohibition of abusive conduct, whilst three quarters of competition lawyers support*[ed] *it.*"[4] Prior to the Competition Bill, the intention had been to maintain the investigative regime operated by the MMC. In considering the legacy of the CA98, particularly in light of the proposed regime for addressing alleged market power in digital markets, it is worth recalling that the framework for controlling the use and misuse of market power in the UK could have been very different.

2 See *House of Commons Research Paper 98/53*, April 28, 1998, page 7.

3 "Putting British business at a competitive disadvantage," The Times, February 9, 1998.

4 "Lawyers and economists reject competition bill," Financial Times, April 2, 1998.

# III. THE CA98 TRACK RECORD

### *A. The Public Enforcement Record*

The success of any enforcement regime will inevitably be measured against its enforcement record. From March 1, 2000 when the Prohibitions came into force, to the end of June 2022 there have been:

a. 68 decisions that the Chapter I Prohibition has been infringed (7 of which have been wholly or partially overturned on appeal);
b. 13 decisions that the Chapter II Prohibition has been infringed (4 of which have been wholly or partially overturned on appeal with 2 further appeals pending); and
c. Penalties totaling approximately £1.407 billion (although the total is approximately £1.067 billion when overturned or reduced penalties are taken into account).

These figures represent approximately 3.6 infringement findings per year, averaging approximately £17.4 million in fines per infringement. Compared to the equivalent enforcement records of major competition agencies in other jurisdictions, these figures do not suggest a strong enforcement record.[5]

However, figures only ever tell part of the story. The deterrence function of a successful enforcement regime is at least as (if not more) important as its punitive function. Although public enforcement of the CA98 had a slow start, particularly compared to expectations, it was nevertheless a high profile start. The Office of Fair Trading ("OFT") adopted several early decisions prioritizing sectors which were considered to be key to the economy. However, as the boundaries of the enforcement regime were tested, the OFT ran into some early difficulties. For example, it had an early decision sent back to it by the CAT in *Aberdeen Journals I*, and it later had significant and high profile infringement decisions set aside by the CAT in both the *Mastercard* and *Tobacco cases.*

These setbacks appeared to slow the acceleration in public enforcement, and (to many observers) gave the impression that the OFT was not capable of pursuing complex CA98 cases. Whether or not this impression was fair, it contributed to institutional reform in 2013: the OFT and the Competition Commission were merged to form the Competition and Markets Authority ("CMA").

Following these reforms, the CMA has generally had a more active track record (averaging 4.5 infringement decisions per year compared to the OFT's 2.6). The increased activity has also been accompanied by a higher success rate. With the exception of the *Phenytoin* case, which the CAT partially overturned and remitted to the CMA, there has not been a major reversal since the Tobacco case in 2012. The CMA has also not shied away from pursuing multinational companies. Nevertheless, there is still a perception of under-enforcement. As recently as 2019, a Government review found that, while there has been *"some improvement in the speed and number of cases, questions remain about the effectiveness of the UK's competition enforcement regime,"* particularly in relation to the enforcement of the Chapter II Prohibition.[6] However, the position appears to be changing, and, despite the inevitable difficulty in enforcement during the pandemic, enforcement levels appear to be increasing.

### *B. Growth of Concurrency*

The CA98 enforcement record is not the work of just one institution. Concurrent enforcement of competition law was another innovation introduced by the CA98.

In the past 25 years, the primary responsibility for public enforcement has been entrusted to first the Director General of Fair Trading, then the OFT and, since April 1, 2014, the CMA. More significantly, the number of sectoral regulators with "concurrent powers" – i.e. the power to enforce the Prohibitions in specific areas – has expanded over time. There are currently eight such agencies[7], which together form the UK Competition Network.

5 For example, between January 2000 and December 2021, in cartel cases alone the European Commission imposed over €31 billion in fines (or approximately €28.8 billion when adjusted for judgments of the European Courts).

6 Department for Business Energy and Industrial Strategy, *Competition Law Review: Post Implementation Review of Statutory Changes in the Enterprise and Regulatory Reform Act 2013*, July 2019.

7 The Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Northern Ireland Authority for Utility Regulation (NIAUR), the Civil Aviation Authority (CAA), the Payment Systems Regulator (PSR), and the Financial Conduct Authority (FCA).

In the early days, sectoral regulators (with some notable exceptions such as Ofcom and Ofgem) were generally reluctant to use their new competition powers, preferring their normal regulatory powers instead. However, calls for clarity and stronger enforcement were quick to arise, and the resulting reforms (which formed part of the wider institutional reforms of 2013) included a ministerial power to make an order removing an agency's concurrent competition powers (the so-called "use it or lose it" power) to encourage concurrent regulators to use their CA98 powers, and (in some circumstances) a duty on agencies to consider using their competition powers before turning to their other powers.

Since the 2013 reforms, sectoral regulators have made more extensive use of their concurrent powers. Almost all agencies have brought significant infringement cases with Ofgem, Ofcom and the FCA being particularly active. On the other end of the spectrum, the CAA and PSR have each adopted only one infringement decision, while NIAUR has not yet opened a CA98 investigation. Some of these cases have also been among the most complex cases brought under the CA98 to date – particularly the abuse of dominance cases brought by Ofcom and Ofwat – and have made a significant contribution to the enforcement of the Prohibitions.

Nevertheless, the overall enforcement figures have remained low. Infringement decisions adopted by sectoral regulators represent approximately 10 percent of overall infringement decisions. The perception remains that some agencies tend to prefer the familiarity of their sector-specific powers (at least partly because they tend to be less resource intensive and time consuming). The Government, which has recently noted the low level of enforcement in regulated sectors, is conscious of that view, although it has put forward an alternative explanation for the low number of cases: that it reflects a *"low underlying level of anti-competitive behaviour in regulated sectors."*[8]

There are no obvious further candidates to join the current network of concurrent regulators. However, as the CMA notes in its latest concurrency report, the broad range of agencies pursuing CA98 investigations indicates the "[t]*he maturing of the concurrency regime that came into effect in 2014.*"[9] It seems that the threat of potentially losing a powerful regulatory tool, coupled with increased transparency relating to its use, have been strong catalysts for this development.

### *C. Merits Appeal v. Judicial Review*

One of the ways in which the UK regime differs from the EU model is that infringement or non-infringement decisions may be appealed to the CAT on a full merits basis, and not (as in the EU) on grounds akin to a judicial review. The CAT has not been shy to exercise its powers in full. While the CAT has upheld the significant majority of the decisions on appeal, it has also:

a. Concluded that certain decisions were based on insufficient analysis and sent them back for further work. Such cases have not been limited to the early days of the regime: it is interesting to draw parallels between one of the first appeals, *Aberdeen Journals I*, which was remitted to the OFT on the basis that the latter had taken too many shortcuts in its market definition analysis, and the more recent *Phenytoin* case, where the CAT sent the case back to the CMA because of perceived shortcuts in its analysis of whether a price increase was excessive.
b. Overturned infringement findings in their entirety (e.g. in the *Mastercard* and *Tobacco* cases), or changed the financial penalties imposed (either by reducing a penalty, or even increasing a penalty as it did in *Umbro*).
c. Made its own infringement findings when overturning non-infringement decisions. For example in *Albion Water*, the CAT dismissed an Ofwat non-infringement decision and made its own infringement finding.

Almost since the first appeal of an infringement decision, calls were raised in some quarters (including from within the OFT and subsequently the CMA) for the merits appeal standard to be replaced with a judicial review standard. This was largely based on the premise that well-resourced companies had the means to outgun the competition agencies. The Government considered this option during the institutional reforms of 2013, but confirmed its commitment to a full merits appeal standard. However, in its latest consultation, the Government has decided to chip away at the appeal standard: although final decisions will still be subject to full merits review, a judicial review standard will be introduced in relation to interim measures decisions imposed in a CA98 investigation.

### *D Exclusions*

Although ministers are still accountable to Parliament for the operation of the CA98 regime, and make senior appointments to the institutions, the CA98 limits the role of ministers in the day-to-day operation of the regime. There is, therefore, no scope for overt political intervention in

8 Department for Business Energy and Industrial Strategy, *Competition Law Review: Post Implementation Review of Statutory Changes in the Enterprise and Regulatory Reform Act 2013*, July 2019.

9 CMA, *Promoting competition in services we rely on - The annual concurrency report 2022*, April 2022.

CA98 investigations. This may be contrasted with, for example, the UK merger control regime where ministers have a discretion to intervene on specified public interest grounds.

However, one potential lever is the ministerial power to exclude specific agreements or types of agreements from the application of competition law under the CA98 where there are *"exceptional and compelling reasons of public policy."* This can be a useful tool in situations where co-ordination between competitors is essential for the public good.

Until 2020, the power was not much used. However, it was dusted down in the early days of the response to the COVID-19 pandemic, when the Government suspended the application of the CA98 to facilitate co-operation between retailers and the suppliers of dairy produce to alleviate supply chain stresses. Since then, exclusion orders have been issued in a number of cases – although the exception has been narrow and time limited in each case. The CMA has also recently suggested that the Government could use exclusion orders to accommodate agreements which could be caught by the Chapter I Prohibition but otherwise generate significant environmental benefits.

The Government's use of exclusion orders has generally been cautious, and there have not been any proposals to otherwise politicize the CA98 regime. However, the CMA can still be subject to less overt political pressure, particularly in terms of case prioritization, including through non-binding strategic steers from the Government on its economic priorities and its expectations of the CMA. With the effects of the COVID-19 pandemic still being felt, and the more recent cost of living crisis, both an increased use of the Government's exclusion order powers and more pressure being applied to the CMA to investigate sectors that attract public attention can be expected.

# IV. INDIVIDUAL ACCOUNTABILITY

Two of the biggest changes to the public enforcement of competition law in the UK were introduced by the Enterprise Act 2002 ("EA02"). Both of these changes relate to individual responsibility for breaches of competition law, and were built on the foundations provided by the CA98 and its early enforcement.

## *A. Criminal Cartel Offense*

Under the criminal cartel offense, individuals may be prosecuted for engaging in hard core cartel conduct, with punishment including up to five years' imprisonment and/or unlimited fines. The offense is distinct from the CA98 regime, although criminal and civil investigations are often investigated in parallel, and the scope of the offense is limited to agreements such as direct and indirect price fixing, market sharing, customer sharing, bid rigging and limiting production or supply.

The CMA had limited success in prosecuting criminal cartel cases – although not for want of trying – bringing prosecutions in only four cases, which collectively resulted in five convictions. Also noteworthy is the fact that the CMA has not secured a conviction in a contested case, with high profile (and reputation harming) failures. According to the CMA, this record reflects the fact that, prior to 2013, the prosecution had to establish that an individual acted dishonestly to secure a conviction, which proved to be a very high bar.

The CMA campaigned for the removal of the dishonesty requirement and, in 2013, its wish was granted. However, although there are some live investigations, the removal of the dishonesty requirement has not improved the CMA's record. In fact, the CMA has yet to bring a prosecution where dishonesty does not need to be established, leaving the practical value of this reform as yet untested.

Although the cartel offense remains an important weapon in the CMA's arsenal, the CMA seems no longer to pursue prosecutions with its earlier vigor. There have even been calls from former CMA leaders to leave other agencies to bring prosecutions. These calls have been left unanswered and the Government recently proposed legislative changes which would strengthen the CMA's criminal cartel enforcement by enabling it to issue "no-action" letters to "assisting offenders" (i.e. defendants wishing to assist the CMA). Nevertheless, considering the CMA's current priorities, and the potential for further reputational damage in the event of failure, it seems unlikely that these reforms will lead to a significantly higher prosecution rate.

## *B. Director Disqualification*

The EA02 also created a route for the CMA to apply for individuals to be disqualified from senior management roles for up to 15 years. This sanction is available if a breach of competition law has been committed, and it can be established that the individual's conduct makes him/her unfit to be a company director. It is not necessary for the individual's conduct to have contributed to the competition law breach: it is enough

that the individual had reasonable grounds to suspect (or ought to have known) that the conduct of the company constituted a breach but took no steps to prevent it.

Director disqualification is, therefore, a powerful weapon. It is also a flexible one. Director disqualifications can be obtained either through a court order, or through a disqualification undertaking given to the CMA by the relevant individual. Nevertheless, the CMA waited until 2016 to exercise this power for the first time. Since then, it has used this tool vigorously, securing a total of 25 director disqualifications in a wide variety of industries, including 21 disqualifications secured between 2019 and 2022.

This upward trend is almost certain to continue. The CMA has made it clear that it now assesses whether to seek director disqualifications in all cases where competition law is breached. However, the CMA's focus to date has been on relatively small companies: it has yet to pursue a director of a large company. It remains to be seen how the CMA's current weapon of choice will fare against higher profile targets with deeper pockets.

# V. THE FUTURE

This section focuses primarily on three specific areas which present the most interesting questions for the future: (i) proposed reforms of the wider competition regime; (ii) reform proposals in respect of digital markets; and (iii) the scope for post-Brexit divergence.

### *A. Proposed Reforms*

The question of whether the CA98 regime needs root-and-branch reform is perennial. Recently, a former Chair of the CMA suggested that *"despite the relatively recent legislative changes, the UK has an analogue system […] in a digital age,"*[10] and a series of studies (e.g. the *Furman* and *Penrose* reports) resulted in a recent Government consultation for legislative changes. As the first such initiative since the UK exited the European Union, the consultation was widely expected to be a wind gauge for post-Brexit competition law divergence.

It was therefore surprising to some that the Government's proposals do not include any fundamental changes to the CA98 framework, although some of the proposals are significant. In particular, it is proposed to change the prohibitions themselves, by expanding the territorial scope of the Prohibitions to anti-competitive agreements and abusive conduct implemented outside of the UK if they are likely to have *"direct, substantial or foreseeable effects within the UK."* A statutory duty of "expedition" on the CMA (relating to all its competition and consumer protection functions) is also proposed, together with enhancements to the CMA's evidence gathering and fining powers. However, it is currently unclear when, and in exactly what form, these proposals will become law.

It is possible to draw some parallels between the period ahead of the 2013 reforms and today: there are calls for reform, extensive studies, and a lingering sense from the Government that the CMA's track record requires further improvement. The UK's competition law regime is also subject to exogenous pressures which are progressively resembling those experienced following the financial crisis. Nevertheless, the Government's proposals are less fundamental than the institutional changes in 2013, which perhaps reflects a recognition by the Government that enforcement is generally working well, and does not require fundamental reform.

### *B. Digital Markets*

The most intense criticism of the CMA for under- enforcement has focused on the relatively few Chapter II cases it has brought. Meanwhile, during the past decade, digital markets have created a new frontier for competition enforcement with the growth of digital platforms generating difficult questions on the alleged use and misuse of market power. This concern is not unique to the UK, and it is therefore not surprising that, in 2019, the Furman Report highlighted perceived deficiencies of UK competition law enforcement in digital markets and recommended an overhaul of the regime.

In response, the Government announced a new regulatory regime which would include an enforceable Code of Conduct for companies with "Strategic Market Status," a power for pro-competitive interventions (e.g. relating to data, interoperability, access obligations etc.) and a bespoke merger control regime. Once in force, this regime would be overseen by a new dedicated Digital Markets Unit ("DMU") within the CMA.

10 See *Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy*, February 2019.

Although the Government's plans have received a lot of publicity, a draft Bill has yet to be published, and (at the time of writing) seems unlikely to be introduced in the near future. In the meantime, the DMU (which was already launched in April 2021) is using the CMA's current powers – including its CA98 powers. If and when the new regime is introduced, it is likely that a considerable part of UK competition law enforcement relating to market power will be addressed outside of the CA98 framework. Considering the reluctance when the CA98 was introduced to extend domestic competition law to market power for fear of stifling competition, it is interesting that the Chapter II Prohibition is now seen by the Government as insufficient (at least in relation to digital markets) and in need of supplementation.

### *C. Post-Brexit Divergence*

One aspect of the CA98 that was controversial was the inclusion of a provision intended to ensure that the UK substantive competition law was developed and interpreted consistently with EU competition law. Following Brexit, this provision was replaced with a requirement for close conformity with EU law as it stood before December 31, 2020 (i.e. the end of the Implementation Period). The requirement is not absolute, and is subject to a list of exceptions.

Without the requirement for consistency, it seems inevitable that EU and UK competition law will diverge over time, whether through legislative change, judgments or decisional practice. However, the pace of that divergence may not be as fast as some might have expected. For example, when the renewal of the block exemption of certain vertical agreements from the Chapter I Prohibition was being considered, there was widespread expectation that the Government (advised by the CMA) would propose an ambitious overhaul of the rules. Instead, while there is some divergence on specific points, the new block exemption remains broadly aligned with EU rules (including in relation to more controversial topics such as relaxing the approach to online sales bans).

More differences may develop over time, particularly as more difficult questions are considered by the CMA, concurrent regulators, and the courts. However, it currently seems that, unless and until there are fundamental reforms to the CA98, we are unlikely to see wholesale divergence between EU and UK competition law.

## VI. CONCLUSION

Despite concerns at the time that the adoption of the European model of enforcement was inappropriate, the regime introduced by the CA98 has been shown to be effective, and the UK seems to be positioned to retain it for the foreseeable future. The CMA also seems set to focus on the robust enforcement of the competition regime, including through the increasing use of its director disqualification powers.

What will happen over the next 25 years? Such predictions are uncertain. However, as of now, it seems safe to predict that there will be further adjustments (rather than wholesale reforms) to the enforcement framework, to make enforcement more effective and to reflect changing economic realities. A continuation of the trend towards individual accountability also seems likely.

A significant change will occur if the proposed digital markets regime is introduced. In that event, we are likely to see a significant amount of enforcement activity relating to market power being undertaken outside of the CA98 framework. That aside, the past 25 years have shown that the UK enforcement regime is effective and there is currently no reason to doubt its future.

# THE LEGISLATIVE FRAMEWORK AND COMPETITION POLICY IN AUSTRALIA

BY ALLAN FELS AO[1]

1 Professor of Law and Economics at Melbourne and Monash University.

# I. INTRODUCTION

This article briefly analyzes, mainly from an economics perspective, the legislative framework governing competition law and policy in Australia. Competition policy is not just about antitrust or competition law. Competition policy covers every aspect of policy that affects the state of competition whether positively or negatively. For the purposes of this article, I briefly review "meta law" matters; government laws and regulations of any kind affecting competition; and some economic questions about the nature of the competition statute, the Australian *Competition and Consumer Act 2010*.

# II. META LAWS

"Meta laws" are constitutional or treaty laws that set parameters for legislation (e.g. the Australian and U.S. constitutions, the Treaty of Rome etc.) play an important part in a nation's competition policy. Although rarely mentioned in competition law textbooks, they are the unsung heroes of the promotion of competition especially in regard to the prevention of interstate or intercountry restrictions on competition.

Section 92 of the Australian Constitution, enacted in 1901, provides that "trade, commerce and intercourse between the states shall be absolutely free." Those words have had a major effect on removing restrictions on interstate competition which were rife before the enactment of the constitution, and they continue to play a role in striking down proposed new interstate trade restrictions. This is notwithstanding the fact that the Court and legal minds have had difficulty in making legal sense of the term "absolutely free." That term was introduced in constitutional debates following delegate dissatisfaction with lengthy seemingly legalistic attempts to spell out what was and what was not meant by restrictions on interstate commerce. However, in the last thirty years or so the High Court of Australia has found an economically rational way of interpreting the provision. Its approach is indeed to prohibit restrictions on interstate commerce generally, while recognizing that some forms of state-based regulation e.g. concerning health, have a legitimate purpose and justification even though there may be side effects on the freedom of interstate commerce.

This has recently been made very clear in recent litigation concerning state-imposed restrictions on interstate movement of peoples in situations where a COVID-free state (Western Australia) prohibited any persons from other parts of Australia from entering the state. The High Court made it clear that even if such restrictions limited the rights of individuals to move to anywhere they wished within Australia and even if in this and other cases there may have been some secondary effects on competition, nevertheless if the legislation served a valid wider purpose, then it was not unconstitutional. Accordingly, Section 92 continues to play a critical role in Australian competition policy.

# III. NATIONAL COMPETITION POLICY

Australia was renowned for its world leading approach to national competition policy adopted in the mid-1990s. Under this comprehensive policy, every government law, regulation, and action in every sector from agriculture to health without exception and at every level of government was subjected to an independent review over a ten-year period with a view to removing unwarranted restrictions on competition. This massive exercise led to considerable reforms across the whole economy and, along with a vigorous ACCC approach to law enforcement, is believed to have boosted productivity and GDP significantly. However, since the mid-2000s, "reform fatigue" has led to the policy not being continued even though there is unfinished business from that era and even though new sources of restrictions on competition have arisen. In short, the comprehensive national competition policy applicable to all legislation has become dormant, and governments now are effectively free to introduce anticompetitive elements into their laws and actions. There are no signs on the horizon of a renewed interest in the adoption of a national competition policy and there is less interest in whether new laws enacted by governments are having anticompetitive effects.

# IV. THE COMPETITION STATUTE

The Trade Practices Act 1974 (now continued as Australia's *Competition and Consumer Act 2010*) was a comprehensive modern competition law prohibiting cartels and anticompetitive agreements, anticompetitive mergers, and abuse of market power. The law also contained consumer protection provisions, especially prohibiting misleading and deceptive conduct. There was an independent regulator (now the Australian Competition and Consumer Commission, or "ACCC") and an array of sanctions. Substantial regulatory functions regarding such fields as telecommunications and energy were added in the 1990s.

Although there have been amendments to the law since then, the underlying framework has stood the test of time. Before considering some of the details, two points should be made.

First, it was decided in 1974 that the Act should specify in considerable detail the kinds of behavior it envisaged would be prohibited. One reason was to aid judges who had had no exposure to competition law in understanding what sorts of behavior the law was concerned with. As a result, the competition provisions are very lengthy. For example, the prohibition on resale price maintenance ("RPM") occupies many pages and spells out most imaginable forms that RPM takes and various forms of behavior that do not constitute RPM. There is a similar lengthy provision about what constitutes exclusive dealing and since the enactment of criminal cartel provisions in 2011 the nature of a criminal cartel is spelt out in great detail.

The result is that the competition provisions of the Act are about 20,000 words long, compared with the few words that constitute the U.S. Sherman Act and the EU competition provisions.

Despite the very detailed specification of the elements of anticompetitive behavior, most parts of the statute have an explicit or implicit competition test as a requirement for an offence. The exclusive dealing prohibitions for example apply only if the behavior substantially lessens competition.

The abuse of market power provision has also had this flavor until recently. They listed a number of forms of behavior where competitors were harmed. However, the Courts drew on other parts of the wording of the abuse of market power provision to read into it a requirement that any breach of the abuse of market power law could only occur if there was a substantial lessening of competition.

The original justification for such a detailed approach is much less strong now that the Courts have had nearly 50 years of experience of the law.

There is a case for now shortening the Act considerably with the underlying principle being simply that any behavior that substantially lessens competition should be prohibited, save for a few per se provisions relating to price fixing, market sharing, bid rigging, and collective boycotts. One effect of the detailed wording is that it often focuses the attention of judges on these specific forms of behavior that are occurring rather than on the competition principle.

In fact, the current detailed wording creates something of a diversion of attention away from the key principles about behavior that substantially lessens competition. Courts need to wade through very detailed provisions to ensure that the behavior is captured by the provision of the statute, and this tends to distract attention from the underlying competition questions.

Some recent progress has been made in the process of "simplifying and shortening" the law, but more needs to be done.

Second, in common with many competition statutes around the world, some of the most fundamental economic features that one might expect in a comprehensive statute addressing competition do not exist. As economics 101 courses state, the heart of monopoly is a high degree of concentration in a market and its principal undesirable outcome is higher prices. Yet Australia's competition statute does not explicitly contain any divestiture provisions (other than in the special case of unlawfully consummated mergers), nor does it contain price regulation provisions (although there are some residual prices surveillance powers that remained buried in the legislation).

The lack of a divestiture power needs reconsideration. There has been considerable and successful use of divestitures in the United States in regard to oil, tobacco, chemicals, and telecommunications. There has also been some use of this power in the UK and elsewhere. In Australia, there has been heavy use of divestiture powers in regard to public utilities but not in regard to the private sector.

In the United States, the divestiture power under antitrust law is only applicable if it is preceded by breaches of the monopolization or other provisions of the law. There is a strong case for introducing this element into Australian law as part of the abuse of market power provisions or perhaps more generally in relation to any possible breaches of the competition provisions. The application of a divestiture law would depend upon a Court determining that there has been a breach of the competition law (especially abuse of market power) and that the best remedy is divestiture.

One of the important benefits of this provision would be to strengthen the sanctions and thereby to strengthen the abuse of market power law. The abuse of market power provisions need to be taken more notice of by business. The current sanctions available under the provisions

of the market power law are quite weak. Rarely or ever are fines imposed. Damages follow up cases are rare. Cases are difficult to win and take many years. Private actions are few. While there has been some improvement in the formulation of the law as discussed below this has at most marginally strengthened its impact. The incentives to comply with this law would be greatly strengthened if there was a possibility of divestiture.

The abuse of market power provisions have recently been changed. Under the new provisions a firm with a substantial degree of power in a market is prohibited from engaging in conduct that has or is likely to have the purpose or effect of substantially lessening competition.

The new provisions contain two important changes. The previous law was only applicable if a Court determined the behavior had the purpose of substantially lessening competition. The fact that the behavior may have the effect of lessening competition was legally irrelevant. Now an effect test has been added. Moreover, it had to be established that a firm with market power was "taking advantage" of its market power before a breach could be established. The term "take advantage" gave rise to many fanciful interpretations of the law that enabled some forms of anticompetitive conduct to survive. The words "substantial lessening of competition" have been injected in place of the former "take advantage of" provision. This proviso places faith in the ability of Courts to apply a competition test properly. We return to this matter when discussing merger law. We also note that the section has long used the term "substantial market power" to avoid any limitations that might arise from the use of the term "abuse of dominance." In addition, the precedent of using the term "substantial market power" has some relevance to debates discussed below about changing the Australian merger law.

Section 50 prohibits mergers which have the effect or likely effect of substantially lessening competition. In the mid-1990s this law replaced a prohibition on mergers that gave rise to dominance or enhanced dominance. The dominance test was generally seen as applicable only if a single firm emerged as dominant in a market. If there were four players in a market each with twenty-five percent market share and there were two mergers resulting in two players with a fifty percent share each, the merger might well have lessened competition but would not have given rise to single firm dominance. The purpose of the change of test to substantially lessening of competition was to cover any mergers that gave rise to a substantial lessening of competition. However, in recent years the ACCC has lost a number of merger cases in the Courts. Several explanations of these losses have been proffered. One is that the case selection by the Commission was poor and/or that its litigation skills were weak. Another is that compared with the 1990s the defense bar is much better and more skillful than it used to be.

My own view, and that of the outgoing Chair Rod Sims, is that the problem lies in the Court's interpretation of the words "substantial lessening of competition." Compared with the former dominance test, two changes have occurred. The first is that the wording has tended to encourage a move away from the emphasis on structural conditions in the market. Under the dominance test, the Court first looked at whether the effect of the merger was to increase concentration and dominance. The new words, however, have an implied emphasis on behavior or conduct in the market and open the door more to speculative reasoning about the nature of the conduct that might arise following a merger. Defendants are able to paint sometimes fanciful pictures of possible competitive outcomes despite the increase in concentration.

Second, the test tends to make Courts look more into the future than they did under the dominance test. The dominance test has a focus on the immediate impact on concentration and dominance even if in theory at least a longer-term view is required. The substantial lessening of competition test, however, tends to point to the need for a much longer-term view of the impact of the merger. Once that happens, this opens a range of speculative outcomes which make it more difficult for the Courts to determine with sufficient certainty that the merger may be harmful. There is much to be said for injecting additional terminology, such as wording prohibiting "mergers that substantially lessen competition or that create or enhance substantial market power."

There was a sustained battle over a period of thirty years about whether the abuse of market power law should be changed. One outcome of the very substantial pressure from small business, farmers, and others for changing the abuse of market power law was that politicians were concerned not to change this part of the Act because of heavy pressure from big business interests. This diverted much of the pressure into the development of legislation that is peripheral to market power abuse concerns, but is still substantial in its effect. The most important set of changes related to the introduction of a prohibition on unconscionable conduct that was enforceable by the ACCC. There was also provision for industry codes of conduct to regulate some vertical relationships between for example oil companies and service stations, franchisors and franchisees, grocery providers and retailers etc. and there is currently debate about the introduction of an unfair contracts law which goes a step further than an unconscionable conduct law.

Australia is one of the very few countries that does not require compulsory pre-notification of mergers, at least those that are substantial. The system of informal notification does not work badly. Most firms pre-notify and provide the information that the ACCC wants. However, some exploit the informality by not submitting mergers or by withholding information that the regulator wants or by engaging in various forms of gaming behavior e.g. providing last minute information. There is a strong case for introducing compulsory pre-merger notification. The costs of

this would not be high, since most firms already notify properly. It is also true that the benefits, although tangible, are not very large, but it would be better to put the notification scheme onto a proper statutory footing.

## V. SHOULD THE STATUTE BE CHANGED?

Should the statute be changed?

Outgoing Chairman Rod Sims has proposed that it should be. In retrospect, it would have been preferable in the 1990s to have changed the dominance test to a prohibition on the acquisition or strengthening of substantial market power. This would have retained the more structural and immediate flavor of the test than the words “substantial lessening of competition.” Another lesser point is that the new provision is less applicable to acquisitions by firms with substantial market power of very minor but potentially significant potential competitors (e.g. digital platforms’ acquisition of small startup firms that could be future rivals).

The 1974 Trade Practices Act provided a sound foundation for the application of modern competition law. Despite considerable pressures to weaken the law, it has survived with some changes and improvements. There continues to be a need to make some changes to convert the law from a good one to an excellent one.

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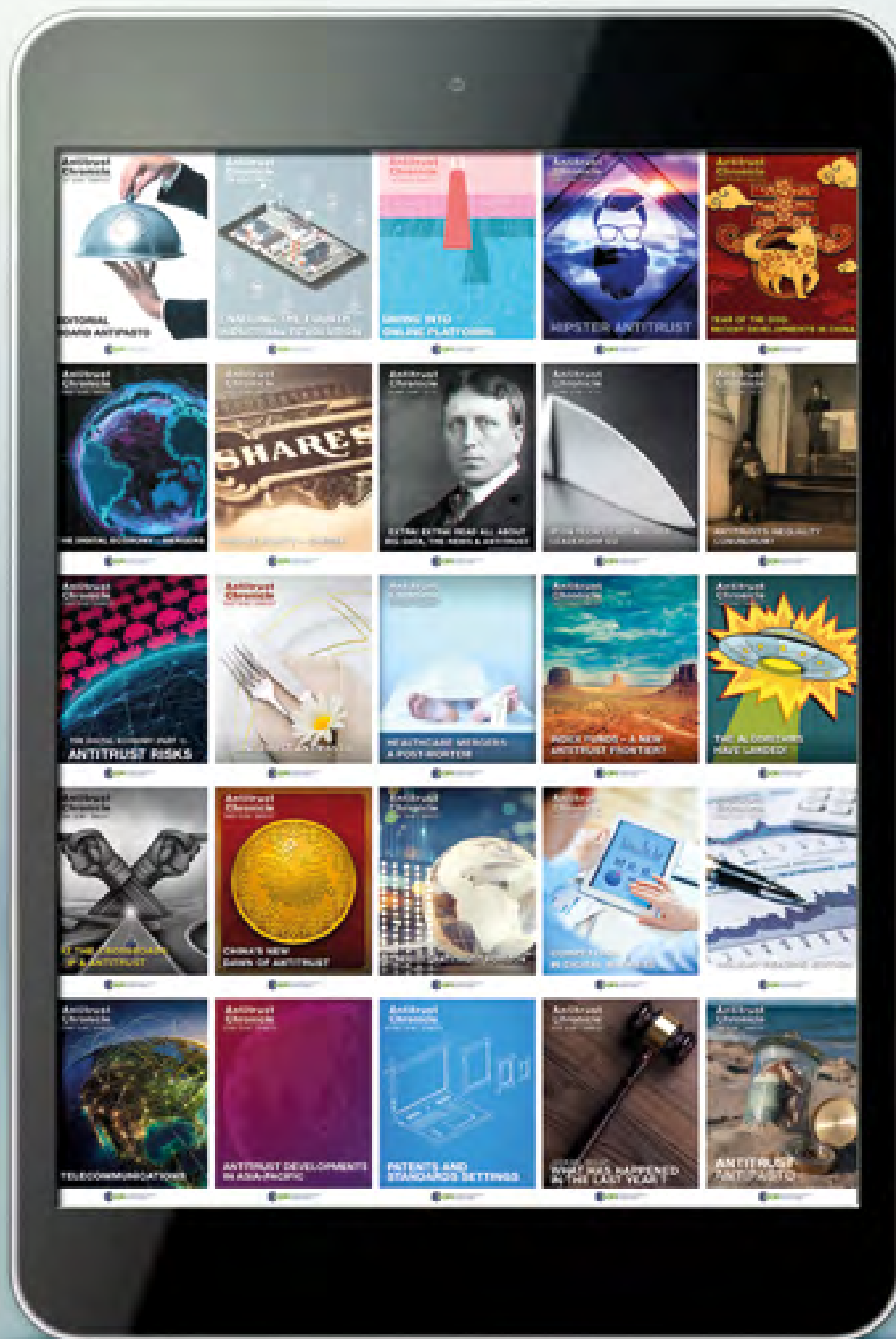

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