Antitrust Economics Workshop
September 11, 2019
9:10 a.m.–4:25 p.m.

46th Annual
Conference on International Antitrust Law & Policy
September 12–13, 2019
Day 1: 9:15 a.m.–4:40 p.m.
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Fordham Law School
Skadden Conference Center | 150 West 62nd Street
New York City
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Rima Alaily
Deputy GC of Competition, Microsoft
Rima Alaily leads the Competition Law Group responsible for helping the company comply with the competition laws around the world, close mergers and acquisitions, and respond to investigations. The team engages with regulators, academics, and others to consider the role of competition law in the face of our changing economy and the development of new technology. Rima is a long-standing advocate for civil legal aid and works with local and national organizations to provide access to justice for those in need. Prior to joining Microsoft, Rima was a litigation partner at Heller Ehrman LLP. Rima received her B.A. from Brown University in 1994, and her J.D. from Harvard Law School in 1998.

James Aitken
Partner, Freshfields Bruckhaus Deringer, LLP
James Aitken is a partner in Freshfields’ antitrust, competition and trade group working from the firm’s London and Brussels offices. He has advised clients on behavioural antitrust investigations, and on obtaining merger clearances, before the European Commission, Competition and Markets Authority and other competition authorities in Europe and worldwide. James also regularly advises on contentious antitrust litigation in the European and UK Courts. He has particular expertise in the technology and financial services sectors as well as advising regulated companies in the infrastructure, energy and telecommunications sectors.

Jeffrey Amato
Partner, Winston & Strawn LLP
Jeffrey Amato handles complex multi-forum disputes, principally in the areas of international cartel litigation, class actions, arbitration and government investigations. Jeffrey also has experience in white collar criminal defense, including representing defendants in federal and state courts at the trial, appellate, and post-conviction levels. His experience includes counseling clients with respect to navigating compliance with statutory, regulatory, and ethical obligations relating to government contracts. During his career in private and public practice, Jeffrey has been involved in legal disputes concerning a wide range of issues in federal, state, administrative, and arbitral forums, each contributing to his proficiency in new substantive areas of the law and diverse business sectors.

Prior to joining Winston, Jeffrey worked at another international law firm. Previous to that, he served as law clerk to the Honorable Arthur D. Spatt, U.S. District Judge for the Eastern District of New York. Before his clerkship, Jeffrey was an attorney with the U.S. Department of Homeland Security, where he prosecuted numerous civil enforcement actions against individuals, air carriers, shippers, and other regulated entities. During his tenure at U.S. Department of Homeland Security, he received an interim appointment as Special Assistant to the Chief Counsel of the Transportation Security Administration. Immediately following his graduation from law school, Jeffrey was an Honors Attorney with the Office of the General Counsel of the U.S. Department of Transportation.

Dr. Pinar Bagci
Principal, The Brattle Group
Dr. Pinar Bagci has 20 years of experience advising on the economics of competition, regulation and damages assessment. She has provided economic analysis for clients throughout in-depth competition and regulatory investigations and in commercial litigation and international arbitrations.

Dr. Bagci has advised Europe’s leading financial institutions and energy, mining, telecommunications and electronics companies throughout in-depth merger, cartel, dominance, State Aid and market investigations by the European Commission and national regulatory authorities. She has submitted expert economic analysis and testimony in international arbitration and litigation proceedings brought before European courts and the European Court of Justice.

In litigation matters, Dr. Bagci has prepared expert economist testimony for national courts and international arbitration tribunals in relation to liability and the estimation of damages in the financial, energy, consumer electronics, and
mining sectors. She is currently advising a leading investment bank throughout an EC investigation of alleged collusion to manipulate forex benchmarks. She recently provided economic analysis on competition issues in one of the largest damages claims brought before an international tribunal concerning vertical restraints and abuse of dominance in gas supply and transit contracts.

David Bamberger  
Partner, DLA Piper
David Bamberger has been litigating for more than 35 years in federal and state courts around the country, as well as before arbitration panels. He devotes a substantial portion of his practice to litigating complex antitrust and trade regulation matters, including class action cases. David has tried scores of cases, many of them jury trials, and has argued appeals in many appellate courts, including the Supreme Court of the United States. In addition to maintaining an active litigation practice, David also regularly counsels clients in a variety of industries on antitrust and trade regulation matters.

The respected research publication Legal 500 United States recommended David in its 2014 edition and called him "practical, timely and accurate." Its 2012 edition called him "excellent," and its 2011 edition described him as "vastly experienced" and noted that a client commented that he is "one of the most knowledgeable attorneys in the country; very accessible and mindful never to churn a file." In 2018, he was named a BTI Client Service All-Star by BTI Consulting, which noted that he was selected for his "exceptional legal expertise with practical advice, business savvy and innovative, effective solutions." Only 326 lawyers in the US received this honor in 2018. David is also listed in The Best Lawyers in America 2018 and is named a 2018 Washington, DC Super Lawyer in the area of Antitrust Litigation, and he has been named among the "Noted Practitioners" in Chambers USA in the area of litigation for Washington, DC.

Oliver Bethell  
Director, EMEA Competition, Google
Mr. Oliver Bethell is currently leading Google's EMEA competition team at Google’s London headquarters. His role involves leadership of a large cross-functional (Policy, Legal, Economists, Product, Eng, Comms) and international in-house and external teams. He is responsible for strategic decision-making and negotiations, working with General Counsel and other SVP level executives, and CEO. Prior to this he worked in private practice at Cleary Gottlieb Steen & Hamilton in Brussels before moving to Google’s in-house team in London in 2008. His experience to-date includes leadership of large cross-functional teams in a range of high-profile international investigations and high-level advocacy and negotiation with regulatory agencies around the world. He is a 14 year qualified barrister with a range of European and US advisory and management experience. Oliver is a graduate of Oxford University and BPP Law School and a member of the Bar of England and Wales.

Michael S. Burkhardt  
Partner, Morgan Lewis
Michael S. Burkhardt represents employers in a wide range of labor and employment disputes, including employment discrimination class actions, systemic discrimination investigations, and multiplaintiff litigation. He handles FLSA and state wage and hour actions, as well single-plaintiff disability, sex, age, and race discrimination claims. He also represents clients in whistleblower and wrongful discharge claims. Michael has experience in all areas of employment litigation and counseling, particularly EEOC systemic investigations, class action litigation, noncompetition litigation; and compensation, promotion, and hiring analyses.

Dr. Alexandre Carbonnel  
Senior Consultant, NERA Economic Consulting (Paris)
Dr. Alexandre Carbonnel co-leads the Antitrust and Competition team in Paris. Dr. Carbonnel has years of experience analyzing economic issues related to competition and regulatory investigations by the European Commission and national competition authorities in France and the UK. He also served as an expert consultant in major commercial litigation.
Dr. Carbonnel’s work spans a wide range of areas in competition law, including cartels and exchanges of information, abuse of dominance, and merger control. He is also an expert in the evaluation of damage claims before courts. He has significant experience in key industries, including telecommunications, pharmaceuticals, e-commerce, agro-alimentary products, and logistics.

Dr. Carbonnel has contributed to economic reports advising national authorities on competition issues and counseling the European Commission on intellectual property rights. He also published on the economic assessment of mergers in the European Competition Law Review and is a guest lecturer in competition economics at HEC Paris and at the European University Institute in Florence.

Prior to joining NERA, Dr. Carbonnel worked as a competition economist in an economic consultancy in Brussels and Paris. He started his career at the Office of Fair Trading in London, where he worked on a high-profile case involving alleged anti-competitive practices in the pharmaceutical industry and also on the assessment of Phase 1 mergers.

He holds a PhD in economics and an MA in mathematical economics and econometrics from the Toulouse School of Economics, and a BA in economics from the University of Lausanne (HEC Lausanne). During his doctoral studies, Dr. Carbonnel was a university lecturer in economics at the Toulouse School of Economics and in the Law School of Toulouse I University.

Dr. Anca Cojoc
Senior Consultant, NERA Economic Consulting (London)
Dr. Cojoc is a Senior Consultant in NERA’s Antitrust and Competition Practices, based in London. She specialises in competition economics, litigation, damages, and regulatory matters.

Dr. Cojoc has almost 10 years of experience as an economist in regulatory agencies and consultancies. She has led client engagements in commercial litigations, market investigations, and mergers across a wide range of sectors, including media and communications, telecommunications, energy, water, financial services, health care, and transportation. She has considerable expertise in implementing applied econometric and statistical models to address competition, regulatory, and policy issues. Dr. Cojoc’s recent work includes advising clients in commercial litigations, market investigations, and mergers; economic analysis to assess liability and estimate potential damages in pending litigation; managing the economic and econometric analysis for a gas and electricity retailer; and research on Big Data in the context of competition policy frameworks.

Prior to joining NERA, Dr. Cojoc provided economic advice and analysis in various commercial litigation cases and mergers in the London office of an economic consultancy. Before that, she was an Assistant Manager in the Competition Economics Team of a “big four” accountancy and a Research Fellow with the American Institute for Economic Research where she conducted research on various public policies. She also worked for the UK Competition Commission (now the CMA) advising on various merger cases and market investigations.

Dr. David Colino
Principal Consultant, Edgeworth Economics
Dr. David Colino is an expert in applied microeconomics and finance who specializes in the application of statistical and econometric tools to litigation and business consulting matters. Dr. Colino’s work focuses on the economics of antitrust and intellectual property, for which he provides rigorous economic and quantitative analysis to address issues of class certification, liability, and damages. He has worked on US and Canadian cases in industries such as electronic components and financial derivatives, and has analyzed economic issues related to antitrust class certification in monopolization and price fixing claims.

Dr. Colino’s academic research has focused on the economics of innovation and intellectual property. At the Massachusetts Institute of Technology, he instructed courses in statistics, microeconomics, and industrial organization, as
well as advanced graduate classes focusing on core issues in antitrust and regulation. Dr. Colino is an articulate and effective communicator who is fluent in three languages. He was awarded numerous prizes and fellowships during his academic studies. Dr. Colino earned his PhD in economics from the Massachusetts Institute of Technology; his Master in economics and finance from CEMFI, Spain; and he is an Ingénieur Polytechnicien from the Ecole Polytechnique, France.

**Dr. Andrea Coscelli**  
**Chief Executive of the Competition and Markets Authority (UK)**  
Andrea Coscelli is the Chief Executive of the Competition and Markets Authority (CMA), which was established on 1 October 2013 and assumed its full functions and powers on 1 April 2014. He is responsible for establishing and managing the new organization and working with the chairman, the board and the executive team. His previous roles include Acting Chief Executive at the Competition and Markets Authority Executive Director, Markets and Mergers at the Competition and Markets Authority, Director of Economic Analysis, Competition Group, Ofcom, Vice-President (Partner), European Competition Practice at Charles River Associates (CRA) International, Associate Director, Lexecon Ltd, and Co-founder of the Association of Competition Economics (ACE). He holds a PhD in Economics from Stanford University.

**Susan Creighton**  
**Partner, Wilson Sonsini Goodrich & Rosati**  
Susan Creighton is co-chair of the firm's antitrust practice. Susan's practice focuses on merger review, government conduct investigations, and antitrust litigation and counseling. Representative matters include serving as lead outside counsel for Google in the Federal Trade Commission's search investigation of the company, and representing Netflix in connection with the Justice Department's investigation of the proposed Comcast/TWC merger.

Susan was named "Lawyer of the Year" by *Global Competition Review* in 2013, and was one of *The National Law Journal*’s "Outstanding Women Lawyers" in 2015. She has testified before the Antitrust Modernization Commission, the Federal Trade Commission, and the Senate on antitrust-related issues. She also has written a number of widely cited articles, including on issues related to mergers, intellectual property, and unilateral conduct.

From 2003 through the end of 2005, Susan served at the Federal Trade Commission as Director of the Bureau of Competition. From 2001 to 2003, she served as Deputy Director of the Bureau under then-Director Joe Simmons. Prior to joining the FTC, Susan wrote the white paper for Netscape that is credited with triggering the Department of Justice's investigation and eventual suit against Microsoft for illegal monopolization.

Susan has served in a variety of leadership roles within the firm, including on the board of directors. 
Prior to joining the firm, she was a law clerk to U.S. Supreme Court Justice Sandra Day O'Connor. She also served as a law clerk to Federal District Judge Pamela Ann Rymer.”

**Kris Dekeyser**  
**Director of Policy and Strategy Directorate, European Commission**  
Kris is Director of the Policy and Strategy Directorate at the European Commission’s Directorate General for Competition. Before taking up his present position, Kris filled numerous management positions across DG Competition – he was in charge of antitrust and merger policy and case support; took up the duties of the European Commission's Cartel Settlement Officer at DG Competition's Cartels Directorate; and he was also Head of the Unit in charge of the European Competition Network and the Private Enforcement initiative.

Kris graduated in both law and political sciences and he is a guest Professor at the Hogeschool-Universiteit Brussel. He is the author of a variety of publications in English and French in the field of competition law. He also regularly delivers lectures at seminars and conferences around the world on both general and specialised areas of
Competition law, variously organised by Universities, Bar Associations, business forums, government organisations, competition enforcement agencies, etc.

**Makan Delrahim**  
**Assistant Attorney General, Antitrust Division, The United States Department of Justice**

Makan Delrahim was confirmed on September 27, 2017, as Assistant Attorney General for the Antitrust Division. Mr. Delrahim previously served as Deputy Assistant to the President and Deputy White House Counsel. Mr. Delrahim’s rich antitrust background covers the full range of industries, issues, and institutions touched upon by the work of the Antitrust Division. He is a former partner in the Los Angeles office of a national law firm. He served in the Antitrust Division from 2003 to 2005 as a Deputy Assistant Attorney General, overseeing the Appellate, Foreign Commerce, and Legal Policy sections. During that time, he played an integral role in building the Antitrust Division’s engagement with its international counterparts and was involved in civil and criminal matters. He has served on the Attorney General’s Task Force on Intellectual Property and as Chairman of the Merger Working Group of the International Competition Network. Mr. Delrahim was also a Commissioner on the Antitrust Modernization Commission from 2004 to 2007. Earlier in his career, Mr. Delrahim served as antitrust counsel, and later as the Staff Director and Chief Counsel of the U.S. Senate Judiciary Committee.

**Dr. Stephanie Demperio**  
**Senior Consultant (Washington, DC), NERA Economic Consulting**

Dr. Demperio conducts economic research and analysis in the areas of antitrust, intellectual property economics, commercial damages, public health and policy, and business valuation. She has supported clients in matters brought before courts and government authorities in the US, Canada, Australia, and the UK.

In antitrust matters, Dr. Demperio has evaluated the competitive effects of mergers and acquisitions, and analyzed antitrust claims and damages in cases involving alleged monopolization and predatory pricing practices. In addition, she has analyzed antitrust impact related to class certification. Her project experience in antitrust matters spans a wide variety of industries including agricultural commodities, auto parts, paper, telecommunications, food products, and pharmaceuticals.

In intellectual property, Dr. Demperio has deep expertise in calculating lost profits and reasonable royalty damages in cases involving patent, copyright, trademark, and trade secret infringement, and has done so in a wide range of industries, including pharmaceuticals, chemicals, and apparel.

She earned her MA and PhD in economics from the University of Virginia, and her BA in mathematical economics, cum laude and with honors, from Colgate University.

**Isabelle de Silva**  
**President, Autorité de la Concurrence**

Isabelle de Silva was appointed president of the Autorité de la concurrence on October 14, 2016 by decree of the President of the French Republic.

Isabelle de Silva is a member of the Conseil d’Etat, the French supreme administrative court, which she joined in 1994 after graduating from Ecole des Hautes Etudes Commerciales (HEC-1990), the Community of European Management Schools (CEMS-1990), the Sorbonne University in philosophy (Paris I-1989) and Ecole Nationale d'Administration (ENA-1994), the French national school for civil service.

After holding different positions as auditeur (1994) and then maître des requêtes (1998) at the Conseil d’Etat, she became commissaire du gouvernement at the Second and then Sixth Chamber of the Conseil d'Etat (2000-2009), and was later promoted to the rank of conseiller d'Etat (2009). She has been appointed as president of the Sixth Chamber of the Conseil d’Etat in 2013, in charge of cases in the field of justice, finance, environment and regulated professions.
She was an adviser to the Minister of Culture and Communications, in charge of the press and the radio (1999-2000), director of legal affairs of the Ministry of Ecology, Sustainable Development, Transport and Housing (2009-2011), and became a member of the sector regulator for press distribution in 2012. She had been a member of the board of the Autorité de la concurrence since 2014.

Isabelle de Silva is an Officer of the French Légion d’honneur, ordre national du Mérite and ordre des Arts et des Lettres.

Alexandre Barreto de Souza
President, CADE
Alexandre Barreto de Souza is the President of CADE. He holds a Master’s degree in Management, a specialization in Public Management and has a Bachelor’s degree in Management from the University of Brasilia (UNB). He is a Federal Auditor of External Control of the Federal Court of Accounts (TCU as per its acronym in Portuguese). From 2000 to 2005, Mr. Barreto worked at the Federal Senate as a Technical Advisor assigned by TCU. At TCU, between 2010 and 2013, he was the Director responsible for the monitoring of state-owned financial institutions. Between 2013 and 2014, he was the Director of the areas responsible for the control over public bids and contracts for all public administration. His work largely involved rationalization of the procedures, fraud prevention and fight against bid rigging. Furthermore, he worked as Chief of Staff of the Minister of TCU.

Daniel Francis
Associate Director for Digital markets, Federal Trade Commission
Daniel Francis joined the FTC in 2018 as Senior Counsel to the Director of the Bureau of Competition. Prior to joining the Commission, Daniel was a Climenko Fellow and Lecturer on Law at Harvard Law School. He is a candidate for the JSD degree at New York University School of Law. Daniel was previously in private practice, where he spent a number of years as a full-time antitrust attorney in Washington, DC, where he focused on the oil and gas, aerospace, defense, and entertainment sectors. Daniel is admitted to the practice of law in New York and the District of Columbia.

Jennifer Giordano
Partner, Latham and Watkins
Jennifer Giordano is a partner in the Litigation & Trial Department and a member of the Firm’s Global Antitrust & Competition Practice.

Ms. Giordano is an experienced antitrust litigator and trial lawyer who has successfully defended clients in cutting-edge federal antitrust cases at both the trial and appellate level. She focuses on complex antitrust cases, including multidistrict litigation, class actions, and strategic business-to-business litigation.

Ms. Giordano has achieved significant victories for her clients at all stages of litigation on a wide variety of antitrust claims, including monopoly, monopsony, price fixing, price discrimination, tying, and state law unfair competition claims.

Cal Goldman
Partner, Goodmans LLP
Cal Goldman is Chair of Goodmans Competition, Antitrust and Foreign Investment group. His practice focuses on all aspects of Canadian competition law, with a particular emphasis on Canadian and international matters before the Competition Bureau as well as foreign investment reviews before Investment Canada. Over the years and in recent years, Cal has acted as counsel in a number of leading competition law and foreign investment review cases in Canada. Cal is a former Director (since renamed “Commissioner”) of the Canadian Competition Bureau and a former Vice Chair of the Organization for Economic Co-operation and Development (OECD) Competition Committee. Cal was the first appointee to the Soloway Chair of Business and Trade Law, University of Ottawa.

Cal is co-chair of the International Chamber of Commerce Task Force on the International Competition Network. He is also on the Executive of the Business at OECD (BIAC) Competition Committee. He is co-chair of the Future of Competition Law Standards Task
Force of the American Bar Association’s Section of Antitrust Law (“ABA SAL”). From 2017-2019 he was co-chair of the National Interest and Competition Law Task Force of the ABA SAL. In 2013-2015, Cal was co-chair of the Foreign Investment and Antitrust Interface Task Force of the ABA SAL. Before that, he held other leadership positions in the ABA SAL. He is also a former chair of the National Competition Law Section of the Canadian Bar Association.

Cal is highly recognized globally as a leading competition lawyer in a number of well-known Canadian and international legal publications.

Dr. Laila Haider
Partner, Edgeworth Economics
Dr. Laila Haider is an expert witness who specializes in economic research and analysis in the areas of antitrust, false advertising, labor and employment, and commercial damages. She frequently testifies in depositions and arbitrations and submits expert reports. Dr. Haider has particular expertise in the application of microeconomics, statistics, and econometrics to litigation issues.

In antitrust, Dr. Haider regularly provides economic testimony and consulting in class actions involving allegations of price fixing, bid rigging, monopolization, and exclusive dealing. She has significant expertise in the economics of class certification, where her focus has been on both direct purchaser and indirect purchaser litigation. Dr. Haider also has extensive experience evaluating damages approaches and critiquing opposing damages models in cases involving antitrust and consumer protection claims. She has also analyzed the competitive effects of proposed mergers and acquisitions. Dr. Haider has provided her expertise in a wide variety of industries, such as the manufacturing, automotive parts, electronics, health care, pharmaceutical, chemical, agricultural products, consumer products, and airline industries.

Dr. Haider has an abiding interest in social reform cases and was among the first lawyers in the U.S. to assert that sexual harassment was a form of discrimination prohibited by Title VII; he successfully tried the first case establishing that principle. He represented Native Alaskans whose lives were affected by the 1989 Exxon Valdez oil spill. Later, he negotiated a then-historic $176 million settlement from Texaco, Inc. in a racial-bias discrimination case. In the landmark O’Bannon v. NCAA litigation, Dr. Haider represented a class of current and former Division I men's basketball and FBS football players against the NCAA and its member institutions, based on rules foreclosing athletes from receiving compensation for the use of their names, images, and likenesses. At the conclusion of a three-week bench trial, the Court determined that the NCAA had violated the antitrust laws and issued a permanent injunction as requested by the plaintiffs. Immediately
following the decision, Michael was named AmLaw Litigation Daily’s “Litigator of the Week,” citing the “consensus among courtroom observers [was] that Michael Hausfeld…got the best of a parade of NCAA witnesses at trial.” Law360 dubbed the trial team led by Michael as “Legal Lions,” citing the firm’s historic victory over the NCAA.

In Friedman v. Union Bank of Switzerland, Michael represented a class of Holocaust victims whose assets were wrongfully retained by private Swiss banks during and after World War II. The case raised novel issues of international banking law and international human rights law. In a separate case, he also successfully represented the Republic of Poland, the Czech Republic, the Republic of Belarus, the Republic of Ukraine and the Russian Federation on issues of slave and forced labor for both Jewish and non-Jewish victims of Nazi persecution. He represented Khulumani and other NGOs in a litigation involving the abuses under apartheid law in South Africa.

Scott Hemphill
Moses H. Grossman Professor of Law, NYU Law
Scott Hemphill teaches and writes about antitrust, intellectual property, and regulation of industry. His research focuses on the law and economics of competition and innovation, and his scholarship ranges broadly, from drug patents to net neutrality to fashion and intellectual property. Hemphill’s recent work examines the antitrust problem of parallel exclusion in concentrated industries and anticompetitive settlements of patent litigation by drug makers. His scholarship has been cited by the US Supreme Court and the California Supreme Court, among others, and has formed the basis for congressional testimony on matters of regulatory policy. Hemphill's writing has appeared in law reviews, peer-reviewed journals, and the popular press, including the Yale Law Journal, Science, and the Wall Street Journal. He joined NYU from Columbia Law School, where he was a professor of law. Hemphill has also served as antitrust bureau chief for the New York Attorney General and clerked for Judge Richard Posner of the US Court of Appeals for the Seventh Circuit and Justice Antonin Scalia of the Supreme Court. He holds a JD and PhD in economics from Stanford, an AB from Harvard, and an MSc in economics from the London School of Economics, where he studied as a Fulbright Scholar.

Dr. Jason Hong
Senior Consultant, NERA Economic Consulting (New York)
A Senior Consultant in NERA’s Antitrust Practice, Dr. Hong joins NERA after serving for three years as an economist in the Antitrust Division of the US Department of Justice. At the Justice Department, he analyzed the competitive effects of proposed mergers and other alleged anticompetitive behavior. Dr. Hong also performed econometric analyses to estimate market demand, executed merger simulations, and evaluated industry claims of increased market efficiency and other pro-competitive justifications of proposed mergers. Dr. Hong’s experience spans a number of industries, including paper products, retail food, consumer appliances, online advertising, and agricultural equipment.

Jeff Jaeckel
Co-chair, Global Antitrust Law Practice Group, Morrison & Foerster LLP
Jeff Jaeckel is a co-chair of Morrison & Foerster’s Global Antitrust Law Practice Group and a member of the board of directors of Morrison & Foerster LLP. Mr. Jaeckel is an experienced antitrust litigator and counselor. He represents foreign and domestic corporations in connection with all manner of antitrust and competition law matters, from M&A strategy and investigations to cartel investigations to civil litigation.

Mr. Jaeckel has notable experience representing public and private corporations in connection with their most significant and complicated antitrust litigation in federal and state courts. He regularly represents clients in all antitrust aspects of complicated transactional matters, including strategy and structuring of transactions to avoid antitrust risk and achieve strategic business objectives, and U.S. and multinational
merger notification and review. Mr. Jaeckel also represents domestic and international companies in connection with government investigations of conduct, including civil investigations relating to monopolization or criminal investigations of alleged price-fixing. Mr. Jaeckel also assists clients in the protection of their intellectual property and counsels clients on the antitrust ramifications of commercial agreements to capitalize on the value of intellectual property.

Mr. Jaeckel represents clients across a range of industries, including pharmaceuticals and medical devices, semiconductors, software, Internet services, transportation, consumer products, telecommunications, and media and entertainment.

Frédéric Jenny
Chair, OECD Competition Committee
Frédéric Jenny holds a Ph.D in Economics from Harvard University (1975), a Doctorate in Economics from the University of Paris (1977) and an MBA degree from ESSEC Business School (1966). He is professor of Economics at ESSEC Business School in Paris. He is Chairman of the OECD Competition Committee (since 1994), and Co-Director of the European Center for Law and Economics of ESSEC (since 2010). He was previously Non-Executive Director of the Office of Fair Trading in the United Kingdom (2007-2014), Judge on the French Supreme Court (Cour de cassation, Economic Commercial and Financial Chamber) from 2004 to August 2012, Vice Chair of the French Competition Authority (1993-2004) and President of the WTO Working Group on Trade and Competition (1994-2003). He was visiting professor at Northwestern University Department of Economics in the United States (1978), Keio University Department of economics in Japan (1984), University of Capetown Business School in South Africa (1991), Haifa University School of Law in Israel (2012). He was Visiting Professor at University College London Law School (2005-2010), Global Professor of Antitrust in the New York University School of Law’s Hauser Global Law School (2014 and 2017) and Senior Fellow in the Online Global Competition and Consumer Law Master’s Program, University of Melbourne (Australia) (2016-2018).

Frédéric Jenny has written extensively about trade, competition and economic development and has served as an adviser to many developing countries on competition and trade issues.

Dr. John H. Johnson IV
CEO, Edgeworth Economics
Dr. Johnson is the CEO of Edgeworth Economics. He has helped build Edgeworth into one of the most prominent economic consulting firms in the world by assembling a group of the brightest, rigorously trained economists. In his consulting practice, Dr. Johnson uses econometrics and economic theory to develop careful analyses in a wide range of antitrust, labor and employment, class action, and damages-related matters. Dr. Johnson frequently writes and presents on economic topics related to litigation, including several highly-cited papers on rigorous analysis in antitrust class actions. A teacher at heart, Dr. Johnson is known for his ability to explain technical concepts in a simple, straightforward manner.

Dr. Johnson provides consulting and testimony that spans all aspects of criminal and civil antitrust litigation, including data discovery and extraction, class certification, liability, and damages.

Dr. Johnson has served as an antitrust expert witness and consultant in the United States, Canada, Europe, and Asia opining on class certification, market definition, anticompetitive effects, liability issues, causation, and antitrust damages, in addition to consulting on antitrust and labor matters on behalf of the NFL Players Association. He is a past Associate Editor of the Antitrust Law Journal.

In the area of labor and employment, Dr. Johnson applies his econometric training in age, race, gender, and pregnancy discrimination litigations, wrongful termination cases, wage and hour disputes, and other labor issues. His work in these areas includes economic issues related to liability in addition to the quantification of damages. Dr. Johnson’s
publications focus extensively on issues related to the Fair Labor Standards Act and the intersection of work and family relationships.

Dr. Johnson’s class action practice focuses on class certification issues in antitrust, data privacy, false advertising, and labor class actions. He constructs and analyzes complex databases, employing sophisticated econometric techniques to determine whether liability and/or damages can be certified on a common, class-wide basis or whether individual inquiry is appropriate. Dr. Johnson has authored several academic papers on antitrust and labor class actions, and coauthored an amicus brief to the Supreme Court in Comcast v. Behrend.

In the area of data privacy and analytics, Dr. Johnson works with companies and outside counsel to provide litigation and consulting support related to the appropriate use and interpretation of complex datasets. As part of Edgeworth’s data analytics and privacy practice, Dr. Johnson helps clients assess potential scope of a data breach, assess theories of injury and harm, and provide assistance with FTC investigations and class actions. On the analytics side, Dr. Johnson provides consulting to help companies translate their internal data into actionable and understandable information in a variety of contexts, such as human resources and business intelligence. Dr. Johnson is a member of the International Association of Privacy Professionals and is a Certified Information Privacy Professional - US Private Sector (CIPP-US). In addition to his roles at Edgeworth Economics, Dr. Johnson is also a member of the Boards of Directors of the National Appleseed Pro Bono Network and the National Archives Foundation.

Dr. Johnson received his PhD in economics from the Massachusetts Institute of Technology and his BA in economics, with highest distinction, from the University of Rochester.

Karen Kazmerzak
Partner, Sidley Austin LLP
Karen Kazmerzak, a former Federal Trade Commission lawyer, has a broad practice counseling clients regarding antitrust matters involved in mergers and acquisitions and concerning antitrust issues in licensing, distribution, pricing, and competitor collaborations. She represents clients seeking merger clearance from the FTC and the U.S. Department of Justice, and clients that are third-party market participants subpoenaed by the government or that oppose an acquisition. Karen also works closely with co-counsel and economists around the world to develop the best global strategy for clients’ advocacy across several jurisdictions, including in the United States. Hailed as “very knowledgeable and easy to talk to,” her clients appreciate her strong legal acumen combined with her ability to address the business issues in an array of industries. In 2018, Chambers recognized Karen as an “Up and Coming” lawyer for her growing presence in the legal industry and driving practice focused on merger work and business compliance counseling.

Mike Kheyfets
Partner, Edgeworth Economics
Mr. Kheyfets is a professional economist who provides his clients with economic research and rigorous data analysis in litigation, regulatory, and business analytics matters. Across his practice, Mr. Kheyfets applies his technical training to develop large datasets, employ sophisticated statistical modeling, and analyze complex issues. He is highly skilled in communicating his findings clearly and concisely to a range of audiences that include business people, legal counsel, and judges and juries.

In the area of antitrust and competition, Mr. Kheyfets advises clients on a broad range of matters, including allegations of price-fixing, monopolization, market allocation, bid rigging, refusals to deal, and tying and bundling. He specializes in all phases of these matters, from managing the data discovery process to class certification, liability, and damages. Mr. Kheyfets also assists his clients with competitive analyses of mergers and acquisitions.

In his privacy and data security work, Mr. Kheyfets applies rigorous empirical analysis to provide clients and outside counsel with answers to complex questions surrounding the scope
of—and potential financial exposure resulting from—a data breach. Mr. Kheyfets holds a CIPP-US (Certified Information Privacy Professional, US Private Sector) certification from the International Association of Privacy Professionals.

Outside of litigation, Mr. Kheyfets serves in an advisory role to his clients, consulting on data-driven approaches to strategic decision-making. He has extensive experience analyzing large datasets as well as developing and validating a variety of models.

Mr. Kheyfets has served in several leadership roles within the American Bar Association’s Antitrust Section, where he educated members of the legal community about issues in data analysis, economics, and statistics.

Mr. Kheyfets received his BA, magna cum laude and Phi Beta Kappa honors, and his MA in economics from Boston University.

William Kovacic
Global Competition Professor of Law and Policy; Professor of Law; Director, Competition Law Center, The George Washington University Law School
Before joining the law school in 1999, William E. Kovacic was the George Mason University Foundation Professor at the George Mason University School of Law. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. He was the FTC’s General Counsel from June 2001 to December 2004. In 2011 he received the FTC’s Miles W. Kirkpatrick Award for Lifetime Achievement.

Since August 2013, Professor Kovacic has served as a Non-Executive Director with the United Kingdom’s Competition and Markets Authority. From January 2009 to September 2011, he was Vice-Chair for Outreach for the International Competition Network. He has advised many countries and international organizations on antitrust, consumer protection, government contracts, and the design of regulatory institutions.

At GW, Professor Kovacic has taught antitrust, contracts, and government contracts. He is co-editor (with Ariel Ezrachi) of the Journal of Antitrust Enforcement. His publications since returning to GW in 2011 are many.

Kai-Uwe Kühn
Academic Advisor, University of East Anglia
Kai-Uwe Kühn is a Professor of Economics and Deputy Director of the Centre for Competition Policy at the University of East Anglia. He holds visiting appointments at the Düsseldorf Institute for Competition Economics (DICE) and Georgetown University. From May 2011 to August 2013, Prof. Kühn was Chief Economist at DG Competition, European Commission. He has advised competition authorities and private firms on competition policy as well as merger, state aid, and antitrust cases for 25 years.

His consultancy work has covered the whole range of competition matters from policy issues (e.g. the Commission Notice on Market Definition (1997), the 1997 Green paper on Vertical Restraints, the 2010 Vertical Guidelines) to mergers (e.g. GE/Honeywell merger (2001) including the court appeal), and antitrust matters (e.g. the Microsoft I on server interoperability). Most recently he acted as an expert in a large number of cartel damages cases, advised on complex antitrust cases (e.g. hotel bookings and another MFN case, radius clauses, and novel forms of exploitative abuses such as privacy and other contractual terms), as well as large number of merger cases in different jurisdictions. During his time as Chief Economist, he advised the Competition Commissioner on all competition cases and policy initiatives (in particular State Aid Modernization) and led the economic analysis on many large mergers (e.g. Deutsche Börse/NYSE, UPS/TNT, Univeral/EMI, H3G/Orange Austria, Western Digital/Hitachi, Outokumpu/Inoxum) and antitrust cases (e.g. Google, e-books, and the Standard Essential Patent cases), often in close cooperation with counterparts at the US agencies.

Prof. Kühn spent most of his academic career as a tenured Associate Professor of Economics at the University of Michigan. His research includes theoretical, experimental, and empirical industrial organization covering a wide range of
topics including durable goods, vertical integration, vertical restraints, market foreclosure, the impact of credit constraints on market behaviour, as well as collusion and the coordinated effects of mergers. It has been published in leading journals like the Journal of Political Economy, the Rand Journal of Economics, the American Economic Journal: Microeconomics, and the Journal of the European Economic Association. He has been the co-editor of the Journal of Industrial Economics.

Karen Hoffman Lent
Partner, Skadden, Arps, Slate, Meagher & Flom LLP

In the antitrust litigation area, Ms. Lent has handled litigations involving price fixing, group boycotts, monopolization, other restraints of trade and class actions. She is representing Citibank in class actions alleging price fixing with respect to U.S. denominated supranational, sub-sovereign and agency bonds; price fixing with respect to VIX products; and a price fixing and group boycott matter regarding U.S. Treasuries. She also is representing Actavis plc in class actions alleging anticompetitive reverse payment settlements regarding branded drugs Lidoderm and Actos; The Vitol Group in class actions alleging price fixing and market manipulation of North Brent Sea Crude Oil; a company in connection with an investigation into “no-poach” agreements; and five New York law schools in a case alleging they and Barbri engaged in a group boycott of a competing bar review course. Other representations include, among others, Anheuser-Busch InBev in connection with an antitrust challenge to its acquisition of Modelo; Pfizer Inc. in a class action alleging monopolization with respect to the drug Neurontin; Ainsworth Lumber Company in an antitrust class action alleging price fixing in the Oriented Strand Board industry; NewYork-Presbyterian Hospital in a putative antitrust class action brought by resident physicians; International Paper Company in an antitrust class action alleging price fixing; and IASIS Healthcare in an antitrust action challenging a series of exclusive contracts.

Ms. Lent has extensive experience counseling professional sports leagues and teams on a variety of antitrust and sports law matters. She is representing the National Collegiate Athletic Association (NCAA) in litigation brought by student-athletes challenging its eligibility rules; the National Football League (NFL) in litigation brought by photographers alleging violations of intellectual property and antitrust laws; the NFL in a class action brought by retired players alleging negligence in administering prescription painkillers; and the NCAA, National Basketball Association (NBA), NFL, National Hockey League (NHL) and the Office of the Commissioner of Baseball in their suit against the state of New Jersey to prevent the authorization and licensing of gambling on the sports leagues’ athletic events. Ms. Lent also represented the NBA in connection with the league’s imposition of discipline upon Los Angeles Clippers owner Donald Sterling; and the NBA and four of its teams in a litigation brought by the Spirits of St. Louis regarding the Spirits’ right to receive a portion of the teams’ television revenues.

She also advised the NBA and its member teams in connection with its most recent labor dispute and lockout and has successfully arbitrated several disputes involving disability insurance coverage for NBA players. Ms. Lent represented the NHL in connection with the Phoenix Coyotes’ attempt to relocate the team, out of bankruptcy, over the league’s objection. She also has provided advice on various issues to Madison Square Garden, the PGA Tour and Collegiate Licensing Corporation.

In the area of general antitrust counseling, Ms. Lent advises clients on compliance with basic antitrust statutes, including issues relating to competitor collaborations, unilateral conduct and distribution. She also presents antitrust compliance programs.

Ms. Lent actively works on pro bono matters, and received the Legal Aid Society Pro Bono Publico Award in 2009 and 2011 for her successful representation of a disabled senior
citizen whose landlord illegally overcharged her monthly rent for several years.

Gail Levin  
Deputy Director, Bureau of Competition,  
Federal Trade Commission  
Gail Levine is a Deputy Director for the Bureau of Competition at the Federal Trade Commission. She oversees a wide variety of mergers, conduct investigations, and antitrust litigation, particularly in health care and high tech. Gail joined the FTC in October 2018.

Gail joined Uber in 2016 as the Head of U.S. Regulatory Affairs, overseeing advocacy nationwide on a wide range of regulatory issues. She later served as Director of U.S. Competition Law at Uber, overseeing antitrust litigation, deals, competition advocacy and counseling nationwide. Before joining Uber, Gail was Vice President and Associate General Counsel at Verizon Communications Inc., where she shaped the company’s patent policy program, led the patent prosecution team, directed the company’s Federal Trade Commission initiatives, and handled antitrust matters.

Before joining Verizon, Gail was an attorney advisor to the Chairman of the Federal Trade Commission, advising on antitrust and intellectual property issues. Before joining the Chairman's office, Gail was the FTC’s Deputy Assistant General Counsel. She was a significant contributor to the FTC’s report on intellectual property and innovation, and she co-authored many other FTC reports on antitrust and high-tech issues. Before joining the FTC, Gail was a trial lawyer in the Civil Division of the U.S. Department of Justice.

Gail has served on the Council of the Antitrust Section of the American Bar Association, the ABA Presidential Transition Task Force, and the ABA Presidential Task Force on Pleading Standards.

She clerked for Judge Royce Lamberth of the U.S. District Court for the District of Columbia and Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. She graduated magna cum laude from Harvard Law School, where she was an editor of the Harvard Law Review.

Carrie C. Mahan  
Partner, Weil, Gotshal & Manges LLP  
Carrie is a partner in Weil’s Washington DC office, where she has a diverse practice advising clients on antitrust and consumer protection issues in government investigations and private litigation, as well as mergers, acquisitions, and joint ventures.

Ms. Mahan has extensive experience representing clients in all major antitrust venues, including both state and federal courts and federal, state and international competition and consumer protection enforcement agencies. Her ability to develop unique arguments under complex antitrust theories has led her to play a leading role in the defense and overall strategy for many key clients, including large joint defense groups. She has secured victories for clients in major nationwide antitrust class actions at critical stages, including dismissal without discovery at Rule 12, defeating class certification, and prevailing at summary judgment. Most recently she was appointed as liaison counsel for nineteen defendants in the federal antitrust class actions and direct action complaints being litigated in In re Broiler Chicken Antitrust Litigation.

Ms. Mahan has worked closely with clients to secure approvals of proposed mergers, acquisitions and joint ventures from the Department of Justice and the Federal Trade Commission, as well as favorably resolving a number of non-public investigations by the Federal Trade Commission into trade association and joint venture conduct and activities without litigation or public disclosure. She also represents clients in criminal investigations before the Antitrust Division, including a recent grand jury investigation in the media industry. Finally, Ms. Mahan is frequently relied upon by clients to help guide their day-to-day business decisions and manage risk related to questions of pricing, technology, customer and vendor relationships, and overall strategic direction. Her clients value her pragmatic advice and creative
thinking in the development of novel strategies for improving compliance programs and mitigating risk.

Ms. Mahan is consistently recognized for Antitrust Litigation by Super Lawyers and recommended for Civil Litigation/Class Actions by Legal 500 US, where clients have noted she is “very smart and assertive.”

**Dr. Craig Malam**
**Associate Director, NERA Economic Consulting (San Francisco/Sydney)**

Dr. Craig Malam has more than ten years’ experience conducting economic research and analysis as part of investigations and litigation relating to competition issues, and for regulatory decision-making in Australia and the United States. He is currently based in NERA’s San Francisco office.

While in San Francisco, Dr. Malam has supported antitrust experts engaged in merger, cartels, bid-rigging, and breach of contract proceedings, across the consumer electronics, health care, retail, construction, and software industries. While working from NERA’s Sydney office, Dr. Malam conducted economic research and analysis for mergers across a range of industries including mining, gambling and wagering, retail mobile services, and waste/recycling.

As an economist at the Australian Competition and Consumer Commission (ACCC) Dr. Malam regularly conducted economic research and analysis to assist investigation teams and Commissioners across a range of competition and antitrust matters including mergers, price fixing, misuse of market power, and predatory pricing. His industry experience spanned cable television, cinema exhibition, supermarkets and primary production, automotive distribution, as well as financial markets.

**Melissa H. Maxman**
**Managing Partner, Cohen and Gresser**

Melissa H. Maxman is the Managing Partner of the firm’s Washington, D.C. office. She has decades of litigation experience at both the trial and appellate levels, primarily in the areas of antitrust, RICO, environmental law, complex commercial disputes, and white collar defense. She has extensive experience advising domestic and foreign corporations on global antitrust issues. She has represented clients in complex civil and criminal matters before the Federal Trade Commission, the Antitrust Division of the Department of Justice, and in private civil matters. Melissa has been recognized in Legal 500’s U.S. guide in the commercial litigation and corporate investigations and white collar defense categories.

Prior to joining Cohen & Gresser, Melissa was the Chair of the Antitrust and Trade Regulation Practice Group in the Washington, D.C. offices of two large national law firms. She served as an Assistant United States Attorney in the Eastern District of Pennsylvania and was a law clerk for the Honorable Harry T Edwards of the United States Court of Appeals for the District of Columbia. Melissa is a cum laude graduate of the University of Michigan Law School, where she was editor-in-chief of the Michigan Law Review.

Melissa has been a member of the American Law Institute since 2003. She is also an Advisory Board member for the Institute for Consumer Antitrust Studies and is Co-Chair of the ABA National Institute on Class Actions. She is the immediate past chair of the Dean’s National Advisory Council for the Columbian College of Arts and Sciences at the George Washington University. She serves as Co-Chair of the Exemptions and Immunities Committee of the ABA Antitrust Section. University of Michigan Law School (J.D., cum laude, 1988); George Washington University (B.A. 1983).

**William Michael**
**Partner, Paul Weiss Rifkind**

A partner in the Litigation Department, Bill Michael has extensive experience in antitrust litigation, including both civil and criminal government investigations, as well as other complex commercial litigation and appellate matters.
Bill previously served as Chair of the Editorial Board of *The Antitrust Practitioner*, a publication of the American Bar Association’s Section of Antitrust Law Civil Practice and Procedure Committee. He is the co-author of the “United States” chapter in the tenth and eleventh editions of *The Public Competition Enforcement Review* and the co-author of the chapter titled “Settling an Antitrust Case” in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement*. Bill has also authored several articles on antitrust-related issues for publications that include the *New York Law Journal*, *Law360* and *Competition Policy International*. Bill was recognized in the 2018 edition of *The Legal 500 US* as a Recommended Lawyer in the Antitrust: Civil Litigation/Class Actions category.

Prior to joining Paul, Weiss, Bill was a trial attorney in the Antitrust Division of the United States Department of Justice, where he focused on civil merger and non-merger investigations in the telecommunications and media industries.

In law school, Bill was a senior editor of the *Yale Law Journal*.

**Andreas Mundt**  
**President, Bundeskartellamt**  
Andreas Mundt has been President of the Bundeskartellamt since 2009, member of the Bureau of the OECD Competition Committee since 2010 and the Steering Group Chair of the International Competition Network since 2013. After qualifying as a lawyer, Andreas Mundt entered the Federal Ministry of Economics in 1991. In 1993 he joined the staff of the Free Democratic Party in the German Parliament. In 2000 he joined the Bundeskartellamt as rapporteur and later acted as Head of the International Section and Director of General Policy.

**Gabriella Muscolo**  
**Commissioner, Italian Competition Authority**  
Since May 2014, Gabriella Muscolo is a Commissioner at the Italian Competition Authority.

Appointed as a Judge in 1985, she sat at the Specialist Section for Intellectual Property and Competition Law in the District Court of Rome and at the Court for Undertakings in Rome. From 2009 to 2014, she was appointed member of the Enlarged Board of Appeal-EBA of the European Patent Office-EPO. Since 2018, she is a Fellow of the Centre of European Law of King’s College London.

Since 2008, Gabriella Muscolo has been lecturer of Company Law at the School of Specialization for Legal Professionals at the University of Rome – La Sapienza. She also lectured at Italian and foreign Universities such as Université de Strasbourg, CEIPI-Centre d’Étude International de la Propriété Intellectuelle, Technische Universität Dresden, Universidad de Alicante, Queen Mary University, University of Washington, CASRIP- Center for Advanced Studies and Research in Seattle and Waseda University in Tokio.


James H. Mutchnik, P.C.
Partner, Kirkland & Ellis

Jim represents corporate and individual clients in antitrust and white collar crime defense matters and related commercial litigation matters in federal and state courts throughout the United States and before a variety of federal and state investigative agencies, including the Antitrust Division, United States Department of Justice, the Federal Trade Commission, United States Attorney’s Offices and the Securities and Exchange Commission. In the antitrust area, Jim specializes in litigating various matters involving domestic and international cartels, alleged price fixing, monopolization claims, price discrimination and representing clients in dealing with the antitrust aspects of mergers, acquisitions and joint ventures. Jim’s white collar crime defense and internal investigation matters cover price fixing, accounting fraud, FCPA violations, securities fraud and insider trading, public corruption, environmental crimes and other corporate crime issues. Jim is recognized annually by Chambers USA and Chambers Global as one of America’s Leading Business Lawyers in Antitrust and has been recognized as a leading lawyer by The International Who’s Who of Competition Lawyers and Economists. He has been recognized as an “Illinois Super Lawyer” by Super Lawyers magazine and was also recognized in recent editions of The Legal 500 U.S. for his “practical advice and superb service” in the area of Antitrust. Most recently, Best Lawyers recognized Jim as the Litigation – Antitrust Lawyer of the Year. Jim is the head of Kirkland’s e-discovery training program for attorneys and legal assistants. His prior work for the Antitrust Division and character were featured in the major motion picture, The Informant, and book of the same name.

Sharis Pozen
Co-Head, Global Antitrust Practice, Clifford Chance

Sharis Pozen is the Co-Head of the Global Antitrust Practice at Clifford Chance. She has extensive experience in both government and private practice. Over the course of her career, Sharis has held senior positions at GE, the U.S. Department of Justice, the U.S. Federal Trade Commission and two major law firms based in New York and Washington, D.C.

Prior to joining Clifford Chance, Sharis was the Vice President of Global Competition Law and Policy at GE, where she was responsible for merger clearance on numerous significant, transformational deals, steering global antitrust investigations to positive conclusions, antitrust compliance and other related issues.

Sharis is one of the few antitrust practitioners who has served in high-level positions at both the U.S. Department of Justice and the U.S. Federal Trade Commission.

While working at a major New York-based law firm, Sharis was a partner and a leader in their antitrust and competition practice, where she advised clients on a broad spectrum of antitrust issues related to mergers and acquisitions, litigation, criminal investigations and counseling across national and multinational industries, including technology and telecommunications, health care and pharmaceutical, energy, financial services, transportation and agriculture.

While serving as acting assistant attorney general at the U.S. Department of Justice, Sharis led many high-profile matters and worked extensively with leaders of international antitrust authorities. She also oversaw several criminal antitrust matters.

Prior to working at the U.S. Department of Justice, Sharis was a partner at a major Washington, D.C.-based firm, where she served as a director of the firm’s Antitrust Group. Her practice focused on antitrust issues and trade regulation across a broad spectrum of industries.
Enrico Adriano Raffaelli  
**Founding Partner, Rucellai & Raffaelli**  
Enrico is a graduate of the Milan University of Studies and has been a lawyer since 1976. He was a Founding partner of the Rucellai & Raffaelli law firm in 1979. Enrico specializes in national and European Community competition law (repeatedly Highly Recommended individual, PLC Which Lawyer? and Notable Pratitioner, Chambers Partner Europe), intellectual property law, commercial law, commercial litigation and national and international commercial arbitration.

William Rinner  
**Counsel to the Assistant Attorney General, The United States Department of Justice**  
William Rinner is Counsel to the Assistant Attorney General, joining the Antitrust Division in September 2017. Among other responsibilities, he has advised the Assistant Attorney General on matters in the Appellate, Healthcare and Consumer Products, and Competition Policy and Advocacy sections, as well as on policy issues involving technology and intellectual property. Before joining the Division, Bill was an antitrust litigator in private practice in Washington, D.C. Bill previously clerked for the Honorable Richard Posner of the United States Court of Appeals for the Seventh Circuit. Bill is a graduate of Yale Law School and University of Notre Dame.

Howard Shelanski  
**Partner, Davis Polk**  
Howard Shelanski earned his B.A. from Haverford College and received his J.D. and Ph.D. in economics from the University of California at Berkeley. After graduating from law school he clerked for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit, Judge Louis H. Pollak of the U.S. District Court in Philadelphia, and Justice Antonin Scalia of the United States Supreme Court. After practicing law in Washington, D.C., Professor Shelanski joined the Berkeley faculty in 1997, where he remained until coming to Georgetown in 2011.

Professor Shelanski has held several positions in the federal government. From 2013 to 2017, he served as Administrator of the White House Office of Information and Regulatory Affairs (OIRA). Before President Obama nominated him to OIRA, Professor Shelanski was Director of the Bureau of Economics at the Federal Trade Commission from 2012 to 2013, where he had previously been Deputy Director from 2009 to 2011. Earlier in his career, he was Chief Economist of the Federal Communications Commission (1999-2000) and a Senior Economist for the President’s Council of Economic Advisers at the White House (1998-1999).

In addition to being a member of the Georgetown Law faculty, Professor Shelanski practices antitrust law and is a member of the law firm of Davis Polk & Wardwell LLP. Professor Shelanski’s teaching and research focus on antitrust and regulation. In addition to numerous articles, he has co-authored leading casebooks, treatises and edited volumes in both antitrust and telecommunications law.

Joseph J. Simons  
**Chairman, Federal Trade Commission**  
Joseph J. Simons was sworn in as Chairman of the Federal Trade Commission on May 1, 2018. Before joining the Commission, Joe was a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and Co-Chair of the firm’s Antitrust Group. His practice there focused on antitrust M&A, litigation, and counseling. Prior to joining Paul, Weiss, he was the Director of the FTC’s Bureau of Competition from 2001 until 2003, and he also served an earlier stint at the Bureau of Competition from 1987 to 1989 as Assistant to the Director, then Assistant Director for Evaluation, and finally Associate Director for Mergers. Along with a former chief economist of the Department of Justice Antitrust Division, Joe developed “Critical Loss Analysis,” a technique for market definition that has been adopted and used widely by the Antitrust Division, the FTC, and the U.S. Court of Appeals. It has also been incorporated into the DOJ/FTC Horizontal Merger Guidelines. He received his A.B. in Economics and History from Cornell University in 1980 and his J.D.,
cum laude, from Georgetown University Law Center in 1983.

Joe lives in Virginia with his wife, Martha. They have six children between them.

Paul Stuart
Barrister, Cleary Gottlieb
Paul Stuart’s practice focuses on UK and EU antitrust law and litigation.

Paul has advised clients on a wide range of disputes and investigations, and represented clients in proceedings before the EU General Court, the EU Commission, the Court of Appeal, the High Court, and the Competition Appeal Tribunal.

Paul’s antitrust litigation experience includes acting for LG Display in a follow-on damages claim by iiyama before the English High Court and Court of Appeal, for Sony in a follow-on damages claim by Microsoft Mobile that was stayed in favour of arbitration, and for NSK in a follow-on damages claim by Peugeot before the Competition Appeal Tribunal. Paul has also acted in European Court proceedings for the European Central Bank, Western Digital, and Google.

Paul joined Cleary Gottlieb in 2010 as an associate and was resident in the Brussels office from 2010 to 2012. Paul is listed as a Future Leader in Who’s Who Legal Competition and co-authored the Best Business Procedure article at Concurrences’ 2018 Antitrust Writing Awards.

Dr. Will Taylor
Senior Consultant, NERA Economic Consulting (Auckland)
Dr. Taylor is an Associate Director in NERA’s Antitrust and Competition; Energy; and Communications, Media, and Internet Practices. He provides expert analysis and advice to clients across New Zealand and Australia in matters involving antitrust, regulatory, and financial economics. Dr. Taylor regularly assists clients dealing with complex regulatory issues, merger and abuse of market power investigations and quantum disputes in litigation and arbitration.

In the field of competition economics, Dr. Taylor advises clients on mergers and acquisitions, contracting issues, and allegations of anticompetitive practices. His most recent case experience has involved analysis of the antitrust implications of technological disruption in the pay TV, insurance, broadband, and news/media markets. His broader experience spans industries including health care, manufacturing, forestry, retail, agriculture, transport, electricity generation and distribution, and waste.

In the regulatory sphere, Dr. Taylor has extensive experience in the design and operation of regulatory regimes and access pricing for communications services (fixed and mobile), energy networks (gas and electricity), airports, ports, and dairy. On energy matters more broadly, he has advised clients on market design, transmission pricing reform, and transmission governance in the gas sector. Dr. Taylor seamlessly brings together his extensive experience on both regulatory and competition issues, enabling him to provide highly valuable analysis and expertise to businesses on market studies and inquiries by governments and regulators. These studies typically assess competition and, if it is lacking, consider regulatory interventions.

Dr. Taylor’s expertise in financial economics is brought to bear in quantum disputes regarding infrastructure access, fair trading and misrepresentation claims, and commercial damages arbitrations and litigation.
T. Scott Thompson, PHD  
Partner, Bates White Economic Consulting

Scott Thompson specializes in antitrust analysis of alleged anticompetitive conduct. He has significant methodological expertise and extensive experience using economic models and empirical techniques to assess and quantify predicted effects of proposed mergers, agreements, and single-firm conduct.

Dr. Thompson has an extensive background providing antitrust analysis in support of expert testimony and enforcement decisions. Since joining Bates White he has represented clients before the Federal Trade Commission and the Antitrust Division of the US Department of Justice, and has worked often with clients and testifying experts on matters in litigation. Dr. Thompson’s recent work on litigated matters includes the FTC’s litigation against Qualcomm, DOJ’s opposition to the AT&T Time-Warner merger, and DOJ’s opposition to Electrolux’s acquisition of GE’s major appliance business.

Prior to joining Bates White, he served as staff economist and the Assistant Chief of the Economic Regulatory Section of the Antitrust Division. In that role, Dr. Thompson conducted or supervised the agency’s economic analysis in numerous antitrust investigations in a wide variety of industries including computer software, healthcare, health insurance, investment products, payment systems, financial services, and medical technology. Dr. Thompson has extensive experience in econometrics, simulation, survey design and analysis, analysis of vertical and horizontal restraints, and merger analysis.

Prior to joining the Antitrust Division, Dr. Thompson taught and conducted research in the field of econometrics as Assistant Professor at the University of Minnesota.

Over the course of his career, Dr. Thompson has contributed to the academic literature on market definition and market power, two-sided markets, theoretical econometrics, and international trade. He authored parts of the ABA Section of Antitrust Law’s treatise Econometrics (2005), and coauthored a chapter in The Antitrust Revolution, Seventh Edition.

Dr. Nicola Tosini  
Associate Director (Berlin), NERA Economic Consulting

Dr. Nicola Tosini is an Associate Director in NERA's Antitrust and Competition Practice, primarily based in Berlin. He is an expert in the application of empirical and conceptual analysis to competition cases and has more than 10 years of experience advising firms during merger reviews, antitrust investigations, and the litigation of damages.

Dr. Tosini has submitted economic evidence to the European Commission and several national competition authorities. He has also been involved in the litigation of cartel damages before national courts, providing key input for court filings, settlement discussions, and expert reports.

Dr. Tosini’s experience spans a variety of industries, including automotive parts, building materials, chemicals, consumer packaged goods, electronics, freight transport and forwarding, passenger air travel, pharmaceuticals, retail, and telecommunications. He regularly speaks at conferences and writes articles on topics in competition economics. His article on the importance of innovation in the assessment of mergers has been awarded the Concurrences 2019 Antitrust Writing Awards.

Before joining NERA in 2016, he was an economic consultant in London and Berlin. He holds an MA and a PhD in economics from the University of Pennsylvania, and a Laurea in economics from Università Bocconi in Milan. He is a native Italian speaker and is also proficient in English and German.

Darren Tucker  
Partner, Binson & Elkins

Darren Tucker is the chair of the firm’s antitrust practice group, where he focuses on merger and non-merger antitrust investigations in the technology, energy and pharmaceutical sectors. Darren draws on both his experience as a former Federal Trade Commission attorney and his more than 15 years in private practice to provide valuable insights to clients regarding
competition enforcement and policy issues. He advises clients on a range of pricing and distribution issues and helps clients close mergers, acquisitions and joint ventures worth billions of dollars annually.

In addition to representing clients before the Department of Justice and the Federal Trade Commission, Darren has extensive experience on competition matters outside the U.S., having counseled clients on antitrust matters in Europe, Canada, Japan, China, South Korea, Taiwan, Russia and Australia. He is skilled at collaborating with local counsel around the world, and he is among the few attorneys whose practice includes global dominance investigations.

**Ingrid Vandenborre**  
**Partner, Skadden, Arps, Slate, Meagher & Flom**

Ingrid Vandenborre is a partner at Skadden, Arps, Slate, Meagher & Flom. She is the managing partner of the firm’s Brussels office and currently serves on the firm’s governing body, the Policy Committee. Her practice focuses on EU and international merger control and competition law enforcement. Ms. Vandenborre has consistently been named as a leading practitioner in Who’s Who Legal guides in both competition and life sciences. She was recognized by Global Competition Review on various occasions, including being profiled as a leading antitrust attorney in its 2013 and 2016 Women in Antitrust issues.

She has successfully assisted companies in obtaining conditional immunity with the European Commission and other competition law agencies in and outside the EU. Ms. Vandenborre also is representing companies in proceedings before the European General Court against European Commission findings of cartel infringements, and is involved in the defense against civil claims arising from these findings. Recent representations include the immunity and leniency applicants in the EU power cables and car battery recycling cartel investigations, respectively. She currently serves as non-governmental adviser to the intergovernmental International Competition Network in relation to matters concerning cartel enforcement and private litigation.

Ms. Vandenborre is a graduate of the Catholic University of Leuven in Belgium and completed part of her law studies at Duke University School of Law. She holds an LL.M. degree from the University of Chicago Law School and is an alumna of the Belgian American Educational Foundation.

**Dr. Claire Xie**  
**Senior Consultant, NERA Economic Consulting (New York)**

Dr. Claire Xie is a Senior Consultant in NERA’s Antitrust and Intellectual Property Practices, where she conducts economic analysis in the areas of antitrust, intellectual property, and commercial damages.

In antitrust matters, Dr. Xie has evaluated the competitive effects of mergers and acquisitions, and has analyzed antitrust claims and damages in cases involving alleged monopolization and price fixing behaviors in industries such as agriculture, data management, finance, fuel retailing, pharmaceuticals, and telecommunications. In the area of intellectual property, Dr. Xie has evaluated damages resulting from patent infringement and breaches of contract in the apparel, credit card, and pharmaceuticals industries.

Dr. Xie received her PhD and MA in economics from the University of Minnesota, Twin Cities, where she also taught microeconomics, macroeconomics, money and banking, and Chinese economy. She received her BA in economics and mathematics, summa cum laude, from Agnes Scott College.

**Koren W. Wong-Ervin**  
**Director of Antitrust & IP Policy & Litigation, Qualcomm Incorporated**

Koren W. Wong-Ervin is the Director of Antitrust & IP Policy & Litigation at Qualcomm Incorporated, a Senior Expert and Researcher at China’s University of International Business and Economics, and an Academic Advisor at China's University of Political Law & Science.
Prior to joining Qualcomm, Koren was the Director of the Global Antitrust Institute (GAI) and an Adjunct Professor of Law at George Mason University. While at GAI, Koren (along with Judge Douglas Ginsburg, Josh Wright, and Bruce Kobayashi) trained over 350 foreign judges and enforcers and submitted over 20 comments on foreign draft laws and guidelines.

Prior to joining George Mason, Koren was Counsel for Intellectual Property and International Antitrust in the Office of International Affairs at the U.S. Federal Trade Commission. She also served as an Attorney Advisor to Federal Trade Commissioner Joshua Wright.

Prior to working at the Commission, Koren spent almost a decade in private practice, focusing on antitrust litigation and government investigations with a particular focus on issues affecting clients in the technology and financial industries.

Koren currently serves on the American Bar Association (ABA) Section of Antitrust Law’s International Task Force and Due Process Task Force, and was previously co-chair of the ABA’s 2016 Antitrust in Asia Conference. From 2012 to 2015, she served as a vice chair of the Intellectual Property Committee within the Section of Antitrust Law. Prior to that, she served on the editorial boards of Antitrust Law Developments (7th edition), the leading two-volume antitrust treatise, and the 2003 Annual Review of Antitrust Law Developments, an annual supplement to the fifth edition of the treatise.

Koren graduated second in her class from the University of California, Hastings College of Law, where she was associate editor of the Hastings Law Review. She earned her BS degree magna cum laude in Political Science from Santa Clara University.

Tim Wu
Julius Silver Professor of Law, Science and Technology at Columbia Law School


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‘A couple of dozen’ states are considering an antitrust probe of Big Tech, says DOJ official

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**KEY POINTS**

“I think it’s probably safe to say more than a dozen. A couple of dozen state attorneys general have expressed an interest in the subject matter,” Delrahim says.

The Justice Department says in July that it is opening a review into potential antitrust concerns in the technology sector.

The department does not name specific companies that are under review, but shares of Amazon, Alphabet and Facebook all slump immediately afterward.
A top antitrust official at the Department of Justice said Tuesday that “a couple of dozen states” are interested in investigating Big Tech for antitrust concerns.

Makan Delrahim, the assistant attorney general for the antitrust division, said a large bipartisan group of state attorneys general spoke to the Justice Department about starting a joint investigation into technology companies.

“I think it’s probably safe to say more than a dozen. A couple of dozen state attorneys general have expressed an interest in the subject matter,” Delrahim said at the Technology Policy Institute’s Aspen Forum.

The Justice Department announced last month that it is opening a review into potential antitrust concerns in the major online platforms, saying the review will “consider the widespread concerns that consumers, businesses, and entrepreneurs have expressed about search, social media, and some retail services online.”

The Justice Department did not name specific companies that were under review, but shares of Amazon, Alphabet and Facebook all slumped immediately following the July announcement. The stocks of all three companies were roughly 1% on Tuesday, along with major market indices.

Delrahim said the Justice Department intends to work together with the states on their probe, adding that cooperation benefits all parties involved. There is not a set timeline for the investigation, Delrahim said.

Major technology companies have drawn scrutiny from federal lawmakers and regulators about how they handle user data and disseminate information. The skepticism has spread to new projects, with Facebook’s proposed cryptocurrency, Libra, receiving pushback from Washington soon after it was announced.

The Wall Street Journal first reported the news of the state effort. It is not clear which states would be part of the investigation.

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Apple health team faces departures as tensions rise over differing visions for the future

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KEY POINTS
Two-Sided Platforms Are Becoming ever more relevant with the growth of financial services and online markets, and courts around the world are currently grappling with how to apply the antitrust laws to such platforms and, in particular, when the two sides of a platform should be considered a single market.1

This article discusses the current legal framework in the United States precipitated by the U.S. Supreme Court’s June decision in Ohio v. American Express Co.,2 in which the Supreme Court held that, because credit card networks are two-sided platforms that facilitate instantaneous transactions, such platforms experience “pronounced indirect network effects” and, therefore, must be considered a single product market.3 Thus, the Court held, to determine whether prices are inflated above a competitive level in the market for credit card transactions, a court must examine the “overall” price across the platform.4

Defining the Two-Sided Platform

At the outset, it is important to distinguish between a two-sided platform and a two-sided market. In antitrust jurisprudence, a two-sided platform is distinct from a two-sided market, and describes a business model in which a single firm provides interrelated products or services to two or more groups of users with the result that demand from each group will be affected by demand from the other group.5 In contrast, in economic literature, the terms “two-sided market” and “two-sided platform” are used interchangeably to refer to what is known in antitrust jurisprudence as a two-sided platform, which can be either a single- or a two-sided product market depending on the nature of the product or service provided and the interactions involved.6

In Amex, the Supreme Court declared that “[t]wo-sided platforms offer different products or services to two different groups who both depend on the platform to intermediate between them.”7 The Court went on to explain that, as a result of the interrelation between the two sides, such platforms exhibit “indirect network effects,” meaning that “the value of the two-sided platform to one group of participants depends on how many members of a different group participate,” and “the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases.”8

In addition to credit card networks like those at issue in Amex and other payment networks, examples of two-sided platforms include:9

- Media, such as newspapers and magazines (both print and online connect advertisers and readers), TV and cable (connecting advertisers and viewers), and social media networks (connecting advertisers and users);
- Search engine services (connecting search users, advertisers, and operators of webpages);
- Global distribution systems (connecting airlines and travel agents);
- Online real estate platforms (connecting buyers, sellers, and agents);
- Job site owners (connecting employers and employees);
- Insurance (insurers connect providers and subscribers);
- Stock exchanges and auction houses (connecting sellers and buyers);
- Dining services, such as Open Table (connecting restaurants and diners);
- Ride-sharing services, such as Uber and Lyft (connecting drivers and riders); and
- Online distribution platforms, such as the Apple App Store (connecting app developers and iPhone users),10 ticketing services (connecting event organizers and ticket offices), and other online marketplaces (e.g., Amazon, eBay, etc., all of which connect sellers and buyers).

Two-sided platforms generally are not found to constitute a single product market but, rather, would encompass one or more related product markets, each of which is defined through the traditional interchangeability inquiry described below.11

Interchangeability: The Default Market Definition Inquiry

Market definition is a factual issue. The default antitrust market definition test, established by the Supreme Court in
**The Supreme Court’s Amex Decision**

The Supreme Court’s decision in Amex addressed claims that American Express’s contractual provisions precluding merchants from steering customers to other networks constitute an unreasonably anticompetitive restraint. The Court held that: (1) Amex and other credit card networks are two-sided instantaneous transaction platforms that constitute a single two-sided market—consisting of merchants on one side and cardholders on the other—for the purposes of analyzing competitive effects, and (2) the government plaintiffs did not establish that Amex’s anti-steering rules violated Section 1 of the Sherman Act.

The majority explained that, due to the enhanced indirect network effects in the credit card transaction market, “[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex’s anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.” For these reasons, the Court concluded, two-sided instantaneous transaction platforms such as the one at issue must be considered one market; “competition cannot be accurately assessed by looking at only one side of the platform in isolation.” Accordingly, “courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.”

The Court attached particular significance to two features of the platform at issue in Amex.

**Instantaneous Transaction Platforms.** The holding of the Amex majority decision was limited to what the Court characterized as “a special type of two-sided platform,” known as a “transaction” platform, pursuant to which a supplier “cannot make a sale to one side of the platform without simultaneously making a sale to the other.” As a result, there are some takeaways that may be applicable only to the credit card industry and similar simultaneous transaction markets, which are likely limited to other transaction providers, such as stock exchanges, auction houses, and ride share businesses.

**Pronounced Indirect Network Effects.** The Supreme Court also held in Amex that the instantaneous nature of the transactions provided by credit card networks produces “pronounced indirect network effects.” Indirect network effects exist when “the value of the two-sided platform to one group of participants depends on how many members of a different group participate. In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases.”

The Court explained that the need to consider both sides of the platform in the case before it was due to “more pronounced indirect network effects,” which it considered to be unique to two-sided platforms providing instantaneous transactions.

As next discussed, however, there may be other takeaways with broader application.

**Legal Framework for Two-Sided Platforms Going Forward**

The Supreme Court’s decision in Amex was not issued in isolation—several other courts have tackled or are still tackling questions regarding the application of the antitrust laws to two-sided platforms.

First, it is important to recognize that the issues in Amex are limited to vertical restraints—conduct involving a supplier’s dealings with two or more categories of customers. Thus, the Amex decision has no application to horizontal restraints, even if the defendants also may be otherwise engaged in vertical relationships. Indeed, there generally is no need for market definition in cases involving horizontal restraints, which usually involve per se antitrust violations.

Second, the majority’s holding is narrow: by focusing only on the merchants’ side of the platform, the plaintiffs did not satisfy the first step of the rule of reason analysis required in the case because they did not carry their burden of establishing that Amex’s anti-steering provisions have anticompetitive effects in the two-sided transaction market as a whole. Accordingly, a challenge to Amex’s anti-steering provisions that considers its effects on both merchants and cardholders should still be possible. In fact, such an amended complaint was filed in July by a group of merchants.

**The Interchangeability Requirement Remains Alive and Well.** The Supreme Court noted in Amex that it is not always necessary for a court to consider both sides of a two-sided platform. Rather, non-instantaneous transaction two-sided platforms should be treated as separate markets. For example, the Amex decision revisited the Supreme Court’s decision in Times-Picayune and declared that, because of the minimal indirect network effects in the newspaper advertising industry, the market properly was characterized as single-sided despite the two-sided nature of the platform.
Justice Breyer explained in his Amex dissent, when the two sides of a platform are interrelated but not interchangeable or involved in a simultaneous transaction, the relevant product market should be limited to the side of the platform in which the anticompetitive restraint is alleged.31

Similarly, in one of the first decisions to interpret the Amex ruling—the current NCAA college athlete compensation case—Judge Wilken limited the Supreme Court’s decision to “[t]wo-sided transaction platforms [that] ‘facilitate a single, simultaneous transaction between participants,’” which are unique “[b]ecause of this directly proportional and simultaneous consumption on both sides.”32 Judge Wilken went on to differentiate the market in NCAA, explaining that “the market participants and their interactions are nothing like what the Supreme Court observed in the context of credit-card transactions in American Express. There is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes ‘only one product.’”33

Other two-sided platforms that should not be defined as single markets likely include: media markets where firms sell advertising and content, such as newspapers, magazines, television and cable, and social media networks; search engines; dating clubs; ticketing services; internet marketplaces; health insurers (engaged in separate transactions with providers and patients); and, importantly, online distribution platforms. While certain of these platforms—particularly those that operate online—may at first glance appear to meet the Court’s test to be considered single markets due to their provision of “instantaneous” services, the service offered is not a transaction, and therefore lacks the necessary “directly proportional and simultaneous consumption on both sides.”34

The Intersection of Amex and Apple. In an upcoming Supreme Court antitrust case, Apple Inc. v. Pepper,35 Apple has argued that its App Store is a “two-sided marketplace for connecting developers and consumers,” and points to several analogous online platforms providing intermediary services—including Ticketmaster, eBay, and Google’s Play marketplace.36

Thus, the question arises, is Apple’s App Store an instantaneous transaction platform, such that it should be considered a single market under Amex? Verizon posed these very inquiries in its amicus brief in Pepper, hypothesizing that,

The court’s recent decision in Amex suggests that Petitioner’s App Store is a transaction platform. This means that there are purchasers on both sides of the platform, and as Amex makes clear, these purchasers—app developers and iPhone users—are best understood as purchasing the same item—transactions. In other words, the App Store appears to be a transaction platform with direct purchasers on both sides.37

Although Apple provides a single product, that product is not the transaction consummated directly between the app developer and the consumer, but rather a distribution service. Apple and other online marketplaces carry out the same function as brick-and-mortar distributors. First, the app developer lists its product (the app) on the App Store; Apple then holds the app until the consumer decides to buy it. Thus, while the service may appear to be instantaneous because it is provided through an online platform, Apple essentially acts as an aftermarket for the original product (the app). Accordingly, as Verizon has suggested, these online marketplaces may serve two sets of direct purchasers but, counter to Verizon’s analysis and unlike a credit card transaction, the service they provide is not an instantaneous transaction.

The Rule of Reason Analysis to Be Applied to Two-Sided Markets. As the Amex decision highlighted, an important question for courts grappling with two-sided platforms in the future is whether to place the burden on the plaintiff, in the first step of a rule of reason analysis, to address the competitive consequences of the conduct at issue on both sides of the platform, or to require the plaintiff to establish the anticompetitive consequences of the conduct on only one side of the platform, with the burden of establishing the procompetitive aspects placed on the defendant in step two of the analysis.

As already noted, according to both the Second Circuit and Supreme Court, the district court in Amex improperly took the latter approach in a trial showing anticompetitive effects only on the merchant side of the platform instead of considering both sides of the platform for the purposes of demonstrating anticompetitive effects in step one. The Supreme Court declared that this disregarded the “pronounced indirect network effects” in instantaneous transactions.38

It is unfortunate that the Supreme Court placed the burden of proof on the plaintiff as part of its step one obligation in a two-sided platform case, even though the required information is in the hands of the defendant. It might be asked what obligation is left for the defendant in step two of the rule of reason analysis.

Also of significance, the Supreme Court did not consider the dramatic consequences Amex’s anti-steering provisions have on the indirect network effects. Similar to a most-favored nation clause, the anti-steering rules disrupt the elements of choice that both merchants and cardholders should have in completing their transactions efficiently by blocking essential communications between the two parties, thereby obstructing the network effects that should otherwise be so significant.
Conclusion

As the lower courts begin to apply to the Supreme Court’s ruling in *Amex* that, due to the “pronounced indirect network effects” between the two sides of the credit card network, the platform should be a considered a single product market,

it is likely that the direct effect of the decision will be limited to those few two-sided platforms that similarly provide instantaneous transactions.40

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41 138 S. Ct. 2274 (2018) (*Amex*).

42 Id. at 2286; see also Lapo Filistrucchi, Damien Geradin, Eric Van Damme & Pauline Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 n.8 (2014) (explaining network effects) (“Demand is characterized by a direct network effect when consumers’ willingness to pay for a product depends on the number of other consumers (or the quantity bought) of the same product; demand is characterized by an indirect network effect when consumers’ willingness to pay for a product depends on the number of consumers (or the quantity bought) of another product.”).

43 *Amex*, 138 S. Ct. at 2286.

44 See, e.g., Michael Katz & Jonathan Sallet, Multisided Platforms and Antitrust Enforcement, 127 Yale L.J. 2142, 2143 (2018) (“Many of the world’s most prominent firms today operate as ‘platforms’ that facilitate interactions among different groups of users.”).

45 See, e.g., Filistrucchi et al., supra note 3, at 296 (“[A] two-sided market is a market in which a firm acts as a platform: it sells two different products to two groups of consumers, while recognizing that the demand from one group of consumers depends on the demand from the other group and, possibly, vice versa.”) (citing David S. Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. on Reg. 325 (2003)). But see Katz & Sallet, supra note 5, at 2143 (“Many of the world’s most prominent firms today operate as ‘platforms’ that facilitate interactions among different groups of users.”).

46 *Amex*, 138 S. Ct. at 2280.

47 Id. at 2280–81.

48 See Jean-Charles Rochet & Jean Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006) (“Examples of two-sided markets readily come to mind. Videogame platforms, such as Atari, Nintendo, Sega, Sony Play Station, and Microsoft X-Box, need to attract gamers in order to persuade game developers to design or port games to their platform, and they need games to induce gamers to buy and use their videogame console. Software producers court both users and application developers, client and server sides, or readers and writers. Portals, TV networks, and newspapers compete for advertisers as well as ‘eyeballs.’”); David S. Evans & Michael Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 675 (2005) (“Advertising-supported media, such as magazines, newspapers, free television, and web portals, are based on a two-sided business model. The platform either creates content (newspapers) or buys content from others (free television). The content is used to attract viewers. The viewers are then used to attract advertisers.”).


50 See, e.g., Times-Picayune Pub’g Co. v. United States, 345 U.S. 594, 612 n.31 (1953) (“For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose ‘cross-elasticities of demand’ are small.”).


52 345 U.S. 594.

53 Id. at 610.

54 *Amex*, 138 S. Ct. at 2274.

55 Id. at 2286–87.

56 Id. at 2290.

57 Id. at 2287.

58 Id.

59 Id. at 2286.

60 Id. at 2280.

61 Id. at 2286.

62 Id. at 2280–81 (internal citation omitted).

63 Id. at 2286.


65 See In re NCAA Grant-In-Aid Cap Antitrust Litig., No. 14-MD-02541 CW, 2018 WL 4241981, at *4–*5 (N.D. Cal. Sept. 3, 2018) (NCAA) (noting “material and obvious differences” between that case and Amex because “the restraints at issue in this litigation are horizontal agreements among competitors to limit student-athlete compensation, which is alleged to constrain competition among the universities; by contrast, the restraint analyzed in American Express was a vertical agreement between a single credit card company, American Express, and the merchants who participate in that credit card company’s network.”).

66 As the Supreme Court explained, “Under the three-step rule of reason framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.” *Amex*, 138 S. Ct. at 2294 (internal citations and quotations omitted).


68 *Amex*, 138 S. Ct. at 2286.

69 Id.

70 Id. at 2295–96, 2302 (Breyer, J., dissenting).

71 NCAA, 2018 WL 4241981, at *3 (quoting Amex, 138 S. Ct. at 2280).

72 Id. at *4.

73 Id. at *3.


77 *Amex*, 138 S. Ct. at 2286.

78 Id.
Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge

BY JAMES KEYTE

The EU’s recent antitrust fines against several leading international tech and platform firms are startling: Google was fined $5.1 billion for alleged tying and exclusivity arrangements related to pre-installed search and $2.7 billion for allegedly “favoring” its own comparison shopping service; Qualcomm was fined $1.22 billion for allegedly paying Apple not to buy chips from rivals; and Intel was fined $1.3 billion (which was set aside by the EU Court of Justice) based on the claim that it abused loyalty rebates. But why are these firms penalized in the EU for dominance “abuses,” yet they go unscathed in the United States for the same or similar practices?

Some in the business community view these divergent outcomes as “techlash”— outright frontal attacks on U.S. innovation and success; others attribute it to differences in enforcement systems and objectives, including the EU’s continuing effort to build a discrimination-free “internal market” among Member States. In the midst of these dramatically different outcomes, both jurisdictions, at least publicly, continue to seek convergence on monopoly/dominance law and policy to the extent feasible.1

The goal of this article is two-fold: first, to provide a summary of where full or partial convergence has occurred; second, and perhaps more importantly, to detail the procedural and substantive areas of continued divergence.

Setting the Stage

To start, there are simple differences that are not likely to change any time soon. Article 102 is both more specific and broader than Section 2 of the Sherman Act, and the enforcement and judicial systems also are quite distinct. Unlike in the U.S., in the EU’s administrative law system, the Commission is the investigator, prosecutor, and decision maker; it does not have to go to court to impose penalties or other remedies. Moreover, in contrast to the U.S., the Commission’s decisions are given significantly more discretion with respect to competition policy choices and the assessment of complex economic issues.

Yet, in broad terms, there has been significant convergence over the past decade and a half. Since the early 2000s, the EU has been committed to using much more economic analyses in its assessment of dominant firm behavior, which to a significant degree is consistent with the use of economic analyses in the U.S. courts since the late 1970s. For example, last year’s Intel decision3 solidified a move away from non-rebuttable to rebuttable presumptions for certain dominant firm practices (there, loyalty discounts), which also aligns more with Sherman Act principles insofar as the focus is on actual effects rather than formalistic categories. And both the EU and the U.S. are committed to a “consumer welfare” focus, even if, as I discuss below, the adopted flavors are a bit different.

Where, then, is the divide? The key differences can be summarized as follows:

- The EU’s view of “dominance” is broader than “monopoly” in the U.S.
- The EU places a “special responsibility” on dominant firms not to “distort competition” in any market; the U.S. does not.
- At least in the context of alleged foreclosure through exclusivity arrangements, the EU places the burden on the dominant firm to prove that its conduct did not foreclose (and was not “capable of” foreclosing) competition or, alternatively, that the conduct was “objectively necessary” to achieve customer-related efficiencies. In the U.S., both the government and private plaintiffs carry a relatively heavier burden of proof throughout a Section 2 case.
- The EU does not require likely “recoupment” for price-related predation (predatory pricing, margin squeezes). In the U.S. it is a prerequisite.
- The EU wishes to create or protect rivalrous market structures and readily accepts raising rivals’ costs (RRC) theories as a basis for proving a “distortion of competition” in the dominant firm’s market. The U.S. is more tolerant of dominant market structures (especially resulting from innovation or efficiencies) and looks more to consumer welfare metrics to assess overall market harm, including after considering efficiencies and other justifications.
- The EU accepts “leveraging” into a separate market as an overarching Article 2 concern. In the U.S. that theory died with Trinko.4
- The EU allows (though cautiously) for a duty to deal under an “essential facilities”-type doctrine. In the U.S. that notion, too, is all but dead.

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Much of this divergence stems from the U.S. courts’ concern with “false positives”—erroneously condemning pro-competitive or neutral conduct—as well as a reluctance to undertake judicial intervention (and, effectively, oversight) of complex, unilateral business practices. Given these procedural and substantive differences, it is fair to observe that, absent a unifying process and analytical framework, the Atlantic divide on monopoly/dominance policy and law will persist.

The Different Statutes and Systems

**Article 102 Is Both Broader and More Specific.** The foundational differences between U.S. monopoly law and EU dominance law and policy are quite significant and derive from diverse historical contexts. Section 2 arose from the concern over the consolidation and power of the great U.S. trusts and was enacted in 1890 along with Section 1 of the Sherman Act. As written, Section 2 does not tell us much: “Every person who shall monopolize . . .”5 Instead, Section 2 is only understood through a lengthy common law history that includes the rise and fall of various per se categories as well as the enormous impact that different economic schools of thought (i.e., the Chicago School and the “Post-Chicago” School) have had on Section 2 jurisprudence. In recent decades, in particular, U.S. courts have become extremely cautious about presuming the expertise to determine the difference between pro- and anticompetitive conduct of monopolists.

In Europe, by contrast, the prohibition against “abuses of dominance” was introduced in Article 86 of the 1954 Treaty of the European Economic Community (TFEU), which, even at its inception, sought to open markets and level the playing field across Member States—a distinctly “ordoliberal” influence.6 Historically, what is now Article 102 places a premium on the freedom to compete, and the increased choice that brings, which is reflected in the language itself.

Among other things, Article 102 “abuses” include:

- “imposing unfair purchase or selling prices or other unfair trading conditions”;
- “limiting production, markets or technical development to the prejudice of consumers”;
- “applying dissimilar conditions to equivalent transactions . . .”; and
- “making . . . contracts subject to acceptance . . . of supplementing obligations which . . . have no connection with the subject of such contracts.”7

On the surface, the differences in the statutes are significant. Section 2 says nothing about an “abuse,” let alone by “limiting production” (which effectively is the same as raising prices). Likewise, the concept of “unfairness” referenced in Article 102 is foreign to Section 2. And while violations for “price discrimination” and “tying-related” conduct may fall within certain interpretations of Section 2, Article 102 incorporates these prohibitions directly into the statute, which is consistent with a rule-based, administrative law system. Finally, while neither the Sherman Act nor the TFEU includes any notion of proving harm to ultimate consumers or assessing efficiency justifications, decades of U.S. common law have led to the requirement that the monopolist’s conduct harm consumers. Moreover, under U.S. law, an alleged monopolist always has the opportunity to justify its conduct on efficiency or other procompetitive grounds—essentially a rule of reason standard. By contrast, Article 102 on its face and as applied over several decades (with the exception of Intel, discussed below), historically operated much like a per se rule, presuming irrebuttable harm where the Commission found that the conduct fit into an “abuse” category. And while, in theory, one could argue about effects and efficiencies, these seemed to carry little weight.

**DG Comp Has More Discretion than U.S. Enforcers.** An often-overlooked distinction between the U.S. and the EU is that the Commission does not have to go to court to impose a penalty or other remedy on a party. Moreover, on complex economic issues or policy choices, the reviewing courts in the EU grant the Commission broad discretion (although the EU courts have much broader powers to assess the appropriateness of fines).8 In sharp contrast, the DOJ and FTC cannot unilaterally “impose” any relief on a party, but instead must first seek and obtain that relief from a federal judge who, in turn, is charged with following case law both on the substance of the alleged violation and the scope of the remedy. Moreover, the common law system gives U.S. courts, including the Supreme Court, significant latitude to interpret Section 2 of the Sherman Act to delve deeply into complex economic issues that often are determinative.

The natural consequences of these systemic differences are subtle, but far reaching. The EU Commission is relatively free to pursue whatever substantive policy or theory of liability it chooses, subject only to later review (with the limitations noted above). That flexibility also applies to what competition policies to pursue through Article 102, a concept that in the U.S. would be limited by what realistically could be achieved in court.

Another key difference between the two jurisdictions is that, in the EU, there is not the same constant feedback from the courts that we find in the U.S. common law system, which might otherwise help clarify the scope and application of Article 102. For example, without that flow of case-law guidance, the Commission may find itself interpreting Intel for years without further clarification from EU courts. The simple point is that any opportunity for convergence driven by case law is made more complicated by the different processes of the two systems. These differences can be exacerbated by rapidly changing markets that can make any case law pronouncements themselves seem immediately outdated.

**Use of Economic Analyses and the Consumer Welfare Paradigm**

**The EU Uses Economics, but the Flavor Is Distinctly Post-Chicago.** In terms of economic influences between the two jurisdictions, one sees an interesting blend of conver-
gence and divergence with respect to distinct economic schools of thought. At the risk of oversimplification, the battleground is drawn between the Chicago School, which focuses on price effects and efficiencies and continues to influence the U.S. courts, and the Post-Chicago School, which is grounded in game theory and posits that there are predatory strategies that, under certain conditions, can harm consumers by first harming rivals in a variety of ways and degrees. Post-Chicago economics underlies most current theories of market foreclosure, so-called raising rivals’ costs, and other forms of exclusionary conduct. And while these more recent economic theories have had significant influence on the U.S. agencies (and many courts), in the EU they seem all but fully embraced by the Commission.

The dichotomy makes a certain amount of sense, at least historically. Not only do the EU’s history and statute (as written) reference “fairness,” the use of modern economics in EU analyses did not come into play until the early 2000s—i.e., the EU never experienced the full force of Chicago School economics as did the U.S. agencies and courts. Thus, while the U.S. may still be viewed as significantly influenced by Chicago School thinking—including the recent AMEX decision (discussed below)—the EU Commission began to focus on economic analyses when concepts of foreclosure, leveraging, and raising rivals’ costs had become prominent in the economic literature. The relatively greater influence that Chicago School economics has had on U.S. courts is subtle, but important: even where Post-Chicago School economics is accepted by U.S. courts, there remains a strong focus on whether any alleged foreclosure results in power over marketwide price, and any such effect must also be weighed against any efficiency or other justifications. As I describe below, in the EU, by contrast, these limitations appear nascent.

The EU Focuses More on “Leveling the Playing Field.” Another subset of what many view as two of the competing economic schools of thought relevant to U.S./EU divergence revolves around the question of whether “monopolies” and dominant firms are in fact good for innovation—the classic Schumpeter versus Arrow debate. In the 1940s, Harvard economist Joseph Schumpeter proposed that the high profits that come with monopoly provide the incentive to innovate and that the “gales of creative destruction” in that quest are good for consumers. By contrast, Kenneth Arrow wrote in the 1960s that innovation and consumers are best served by the pressure of having more competitors in a market and, therefore, monopolists seek to preserve the status quo. While some economists do not necessarily see these views as conflicting, their differences and their influences are readily apparent.

In the U.S., for example, one can clearly see a Schumpeter theme behind the Trinko articulation that the ability to charge monopoly prices is “an important element of the free market system” that “attracts business acumen in the first place.” In sharp contrast, in the EU, excessive pricing is itself an “abuse” under Article 102; hence, the pursuit of “monopoly rents,” even in the context of competition “for the market,” does not fit neatly within EU substantive law. Equally important, the EU appears much more interested in promoting “rivalry” among current and prospective firms (and the attendant expansion of “choice”), which in turn leads to a focus on ensuring market structures with multiple participants. In the U.S., however, protecting “rivalry as such” is not an objective, and the courts, as well as the antitrust agencies, are much more willing to accept highly concentrated markets that flow from innovation or efficiencies, including network effects.

A variation on the theme is that, in the U.S., all firms, including monopolists, can vigorously engage in competition “for the contract,” including those agreements that in varying degrees foreclose opportunities for current or prospective rivals. To be sure, various pricing or contracting practices by monopolists can raise foreclosure concerns in some circumstances—e.g., unjustifiable long-term exclusives, coercive tying, etc.—but the contrast in the EU for this type of competition remains sharp. The EU seems concerned, however, with any agreements involving dominant firms that disadvantage rivals, even if those agreements themselves are the result of a competitive process. And while a EU defendant can argue that any foreclosure is overcome by objective efficiencies or justifications (e.g., the prevention of “free riding”), those arguments, to date, are not reflected in the outcomes of any litigated cases.

The EU’s Focus on Consumer Welfare Centers More Around Protecting Rivalry. There are those who would say that the U.S. and the EU have converged by focusing on consumer welfare as a guiding principle for enforcement and judicial decisions. That is true if one thinks of a prior time when the EU condemned certain practices quite formalistically without regard to any demonstrable impact on markets or consumers.

Yet, in large part because of Articles 102’s history and the EU’s related policy objectives, the EU’s understanding of consumer welfare in the Article 102 context appears grounded more in how the conduct in question affects rivals, choice, and entry barriers than it does ultimate consumers. Again, while the Article 102 Guidance speaks in terms of protecting competition, not competitors, there seems to be a presumption of sorts that harm to rivals, or just making the playing field less “level,” necessarily harms consumers or raises sufficient risk of such harm to warrant intervention. And, no doubt, there are those in the Post-Chicago School of economics who would support that inference.

U.S. courts, on the other hand, have remained fairly dedicated to the idea, even in the context of Post-Chicago economics, that consumer welfare (in the sense of harm to ultimate consumers) must be diminished, which requires proof of market-wide anticompetitive effects (e.g., on price, quality, or output) that are not outweighed by procompetitive efficiencies or justifications. The difference is evident, for
example, in the contrasting outcomes of the U.S. and EU investigations into Google’s comparison shopping services. The FTC acknowledged that Google’s conduct may have harmed rivals, but found no basis to find market-wide harm to consumers,\(^20\) whereas the EU fined Google $2.7 billion. Likewise, in the recent AMEX decision, the Court appeared inclined to endorse the solidly Chicago School view of Section 2 in suggesting that increases in output (or other indicators of market efficiency and health) trump harm to rivals, including under theories of raising rivals’ costs.\(^21\)

Where Significant Divergence Remains

“Dominance” Is Easier to Show in the EU. One important area of divergence is the threshold question of what can constitute “monopoly power” or “dominance” in the first place. In the U.S., this statutory requirement often is proven indirectly with evidence of high market shares in well-defined antitrust markets, typically those that exceed 60–70 percent, coupled with high entry barriers and fairly static market dynamics. In the EU, however, “dominance” can be found with market shares below 40 percent as long as the Commission finds that the firm has the ability to behave independently of its competitors, customers, and consumers.\(^22\) This difference in and of itself can lead to significant divergence (although in most recent EU actions involving high-tech or platforms, the firms in question have been found to have particularly high shares, subject to contentions over market structure and marketplace dynamics).

The EU Places “Special Responsibilities” on Dominant Firms. By far, the most fundamental overarching difference between the U.S. and the EU is that, in the EU, “dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets.”\(^23\) This special responsibility—again, rooted in the “disempowering” objectives of ordoliberalism—was first recognized by the Court of Justice in the early 1990s when all forms of exclusionary conduct were effectively deemed anticompetitive by rule.\(^24\) Accordingly, one may question whether this mandate currently makes sense as the EU courts and the Commission continue to shift to an economic assessment of effects flowing from challenged conduct.

The 2009 Guidance Paper, however, is clear on the continued vitality of this special responsibility framework, explaining that the scope of that responsibility “must be considered in the light of the specific circumstances of each case.”\(^25\) We know from the Guidance Paper that the Commission reads that as a duty “not to allow [a dominant firm’s] conduct to impair genuine undistorted competition on the common market.”\(^26\) And, elsewhere, the Guidance Paper speaks in terms of not “impair[ing] effective competition,” creating “obstacles to competition” or “hampering competition from competitors.”\(^27\) In essence, because of this special responsibility—informed by Post-Chicago School economics—the EU bars dominant firms from engaging in practices that make it more difficult for rivals (current and potential) to compete “on the merits” by foreclosing market opportunities. Hence, there is less of a focus on preventing certain market-wide outcomes (as in the U.S.) and more of an aim to promote and preserve a rivalrous competitive process, which in a large sense is presumed to protect ultimate consumers.

A Heavier Burden of Proof for “Dominant Firms.”

Post-Intel, the burden-shifting paradigm under Article 102 is now clear and it, too, sharply contrasts with U.S. procedure. To start, the EU identifies situations where a dominant firm may be engaging in conduct that the Commission believes “forecloses” rivals. As there is no judicial review of that threshold decision, the bar is not particularly high for the Commission. That characterization then creates a rebuttable presumption that vertical restrictions of dominant firms are unlawful. The burden then shifts to the dominant firm to show that its conduct is not “capable of” foreclosing competition, including under some of the Intel factors.\(^28\) If the dominant firm “puts forward good enough arguments,” the Commission would then have to “show that the conduct can indeed foreclose competition.”\(^29\) Finally, the dominant firm can attempt to prove that its conduct is “objectively necessary” or “produces substantial efficiencies which outweigh” the actual or potential foreclosure effect.\(^30\)

In practice, this burden-shifting paradigm weighs heavily against the dominant firm. It would seem relatively easy, for example, for the Commission to find potential foreclosure effects and then conclude that the dominant firm has failed to prove a negative—that the conduct is “incapable” of foreclosing competition in a way that may “distort” competition in any market. And even if the firm comes forward with sufficient evidence to shift the burden back to the Commission, it would also seem fairly easy for the Commission to find that the conduct is likely to impede or foreclose rivals, because the Commission does not also have to prove actual or likely market-wide effects—at least not to the same extent that the U.S. agencies would have to in court.

The EU Does Not Require Recoupment for Price-Related Predation. More substantively, a major area of divergence concerns condemning predatory pricing—the notion that a monopolist can invest in below-cost pricing (or bidding or margin squeezes) with the prospect of driving out rivals. Starting with Brooke Group,\(^31\) U.S. courts have required allegations and proof of likely “recoupment”—i.e., that the firm is likely to drive out rivals to the degree that it can later raise prices, enhance its monopoly power, and harm consumers. As U.S. courts observe, the strategy appears rarely attempted,\(^32\) and there are very few cases on the strategy in any form.

In the EU, however, there does not appear to be a recoupment requirement. Presumably, the theory is that a rational firm would only engage in such conduct if there were a real prospect of benefiting from it. Or, at a minimum, it is conduct that “harms rivals” or unbalances the playing field (and,
certainly, there are RRC theories centered around predatory pricing). Either way, these are major differences that are unlikely to change.

The divide between the U.S. and the EU on price discrimination and margin squeezes is equally significant. In the U.S., these are grouped within the predatory pricing paradigm as they typically involve lower prices to some group of customers (in both monopoly and monopsony settings), and raise concerns of removing consumer benefits with potential false positives. Accordingly, both price discrimination under Section 2(a) of the Robinson-Patman Act and margin squeezes under Section 2, require demonstrable proof of the ability to recoup—again, a very difficult standard to meet. In the EU, by contrast, the probability of recoupment for these parties is not required, and the agencies and the courts appear to assess the conduct more in a Post-Chicago framework. Hence, price discrimination and margin squeezes pose risk to firms if their conduct appears to raise rivals’ costs and injure significant competitors under, for example, the “as efficient competitor” test.

The EU embraces “leveraging” as an overreaching theory. A critical difference between the U.S. and the EU centers around how a monopolist or dominant firm may behave to “maintain” its market position (assuming it was achieved appropriately). In the U.S., the notion is that even a monopolist may compete aggressively, including where it harms rivals or creates entry barriers (for example, through innovation, scale efficiencies, or network effects), as long as its conduct can be viewed as “competition on the merits.” Hence, monopolists can engage in exclusive dealing arrangements, loyalty rebates, and even tying or bundling as long as those agreements are not coercive and do not unduly foreclose competition from rivals in a way that demonstrably harms ultimate consumers. While this may sound similar to the EU standard, the key difference is that, in the U.S., courts are not trying to preserve “rivalry as such” and will let even “destructive competition” take place absent significant foreclosure of markets balanced against the promotion of innovation or demonstrable efficiencies. Indeed, many in the U.S. (and elsewhere) take the position that proving net harm to ultimate consumers under RRC and foreclosure strategies is either inherently speculative or too complex for judicial intervention.

The EU, however, appears willing to intervene to foster competitive market structures and maintain the opportunities of smaller rivals and new entrants. In this respect, the EU focuses on any conduct by dominant firms that may impact rivals (especially those that would otherwise be equally efficient), “distorting” competition and, in turn, ultimately harm consumers. In essence, the EU’s premise is that “leveling the playing field” is the best way to promote innovation, protect consumer welfare, and help create one internal EU market.

The EU embraces “leveraging” as an overreaching theory. A critical and transparent difference between the U.S. and the EU is on the subject of “leveraging” as a Section 2 or Article 102 violation. “Leveraging” is the notion of a monopolist or dominant firm (of one market) engaging in conduct that adversely distorts competition in a second market in which the acting firm is not dominant. The conduct can involve a range of behaviors, including tying, exclusive (complete or partial) contracts, loyalty programs, etc. The key is that the stronger position in one market is “leveraged” into a separate market in a way that gives the monopolist or dominant firm an advantage that it otherwise would not have.

In the U.S., the doctrine was alive and well for decades, especially in the Second Circuit through the Kodak decision, and was followed by several other circuits as well. But that all came to a crashing halt in Trinko where the Court explained that, as a matter of statutory interpretation, for a Section 2 violation there must be either monopolization of the second market or at least proof of “attempt” to monopolize (a theory not available in the EU). Thus, with the stroke of a pen, leveraging was gone in any Section 2 case (other than per se tying) that allegedly involves extending monopoly power from one market into another. Moreover, even if plaintiffs were able to convert those cases to Section 1 challenges of vertical “agreements,” they would still have to deal with proving market-wide harm to competition and combating the proffered justifications for the vertical agreements—no small task in the U.S. Finally, even for tying or bundling, in the U.S. Microsoft decision, the per se rule was effectively discarded for markets involving high-tech products sold as a bundle (or other circumstances where the distinctions between two products are blurred or efficiency justifications are plausible).

In the EU, however, emboldened by a large dose of Post-Chicago economics, leveraging has settled in as a standard theory of exclusion and harm. In fact, the notion of leveraging to harm rivals underlies most of the large dominance fines in the headlines since Intel. Thus, while the Commission often lays out its reasoning under what appear to be standard theories of tying or exclusive dealing (complete or partial), at the end of the day a foreclosure leveraging theory would appear to suffice. At a minimum, the notion of leveraging, and any related evidence, likely will continue to be a major focal point of agency investigations and enforcement activity in the EU and in a large sense will ensure some degree of continued Atlantic divide.

The EU continues to accept the notion of “essential facilities.” The EU notion of so-called essential facilities in many ways mirrors the U.S. doctrine, which had a long but limited life that imposed a duty to deal with rivals under Section 2. But that duty, too, was effectively killed by Trinko, just not as directly. In the U.S., there is a high premium on being able to keep and “exploit” what one creates, and absent an Aspen-like unjustifiable withdrawal from an otherwise profitable and open-ended collaboration with a rival, there is no “duty” to deal with or help rivals, no matter the effects on the market.
For its part, the EU has narrowed its version of the essential facilities doctrine, but it is still available under certain conditions as it is in several other non-U.S. jurisdictions. It also has some consistency with a tradition in the EU of trying to keep the playing field level, a history inconsistent with Section 2 jurisprudence and the U.S. courts’ reluctance to interfere with innovation incentives and property rights.

Seeking Convergence Remains a Laudable Goal

Assuming the areas of convergence and divergence detailed here are close to the mark, the question then is what, if anything, to do about it? As a threshold matter, I assume convergence remains a valuable objective with the aim of increasing predictability and avoiding divergent outcomes, where possible. The difficulty, however, is that very little flexibility lies on the U.S. side. Absent re-writing the Sherman Act, Section 2 common law is so deeply developed that U.S. agencies have little discretion to expand the reach of Section 2 in ways that may close the divide. Again, they would have to get a court (and then appellate courts) to agree to any shift that, for example, more expansively adopted Post-Chicago School thinking. The question, then, becomes whether the European Commission—which does have greater discretion—should consider changes that might close the gap.

Here are a few ideas for the Commission to consider. First, rather than flowing from an umbrella “special responsibility,” it might promote convergence to shift EU policy to an Article 102 standard founded more completely on an effects-based analysis of consumer harm (including justifications). Second, a consumer welfare standard that relies in part on protecting “rivalry as such” as a prophylactic proxy for ultimate consumer harm tends to protect competitors over consumers in the dominant firm’s market, especially in the short run. The EU may want to consider a standard of foreclosure that requires demonstrative proof of power over price (including output and quality) in the relevant market. Third, “leveraging” as a broad basis to find anticompetitive harm creates a flexibility that tends to render the more exacting elements (and economics) of tying, exclusive dealing, etc., superfluous rather than focusing on actual consumer harm in separate markets; this theory, too, may benefit from a market-wide harm requirement. Fourth, imposing duties to deal under interpretations of antitrust laws—as opposed to direct legislation—tend to create significant innovation disincentives, which the EU recognizes but has not definitively resolved. Finally, the likelihood of convergence may increase if the burden of proving these substantive requirements always remained with the Commission—after all, it is the entity seeking to impose penalties and remedies (without having to go to court). This could precipitate a greater focus on evidence of actual harm to consumers rather than theories of potential harm that may be viewed as inherently speculative.

There also remains an important practical consideration weighing in favor of seeking further convergence, especially from the EU perspective. In our global, digital economy, some of our greatest innovations lead to market structures that are highly concentrated and also naturally result in significant scale and network-efficiency advantages for the successful innovator. Arguably, such “creative destruction”—and resulting market concentration—is as much a manifestation of “competition on the merits” as any artificially created marketplace focused on the number of rivals.

This is not to suggest that “monopolists” or dominant firms cannot improperly “foreclose” rivals and harm ultimate consumers—which they can—but rather that it may not be a useful policy to turn on those whose mere success creates dominant market structures and efficiency advantages. Indeed, as long as dominant firms in the EU (and Member States)—especially, successful innovators—are exposed to a much higher relative risk than in the U.S. and elsewhere, it may continue to be difficult in the EU to attract the risk capital that often backs the next generation of successful (and potentially dominant) firms in the digital economy. While most would agree that substantive antitrust standards should not be sacrificed to this other form of competition, these considerations may well be a factor in the EU’s broader policy objectives.

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3 Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:EU:C:2017:632 (GC Sept. 6, 2017).


7 Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) 47 (formerly Article 82 TEC).

8 See Laguna de Paz, supra note 2.


12 See Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (1942).


14 See Jonathan B. Baker, Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation, 74 ANTITRUST L.J. 575 (2007); Carl Shapiro, Competition and
that the central criticism of the Post-Chicago School is that it relies on “possibility theorems” that are “seldom met in the real world”).


See Laitenberger, supra note 1 (summarizing recent EU enforcement actions).


See generally Laitenberger, supra note 1 (summarizing recent EU enforcement actions).


Economics

Should Government ‘Pick Winners’? It’s Worked Before

Eight books on what’s known as industrial policy show the successes and the failures.

By Noah Smith
August 22, 2019, 7:30 AM EDT

On both sides of the political aisle, U.S. leaders are becoming more interested in industrial policy — government efforts to promote the growth of certain sectors of the economy. The idea has figured prominently in Senator Elizabeth Warren’s policy proposals, blueprints for a Green New Deal and conferences on the future of conservatism. Even the International Monetary Fund, long a bastion of economic orthodoxy, recently put out a paper entitled “The Return of the Policy That Shall Not Be Named: Principles of Industrial Policy.”

This is good. But because the idea was relegated for decades to the margins of economic thinking, debates about industrial policy can still degenerate into declarations that government “can’t pick winners,” or vague references to the success of East Asian economies. To help foster a more productive conversation, here are some books and papers to get people thinking about industrial policy.

This short, readable book is less about how to do industrial policy, and more about why to do it. Giving a variety of examples from U.S. history, Cohen and DeLong argue that supporting specific sectors and making specific promises is essential to gaining popular legitimacy and support for an economic policy program. People can only get behind a plan, they argue, if they have some concrete idea of how it’s going to improve their lives. Simply leaving economic development to the whims of the market, they say, will merely result in a bloated financial sector and popular disillusionment.

No. 2. "Industrial Policy for the Twenty-First Century," by Dani Rodrik

In this paper, Rodrik, a Harvard University economist, offers a theory of why industrial policy works as a development strategy for poor countries. Instead of picking winning industries, Rodrik argues, successful countries subsidize exports, in order to figure out what they’re good at making. World markets act as a discovery tool, rewarding successful industries and punishing unproductive ones, and helping each country find its most efficient place in the global trading system.

No. 3. "How Asia Works," by Joe Studwell

If you want to read about the recent history of successful industrial policies, this is the place to start. Drawing on a variety of sources, Studwell presents a unified vision of an East Asian development model that made Japan, South Korea and Taiwan rich, and is now helping to propel China’s economy. Some elements of the model -- for example, redistributing farmland from landlords to tenant farmers -- are only applicable to poor countries. But Studwell’s idea of “export discipline” -- pushing companies to enter world markets and forcing the liquidation of those that fail -- could conceivably be used in rich countries as well.

No. 4. "The Park Chung Hee Era: The Transformation of South Korea," edited by Byung-Kook Kim and Ezra Vogel

This collection of essays details the astonishing 16-year rule of South Korean military dictator Park Chung-hee, a period of time when real per capita income almost quadrupled. Though Park was a repressive tyrant, his economic
policies brought the country out of poverty faster than any in history. Park's approach, which included hefty amounts of state planning, large government-supported conglomerates, targeting of strategic industries and export promotion, is perhaps the purest example of modern industrial policy at work.

No. 5. “Can Japan Compete?”, by Michael Porter, Hirotaka Takeuchi and Mariko Sakakibara

Written in 2000, this book offers a cautionary tale of how industrial policy can go awry, especially in developed countries. Business professors Porter, Takeuchi and Sakakibara show how Japan’s fabled Ministry of International Trade and Industry, which famously helped propel the country to the forefront of industries like auto manufacturing and machine tools, faltered in the 1980s and 1990s. In newer industries like electronics, old approaches failed, Japan lost competitiveness, and MITI’s reputation soured.

No. 6. “The Entrepreneurial State: Debunking Public vs. Private Sector Myths,” by Mariana Mazzucato

In this forceful book, which has been influential in the U.K., economist Mazzucato argues that most major technological breakthroughs have a significant amount of state backing. She shows that private companies such as Apple, though venerated for their innovation, actually harvest the fruits of a far-reaching process of government-supported research and development. Mazzucato argues that popular theories about the superiority of the private sector over government are misguided, and that only the public sector can bear the expense and shoulder the risk of big long-term projects.


Economists Gruber and Johnson don’t just theorize about the value of industrial policy -- they lay out a concrete plan. Drawing on the lessons of World War II and the Space Race, they propose a $100 billion annual increase in research and development spending in the U.S. Cognizant of the problem of economic activity concentrating in a handful of big-city technology hubs, they propose building large new research parks in economically languishing areas with lots of local talent and good quality of life. Each hub would focus on a promising area of scientific discovery, with the government putting in research funding and commercialization assistance, and extracting a return via public land ownership. It’s a bold plan, and a good one.

No. 8. “Our Towns: A 100,000-Mile Journey into the Heart of America,” by James and Deborah Fallows

Flying around the U.S. in a small airplane, the two veteran writers chronicle the stories of towns that have revived themselves after the triple shock of Rust Belt decline, Chinese competition and the Great Recession. By observing the common elements, they try to extract general lessons about the kinds of local industrial policies that cities can adopt to revive themselves. The prescriptions include a revitalized downtown, strong technical education, focus on a specific industry or set of industries, and – most importantly – close cooperation between local government, businesses, universities and nonprofits.

This reading list provides an introduction to the best modern thinking on the topic of industrial policy, but there is plenty more to read. Although the topic is understudied, there are a number of economics papers that examine individual cases of the success or failure of industrial policy, or offer theories about how it can work. There are also a
number of other authors writing popular books in the area. But this reading list should provide a launching pad for anyone interested in this important and suddenly popular topic.

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5 June 2018
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The European Union Approach

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- 2014 Directive on Antitrust Damages Actions
The European Union Approach – Materials

- European Commission, Press Release “A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement”, 11 April 2018
- European Commission, Fact sheet “The New Deal for Consumers: How will the new Collective redress mechanism work?”, April 2018
- Mlex, “EU’s consumer-protection deal ‘seems like a solution in search of a problem’ BusinessEurope says”; “New EU consumer deal welcome, but collective-redress procedure weak, BEUC says”; “Proposal for EU class actions is welcome but scope should be broader, Greens say”; “Consumer benefits of EU class-action lawsuits doubtful, centre-right lawmakers say”, 11 April 2018
- Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)
- Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
2 England & Wales
England & Wales

- Collective redress mechanisms:
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    Group Litigation Orders, Case Management Powers, Representative Actions
  - Opt-in or out procedures:
    Competition/antitrust-focused litigation
- Key characteristics: incl. average length, disclosure, costs, damages
- Recent/future developments: notable cases (Volkswagen, Google, Pride Mobility, Mastercard), third-party funding
England & Wales – Materials

- Civil Procedure Rules, Part 19 - Parties and Group Litigation
- Section 47B, Competition Act 1998
- The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017
- Competition Appeal Tribunal, Guide to Proceedings 2015
3 Germany
Germany

- Code of Civil Procedure does not provide for a general procedural mechanism for collective actions
- For many areas of law, Claimants have to bundle their claims, e.g., antitrust damages claims
- Implementation of the EU Directive on Antitrust Damages Actions
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- Draft Bill: Act to Introduce Model Case Proceedings in Civil Actions
Germany – Materials

- Act to Introduce Model Case Proceedings in Civil Actions:
  - Draft Bill, ‘Entwurf eines Gesetzes zur Einführung eines zivilprozessualen Musterfeststellungsklage’, 4 June 2018 [German]
  - Summary, ‘Regierungsentwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage (MFK)’ [German]

- German laws containing a form of collective action:
  - Act on Model Case Proceedings in Disputes under Capital Markets Law (‘Kapitalanlegermusterverfahrensgesetz, KapMuG’)
  - Act Against Unfair Competition (‘Gesetz gegen den unlauteren Wettbewerb’, UWG)
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- Opt-out action by representative entity for injunctive or declaratory relief
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Draft bill for introduction of damages claims on opt-out basis by representative entity
The Netherlands – Materials

- Act on Collective Settlement of Mass Damage Claims, Articles 907-910 of Book 7 of the Civil Code; Title 14 of the Code of Civil Procedure, Articles 1013-1018


5 Contacts
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   Subtotal: 53

9. Canada
   Blake, Cassels & Graydon LLP: Robert E. Kwinter & Evangelia Litsa Kriaris
   Subtotal: 59

10. China
    Zhong Lun Law Firm: Peng Wu & Yi Xue (Josh)
    Subtotal: 67

11. Cyprus
    Tassos Papadopoulo & Associates LLC: Marios Eliades & Alexandra Kokkinou
    Subtotal: 77

12. Czech Republic
    Vejmelka & Wünsch, s.r.o.: Tomáš Fiala
    Subtotal: 84

13. Denmark
    ACCURA Advokatpartnerselskab: Jesper Fabricius & Laurits Schmidt Christensen
    Subtotal: 89

14. England & Wales
    Ashurst LLP: James Levy & Max Strasberg
    Subtotal: 97

15. European Union
    Skadden, Arps, Slate, Meagher & Flom LLP: Stéphane Dionnet & Antoni Terra
    Subtotal: 122

16. Finland
    Dittmar & Indrenius: Ilkka Leppihalme & Toni Kalliokoski
    Subtotal: 134

17. France
    Osborne Clarke SELAS: Alexandre Glatz & Charles Meteaut
    Subtotal: 141

18. Germany
    Haver & Mailänder: Prof. Dr. Ulrich Schnelle & Dr. Volker Soyez
    Subtotal: 148

19. Greece
    Stavropoulos & Partners: Evanthia V. Tsiri & Efthymia N. Armata
    Subtotal: 155

20. Ireland
    Arthur Cox: Richard Ryan & Patrick Horan
    Subtotal: 161

21. Italy
    Ashurst LLP: Denis Fosselard & Gabriele Accardo
    Subtotal: 171

22. Japan
    Nagashima Ohno & Tsunematsu: Koki Yanagisawa
    Subtotal: 178

23. Korea
    Barun Law LLC: Gwang Hyeon Baek & Seung Jae Jeon
    Subtotal: 186

24. Malta
    GANADO Advocates: Sylvann Aquilina Zahra & Antoine G. Cremona
    Subtotal: 192

25. Mexico
    Ledesma Uribe y Rodríguez Rivero S.C.: Claudia de los Ríos Olascoaga & Bernardo Carlos Ledesma Uribe
    Subtotal: 203

26. Netherlands
    Maverick Advocaten N.V.: Bas Braeken & Martijn van de Hel
    Subtotal: 209

27. New Zealand
    MinterEllisonRuddWatts: Oliver Meech & April Payne
    Subtotal: 215

28. Poland
    Wardyński & Partners: Sabina Famirska
    Subtotal: 222

29. Portugal
    Linklaters LLP: Carlos Pinto Correia & Ricardo Guimarães
    Subtotal: 228

30. Romania
    Wolf Theiss Rechtsanwälte GmbH & Co KG: Adrian Şiţer & Raluca Maxim
    Subtotal: 235

31. Slovakia
    Čechová & Partners: Tomáš Mareta & Marek Holka
    Subtotal: 241

32. Spain
    Ashurst LLP: Rafael Baena & Raquel Mendieta
    Subtotal: 247

33. USA
    Shearman & Sterling, LLP: Todd Stenerson & Ryan Shores
    Subtotal: 258

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Chapter 15

European Union

1 General
1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

For the purposes of this discussion, we will refer to claims that can be brought before the General Court and the Court of Justice of the European Union (hereafter the “European Court of Justice”) (together the “European Courts”) or the national courts of the European Union (hereafter “EU”) Member States in general.

The scope of claims that may be brought before the national courts of the EU Member States for breach of EU competition law (i.e., violation of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union (hereafter “TFEU”)) includes: (i) actions for a declaration of nullity of contractual arrangements that are contrary to EU competition law; (ii) interim measures (including cease and desist orders in relation to conducting EU competition law); and (iii) actions for damages.

The scope of claims that may be brought before the General Court includes: (i) actions for the annulment of a European Commission (hereafter “Commission”) “act”, defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (Case C-60/81, IBM v Commission); (ii) actions for failure to act; (iii) interim measures and (iv) damages actions for excessive delay in proceedings before the EU courts. Appeals on points of law against the judgments of the General Court may be brought before the European Court of Justice. The EU courts have confirmed in many instances that only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, may be the subject of an action for annulment under Article 263 TFEU. See in particular the European Court judgment of 20 December 2017 in Case C-364/16 P, Trioplast Industrier v Commission (and case-law cited), where the Court stated that “it is also apparent from settled case-law that only measures or decisions which seek to produce legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment. Thus, an action for annulment is, in principle, only available against a measure by which the institution concerned definitively determines its position upon the conclusion of an administrative procedure. On the other hand, intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure or purely implementing measures, cannot be treated as ‘acts open to challenge’, in that such acts are not intended to produce autonomous binding legal effects compared with those of the act of the EU institution which is prepared, confirmed or enforced”.

The European Court of Justice confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 of the TFEU and not to the European Court Justice in the context of an appeal (see Case C-40/12 P, Gascogne Sack Deutschland GmbH v Commission, Case C-58/12 P, Groupe Gascogne S.A v Commission, and Case C-50/12 P, Kendrion v Commission, judgments of 26 November 2013).

The European Court of Justice may also be consulted for a preliminary ruling, whereby the Court, at the request of a national court of an EU Member State, renders an interpretative ruling on a point of EU law that has arisen in the context of litigation before the national court.

1.2 What is the legal basis for bringing an action for breach of competition law?

Articles 101 and 102 TFEU and Regulation 1/2003 on the implementation of Articles 101 and 102 TFEU, as interpreted by the European Courts, form the substantive basis for an action for breach of EU competition law.

According to the case-law of the European Court of Justice, Articles 101/102 TFEU have ‘direct effect’, which means they create rights for individuals which the National Competition Authorities and the national courts of the EU must safeguard (Case C-127/73, BRT v SABAM, Case C-282/95 P, Guérin Automobiles v Commission, and Case C-453/99, Courage and Crehan ). In addition, the TFEU, and in particular Articles 101 and 102, have primacy over the national laws of the EU Member States (Case C-6/64, Costa v ENEL).

The procedural grounds for bringing a claim before the European Courts include Article 263 TFEU, which permits the European Courts to annul a Commission decision on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or misuses of powers. Article 265 TFEU enables action to be taken against the Commission’s failure to act, and Article 278 TFEU provides for interim relief.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Articles 101 and 102 TFEU are integrated into the national legal order of each EU Member State. National courts are required to set aside any national legislation and/or contractual arrangements that contravene Articles 101/102 TFEU (see question 1.2 above).
1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The European Courts are not specialist competition law courts. In addition, they do not have jurisdiction to rule on matters between private litigants, except pursuant to the procedure of preliminary rulings, described above.

At national level, there may be specialist courts to which competition law cases are assigned depending on the EU Member State in question. However, all national courts and authorities in the EU Member States are required to ensure the full effectiveness of the EU competition rules (see question 1.3 above).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

As discussed in questions 1.2 and 1.3 above, Articles 101 and 102 TFEU as well as Regulation 1/2003 have primacy over national law and are directly applicable. As a result, they can be invoked by any individual or undertaking in civil disputes before national courts, in accordance with the procedural rules of the Member State and court in question.

Any individual or undertaking with direct and individual concern may bring an action before the European Courts (Article 263 TFEU).

In addition, under the Courage v Crehan (C-453/99) and Manfredi (joined cases C-295/04 to C-298/04) judgments of the European Court of Justice, any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This was further confirmed in Case C-360/09, Pfeiderer AG v Bundeskartellamt, which found that “it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition” stressing that “actions for damages before national courts make a significant contribution to the maintenance of effective competition in the European Union”.

Moreover, the European Court of Justice, in Case C-199/11, Europese Gemeenschap v Otis NV and Others, indicated that the Commission itself was entitled to bring a damages claim before national courts. In that respect, the Court of Justice noted that “the Charter [of Fundamental Rights of the European Union] does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU”.

The Manfredi judgment also stated that indirect purchasers who had no direct dealings with the infringer should have standing to sue. The exercise of the right to sue is governed by national law provisions, but the right to sue for damages pursuant to EU competition law may not be less favourable than the equivalent domestic law right. Indeed, as explained in Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, given that “Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for individuals, the practical effect of the prohibition laid down in that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.

Whilst the right for compensation for harm caused by an infringement of the EU competition rules is an EU right, its exercise is governed by national rules. In practice, most victims rarely claim compensation because national rules often make it difficult for them to bring antitrust damages actions. For that reason, the Commission proposed a Directive to remove the main obstacles to effective compensation throughout the EU Member States. Directive 2014/104 on antitrust damages actions entered into force on 26 December 2014. The purpose of the Directive is to foster private enforcement in Europe while protecting the efficacy of the Commission’s leniency programme. The Directive set forth measures to be implemented in Member States’ legislation by no later than 27 December 2016. All Member States have now transposed the measures into their national system. Portugal was last to implement the rules. Whilst Portugal sought the views of the European Court of Justice on the interpretation of the Directive and its compatibility with its national legislation (see Case C-637/17, Cogeco Communications), on 20 April 2018, Portugal’s Parliament eventually voted in favour of a transposition of the Directive into national law.

As a complement to the Directive, the Commission issued a Recommendation on collective redress (see Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law). Although the Recommendation is non-binding, it invited all Member States to introduce by 26 July 2015 collective redress principles and mechanisms, including actions for damages in those Member States where such mechanisms were not yet available. The Recommendation, along with a Communication, set out the Commission’s views as to the appropriate mechanisms for enabling citizens to obtain effective redress through collective actions while limiting the potential for excessive and abusive litigation. This Recommendation applies not only to collective redress for infringements of competition law, but also for infringements of, inter alia, consumer protection, environmental, and financial services laws.

The Recommendation lays out a series of “principles” that all Member States should follow in devising and implementing collective redress mechanisms. In particular, two important aspects should be mentioned. First, the Recommendation sets out that the claimant party should be formed on the basis of the “opt-in” principle, any deviation from which should be justified by “reasons of sound administration of justice”.

Second, the Recommendation explains that representative actions should be brought only by public authorities or by representative entities that have been designated in advance or certified on an ad hoc basis by a national court for a particular case and that: (i) are non-profit entities; (ii) have a direct relationship between their main objectives and the rights claimed to have been violated; and (iii) have sufficient financial resources, human resources, and legal expertise to adequately represent multiple claimants.

In January 2018, the Commission published a report looking at the progress made by Member States on the implementation of collective redress measures and principles following the 2013 Recommendation (see Commission Communication of 25 January 2018 COM(2018) 40 final). In particular, the report shows that the availability of collective redress mechanisms and the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU and that a number of Member States still do not provide for collective compensatory redress mechanisms for “mass harm” situations where a large number of consumers are affected by EU law breaches. In light of these findings, the Commission intends to further promote the principles set out in the Recommendation and to strengthen the consumer redress and
enforcement aspects of the Injunctions Directive 2009/22/EC. For that purpose, on 11 April 2018 the Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers which will repeal the Injunctions Directive (see COM(2018) 184 final). The proposal was presented together with amendments to four EU consumer law Directives as part of a “New Deal for Consumers” designed, inter alia, to improve the effectiveness of the injunction procedure and collective redress. In particular, the Commission proposes to improve the rules on representative actions by qualified entities and the rules on injunctive and compensatory redress. The proposal concerns not only collective redress for infringements of competition law but also infringements of EU law across all policy fields.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Directive on antitrust damages actions does not cover this matter. There are no specific rules at the EU level governing jurisdictional matters for competition law claims. The jurisdiction of the European Courts is determined by the scope of its judicial review, as discussed below. In relation to actions for damages, the Regulation of the European Parliament and of the Council on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Council Regulation (EC) 1215/2012), the “Recast Brussels Regulation” provides that a defendant who is domiciled in an EU Member State can be sued in that Member State, irrespective of where the contract was concluded or the damage was suffered.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State. With the Directive on antitrust damages actions, the Commission sought to remove a “number of practical difficulties which victims frequently face when they try to obtain compensation for the harm they have suffered” (IP/14/455). As described in question 1.5 above, on 11 April 2018, the Commission unveiled a package of proposals designed to facilitate access to justice to safeguard consumers’ interests and to ensure adequate safeguards from abusive litigation. As described in question 1.1 above, the European Courts have jurisdiction only over a limited number of claims, including: (i) actions for annulment of a Commission “act”, defined as any Commission measure capable of affecting the interests of the applicant by bringing about a distinct change in his legal position; (ii) actions for failure to act; and (iii) interim measures. Claimants should consider a few factors when bringing actions before European Courts. For example, when seeking to annul a Commission “act”, claimants should bear in mind the level of discretion that the Commission enjoys when assessing purported infringements of competition law. For further details, please refer to question 4.1 below.

1.8 Is the judicial process adversarial or inquisitorial?

The process before national courts depends on the national procedures of each Member State, provided that, as stated above, the national procedures applicable to EU law rights are not less favourable than those applicable to equivalent domestic law rights, and do not deprive EU law rights of their full effectiveness (see Case C-213/89, Factortame I).

The process before the European Courts is adversarial, and relies nearly exclusively on written pleadings. In this respect, the Menarini judgment of the European Court of Human Rights of 27 September 2011, in its application of Article 6 of the European Convention on Human Rights (“ECHR”) embodying the right to a fair trial, found that administrative authorities can impose criminal sanctions, provided their decisions are subject to review by a court having full jurisdiction. The Court of Justice in its KME and Chalkor judgments of 8 December 2011 (Cases C-386/10 P, Chalkor v Commission, C-389/10 P, KME v Commission, and C-272/09 P, KME v Commission), after carefully setting out the various standards of review, concluded that the EU courts provide effective judicial protection within the meaning of Article 47 of the Charter of Fundamental Rights (which implements Article 6 of the ECHR).

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The European Courts may grant interim relief in relation to an action pending before them. Private parties can also seek interim measures before the national courts. Under the established case-law of the European Court of Justice (Factortame I), national courts have jurisdiction to grant interim relief when a right derived directly from effective EU law (such as Articles 101 and 102 TFEU) is under judicial examination.

2.2 What interim remedies are available and under what conditions will a court grant them?

The European Courts can grant interim measures when (i) a prima facie case for a violation of EU competition law is established, and (ii) there is urgency, i.e., there will be serious and irremediable damage absent interim measures before the judgment on the substance of the case. These two conditions are cumulative. There is urgency only if the serious and irremediable harm feared by the party is so imminent that its occurrence can be foreseen with a sufficient degree of probability (see Case T-423/17 R, Nexans v Commission, order of 23 November 2017). It is settled case-law that damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irremediable. Interim measures are without prejudice to the final decision on the substance (Cases C-60/81 R and C-190/81 R, IBM v Commission).

Interim measures granted by the European Courts may consist of a decision to suspend a Commission decision entirely or in part. This may apply to Commission decisions ordering undertakings to modify their conduct, or to decisions ordering the payment of a fine. Interim relief may also take the form of an order to the Commission to take certain measures. It is only exceptionally that the judge hearing an application for interim measures will order suspension of a Commission decision before the General Court or prescribe other interim measures (see Case T-423/17 R, Nexans v Commission, order of 23 November 2017 and case-law cited). Moreover, the European Courts have generally been reluctant to grant a request for interim relief against strictly procedural decisions of the Commission.

The two main conditions set out at EU level are also generally followed by national courts of the EU Member States. However, the specific application of these conditions and the related procedures for seeking and obtaining interim relief are a matter of national law (joined Cases C-430/93 and C-431/93, Van Schijndel). The
adoption of Regulation 1/2003 has prompted the introduction of a series of national legislative amendments to align the interim relief powers conferred to national competition authorities under EU law with those conferred by national law.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Final remedies granted by the European Courts consist of the annulment of the Commission decision under appeal, or the issuance of a judgment ordering the Commission to take certain measures. Undertakings or individuals may also claim damages for harm caused as a result of competition law infringements before national courts. In the landmark 2001 European Court of Justice judgment, Courage v Crehan (Case C-453/99) confirmed by the Manfredi judgment in 2006, both cited in question 1.5 above, the Court held that any individual or undertaking that has suffered loss by a contract or by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU can claim damages from the undertaking that has committed the breach. This was confirmed in Case C-360/09, Pfeiderer AG v Bundeskartellamt, in which the court explained that “it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition”. As noted in Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, the right of any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition within the meaning of Articles 101 and 102 TFEU, “constitutes effective protection against the adverse effects that any infringement […] is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation”.

Whilst the right for compensation for harm caused by an infringement of the EU competition rules is an EU right, its exercise is governed by national rules. In practice, most victims rarely claim compensation because national rules often make it difficult for them to bring antitrust damages actions. For that reason, the Commission proposed a Directive to remove the main obstacles to effective compensation throughout the EU Member States. Directive 2014/104 on Antitrust Damages Actions entered into force on 26 December 2014. The purpose of the Directive is to foster private enforcement in Europe while protecting the efficacy of the Commission’s leniency programme. The Directive set forth measures to be implemented in Member States’ legislation by no later than 27 December 2016. All Member States have now transposed the measures into their national system.

The provisions of the Directive do not affect damages actions for infringements of national competition law which do not relate to trade between Member States within the meaning of Articles 101 or 102 TFEU.

Key principles include that: (i) claimants are able to rely on a final decision of a national competition authority or a review court finding an antitrust infringement as proof of the infringement (for actions brought in other Member States, the decision of the national competition authority will be considered at least as prima facie evidence that an infringement of competition law has occurred); (ii) claimants with access to certain types of evidence and courts can order the defendant or other third parties to produce the relevant evidence; (iii) rules on limitation periods have been harmonised to provide for a limitation period of at least five years; and (iv) a rebuttable presumption applies that cartels cause harm. The Court confirmed in Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, that the procedural rules governing actions for damages “must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law”. This is also confirmed by Recital 7 of Regulation 1/2003, which states that national courts within the EU, when dealing with disputes between private individuals, shall protect the subjective rights under EU law, for example by awarding damages to the victims of infringements. See question 1.5 above regarding legislation at the EU level in relation to mechanisms of collective redress before the Member State courts.

The European Court of Justice also confirmed that an excessive delay in proceedings before the General Court is an actionable breach which can only be addressed by bringing a damages action before the General Court under Articles 268 and 340 (the non-contractual liability of the EU) of the TFEU and not to the European Court of Justice in the context of an appeal (see Case C-40/12 P, Gascogne Sack Deutschland GmbH v Commission, Case C-58/12 P, Groupe Gascogne SA v Commission, and Case C-50/12 P, Kendrion v Commission, judgments of 26 November 2013). It is for the General Court to assess, in the light of the circumstances specific to each case, whether it has observed the reasonable time principle and whether the parties concerned have actually suffered harm because their right to effective legal protection was breached. In doing so, the General Court is to apply the criteria set out the Gascogne Sack judgment (C-40/12, paras. 91–95). Reparation must correspond to the loss or damage sustained. The Court enjoys full jurisdictional discretion in relation to the amount of compensation to be awarded. In three separate actions for damages, Gascogne, Kendrion and ASPLA claimed compensation for the General Court’s delay in ruling on their appeals of the cartel fines. In each case, the General Court found that the claimants satisfied the test and awarded damages for delayed proceedings (see Case T-577/14, Gascogne Sack Deutschland and Gascogne v European Union, Case T-479/14, Kendrion v European Union, and Case T-40/15, ASPLA v European Union). Appeals were brought to the European Court of Justice by the Commission and Groupe Gascogne – and the cases are still ongoing.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Under EU law, the damages that can be sought by private plaintiffs are compensatory (and not punitive). In Manfredi, the European Court of Justice held that victims of antitrust infringements should be able to obtain full compensation of the real value of the loss suffered. The entitlement to full compensation extends not only to the actual loss due to an anticompetitive conduct, but also to the loss of profit as a result of any reduction in sales and includes a right to interest.

While there is no guidance on the actual methodology to be used for the quantification of damages at EU level, the Commission issued guidance to national courts: a Communication on quantifying harm in actions for damages based on breaches of Articles 101 or 102 TFEU and a Practical Guide accompanying the Communication prepared by the Commission’s staff. The aim of the Practical Guide is to “offer assistance to national courts and parties involved in actions for damages by making widely available information relevant for quantifying the harm caused by antitrust infringements”. The Guide illustrates types of harm typically caused by anticompetitive practices and offers an overview of the main methods and techniques available to quantify such harm in practice.
The Directive on Antitrust Damages Actions does not provide specific guidance on the quantification of harm, but establishes a rebuttable presumption of harm in the case of cartels. It is for the domestic legal system of each Member State to quantify harm and for the Member States and the national courts to determine the requirements the claimant has to meet when proving the amount of the harm suffered. However, these domestic requirements should not be less favourable than those governing similar domestic actions, nor should they render the exercise of the right to damages practically impossible or excessively difficult.

There have already been a number of successful follow-on damages claims in national courts for breach of the EU competition rules following the Directive. In France, Ouretmer Telecom was awarded €2.6 million in damages from Orange for abuse of dominant position in relation to services in the Caribbean. While the Paris Commercial Court had initially awarded €8 million, on 10 May 2017, the Paris Court of Appeal found that Ouretmer Telecom did not prove the direct and causal link between the anticompetitive practices and the damages and so decided to reduce the damages to €2.6 million. In relation to the same abuse of dominance case, on 18 December 2017, the Paris Commercial Court ordered Orange to pay rival operator Digicel €179.64 million in damages plus 10.4% interest per year for a total of €346 million. In three judgments on 6 April 2017, the French courts ordered the state-owned railway firm SNCF to pay the travel operator Switch €6.9 million in damages resulting from an illegal online booking agreement with Expedia, as found in 2009 by the French competition authority. Also, in France, a court ordered several road sign cartelists to pay damages totalling €5.54 million to two governmental departments. Participants in a German bid-rigging cartel that affected railway tracks, switches, and sleepers were also found liable for damages by the Dortmund Regional Court on 21 December 2016, following a claim by a public rail transportation company. Finally, on 19 July 2017, a Düsseldorf court ruled that state-owned broadcasters ARD and WDR breached antitrust rules by agreeing to cut contracts with an unnamed network operator in 2012, since they decided to end the contracts not because of individual economic motives, but based on an anticompetitive agreement. Consequently, the contract termination was void and the payment obligation to the cable network operator remained valid. As a compensation, the court awarded €3.5 million in damages to the cable network company.

The European Courts have generally referred to the standard for judicial review as one requiring the Commission to produce sufficiently precise, consistent, and convincing evidence for the existence of an infringement (see joined Cases 29/83 and 30/83, CRAM & Rheinzink v Commission). This standard is reflected in Article 2 of Regulation 1/2003. Furthermore, this was confirmed in Case T-459/07, Coats Holdings v Commission, which held that “the Commission must produce sufficiently precise and coherent proof to establish that the alleged infringement took place”. In addition, the European Courts have held that in proceedings which may result in severe fines for the defendants, the Commission, in assessing the evidence, should apply the principle of presumption of innocence under Article 6(2) of the ECHR, which the European Court of Justice has recognised as a general principle of the European Union’s legal order (see Case T-442/08, CISAC v Commission). In this respect, the European Courts will generally accept the existence of an infringement if the Commission has been able to establish certain key facts. For example, the European Courts have accepted the existence of an infringement on the basis of the single statement “where its evidential value is undoubted” (see Case T-25/95, Cimenteries CBR v Commission). The Commission also applies
presumptions that have been confirmed by the courts, such as the presumption of participation in an identified cartel when certain facts have been established, the presumption of the continuous nature of the infringement (again, when certain facts have been proved) and, the most controversial, the presumption of parental liability.

### 4.2 Who bears the evidential burden of proof?

In proceedings brought before the European Courts, the Commission bears the burden of proving that Articles 101 or 102 TFEU were infringed. Conversely, an undertaking relying on Article 101(3) TFEU must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied. The burden of proof thus falls on the undertaking requesting the exemption.

In its judgment in Commission v GlaxoSmithKline (Case C-513/06 P), the European Court of Justice confirmed that restrictions by object within the meaning of Article 101(1) TFEU do not constitute violations per se but are, in theory, capable of exemption and are entitled to a serious and exhaustive analysis under Article 101(3) if the company provides relevant and credible arguments in favour of an exemption. The Court also specified that Article 101(3) requires a prospective analysis on whether the claimed efficiencies in the form of objective advantages are "sufficiently likely", and that this analysis must be undertaken in the light of the factual arguments and evidence provided by the company seeking an exemption.

### 4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Yes. The Directive on Antitrust Damages Actions includes two rebuttable presumptions that will make it easier to prove damages claims.

First, in order to “remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages”, the Directive introduces a presumption that cartel infringements cause harm. As explained in the Directive, “it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred for the cartel. This presumption should not cover the concrete amount of harm”. Such presumption results from the Commission’s reliance on studies indicating that a small but significant portion of cartels (7%) do not lead to overcharging (see, for example, Oxera’s study prepared for the Commission on quantifying antitrust damages of December 2009).

Second, the Directive puts in place a presumption that cartel overcharges are at least in part passed on to indirect purchasers. As explained in the Directive, “taking into account the commercial practice that price increases are passed down on the supply chain”, it is “appropriate to provide that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringer has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show prima facie that such passing-on has occurred, unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser”. This rebuttable presumption gives indirect purchasers much higher chances to obtain compensation as compared to the previous systems in most EU countries. Under those, in fact, indirect purchasers had the burdensome task of proving that the harm has been passed on down the supply chain.

### 4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The value of the evidence brought before the European Courts is assessed based on “the credibility of the account it contains”, in particular on “the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face, the document appears sound and reliable” (see Case T-180/15, Icap and Others v Commission and case-law cited). In this respect, the European Courts attach more importance to contemporaneous documents, because they are written in tempore non suspecto, i.e., before any infringement was alleged to have taken place. It is important to note that in an appeal, the European Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Therefore, and provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it (see Case C-7/95 P, John Deere v Commission).

The introduction by the Commission of a leniency system has resulted in greater reliance also on non-contemporaneous statements (see joined Cases T-67/00 et al., JFE Engineering v Commission). In its ICI judgment of 5 June 2012 (Case T-214/06, Imperial Chemical Industries Ltd. v European Commission), the General Court confirmed that statements made by companies in support of leniency could not be regarded as devoid of probative value as any attempt by the company applying for leniency to deceive the European Commission could endanger its potential favourable position under the Leniency Notice. The General Court stated that corporate statements made in the context of an immunity application could not be disregarded, in particular when their content was confirmed by subsequent leniency applications submitted by other companies.

In its judgment of 8 September 2016 Goldfish and Others v Commission (Case T-54/14), the General Court had the opportunity to rule on the use of secret telephone conversations as evidence in an investigation relating to an infringement of competition law. The Court stated that it followed from the case-law of the European Court of Human Rights that the use of an illegal recording as evidence (in that case by the Commission while assessing an infringement of Article 101 TFEU) did not in itself conflict with the principles of fairness laid down in Article 6(1) of the ECHR, even where that evidence had been obtained in breach of the requirements of Article 8 of the same Convention, where the applicant in question had not been deprived of a fair proceeding or of his rights of defence, and also where that had not been the only item of evidence relied on in support of the decision.

The European Courts accept the submission of expert evidence. The Statute of the European Court of Justice as well as the Rules of Procedure of each the General Court and the European Court of Justice allow the two courts to appoint an expert to provide an opinion or prepare a report (see Article 46.6 and Title III, Chapter 6, Section 2 of the Rules of Procedure of the General Court; Article 45.2 (d) and Title II, Chapter 7, Section 2 of the Rules of Procedure of the European Court of Justice; and Articles 20, 25, and 35 of the Statute of the European Court of Justice).
Both the European Court of Justice and the General Court can require parties to the proceeding or third parties to produce relevant documents and information, including “Member States and institutions, bodies, offices and agencies not being parties to the case”. The procedures pursuant to which access is provided are in those cases governed by the Statute of the European Court of Justice (see Articles 24 and 54 of the Statute of the European Court of Justice).

Access to the documents of the European Institutions is governed by Regulation 1049/2001, which aims to ensure the greatest possible transparency of the decision-making process of the EU institutions, such as the Commission. The Regulation is used increasingly by damages claimants as a basis to request access to leniency material and other documents in the Commission’s file relevant to findings of infringement of Articles 101 and 102 TFEU. Regulation 773/2004 relating to the conduct of proceedings under Articles 101 and 102 TFEU by the Commission operates in parallel with Regulation 1049/2001, and grants addresses of a Statement of Objections a right to access the Commission’s administrative file. In contrast, damages claimants are not granted access to file under Regulation 773/2004. Both Regulations contain limitations as to the types of documents to which undertakings may obtain access, including limitations relating to business secrets or commercially sensitive information.

There have been a number of judgments by the EU courts on the application of Regulation 1049/2001. The EU courts have also defined the rules applicable to undertakings seeking to obtain access to the administrative file of the Commission in relation to Articles 101 and 102 TFEU investigations.

In its judgments of 28 June 2012 (Case C-404/10, European Commission v Éditions Odile Jacob SAS and Case C-477/10 P, European Commission v Agrofer Holding a.s.), the European Court of Justice found that the Commission is entitled to refuse access to all documents relating to the merger control proceedings exchanged between the Commission and notifying parties and third parties, without carrying out a concrete, individual examination of those documents.

In relation to leniency documents, the European Court of Justice held in its Pfleiderer judgment of 14 June 2011 that, absent legislation, the scope of access to leniency documents was for national courts to decide on a case-by-case basis, according to national law. According to Pfleiderer, it is for national courts to conduct a “weighing exercise”, i.e., to weigh the “respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency”. The judgment left a number of questions unresolved, including the application of this weighing exercise to the different types of leniency materials included in a Member State competition authority’s file, such as corporate statements and pre-existing documents, and the application of the weighing exercise to materials in the EU Commission’s file. The Court in Pfleiderer also gave little guidance as to the determining factors for conducting the balancing of interests, arguably leaving substantial discretion to the national courts of EU Member States. The EU Commission has subsequently confirmed that it considers the principles of Pfleiderer to apply equally to leniency materials in the EU Commission’s file. See also question 10.2 below.

In its Bundeswettbewerbsbehörde judgment of 6 June 2013, the General Court confirmed the “weighing exercise” set forth in Pfleiderer, clearly stating that, pursuant to the principle of effectiveness, national courts must have the possibility to conduct such an exercise. The General Court ruled that “EU law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to the proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved”.

In addition, although the General Court admitted that leniency programmes are “useful tools”, which as such may justify a refusal to grant access to certain documents, these programmes “do not necessarily mean that such an access may be systematically refused”. As the Court noted, “any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case”. Accordingly, “[i]f it is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency program that non-disclosure of that document may be justified”. However, similarly to the Pfleiderer judgment, the Bundeswettbewerbsbehörde judgment left a number of questions unresolved, e.g., the application of this weighing exercise to different types of leniency materials.

Pursuant to the Directive on Antitrust Damages Actions, the legislation of the Member States must provide for access to evidence once the plaintiff “has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages” (Article 5 of the Directive). Member States must ensure the disclosure of evidence by order of the courts relevant to their claim without it being necessary for the claimants to specify individual items of evidence. Disclosure will extend to third parties, i.e., including public authorities. The Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.

National courts must limit the disclosure of evidence to what is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts will have to consider the legitimate interests of all parties concerned.

The Directive provides that national courts cannot, at any time, order the disclosure or permit the use of leniency corporate statements or settlement submissions. It also notes that information prepared specifically for the proceedings of a competition authority, as well as information drawn up by a competition authority in the course of its proceedings, can only be disclosed or used by national courts after a competition authority has closed its proceedings.

**4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?**

Witnesses can be summoned by the European Court of Justice or the General Court at their own motion, on application by a party, on the initiative of the Advocate General or at the suggestion of an expert appointed by the Court. The President of the Court can put questions to the witness, as can the other judges and the Advocate General. The representatives of the parties can also put questions to the witness, under the control of the President of the Court. Both the
General Court’s and European Court of Justice’s Rules of Procedure provide that if a witness who has been duly summoned fails to appear, refuses to give evidence or take the oath, a penalty may be imposed upon him by the Court (see Articles 26–30 of the Statute of the European Court of Justice; Article 95 of the General Court’s Rules of Procedure; Article 69 of the European Court of Justice’s Rules of Procedure). Available procedures before Member State courts are determined by national legislation.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A finding by the European Commission or a national competition authority that a violation of Article 101 or 102 TFEU has occurred has probative value as to the existence of an infringement and can be the basis for a follow-on action for damages in a Member State court.

The Directive on Antitrust Damages Actions provides that a claimant may rely on a final decision of a national competition authority (or a review court) finding an infringement. Such decision or judgment will be considered as proof of the infringement (Article 9(1) of the Directive). A decision of a national competition authority will be considered at least as prima facie evidence that an infringement of competition law has occurred in a different Member State (Article 9(2) of the Directive).

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Parties are allowed to submit non-confidential versions of their written pleadings within a time frame imposed by the European Courts, providing a description of the redacted information and a justification for confidential treatment. The Courts will grant confidential treatment if it can be demonstrated that the disclosure of the information could result in serious harm to the undertaking (see Case T-353/94, Postbank N.V. v Commission). Available procedures before Member State courts are determined by national legislation.

The Directive on Antitrust Damages Actions provides that even if relevant evidence contains business secrets or any other confidential information, such evidence should in principle be made available to claimants. However, the Directive also considers that such confidential information needs to be adequately protected. Disclosure of evidence must be appropriate.

Within the framework of the rules on disclosure in the Directive, a range of measures to protect confidential information from being disclosed during the proceedings is envisaged, such as redaction, hearings in camera, limitation of the individuals entitled to access the evidence, and production of expert summaries.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Pursuant to Article 15(1) of Regulation 1/2003, the Commission can also submit observations to national courts when required to ensure the consistent application of Articles 101 and 102 TFEU. These provisions are not used frequently. Available procedures before national courts are determined by national legislation.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

An undertaking may appeal a Commission decision finding a violation of Article 101 TFEU on the basis of a public interest justification, provided that it can show that the conduct referred to in the decision had procompetitive benefits that were necessary and proportional to its anticompetitive effects pursuant to Article 101(3) TFEU. (See also question 4.2 above.)

While the European Courts have not recognised a similar “efficiencies” defence to be available in relation to conduct allegedly infringing Article 102 TFEU, the Commission’s Guidance Paper on its enforcement priorities in applying Article 82 EC [now Article 102 TFEU] also discusses the conditions for an efficiency defence.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

The passing on defence is specific to actions for damages, which are brought before national courts. Available procedures before national courts are determined by national legislation.

The passing on defence is provided for in the Directive on Antitrust Damages Actions (Article 13), which allows antitrust infringers to demonstrate that the price increase was, at least partially, passed on by the claimant to his own customers. When applying this defence, the defendant must prove the existence and extent of the pass-on of the overcharge.

The Directive also addresses the situation of indirect purchasers (Article 14) and makes it easier for them to prove that passing on occurred further in the supply chain. For that purpose, the indirect purchaser must merely establish that (i) the defendant has committed an infringement of competition law, (ii) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant, and (iii) he purchased the goods or services that were the subject of the infringement of competition law.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Private actions for damages take place at the national level and thus depend on the national procedures of each Member State.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

An appeal before the General Court must be brought within two months of the notification of the decision appealed against, in case the appeal is brought by an undertaking who is not the addressee of the decision, within two months from the date of the appeal.
The Directive on Antitrust Damages Actions requires Member States to clarify their national rules regarding limitation periods applicable to damage claims. The limitation period for bringing damages actions must be at least five years (Article 10(3) of the Directive) and shall begin when the infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) the behaviour; (ii) the fact that the behaviour constitutes an infringement of competition law; (iii) the fact that the infringement of competition law caused harm to him; and (iv) the identity of the infringing undertaking (Article 10(2) of the Directive).

In addition, the Directive sets out that the limitation period will be suspended (or interrupted, depending on the national legislation) from the moment a competition authority starts investigating an alleged infringement. The suspension will end, at the earliest, one year after the infringement decision has become final. In practice, this means that claimants will have at least one full year to bring a civil action for damages following the competition authority’s final decision.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The European Court of Justice’s 2017 Annual Report on Judicial Activity reports that the average duration of court proceedings before the General Court was estimated at 21.6 months for competition cases (judgments and orders) for the year 2017 (see p. 215 of the Report). The average duration of court proceedings before the European Court of Justice, across all areas of EU law, was estimated at 15.7 months for references for a preliminary ruling and 17.1 months for appeals for the year 2017 (see p. 114 of the Report).

On application of one of the parties, and having heard the other parties and the Advocate General, the General Court may apply an expedited procedure, in which case the Court will impose conditions limiting the volume and presentation of the pleadings. In 2016, the European Court of Justice adopted a simplified method for dealing with appeals brought in the area of access to documents (as well as relating to public procurement and intellectual and industrial property). Available procedures before Member State courts are determined by national legislation.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Parties may withdraw their appeal before the General Court or the European Court of Justice. Upon request from the other parties to the proceedings, the party withdrawing its appeal may be ordered to pay the costs of the proceedings (see Article 136 of the Rules of Procedure of the General Court and Article 141 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Directive on Antitrust Damages Actions requires Member States to introduce, if not already applicable, rules to facilitate out-of-court resolution of private claims. The limitation periods and court proceedings must be suspended during the settlement discussions for a period not exceeding two years but only for the parties to the negotiations (Article 18(1) of the Directive). The Directive also addresses the effect of partial consensual settlement on any subsequent private actions (Article 19 of the Directive).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Collective damages actions are especially important for consumers harmed by antitrust violations. Collective settlements are in principle allowed, but specific rules are set out or will be determined at the national level. Please refer to question 1.5 above for further details.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The European Courts will generally order payment at a party’s specific request. Moreover, the Courts have discretion to order a party, even if successful, to pay for some or all of the legal costs incurred by the other party or parties in case they consider that the successful party unreasonably caused these costs to be incurred (see Articles 134 and 135 of the Rules of Procedure of the General Court and Articles 138 and 139 of the Rules of Procedure of the Court of Justice). Available procedures before national courts are determined by national legislation.

The Commission’s 2013 Recommendation on collective redress provides that the legal costs of the winning party should be borne by the losing party.

8.2 Are lawyers permitted to act on a contingency fee basis?

There are no rules under EU competition law prohibiting contingency fee arrangements for appeals before the European Courts. Available procedures before national courts are determined by national legislation.

The Commission’s 2013 Recommendation on collective redress provides that Member States should not allow methods of attorney compensation, such as contingency fees, that risk creating an incentive to unnecessary litigation. If a Member State decides to allow contingency fees, appropriate national regulation of those fees in collective redress cases should be implemented.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no rules under EU competition law regulating or prohibiting third party funding of appeals before the European Courts. Available procedures before national courts are determined by national legislation.

As explained at question 1.5 above, in its 2013 Recommendation on collective redress, the Commission set out a series of common, non-
binding principles that all Member States should follow in devising and implementing collective redress mechanisms, including, inter alia, third party funding.

As a general principle, the Commission’s 2013 Recommendation states that third party funding should be allowed, but only under certain conditions. In particular, the third party should be prohibited from: (i) seeking to influence procedural decisions of the claimant party, including on settlements; (ii) providing financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent; and (iii) charging excessive interest on the funds provided.

Additionally, the Commission’s 2013 Recommendation sets out that the court should be allowed to stay the proceedings if: (i) there is a conflict of interest between the third party and the claimant and its members; (ii) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; and (iii) the claimant has insufficient resources to meet any adverse costs should the collective redress procedure fail.

Lastly, compensation to third party funders may not be based on the amount of the settlement reached or compensation awarded to the claimant unless this funding arrangement is regulated by a public authority.

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments of the General Court are subject to appeal before the European Court of Justice. Available appeal procedures before national courts are determined by national legislation.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Full or partial immunity from fines can be offered by the Commission for cartel infringements. Applicants for leniency with the Commission are not granted immunity from civil claims.

However, pursuant to the Directive on Antitrust Damages Actions, immunity recipients are not jointly and severally liable to all claimants. Indeed, immunity recipients would only be liable to claimants who are their own direct or indirect purchasers or providers, except when other claimants show that they are unable to obtain full compensation from other defendants (see Article 11(3) of the Directive).

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

As explained at question 4.5 above, in its Pfleiderer judgment of 14 June 2011, the European Court of Justice concluded on a matter involving access to information submitted pursuant to a Member State leniency programme, that it is for the Member States to establish and apply national rules on the right of access to documents relating to leniency procedures by persons adversely affected by a cartel. The Court noted that the application of these rules entailed a “balancing act” between protecting the effectiveness of the leniency programmes, and the right of individuals to claim damages for losses caused by an infringement of the competition laws. Advocate General Mazák had, in his Opinion in the same case, distinguished between voluntary self-incriminating statements, which should not be made available, and other pre-existing documents submitted by a leniency applicant. (See Case C-360/09, Pfleiderer AG v Bundeskartellamt.) This “balancing act” was confirmed in the Bundeswettbewerbsbehörde judgment, although this judgment also made no distinction between different leniency materials forming part of the Commission’s file. The Court simply noted that the “weighing exercise” should be undertaken for all the documents in the Commission’s file, including the documents made available under the leniency programme.

In July 2011, in the National Grid litigation before the English High Court, Mr. Justice Roth invited the EU Commission to give its views on a number of issues relating to the application and implications of Pfleiderer for national discovery rules and its application to materials on the EU Commission’s file. In response, the Commission stated in an open letter to the Court in November 2011 that it considers the Pfleiderer judgment, which related to access to documents in the German Bundeskartellamt’s file, to apply equally to documents on the Commission’s file. The Commission further noted that the national court should assess whether the disclosure is proportionate in light of the information that is contained in the documents and the other information available to the parties and that it should ensure that the leniency applicant is not worse off than the other defendants.

In May 2012, the heads of the national competition authorities in EU Member States issued a joint resolution in which they promised to protect evidence voluntarily submitted by leniency applicants “without unduly restricting the right to civil damages”. This pledge came only months after the U.S. Department of Justice’s announcement in November 2011 that it would “aggressively protect from disclosure in U.S. federal courts” not only its own leniency materials but also those of other jurisdictions, including the EU.

The Directive on Antitrust Damages Actions requires the Member States to introduce certain restrictions on the disclosure of certain types of evidence. For instance, oral statements of immunity or leniency applicants will remain protected. The same applies for settlement submissions (Article 6(6) of the Directive). Other documents including documents originating from the defendants prepared specifically for the proceedings of a competition authority or related to the authority’s investigation (e.g., information requests) are not protected from disclosure, which can be ordered after the competition authority concerned has closed its proceedings.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Member States had until 27 December 2016 to implement all measures set forth by the Directive on Antitrust Damages Actions. All Member States have now transposed the measures into their national system. Portugal was last to implement the rules.
Portugal sought the views of the European Court of Justice on the interpretation of the Directive and its compatibility with its national legislation (see Case C-637/17, Cogeco Communications), on 20 April 2018, Portugal’s Parliament eventually voted in favour of a transposition of the Directive into national law.

The transposition of the Directive had a limited impact for some Member States that already had a set of rules that provide for compensation for victims of antitrust violations. For other jurisdictions, the impact was significant.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

On 3 August 2015, the Commission adopted certain amendments to its procedural rules (i.e., Regulation 773/2004) and to four related notices, namely the Notice on Access to File, Notice on Leniency, Notice on Settlements, and Notice on Cooperation with National Courts. These amendments to Regulation 773/2004 and to the notices strive to reflect the provisions of the Directive in ensuring that documents used during EC investigations are effectively protected.

The Notice on Access to File provides that documents that prove to be unrelated to the subject matter of an investigation shall be returned to the parties. Upon return, these documents will no longer constitute part of the file.

The Notice on Leniency now states that the Commission shall not transmit company leniency statements to national courts for use in damages actions.

The amended Notice on Settlements provides that companies may not withdraw a settlement request unilaterally. If the Commission adopted a statement of objections, without reflecting companies’ settlement requests, those requests will be disregarded and may not be used as evidence against any of the parties to the case. New settlement rules also provide that the Commission will not transmit settlement submissions to national courts for use in damages proceedings.

As far as the Notice on Cooperation with National Courts is concerned, the Commission will not send documents specifically created for the Commission proceedings to national courts, so long as these proceedings are ongoing. Furthermore, the Commission will not hand over information it has sent to third party firms it has involved as part of the proceedings.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

Aspects of the transposition in EU Member States of the Directive on Antitrust Damages Actions will be assessed in other chapters of this publication.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

As explained at question 1.5 above, in January 2018, the Commission published a report looking at the progress made by Member States on the implementation of collective redress measures and principles following the 2013 Recommendation (see Commission Communication of 25 January 2018 COM(2018) 40 final). In particular, the report shows that the availability of collective redress mechanisms and the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU and that a number of Member States still do not provide for collective compensatory redress mechanisms for “mass harm” situations where a large number of consumers are effected by EU law breaches. In light of these findings, the Commission intends to further promote the principles set out in the 2013 Recommendation and to strengthen the consumer redress and enforcement aspects of the Injunctions Directive 2009/22/EC. For that purpose, on 11 April 2018, the Commission proposed a new Directive on representative actions for the protection of the collective interests of consumers which will repeal the Injunctions Directive (see COM(2018) 184 final). The proposal was presented together with amendments to four EU consumer law Directives as part of a “New Deal for Consumers” designed, inter alia, to improve the effectiveness of the injunction procedure and collective redress. In particular, the Commission proposes to improve the rules on representative actions by qualified entities and the rules on injunctive and compensatory redress. The proposal concerns not only collective redress for infringements of competition law but also infringements of EU law across all policy fields.
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Merricks v Mastercard: UK Class Actions Back Under the Spotlight

The English Courts have reignited the prospects of a £14 billion class action against Mastercard.

In a much anticipated ruling, on 16 April 2019, the Court of Appeal of England and Wales (the Court) granted an appeal by Walter Merricks, the representative for over 46 million U.K. consumers, against Mastercard in relation to alleged overcharging of interbank fees between 1992 and 2008. The Court favoured a broad approach to class certification, lowering the standard of scrutiny favoured by the lower court, the Competition Appeal Tribunal (CAT). The Court found that class claimants need only show a real prospect of success to secure class certification. Detail as to how the class would substantiate its proposed economic model (in this case, a relatively complex theory as to what credit card surcharges would be passed on by merchants to consumers) or scheme of award distribution, if successful, was not required.

Subject to a possible appeal to the U.K. Supreme Court, the case will now return to the CAT, which will decide whether the class action should proceed through the “certification stage” to a full trial and, if so, whether Mastercard is liable to pay any damages.

The Mastercard case places U.K. class actions back under the spotlight, refuelling the debate as to whether such actions may gain prominence after a slower than anticipated start and, in turn, raising questions as to how English law and practice will develop in this area.

Background

In December 2007, the European Commission (EC) found that by setting default interbank fees whenever consumers paid for goods or services using their Mastercard in the European Economic Area (the “Multilateral Interchange Fees”, or MIFs), Mastercard restricted price competition between the banks and violated EU competition law. Mastercard’s appeals against the EC Decision to the European courts were unsuccessful.

EC Decisions are treated across the EU Member States as prima facie evidence of anti-competitive conduct in “follow-on” private actions for damages. As a result, Merricks relied on the 2007 EC Decision when commencing the U.K. class action in September 2016. On behalf of approximately 46.2 million U.K. consumers, Merricks sought damages for the allegedly inflated prices paid by those consumers because the unlawful MIFs were either mostly or entirely passed on to them. Damages for the overcharge and interest were estimated at over £14 billion — reportedly the largest civil damages claim ever brought in the U.K.

Merricks’ claim was brought on an “opt-out” basis. Opt-out class actions in relation to competition/antitrust infringements — collective actions on behalf of everyone matching a certain description unless they expressly opt out of the proceedings — were only introduced in the U.K. in October 2015. They contrast with “opt-in” class actions — consisting only of members matching the description who expressly elect to join the action — which had already existed for several years.

Both opt-out and opt-in claims must be (i) brought by an appropriate authorised representative and (ii) “certified” by the CAT as eligible for inclusion in collective proceedings. Certification requires, amongst other things, that the claims are brought on behalf of an
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**Distribution of Damages**

The Court noted the absence in the relevant legislation of any requirement that aggregate damages should be distributed according to what an individual claimant has lost. Although such a compensatory system “will probably be the most obvious and suitable” distribution method in cases where each individual’s loss is readily calculable, it is not mandatory. If such a prerequisite did exist, then the power to make an aggregate award would be “largely negated” in class actions of this kind.

As the CAT “clearly did” consider that an aggregate award had to be distributed to claimants so as to restore individual loss suffered by them, the Court concluded that its approach was both “premature and wrong”.

**Comment**

The Court’s judgment appears to significantly lower the initial threshold for class actions to proceed in the U.K. Class representatives need only establish a “real prospect of success” — a relatively low bar to overcome, particularly given the significant time and costs incurred in class actions.

Although the Court’s judgment endorsed the Canadian view that certification is a continuing process, in practice this may provide cold comfort to parties. The suggestion by the Court that terminating a class action “once the pleadings, disclosure and expert evidence are complete and the Court is dealing with reality rather than conjecture” does not fully reflect the fact that completing the pleadings, disclosure and expert evidence stages in litigation is a costly and time-consuming exercise. Class representatives and their funders should take note of the potentially significant liability to pay adverse costs if the CPO is revoked after completing such expensive steps in the process.

Only time will tell whether the Court’s judgment results in an increase in the number of class actions commenced in the U.K.; however, developments should be monitored closely. Thus far, no opt-out claim has proceeded beyond the certification stage. However, with a low bar to entry, and in a climate where the subject matter for anticompetitive behaviour continues to be widened by the U.K. anti-trust regulator, the Competition and Markets Authority, there may follow a noticeable uptick in U.K. class action litigation.

Of further note is the Court’s departure from the compensatory principle of damages for torts under English law, by allowing a distribution of damages that does not correspond to a particular individual’s loss. The acceptance of this principle is a significant development in English law and creates novel ground for the English courts and practitioners alike.

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**Court of Appeal Decision**

**Pass-On**

The Court said that a proposed class representative need only demonstrate that a claim has a “real prospect of success” at the certification stage. In support, the Court cited several Canadian authorities (Pro-Sys v Microsoft, in particular), noting that the similarities with the English class action regimes were “obvious”. The Court endorsed top-down calculations of aggregate damages even though they did not require proof of individual losses — to insist on such proof would “run counter to the provisions” of the U.K. regime.

Applying this standard, Merricks only needed to convince the CAT that both (i) the expert methodology concerning pass-on of MIFs to consumers was “capable” of assessing the level of pass-on and (ii) the data to operate that methodology would, or would likely, exist at trial. Merricks did not need to produce or identify all of the relevant evidence. Instead, an analysis of pass-on to consumers on an individual basis is “unnecessary when what is claimed is an aggregate award”, and pass-on to consumers “generally satisfies the test of commonality of issue necessary for certification”. Nor did the certification stage require a “mini trial”, which was, in the Court’s opinion, “more or less what occurred” before the CAT. In sum, the Court said the CAT had misdirected itself as to the applicable test for certification and “demanded too much” of Merricks for that stage of the case.

**Distribution of Damages**

Identifiable class of persons, raise common issues and are “suitable” to be brought in collective proceedings. If the CAT is satisfied that the conditions are met, it may make a “collective proceedings order” (CPO), thus allowing the claim to proceed to a full trial.

For two principal reasons, in July 2017 the CAT refused to grant Merricks a CPO. First, the CAT was unconvinced that expert evidence could adequately demonstrate the “pass-on” of MIFs from merchants to consumers, so as to justify the aggregate damages claimed. Merricks had attempted to rely on a “top-down” approach to calculate the total overcharge to consumers, and therefore the total damages appropriate, but the CAT was not persuaded that sufficient information to support this approach existed. Second, Merricks’ proposed method of distributing damages — calculating the aggregate amount attributable to each year from 1992 through 2008 and distributing that on a per capita basis to each individual falling within the class in the given year — would not have correlated to each individual’s loss, thus contradicting the compensatory principle of damages for torts under English law.

**Actions Back Under the Spotlight**

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Of further note is the Court’s departure from the compensatory principle of damages for torts under English law, by allowing a distribution of damages that does not correspond to a particular individual’s loss. The acceptance of this principle is a significant development in English law and creates novel ground for the English courts and practitioners alike.
Finally, the case confirms the increasingly welcoming approach of the English courts and U.K. Parliament towards third-party funding. The Court specifically noted, for example, that the revised U.K. class action regime was “obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding”. The U.K. litigation funding market has grown significantly in recent years, with current estimates indicating that the capital available for funding now stands at over £1.3 billion. Third-party funding is a particularly valuable avenue for U.K. consumers, given that opt-out class actions cannot be funded by arrangements whereby lawyers receive a portion of any damages received. In the U.S., by contrast, a material part of class settlements can be awarded as fees to counsel for the class.

On a number of fronts, the Court’s judgment provides, at least temporarily, some much-needed clarification. Given the infancy of the U.K. class action regime, such clarity should be welcomed whilst also expecting further twists and turns. Mastercard has already indicated that it intends to appeal the Court’s decision, and separate opt-out CPO applications due to be heard by the CAT later this year are likely to supplement the issues decided by the Court. In the first opt-out case to go before the CAT, it commented about the process that “everyone is learning on the way”. For the moment at least, this still seems apposite.

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Despite 20 years of robust legislative activity in the field of consumer protection and the 2013 European Commission recommendation on collective redress mechanisms, a harmonized approach to collective redress such as group or class actions does not exist throughout the European Union. That may change if the European Commission’s “New Deal for Consumers” is adopted; the legislative package, published on April 11, 2018, introduces, in a proposal for a directive, an EU-wide compensatory redress mechanism to protect the collective interests of consumers. The proposed directive is currently being discussed by the European Council, in particular its Working Party on Consumer Protection and Information, and member states are providing their opinions.

The Commission cited large-scale cross-border infringements of EU consumer law such as the Volkswagen diesel emissions case — which reportedly affected over 8 million consumers across various EU member states and saw compensation offered to U.S. but not EU consumers — and the rise of economic globalization and digitalization as examples of the difficulties consumers face when seeking to claim collective redress across unharmonized redress regimes in the 28 EU member states.

**Background**

The EU has a comprehensive set of consumer rights in place, and all member states have collective redress available for infringements of consumer law in the form of injunctive relief under the Injunctions Directive 2009/22/EC. However, compensatory collective redress (i.e., damages) is not presently available in all member states, and where it is an option, it is often limited to specific sectors (generally those where claims are made by consumers). The European Commission’s January 2018 report on the subject concluded that where collective redress was available, it was underused, including due to rigid conditions set out in national legislation, the lengthy nature of procedures and the perceived excess in costs in relation to the expected benefits.

Each member state has its own approach. In the United Kingdom, for example, individual consumers might together seek a “group litigation order” (as car owners suing Volkswagen did in connection with the so-called “Dieselgate” emissions litigation) or, for a competition law claim, a collective proceedings order from the Competition Appeal Tribunal (as is currently being pursued in connection with a finding of cartel activity in the European trucking industry). Meanwhile, in Germany, no general procedural mechanism for collective actions exists, though an act governing representative actions for consumer claims will come into force in November 2018. Currently, special collective mechanisms are available for certain types of disputes, such as those that are subject to the Capital Markets Model Case Act (KapMuG).

**Proposed Directive**

The New Deal includes a suite of changes to existing directives and the proposed directive on representative actions that would mandate a single approach across the EU, replacing the Injunctions Directive. The proposed features of the new representative action proposal include:

- A wide scope, encompassing infringements of provisions of EU law that harm or may harm the collective interests of consumers, including in the financial services, energy, telecommunications, health and environment sectors;

- Standing restricted to “qualified entities” that are designated by member states and meet minimum reputational criteria (such as being a nonprofit and having transparent funding arrangements);
A variety of possible remedies in addition to injunctive relief (which is already available), in particular compensatory relief, declaratory relief (i.e., establishing an infringement but not granting relief) and court-approved settlements;

- Baseline procedural features such as permitting opt-out actions where consumers may benefit from relief without having to individually opt in, and the ability for consumers to seek disclosure of certain types of documents from the defendant; and

- Streamlined proceedings, with final decisions serving as irrefutable evidence of consumers’ entitlement to redress within the member state where the case was brought and as a rebuttable presumption of infringement in other member states; declaratory decisions upon which litigants can directly rely in subsequent redress actions; and mutual recognition of qualified representative entities, enabling EU-wide infringements to be pursued in a single member state.

The proposed directive will need to pass through the European Parliament and European Council, and the co-legislators will need to agree on the final text before it becomes law, a process that could take months or even years. This process may lead to amendments of the present text or even abandonment of the project. If the proposed directive is finalized and becomes law, member states will have at least 18 months to ensure that its provisions are reflected in their local laws.

‘The European Way’

One focus of the legislative process may be whether the proposed directive delivers on its promise to provide increased legal certainty and adequate safeguards for companies against the type of litigation that is often criticized as abusive in U.S.-style class actions. The availability of punitive damages, absence of limitations when it comes to standing, possibility of funding using contingency fees and wide-ranging discovery are “U.S.-style” features that the European Commission has singled out in its joint information note “Towards a Coherent European Approach to Collective Redress: Next Steps” as “not compatible with the European legal tradition.” Věra Jourová, the commissioner for Justice, Consumers and Gender Equality promised in an April 11, 2018, press release that “representatives actions, in the European way, will bring more fairness to consumers, not more business for law firms.”

What “the European way” might entail and whether it will deliver on the promise of fairness will only become clear once the proposed directive completes its long legislative journey and is tested in the courts of the member states.