Fordham Competition Law Institute
CLE Conference Day 2 Materials

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 specializes 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 Dekeysar**
**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 has 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.

In labor and employment, Dr. Haider provides economic testimony and consulting in a range of areas including the economics of discrimination, wage and hour claims, labor class actions, and wrongful termination. She also has expertise in evaluating claims of economic loss in these matters.

Dr. Haider is Co-Chair of the Economics Committee of the ABA Section of Antitrust Law (“ABA-SAL”). She also recently served as Associate Editor of Antitrust Magazine and has written papers and given numerous presentations on economic issues in litigation. Her work has been published in peer-reviewed journals such as the Journal of the European Economic Association, Antitrust Magazine, and The Antitrust Practitioner. She has also co-authored a chapter in the ABA-SAL volume, Proving Antitrust Damages.

Dr. Haider received her PhD in economics, with distinction, from Columbia University and her BA in economics, summa cum laude, from Gettysburg College.

Michael D. Hausfeld
Chairmain, Hausfeld LLP
Michael D. Hausfeld, widely recognized for his leadership on competition matters and his groundbreaking results in human rights law, is the Chairman of Hausfeld LLP.

His career has included some of the largest and most successful class actions in the fields of human rights, discrimination and antitrust law. He 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, Michael 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 (1999-2003) 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) (1016-2018). Frederic 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.


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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 Practitioner, 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.

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Wu was a law clerk for Justice Stephen Breyer and Judge Richard Posner, and has also worked at the White House National Economic Council, at the Federal Trade Commission, for the New York Attorney General, and in the Silicon Valley telecommunications industry. He has written widely for the popular press and is currently a contributing opinion writer for the New York Times.

Wu has testified before Congress on multiple occasions, has been named twice to the Politico 50 list of those transforming American politics, and was also named one of America’s 100 most influential lawyers by the National Law Journal. He has twice won the Lowell Thomas Award for travel writing, and in 2017 he was named to the American Academy of Arts and Sciences.
FTC, DOJ May Team Up On Vertical Merger Guidelines

By Matthew Perlman

Law360 (March 29, 2019, 8:06 PM EDT) -- The U.S. Department of Justice's top antitrust official showed a willingness Friday to work with the Federal Trade Commission on updating guidelines for vertical mergers that have been on the books since the mid-1980s.

The DOJ has been working since last year on a revision to the antitrust division’s “Non-Horizontal Merger” guidelines, which provide parties insight into how mergers between companies at different points in the supply chain, known as vertical deals, should be analyzed. On Friday, Assistant Attorney General Makan Delrahim said the update could be made more meaningful if the FTC also had some input, rather than the DOJ going at it alone.

“We haven't really shared drafts of it yet.. but I think a joint product would only be better because it would pull from the experience of the two agencies,” Delrahim said during a round-table discussion at the American Bar Association’s annual spring antitrust conference.

The DOJ issued the current vertical guidelines on its own in 1984, and as the number and significance of vertical deals have increased in recent years, there have been calls for an update to account for new economic modeling and changes in the corporate landscape. By contrast, the guidance for deals between direct competitors was last updated jointly by the DOJ and FTC in 2010.

Delrahim said during the panel that he feels the new guidance will be helpful in letting the business community “know where we stand from an enforcement standpoint.” The agency had also been waiting for an outcome on the appeal of its failed challenge to AT&T’s deal for Time Warner, which was its first fully litigated challenge of a vertical merger in decades.

The D.C. Circuit rejected the agency’s appeal over the deal in February, and the outcome is expected to factor into whatever update is issued.

FTC Chairman Joseph Simons, also at the round table on Friday, noted the 1984 guidelines were issued a few years before the current economic models generally used to analyze vertical mergers “got into the mainstream.” These include foreclosure theories, which involve a merged firm preventing competitors from accessing a needed supply.

The DOJ had theorized that AT&T could refuse to license Time Warner’s content to other TV and video distributors after the merger.

“Things really change, and we have to do something to keep up with the change,” Simons said Friday.

He acknowledged, however, that drafting the guidance will present some difficulties, because the analysis is much more complex in vertical deals than in horizontal deals. Simons also said it’s important to make sure any guidelines that come out are as bipartisan as possible “so that they last and they're not reversed.”

During the panel, Simons was also asked about the apparent divergence among the five new FTC commissioners on vertical deals. In late January, the commission voted 3-2 along party lines to allow Staples Inc. to proceed with its planned $483 million purchase of office products wholesaler Essendant Inc. after the companies agreed to put up a firewall preventing Staples from accessing Essendant’s customer information.

Simons, along with fellow Republican commissioners Noah Joshua Phillips and Christine S. Wilson, voted in favor of accepting the commitments, which they said cured concerns about Staples leveraging the information to get a leg up over Essendant’s wholesale customers. Commissioners Rebecca Kelly Slaughter and Rohit Chopra, both Democrats, issued strongly worded dissenting opinions on the clearance that also raised broader questions about vertical merger enforcement.

In February, the commission split along the same lines on Fresenius Medical Care AG & Co.’s $2 billion deal for NxStage Medical Inc. That deal had both horizontal and vertical components in the dialysis industry and the Democratic commissioners contended in a pair of dissent that the majority only addressed the horizontal part.

Simons acknowledged that “clearly there was some disagreement” on those deals, but noted that in the 10 months since the new commission has been in place, just 14 of 304 votes have been contested, and in some of those one of the commissioners crossed party lines.

“So, in terms of completely partisan voting, where only one party is voting for the matter, that's a very small number of cases,” he said.
He also warned that while the agency didn’t challenge either the Staples or Fresenius deals, that doesn’t mean it won’t bring a vertical case in future. Simons added that the commissioners are still getting a feel for each other’s views and positions on certain issues, and that their approaches continue to evolve.

“My sense, and my hope, is that these disagreements will diminish over time as we continue to talk to each other and work together,” Simons said.

--Editing by Amy Rowe.
Final Offer Arbitration (FOA) as a merger remedy

Perspectives of an Economist

T. Scott Thompson, Ph.D.
Final Offer Arbitration as a remedy in AT&T / Time Warner

• Shortly after DOJ filed its Complaint, Turner transmitted an “irrevocable” offer of private arbitration to licensees
  — Similar to provisions in the FCC order approving the Comcast / NBCU merger, but not subject to government oversight

• The Turner offer was discussed favorably and at length in the District and Circuit court opinions

• Commentators have noted that this appears to open the door for “self help” remedies to be offered in litigation
  › “The most surprising aspect of the case … is that the courts credited the parties’ unilaterally offered behavioral fixes, suggesting that such tactics may be quite persuasive in future vertical cases.” (James Keyte, Antitrust, Summer 2019)

• But does Final Offer Arbitration actually remedy vertical merger concerns of the sort raised by DOJ in its case?
Some features of the Turner arbitration offer

- No blackout during arbitration, but new terms apply retroactively
- “Baseball style” arbitration:
  - “The arbitrator shall choose the Final Offer of the party which most closely approximates the fair market value of the Turner Networks at issue. The arbitrator may not alter, or request or demand alteration of any terms of either Final Offer.”
  - “The decision of the arbitrator shall be binding on the parties.”
- Final Offers are complete contracts:
  - “The Final Offers shall be in the form of Carriage Agreement(s) for the Turner Networks requested by Claimant … and shall be for a term of three years unless the parties agree to a different term.”
  - Must specify the Turner networks at issue, and “the proposed price, terms, and conditions on which Turner will provide those Turner Networks.”
- Claimant must forgo FCC dispute resolution process
- Limits on discovery
- Seven year term
A simple model of final offer arbitration (FOA)

• Game theoretic model of final offer arbitration over price:
  ▪ Risk-neutral Buyer and Seller simultaneously submit final offers B and S to an arbitrator who chooses the offer closest to “fair market value” (FMV)
  ▪ FMV assumed to follow a probability distribution known to buyer and seller and independent of their offers (i.e. no “splitting the difference”)

• Nash equilibrium solution:
  ▪ Median FMV is the expected price
    › B and S each “win” with probability ½
    › B and S are not the same, but are symmetric around the median FMV
  ▪ The spread between B and S is greater when FMV is more uncertain

• Takeaways:
  ▪ Arbitrator’s assessment of FMV drives the outcome
  ▪ Binding FOA is risky when FMV is uncertain
    › The probability that the arbitrator’s decision will match FMV is zero!
What is “fair market value?”

• Definitions
  - Not defined in the Turner offer or in the Comcast / NBCU order
  - Fair market value (FMV) is the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts. (Internal Revenue Service Pub 561)
  - Other “dictionary” definitions are similar

• Fair Market Value could be anything between the reservation prices of the negotiating parties
  - If those change due to a merger then FMV might change

• Questions for thought:
  - How does an arbitrator assess FMV?
  - Is FMV the price that would have prevailed but for a merger?
  - What does “closest to FMV” mean when the offers are contracts?
FOA in the economics literature

• Binding FOA is widely discussed as a mechanism for resolving private disputes (e.g., labor disputes, salary arbitration)
  — Originally proposed as an alternative to conventional arbitration (CA)
  — Empirically, CA arbitrators tend to “split the difference”
    ▪ Parties likely to take extreme positions
  — Riskiness of FOA encourages settlements
    ▪ Settlement rates are higher under FOA than CA
  — But FOA arbitrators “formulate preferred awards that compromise between the bargainers’ perspectives” (Marburger, 2004)
    ▪ Outcomes reflect private incentives of the parties

• No discussion of broader public interests (e.g., preservation of competitive pricing)
  — No modeling of FOA as a merger remedy
AT&T / Time Warner experts on the Turner offer

• Quotes from Dennis Carlton’s reports:
  - “Any threat to withhold Time Warner content from a current licensee is eliminated post-merger. … [P]ost-merger, this threat is lost. As such, any bargaining leverage from this threat is lost due to the merger.”
  - The “threat” of baseball style arbitration “creates incentives for both sides to be reasonable and reach agreement.”
  - The arbitration remedy does “not allow an outcome where ‘no deal is reached, resulting in a blackout.’”

• Comments:
  - The threat of baseball style arbitration replaces the threat of a “no deal” blackout
  - Carlton did not say whether bargaining leverage is created by the new threat
  - A blackout could still occur if a licensee chooses to not invoke FOA
DOJ’s experts on the Turner offer

• Quotes from Carl Shapiro’s reports:
  ▪ “Arbitration does not eliminate the incentives created by the merger.”
  ▪ “[A]rbitration changes the mechanism through which AT&T’s incentive to raise rivals cost operates.”
  ▪ “[T]he underlying incentives created by the merger … will very likely affect the outcome of any FOA. … [The merger would] give AT&T the incentive to raise the Turner carriage fees that it submits to the arbitrators under FOA.”
  ▪ “[T]he merger causes ‘upward offer pressure’ on the final offer that Turner submits to arbitrators.”

• But Shapiro did not include arbitration in his model of harm:
  ▪ “So it would take a completely different model to model arbitration. It's not something -- the bargaining model is well established in the literature and in the practice, and there is no model that I'm aware of that would be comparable for arbitration so no, I didn't go in that direction.” (Trial transcript 2325)
Conclusions

• There is empirical and theoretical support for the idea that FOA helps parties reach agreement and avoid “no deal” outcomes

• But the goal of a structural merger remedy is different: to negate anticompetitive incentives created by the merger
  — Neither side of AT&T / TW modeled equilibrium pricing with a FOA remedy
    ▪ Defense pointed instead to Comcast / NBCU precedent and elimination of the blackout threat
    ▪ Shapiro recognized that the merger could change FOA offers but did not model a merger with FOA remedy
  — The economics literature does not address whether binding FOA will work as a merger remedy

• FOA as an effective merger remedy probably requires something more than has been offered to date
The AT&T/Time Warner Decision: More Than Meets the Eye

BY JAMES A. KEYTE

Any hoped and anticipated that the D.C. Circuit’s AT&T/Time Warner decision1 would modernize vertical merger analysis by setting forth a detailed analytical framework for assessing vertical mergers, generally, and those involving foreclosure or raising rivals’ costs (RRC), specifically. In affirming the district court’s refusal to enjoin the transaction, however, the D.C. Circuit found “no need” to opine on the legal standard for evaluating vertical mergers because, on appeal, those standards were not in dispute.2 Yet, there is much to be learned from the circuit court’s decision. Some of the insights provide practical direction for investigations and litigation strategy. Others are doctrinal, as both the circuit court’s and Judge Leon’s district court decision3 reflect a modern approach to vertical merger analysis. For example, the decisions incorporate the Post-Chicago school RRC analysis4 while, at the same time, reaffirm the bedrock principle that all merger analyses must be forward looking when assessing market-wide harm, especially in “dynamic” industries.

The key lessons from AT&T/Time Warner are as follows:

- For vertical mergers, behavioral fixes—even post-complaint—are a viable option for the parties (especially if the government has used them before).
- There is no presumption of competitive harm for vertical mergers as no competition is directly eliminated, which means that the government must prove its prima facie case using at least some meaningful evidence of anticompetitive effects.
- Contemporaneous business documents and testimony (or the lack of them) from key decision makers remain the most powerful evidence in merger cases.
- RRC and other vertical foreclosure theories (as well as econometric modeling) can be valid, but must be consistent with marketplace realities, linked to future market conditions, and supported by contemporaneous business documents.
- Industry retrospectives, including “natural experiments” of prior transactions, can be powerful economic evidence if sufficiently tied to the issues at hand.
- Rapidly changing market conditions, especially in “dynamic” markets, significantly weaken theoretical predictions of harm.
- New vertical merger guidelines would be useful, but should not stray from established antitrust principles.

The Government’s Theory and Evidence

The essential facts of the AT&T/Time Warner case are straightforward. The government claimed that the vertical merger of Time Warner (a content and programming provider) with AT&T (a distributor of content through DirectTV and Universal, a provider of content and programming; statements and testimony of third parties; and, most prominently, expert testimony and analyses. It claimed to show (1) increased bargaining leverage under a Nash bargaining model, and (2) predicted price increases for Time Warner content under an RRC model where the increased bargaining leverage would give Time Warner the ability to increase the costs of its distribution rivals. This, in turn, allegedly would create a cushion for AT&T to charge higher affiliation fees, thereby increasing ultimate prices to consumers. In the government’s view, these anticompetitive effects outweighed any potential price reductions from the merger that might result from the elimination of “double marginalization” (a proposition readily admitted by the government’s

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1 United States v. AT&T, 895 F.3d 852 (D.C. Cir. 2018).
2 Id. at 868–69.
3 AT&T, 895 F.3d at 860.
4 E.g., United States v. AT&T, 907 F.3d 594 (7th Cir. 2018).

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expert) or other efficiencies flowing from Time Warner’s integration with AT&T. While other issues were litigated below and on appeal, these leveraging and RRC theories comprised the heart of the case.

In response, AT&T argued that its prior FCC statements were made several years earlier under different market conditions and that there were no contemporaneous documents or testimony from Time Warner or AT&T suggesting that the merger would reduce competition. The parties also showed, through their own expert testimony, that prior vertical integration in the industry (e.g., Comcast/NBCU) had no material impact on content prices. As the D.C. Circuit concluded, the government presented a largely theoretical case centered on increased bargaining leverage, while the defendants responded with “real-world” data and evidence both on the effects of past vertical mergers as well as the actual negotiations of affiliation agreements.

An Invitation for Behavioral Fixes, Even Post-Complaint

Even though AT&T/Time Warner is the first circuit-level vertical merger decision in several decades, the most surprising aspect of the case has little to do with substantive vertical merger analysis. Instead, an intriguing practical lesson coming out of AT&T/Time Warner is that the courts credited the parties’ unilaterally offered behavioral fixes, suggesting that such tactics may be quite persuasive in future vertical cases. Indeed, almost at every turn, the court’s decision highlights the government’s failure to address or account for the parties’ “irrevocable” offer to enter into the same type of “baseball-style” arbitration that was incorporated into the Comcast/NBCU consent decree. While specific industry context of the arbitration offer in AT&T/Time Warner may render it less useful in other industries, the court’s endorsement of a post-litigation fix did not include any articulated limiting principle.

The risk for the Department of Justice and the Federal Trade Commission going forward is that each in the past has accepted a broad range of behavioral remedies for challenged vertical mergers. These include licensing arrangements, supply or purchasing agreements and related commitments, R&D cooperation, firewalls and so on, depending on the competitive concerns at stake. And, no doubt, practitioners are already combing through past consent judgments and decrees to see whether one or more may fit the particular competitive concern in contemplated transactions. Further, if courts are willing to accept the merging parties’ unilaterally proposed behavioral remedy to resolve particular concerns, why would courts not also accept pre-litigation behavioral “fixes” among any interested parties, including proposals rejected by the relevant agency over the course of an investigation? The decision does little, if anything, to suggest that the agencies are entitled to a seat at the table for remedy negotiations; hence, the game of “Let’s Make a Deal,” both before and after litigation, received quite a boost in AT&T/Time Warner.

At the same time, it seems somewhat inequitable to permit parties unilaterally to propose fixes to the court, especially post-litigation, if the investigation and resulting government complaint was premised on a transaction that drove the parties’ and the agencies’ respective theories, expert analyses, and econometric modeling. And, in fact, at least one court has found that a proposed fix during litigation was too late, while others have addressed litigation-driven fixes on the specific facts.

It is highly doubtful that this is the last word from the courts on unilateral, post-litigation fixes. Moreover, given the government’s position relating to these behavioral fixes, we are likely to see changes in the game rules for remedies, including perhaps as part of timing agreements or other Section 7 processes. Indeed, on the heels of AT&T/Time Warner, the DOJ has suggested a distinct “remedies” phase for Section 7 actions (although implementation remains unclear). As it now stands, however, AT&T/Time Warner is an express invitation for parties to conceive of (and potentially hold for litigation) any variety of proposed fixes (pre- or post-complaint) in all merger litigation, and it ultimately will be up to a court to determine if any particular proposed fix adequately addresses the agencies’ competitive concerns.

AT&T/Time Warner Reflects a Modern Analytical Framework for Vertical Mergers

Because the D.C. Circuit noted that the legal standard for its review was not contested by the merging parties, it would be easy to marginalize the decision in thinking about the analytical framework for future vertical merger cases. This would be a mistake as there is no reason that the court’s discussion and observations about the Section 7 analytical framework for vertical mergers would be materially different in a future case. While the framework is not that surprising, it has important implications for how vertical merger challenges, if not all merger challenges, are litigated.

Baker/Hughes Burden Shifting. Section 7’s analytical framework is familiar to antitrust practitioners, but the way the circuit court described it is illuminating. For example, with respect to the merits standard of Section 7, the court explained that even with a forward-looking incipency standard (“may be substantially to lessen competition”), the government must show a “reasonable probability” that the merger “substantially” lessens competition in a line of commerce (i.e., a “relevant market”), a requirement that underlies all of the court’s subsequent discussion.

On the burden-shifting paradigm, in particular, the circuit court recounts the usual: “[T]he government must first establish a prima facie case that the merger is likely to substantially lessen competition in the relevant market.” If done, “the burden shifts to the defendant to present evidence” that rebuts that showing. But, significantly, the court highlights that the defendant can present two forms of rebuttal: (1) evidence that the prima facie case “inaccurately predicts the relevant transaction’s probable effect on future competition,” or (2)
evidence that “sufficiently discredit[s]” the underlying prima facie case itself. Upon such a rebuttal, the court explains, the burden shifts back to the government and “merges with the ultimate burden of persuasion, which remains with the government at all times.”

As we will see, the rather abrupt holding of the circuit court in AT&T/Time Warner is that the government never even met its prima facie burden.

No Structural Presumption. The most fundamental difference between horizontal and vertical mergers is that there is no inherent elimination of competition in the latter. This, in turn, means there can be no traditional “HHI violation” and no structural presumption of anticompetitive effects. As the D.C. Circuit explained: “[U]nlke horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effects through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share.”

The importance of this distinction cannot be overstated as the government typically relies heavily on the presumption in litigation. Indeed, in several recent Section 7 decisions, courts have found that the “presumption” of anticompetitive effects in horizontal mergers is stronger as concentration levels increase, which in a few instances made the rebuttal burden effectively insurmountable.

By contrast, as the D.C. Circuit explained, in vertical mergers “the government must make a ‘fact-specific’ showing that the proposed merger is ‘likely to be anticompetitive.’” In other words, the government starts from scratch, if not worse, if the government continues to concede in litigation that vertical mergers inevitably generate merger-specific efficiencies (e.g., the elimination of double marginalization). Couple these efficiencies in AT&T/Time Warner with a rapidly evolving industry (both as to content and distribution), and one can see why this was a particularly challenging case for the government.

Moreover, if anything, in the vertical merger context, the subject of market shares potentially could be turned on the government, at least when the shares at one or both levels of the market are relatively low. For example, in the vertical restraints context, courts generally acknowledge that consumer welfare is not at risk if the defendant lacks market power. For example, in Jefferson Parish, the Supreme Court observed that a 30 percent market share did not demonstrate the requisite market share to infer market power, a threshold that has consistently been followed by courts.

One could fairly ask, then, whether in assessing a vertical merger, market shares below 30 percent at either level of the industry should afford a rebuttable presumption that the transaction does not pose a competitive risk under Section 7.

Not Just Price Effects. Another important analytical issue clarified by the D.C. Circuit is that the effects the government must prove need not be “certain,” nor must they relate only to price. As the court explained, “Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.” The court noted, however, that the government did not challenge the merger on “non-price related harms” in the video programming and distribution industry. This is understandable given the nearly unparalleled ongoing creation of new content and distribution in the industry. Perhaps the principle will be of greater relevance in vertical merger challenges to come.

Still Need to Prove Harm to Competition and Consumers. Finally, it cannot be overlooked that the D.C. Circuit decision recounts that the ultimate question is whether the merger causes a substantially lessening of competition in a relevant market, which includes the subject of whether the government’s case adequately addresses the merger’s impact on future competition in that market. While the court never needed to undertake a formal analysis of this fundamental requirement, there are two underlying themes in the decision that provide guidance on the subject.

First, the court makes clear that the concern in vertical mergers is about ongoing and future competitive conditions rather than on what bargaining leverage may or may not presently be brought to bear on any particular market participant (whether a content provider or distributor). This holding suggests the continued validity of the few Section 7 vertical merger cases (though, interestingly, not cited by the court in AT&T/Time Warner, which did not fully discuss the topic).

In the Second Circuit’s Fruehauf decision, for example, the court held that Section 7 does not prohibit foreclosure as such (or, updated to AT&T/Time Warner, relative changes in bargaining power or RRC), as “a vertical merger may simply realign sales patterns . . . [or] may simply free up that much of the market, in which the merging firm’s competitors . . . formerly transacted, for new transactions between the merged firm’s competitors.” This, of course, is consistent with RRC economic literature that developed after Fruehauf, which suggests that to find any foreclosure effects, harm to ultimate consumers must also be established. And while the foreclosure in Fruehauf addressed claims of complete potential foreclosure, the court’s observations are of equal importance to potential changes in bargaining positions in the vertical chain or other RRC theories—as to any of these, an evidentiary connection to market-wide harm remains an essential element of the claim.

Second, and critically, the circuit court’s AT&T/Time Warner decision held that the government must demonstrate how any particular theory of changes in bargaining leverage, foreclosure, or RRC substantially harms market-wide competition on a forward-looking basis. Thus, as discussed later below, even if the government can prove some material increase in bargaining leverage—and even a probable effect on rivals’ costs—the D.C. Circuit’s mantra about the “dynamic” nature of the industry makes it far from clear that the government would have been able to translate an
RRC effect into proof of sustained and likely market-wide harm. On the contrary, the government’s effects evidence appeared to focus on present market conditions rather than on the rapidly evolving competitive landscape in the media industry.

In sum, underlying both the district and circuit courts’ analyses is the premise that Section 7 is not aimed merely at changes in relative bargaining power, which alone does not reduce consumer welfare—whether in the present or the future. Instead, as the district court spelled out, the harm in a Section 7 case (as in all antitrust) must be to competition, not just competitors. In Section 7 terms, this means that the government must show that the change in vertical bargaining relationships caused probable anticompetitive effects in terms of reduced output, higher prices, or reduced quality. In other words, a change in bargaining leverage may have been necessary to the government’s case (according to both courts), but it would still not in and of itself be sufficient to support a Section 7 anticompetitive effect.

What Evidence Matters in Vertical Merger Analysis

Another major takeaway from AT&T/Time Warner is that “real-world” evidence often is much more powerful than theoretical modeling, especially when that expert analyses is viewed as disconnected to marketplace facts. Relatedly, the D.C. Circuit put a premium on evidence (or the lack of it) coming from decision makers of the merging parties in contrast to what it viewed as relative speculation from interested third parties or industry observers.

Contemporaneous Business Documents Remain Critical. Section 7 litigation has seen a number of cases where just a handful of “bad documents” or testimony appeared to drive the outcome of the case. The typical scenario is where a senior or knowledgeable executive states (in documents or testimony) something quite damaging in a Section 7 context, whether related to market definition (and a structural presumption) or the anticipated effects of the transaction. Experienced Section 7 practitioners know well that contemporaneous documents describing the anticipated anticompetitive effects of the transaction can be outcome-determinative in litigation, irrespective of expert testimony and sometimes even in contradiction to industry or customer views.

AT&T/Time Warner is the opposite type of case. One of the more interesting aspects of the case is that there does not appear to be any contemporaneous documents or testimony from the business people with personal knowledge that supported the government’s bargaining leverage and RRC theories. If anything, the evidence of those witnesses refuted the government’s entire premise. To be sure, merging parties have been known to be careful what they write and say about prospective transactions, but here the individuals who negotiated the affiliation agreements testified that they do not consider the source of content in those negotiations. In the face of that testimony, especially when coupled with the apparent lack of effects from the Comcast/NBCU transactions, concerns raised by competing distributors took on less probative value.

Econometric Modeling Is Endorsed, but Must Fit the Facts. The government’s expert testimony and modeling also fell prey to the lack of evidentiary “fit” with the same marketplace realities. The D.C. Circuit found that there was no reliable evidence that any asserted increased bargaining leverage was used or affected content prices. (The court also had problems with some of the model’s inputs.) While the court observed that Nash bargaining models and RRC analyses could apply to vertical mergers, it emphasized that expert testimony must be consistent with “real-world” data and marketplace realities.

In this respect, the D.C. Circuit went to some lengths to explain away some of what the court saw as the government’s legitimate challenges to the district court’s opinion. For example, the D.C. Circuit effectively agreed with the government that the district court misapplied the Nash bargaining model as it related to the downstream RRC construct. The government contended that the district court erroneously focused on whether long-term blackouts would “actually occur” rather than just change the “stakes” in a way that gave the merged firm increased bargaining leverage and, in turn, the ability to raise rivals’ costs in affiliate negotiations. But the D.C. Circuit deftly addressed the issue by concluding that the blackout issue was incorporated into the analysis “of whether the stakes for Turner Broadcasting would change and if so by how much,” and then agreed with the district court that the stakes would only change “slightly” and not give the merged firm “increased leverage” in negotiations. At a minimum, this highlights the complexities faced by courts in assessing the viability of assumptions in econometric modeling and is yet another example where “real-world” testimony of those actually negotiating the agreements (who said they would not enjoy increased leverage) was given significantly greater weight than theoretical forms of evidence.

Finally, the circuit court highlighted that the government, as well as its expert, also failed to account for how long-term contracts “would constrain Turner Broadcasting’s ability to raise content prices for distributors.” These contracts, the court found, would apply until 2021, after which “it would be difficult to predict price increases farther into the future,
particularly given that the industry is continually changing and experiencing increasing competition.”39 Again, “real-world” facts that appeared inconsistent with the government’s claim were paramount in the court’s view.

In the end, both the district court and the circuit court undertook what essentially was a Daubert40-like analysis of the government’s expert modeling and testimony, and found it wanting. Whether or not that is fair or correct, it is an important lesson for all who use expert modeling in antitrust litigation.

Retrospective Analyses and Natural Experiments Get a Boost. In looking at how the court assessed the competing expert testimony, it is also useful to understand why the court placed greater reliance on the parties’ retrospective expert analysis of the effects of prior vertical deals than on the government’s modeling. As a threshold observation, the defendants did not offer their own model of the merger, nor did they have to. The government bears the burden of proving anticompetitive effects, and particularly in the vertical context (i.e., without any “structural presumption” one finds in horizontal mergers), there is no reason to provide the government with modeling that may be turned back on the parties with some debilitating adjustments.

As for the court’s view of the parties’ economic evidence, there are two important takeaways. First, consistent with the D.C. Circuit’s overall view of the reliability of different types of evidence, the court’s discussion highlights the importance of “real-world” data, even if it is translated and delivered through economic analyses or models. Indeed, the court appeared more willing to rely on the data showing the effects of the Comcast/NBCU transaction, even though there were several differences in the transactions (e.g., the nature of the bargains at issue). But, consistent with another underlying theme of the decision—hoisting the government “on its own petard”—the court’s analysis credited the demonstration by defendants’ expert that the prior merger did not produce anticompetitive effects at a time when the industry was even less “dynamic” than today.41

Second, the court’s use of retrospective analysis highlights the importance of exploring “natural experiments” as a central aspect of expert testimony in merger cases. This type of analysis is used across any number of antitrust subjects (market definition, causation, damages),42 and although the specific analysis in AT&T/Time Warner may be particularly analogous (same industry, same alleged effect, same behavioral remedy), the probative value of natural experiments more generally is an important lesson of the case.

Dynamic Industries Are Not Good Environments for Merger Challenges

Finally, the most understated but critical analytical force in AT&T/Time Warner is the role that “dynamic,”5 competition played in the D.C. Circuit’s view of the government’s claim—i.e., the ongoing and dramatic changes in the industry as to both content and distribution. There was no dispute that these dynamic changes were occurring, and the circuit court’s opinion included a crisp summary of the evolving interplay among “traditional” multichannel video programming distributors (MVPDs) offering live and licensed content on a cable or satellite; “virtual” MVPDs that do the same over the internet but can offer smaller packages known as “skinny bundles”; and subscription video on demand services (SVODs), such as Netflix and Hulu, that offer large libraries of content or original programming. SVODs, in particular, were growing rapidly, with many customers “cutting the cord” on their MVPD services. Moreover, SVODs are vertically integrated—creating their own content and distributing it—which in large part precipitated the 2009 merger of Comcast (then the largest cable company in the United States) and NBC Universal.43 The district court also highlighted Amazon’s quickly emerging presence in the industry.44

While not expressly describing how dynamic competition fits into vertical merger analysis, the circuit court’s opinion clearly was influenced by the substantial changes in the video distribution and content sectors. For example, in first recounting how the district court framed the inquiry, the court repeated that the

outcome of the litigation . . . “turn[ed] on whether, notwithstanding the proposed merger’s conceded procompetitive effects, the [government] has met its burden of establishing, through ‘case-specific-evidence,’ that the merger . . . at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts.”45

Likewise, with respect to market definition, the D.C. Circuit highlighted that although the district court accepted the government’s market definition—limited to MVPDs—it still “considered the impact of the increasing presence of [SVODs] on the [MVPD] industry.”46

Citing United States v. General Dynamics Corp.,47 the circuit court also highlighted that the district court “had to determine whether the economic theory [offered by the government] applied to the particular market by considering evidence about the ‘structure, history, and probable future’ of the video programming and distribution industry.”48 This is where both courts made the most use of the dynamic nature of the industry. The D.C. Circuit highlighted, for example, the district court’s finding that “in view of the industry’s dynamism in recent years,” Professor Carl Shapiro’s opinion, in contrast with Professor Carlton’s, had “not been supported by sufficient real world evidence.”49 The circuit court also agreed with the district court that AT&T’s prior FCC submissions (which had highlighted the prospect of increased bargaining leverage from vertical integration) were not particularly relevant to the current state of the market.50 And, as described above, prior vertical integration in the industry had not led to the price increases that Shapiro’s model would predict, and the same industry was now “remarkably dynamic.”51

Going forward, the more interesting question perhaps is how will courts treat changing market conditions where there is evidence of increased bargaining leverage? Such a sce-
nario is likely to arise in a future case, and there are some practical observations to be made. First, as the Second Circuit explained in *Fruehauf*, one of the only quasi-modern vertical merger decisions available, not all effects on rivals cause harm to markets or ultimate consumers.68 Indeed, under the now mature RRC literature, the predicted harm to a rival or rivals must also translate to “power over price” or other relevant market-wide metrics.53 And that inquiry, of course, must also be made on a forward-looking basis.

Second, Section 7, consistent with antitrust jurisprudence generally, is concerned with acquisitions that create durable harm to consumers; ephemeral effects are not enough.54 Even with horizontal mergers—where some measure of competition is immediately eliminated—rapidly changing market conditions (especially those that may render historical shares less predictive of future results) can render alleged effects too speculative for courts to credit.55 Unsupported predictions about competitive effects are even less likely to succeed in vertical merger cases where effects are indirect and require predictions about how harm to intermediate participants may affect downstream consumers (or upstream suppliers in some cases). As we see in *AT&T/Time Warner*, dynamic changes can be taking place at all levels of a vertical chain, which can only enhance the level of unpredictability in dynamic markets.

The court’s repeated references to the “dynamic” nature of the industry ultimately reflected an unsprinkled judicial perplexity as to why the government would challenge a vertical merger in a “market” that is subject to such an onslaught of rapid change, both in terms of consumer behavior (e.g., cord cutting) and supplier entry and repositioning (e.g., Netflix, Hulu, and Amazon). The clear implication is that courts are likely to be skeptical of static models in dynamic industries. And both enforcers and practitioners should take heed that vertical merger challenges in dynamically changing markets will likely be an uphill battle.

**New Vertical Merger Guidelines Remain a Good Idea**

A significant amount of ink has been spilled on whether the DOJ and/or the FTC should issue new vertical merger guidelines, especially as vertical foreclosure theories are now an integral part of antitrust analyses, which was not the case in 1984 when the last Guidelines were issued.56 Proponents have suggested what those new guidelines should include,57 while opponents argue that current case law and analyses is more than adequate to handle the relatively rare vertical merger case.58

A new set of vertical merger guidelines would be useful from several perspectives. Practitioners would benefit from clear pronouncements from the antitrust agencies about the analytical framework they would apply to vertical transactions, the role of econometric analysis and modeling, and the remedies that the government endorses. And, in fact, the DOJ and the FTC recently acknowledged that each was working independently on vertical merger guidelines and hoped eventually to share its work with the aim of producing a joint set of new guidelines.59

One interesting and complex issue the agencies may wish to address is how they view the Section 7 requirement that a transaction substantially reduce competition in a relevant line of commerce. This is critical because, in large part, foreclosure and RRC theories, by definition, focus in the first instance on harm to rivals; there has been less focus on how to establish that any such harm is likely to cause a durable reduction to market-wide competition in terms of output, price, or quality.60 Indeed, this is a challenge for all foreclosure analysis in antitrust, as jurisprudence continues to move away from per se treatment of certain vertical restraints.

**Practical Advice for Practitioners**

The practical advice for practitioners after *AT&T/Time Warner* is as much about the strength and weaknesses of certain types of evidence in antitrust cases generally as it is about doctrinal or economic frameworks.

First, contemporaneous business documents, or first-hand testimony, will generally prevail over predictive modeling, particularly if the experts work relies on questionable assumption or inputs;

Second, econometric modeling of any sort (here, Nash bargaining and RRC) must be assessed thoroughly for its “fit” with the facts (much like a *Daubert* review);

Third, allegations of durable market power are quite difficult to prove in highly dynamic markets (a point not limited to vertical mergers); and

Fourth, and finally, any practitioner considering a vertical merger should immediately explore all potentially effective behavioral remedies because, as of now, they are all in play.


14 See Kelcee Griffis, AT&T-Time Warner Trial Sets Poor Example, Delrahim Says, LAW360 (Mar. 20, 2019).

15 See AT&T II, 916 F.3d at 1032 (emphasis omitted).

16 Id. (citations omitted).


18 AT&T II, 916 F.3d at 1032.


22 AT&T II, 916 F.3d at 1045.

23 Id. at 1046.

24 See id. at 1032.

25 See FTC v. FTC, 603 F.2d 345 (2d Cir. 1979).


27 See AT&T I, 310 F. Supp. 3d 161.

28 The Supreme Court established long ago that Section 7 requires a substantial effect on competition in a relevant market. See Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

29 See cases cited supra note 18.

30 See id. at 1037–38, 1039, 1045.

31 See id. at 1036, 1038.

32 See id. at 1038, 1045.

33 See id. at 1031–32, 1038.

34 Id. at 1039–40.

35 Id. at 1040.

36 Id. at 1046.
ARBITRATION AGREEMENT

1. At the request of any Video Distributor, Turner shall provide, for distribution to consumers, the Turner Networks that it provided, as of November 20, 2017, to a Video Distributor with more than one million subscribers. Turner shall negotiate in good faith and with reasonable diligence with any requesting Video Distributor. If negotiation fails to produce a mutually acceptable set of terms and conditions for a Carriage Agreement, the Video Distributor may submit the dispute to commercial arbitration in accordance with the Arbitration Procedures set forth herein.

2. Upon receiving timely notice of a Video Distributor’s intent to arbitrate, Turner shall continue to provide the Turner Networks pursuant to the terms of any existing agreement until the arbitration is completed. If the arbitrator’s decision changes the financial terms on which Turner must provide the Turner Networks to the Video Distributor, Turner or the Video Distributor, as the case may be, shall compensate the other based on application of the new financial terms for the period dating from expiration of the existing agreement (see Arbitration Procedures Section B).

3. Arbitration pursuant to this Agreement shall be conducted in accordance with the AAA’s Commercial Arbitration Rules and Expedited Procedures, except where inconsistent with specific procedures prescribed below (see Arbitration Procedures Section C). As described below, the arbitrator shall select the Final Offer of either the Video Distributor or Turner and may not alter, or request or demand alteration of, any terms of those Final Offers. The decision of the arbitrator shall be binding on the parties and Turner shall abide by the arbitrator’s decision, subject to any right of appeal pursuant to Federal Arbitration Act, 9 U.S.C. § 1 et seq. (see Arbitration Procedures Section C.8).

4. For purposes of this Agreement:

4.1 In any agreement with a Video Distributor, Turner may withhold licensing Turner Networks to a Video Distributor until at least eight of the top 35 Non-Affiliated Nielsen-rated Video Networks (as measured in prime time, live + 7 over the prior calendar year) have agreed to provide such Video Networks through a linear feed to the Video Distributor.
4.2 Turner may condition its provision of Turner Networks to a Video Distributor on the Video Distributor’s (a) agreement not to distribute the Video Programming to consumers through a website or other means that associate the Video Programming with content that is patently offensive or unlawful or that promotes or communicates the availability or accessibility of pornography, gambling, or unlawful activities; (b) objectively reasonable and customary demonstration of its ability to meet its financial obligations; (c) demonstration of its ability to satisfy objectively reasonable and customary quality and technical requirements for the display and secure protection of Turner’s Video Programming; or (d) agreement to limit the distribution of Turner’s Video Programming to the territory of the United States.

4.3 Turner is not prohibited from ceasing to license a Video Network so long as the network is no longer licensed, distributed or otherwise provided to any Video Distributor.

5. Nothing in this Agreement prohibits Turner from refusing to provide to any Video Distributor rights to any Video Programming: (1) for which Turner does not possess copyright and/or any other applicable rights; (2) not subject to Turner’s management or control or over which Turner does not possess the power or authority to negotiate content licenses; or (3) the provision of which would require Turner to breach any contract in effect as of November 20, 2017.

6. This Agreement shall apply from and after the closing of the Merger to renewals of existing affiliate or other agreements providing rights to distribute the Turner Networks or to agreements for the provision of the Turner Networks to a Video Distributor not currently distributing such Turner Networks. This Agreement shall expire seven years after closing of the Merger, unless any or all of the Turner Networks shall no longer be owned by the same company that owns DirecTV, in which case any such network not commonly-owned with DirecTV shall no longer be bound by this Agreement.

7. Provisions in the existing Turner Networks Carriage Agreements governing notice, waiver, and choice of law are incorporated herein by reference.
ARBITRATION PROCEDURES

A. Initiation of Arbitration

1. Up to 30 calendar days before the expiration of a Carriage Agreement, or at least 90 calendar days after a first-time written request for Turner Networks, a Claimant may notify Turner in writing that it intends to request arbitration to determine the terms and conditions of a new Carriage Agreement. The notification must describe with specificity the Turner Networks that Claimant is requesting. Within 10 calendar days of such notification, Turner and the Claimant must notify any Person who is to party to a Carriage Agreement subject to discovery under Section C.4 and entitled to notice prior to the intended disclosure of that Carriage Agreement pursuant to compulsory process and furnish them with a copy of the confidentiality agreement pursuant to Section A.6 herein. Nothing in the foregoing shall prevent subsequent notifications, disclosures, or discovery.

2. A Claimant may demand a standalone offer or offers for (i) a bundle of all Turner Networks or (ii) any bundles of Turner Networks that Turner has licensed to AT&T, the Claimant, or another Video Distributor for distribution to consumers on or after October 22, 2014. For the purposes of subpart (i) of this paragraph, bundles of Turner Networks shall include all Turner Networks licensed to a Video Distributor, whether through a single Carriage Agreement or multiple Carriage Agreements. A Claimant may demand in its initial notice of intent to arbitrate, and Turner must provide within 10 calendar days, a list of bundles available under subpart (ii) of this paragraph.

3. Prior to submitting a matter to arbitration, a Claimant may elect to enter mediation with Turner, who must participate in good faith and with reasonable diligence, to resolve the dispute or narrow the issues to be arbitrated pursuant to this Agreement. This mediation is to be administered by the AAA under its Commercial Mediation Procedures except where otherwise specified. At any time after the conclusion of the mediation, the Claimant may submit its dispute with Turner to commercial arbitration.

4. The Claimant’s formal demand for arbitration, which shall include the Claimant’s Final Offer, shall be filed with the AAA no earlier than the 10th calendar day after the filing of the Claimant’s intent to arbitrate and no later than the end of the 15th calendar day following such filing. Unless the Claimant elects to enter mediation pursuant to the preceding paragraph, in which case the clock shall toll from the date on which the Claimant notifies Turner of its intent to enter mediation and the conclusion of mediation.

5. Turner shall file a single Final Offer with the AAA within 10 calendar days of being notified by the AAA that a formal demand for arbitration has been filed by the Claimant.

6. The Final Offers shall be in the form of Carriage Agreement(s) for the Turner Networks requested by the Claimant, in accordance with Section A.2 of the Arbitration Procedures and shall be for a term of three years unless the parties agree to a different term. Each party shall submit with their Final Offer a mutually agreed upon confidentiality agreement, which shall include, but not be limited to, the following: (i) a commitment to maintain the confidentiality of any mediation or arbitration, all information and materials exchanged or submitted during the mediation and arbitration processes, and any decision of a mediator or arbitrator; (ii) a limitation on disclosure of highly confidential and/or competitively sensitive information to outside counsel and/or consultants only; and (iii) an agreement to destroy or return all information and materials exchanged or submitted during the mediation and arbitration processes and any material derived therefrom.

7. Promptly upon receiving Turner’s Final Offer, the AAA shall notify all parties to the arbitration that both Final Offers have been received. At this time, theClaimant and Turner shall each provide a copy of their Final Offer to the other party.

8. Following the exchange of the Final Offers and prior to the initiation of an arbitration hearing, the parties may agree to enter mediation to resolve the dispute or narrow the issues in contention. If both parties agree, they may submit revised Final Offers following such mediation.

9. At any time after the commencement of arbitration, the Claimant and Turner may agree to suspend the arbitration to attempt to resolve their dispute through negotiation. The Claimant and Turner shall effectuate such suspension through a joint writing filed with the AAA. Either the Claimant or Turner may terminate the suspension at any time by filing with the AAA a writing calling for the arbitration to resume.

10. Arbitrations under this Agreement shall begin within 45 calendar days of the AAA’s receipt of Turner’s Final Offer. The arbitration hearing shall last no longer than 10 calendar days, after which the arbitrator shall have 10 calendar days to inform the Claimant and Turner in a written decision setting forth the reasons for selecting a Final Offer.

B. Standstill & True-Up

1. Upon receiving timely notice of the Claimant’s intent to arbitrate, Turner will allow carriage of the Turner Networks, and Claimant will continue carriage on the same terms or conditions that were in effect prior to the contract’s expiration as long as the Claimant continues to meet the obligations set forth in this Agreement. In addition, Turner shall not terminate or interfere with the Claimant’s customers’ online access to otherwise available Video Programming in connection with a dispute, regardless of whether the Video Programming is carried pursuant to an agreement.

2. Carriage of the disputed Turner Networks during the period of arbitration is not required in the case of first-time requests, provided that the Claimant shall have the option of carrying the disputed Turner Networks
Networks on the terms of Turner’s Final Offer while arbitration is pending, subject to a true-up pursuant to Section B.3.

3. To the extent practicable, the terms of the Final Offer chosen by the arbitrator, including payment terms, if any, shall become retroactive to the expiration date of the previous Carriage Agreement, if any, and Turner or Claimant, as the case may be, shall compensate the other for any difference based on application of the new terms for the period dating from expiration of the prior agreement, plus appropriate interest, as determined by the arbitrator.

C. Expedited Arbitration Rules

1. The arbitration shall be decided by a single arbitrator under the AAA Commercial Arbitration Rules and Expedited Procedures, excluding the rules relating to large, complex cases and any rules inconsistent with those set forth in this Agreement.

2. The AAA shall assemble a list of at least five potential arbitrators, to be furnished to the Claimant and Turner as soon as practicable after commencement of the arbitration. Each of the arbitrators on the list shall have demonstrable experience practicing in the video programming and distribution industry. Within ten calendar days after receipt of this list, the Claimant and Turner each may submit to the AAA the names of up to 30 percent of the persons on the list to be excluded from consideration, and shall rank the remaining arbitrators in their respective orders of preference. The AAA will appoint as arbitrator the candidate with the highest ranking who is not excluded by the Claimant or Turner within ten calendar days of receiving the list of exclusions from the parties.

3. The parties to the arbitration may agree to modify any of the time limits set forth herein and any of the procedural rules of the arbitration.

4. The parties to the arbitration shall exchange written discovery requests within 10 calendar days of receiving the respective Final Offers, and shall respond within 14 calendar days following receipt of such discovery request. Except for good cause shown, discovery shall be limited to:

   a. Carriage Agreements in effect on or after October 22, 2014, (i) between the Claimant and any Top Video Programmer, (ii) between Turner and any MVPD with more than one million subscribers or any OVD; and (iii) in the case of a Claimant with fewer than one million subscribers, between Turner and up to three additional Video Distributors identified by the Claimant;

   b. Data or documents sufficient to show, for each Carriage Agreement subject to discovery and for each year it was or has been in effect and one year prior to its effective date:

      i. The number of subscribers to the Video Distributor;

      ii. Total payments and revenues relating to the Carriage Agreement, including advertising revenues,

   iii. Offers exchanged between the Claimant and Turner to enter into or renew Carriage Agreements for the Turner Networks at issue in the arbitration;

   iv. The written decision of an arbitrator pursuant to Section A.10 of the Arbitration Procedures and any Carriage Agreement entered into with a prior Claimant as a result of such written decision in a past arbitration for the Turner Networks pursuant to this Agreement, and

   v. Any documents or data in the possession of either party on which that party intends to rely in the arbitration.

Provided, however, there shall be no discovery or use in the arbitration of documents or information not in the possession, custody, or control of the Claimant or Turner, or of the costs or margins associated with the Turner Networks, provided that Turner raises no arguments related to such costs or margins.

5. Notwithstanding the limitations on discovery included herein, Turner and the Claimant are each entitled to submit any additional relevant evidence to the arbitrator, provided that such evidence also be timely provided to the other party. In reaching his or her decision, the arbitrator may consider all documents and data entered into the record, testimony regarding the documents and the parties’ Final Offers, briefs submitted and arguments made by counsel, and summary exhibits illustrating the terms of Turner’s Carriage Agreements or the Claimant’s agreements with other Video Programmers.

6. There shall be a presumption that, for each Carriage Agreement used as evidence of fair market value, the number of subscribers of the Video Distributor that is party to the Carriage Agreement, total payments and revenues relating to the Carriage Agreement, including advertising revenues, promotional and marketing commitments, ratings and viewership (both currently and at the time the contract was negotiated), the date of the Carriage Agreement, and similar information relating to the value of the Carriage Agreement terms and conditions shall be relevant evidence in the determination of fair market value.

7. The arbitrator shall choose the Final Offer of the party which most closely approximates the fair market value of the Turner Networks at issue. The arbitrator may not alter, or request or demand alteration of any terms of either Final Offer.

8. Turner or the Claimant may appeal a decision of the arbitrator to the extent permitted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

9. Arbitration under this Agreement is not available if a dispute between a Claimant and Turner concerning the same bundle of Turner Networks is the subject of any Federal Communications Commission dispute resolution process. Nor may Federal Communications Commission dispute resolution processes be utilized during or after arbitration regarding the same bundle of Turner Networks under this Agreement. Turner shall not (a) commence arbitration of any dispute
under the arbitration procedures contained in this
Agreement, or (b) upon receipt of the notice from the
Claimant that it intends to commence arbitration under
this Agreement, commence any Federal
Communications Commission dispute resolution
process to resolve the same dispute with the Claimant.

D. Definitions


2. “Affiliated” or “Affiliates” means any Person that is
directly or indirectly controlling, controlled by, or under
common control with Turner.

3. “Carriage Agreement” means any agreement for a Video
Distributor to carry or distribute, and for a Video
Programmer to license, Video Networks in the United
States.

4. “Claimant” means a Video Distributor seeking
arbitration under this Agreement.

5. “Cloud DVR rights” means any rights involved in
services enabling consumers to record linear Video
Networks to a remote storage location, accessible over the
Internet, including any terms and conditions regarding fast-
forwarding or ad-skipping, or to view linear Video
Networks on a time-shifted basis.

6. “Final Offer” means a proposed Carriage Agreement
submitted to the Arbitrator pursuant to this Agreement,
identifying the Turner Networks Turner is to provide to the
Claimant and containing the proposed price, terms, and
conditions on which Turner will provide those Turner
Networks. A Final Offer may not include an arbitration
provision that extends beyond or expires after the seventh
anniversary of the closing of the Merger.

7. “MVPD” means a multichannel video programming
 distributor in the United States as that term is defined as of
November 20, 2017 in 47 C.F.R. § 76.1200(b), in its
capacity as an MVPD.

8. “Non-Affiliated” means any Person that is not directly
or indirectly controlling, controlled by, or under common
control with Turner.

9. “OVD” means any Person that distributes Video
Programming in the United States by means of the Internet
or another IP-based transmission path (unless the service is
offered only as a component of an MVPD subscription), in
its capacity as an OVD.

10. “Person” means any natural person, corporation,
company, partnership, joint venture, firm, association,
proprietorship, agency, board, authority, commission,
office, or other business or legal entity, whether private or
governmental.

corporation with its principal place of business in
New York, New York, its successors and assigns and its
managed or controlled subsidiaries in the United States,
including Turner, and their directors, officers, managers,
agents, and employees.

Walt Disney Co., NBCUniversal, Inc., CBS Corporation,
21st Century Fox, Scripps Networks Interactive, Discovery
Communications, AMC Networks, A&E Networks,
Viacom Media Networks, and any other Video Programmer
affiliated with any top ten Nielsen-rated Video Networks
during the term of this Agreement, their successors and
assigns and managed or controlled subsidiaries.

successors and assigns and its managed or controlled
subsidiaries in the United States.

14. “Turner Networks” means Video Networks provided
by Turner for distribution to consumers to Video
Distributors in the United States as of November 20, 2017
(i.e., the Video Networks currently known as TNT, TBS,
Turner Classic Movies (TCM), truTV, CNN, CNN
International, CNN en Español, Cartoon Network/Adult
Swim, Boomerang, and Headline News), including any
video-on-demand, TV Everywhere, and Cloud DVR Rights
that Turner makes available to a Video Distributor in
connection with the license for the linear feed of a Turner
Network, as well as any Affiliated Video Network that in
the future consists substantially of the same Video
Programming as a Turner Network as of November 20, 2017.

15. “Video Distributor” means any OVD or MVPD doing
business in the United States.

16. “Video Network” means Video Programming provided
during Video Networks or local broadcast stations in the
United States and any rights, privileges, or benefits
provided along with its linear feed, including but not
limited to video-on-demand, TV Everywhere, and Cloud
DVR.

17. “Video Programmer” means any Person that provides a
Video Network for distribution through Video Distributors or
local broadcast stations in the United States, including but
not limited to Time Warner Inc., Walt Disney Co.,
NBCUniversal, Inc., CBS Corporation, 21st Century Fox,
Scripps Networks Interactive, Discovery Communications,
AMC Networks, A&E Networks, Viacom Media Networks,
and their successors and assigns and managed or controlled
subsidiaries.

18. “Video Programming” means programming provided
by, or generally considered comparable to programming
provided by, a Video Programmer in the United States
regardless of the medium or method used for distribution,
and includes but is not limited to programming
prescheduled by the programming provider (also known as
scheduled programming or a linear feed); programming
offered to viewers on an on-demand basis (also known as
video on demand); pay-per-view or transactional video on
demand; programming that includes multiple video sources
(also known as feeds, including camera angles);
programming that includes video in different qualities or
formats (including high-definition and 3D).
MONETARY PENALTIES IN CHINA AND JAPAN

Koren W. Wong-Ervin,
Douglas H. Ginsburg,
Ariel Slonim,
Bruce H. Kobayashi,
Joshua D. Wright,
Antonin Scalia Law School,
George Mason University

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Monetary Penalties in China and Japan

by Douglas H. Ginsburg, Bruce H. Kobayashi, Ariel Slonim, Koren W. Wong-Ervin, and Joshua D. Wright

Recent solicitations for comments on monetary penalties in China and Japan highlight opportunities to improve the deterrent effect of antitrust law by more closely aligning penalties with economic theory and evidence. When monetary penalties are not based upon economic analysis and clearly linked to identified harms, they are likely to generate costly errors, either by overdetering welfare-enhancing behavior or underdetering anticompetitive behavior.

On June 17, 2016, China’s Anti-Monopoly Commission of the State Council requested comments on Draft Guidelines issued by the National Development and Reform Commission (NDRC) for the calculation of illegal gains (disgorgement) and setting of fines issued. On July 13, 2016, the Japan Fair Trade Commission (JFTC) requested comments on introducing flexibility into their administrative surcharge system, developing a settlement program, and reforming due process in conjunction with surcharge reform.

Both proposed monetary penalty systems would benefit from a deeper grounding in economics. The NDRC’s Draft Guidelines provided only for the optional use of economic analysis in calculating illegal gains and appear to create a presumption that disgorgement would apply in addition to fines in nearly all cases. The JFTC’s consultation acknowledged that the current inflexible surcharge system could give rise to “unreasonable or unfair” surcharges, but did not require economic analysis to determine appropriate monetary penalties. In both countries, monetary penalties are applied broadly and are not based upon

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identified harms, although the JFTC’s consultation invited comments on whether differentiation by type of infringement was necessary.

**Main Recommendations**

On July 12, 2016, and August 11, 2016, respectively, the Global Antitrust Institute (GAI) of the Antonin Scalia Law School at George Mason University submitted comments to the NDRC and the JFTC. These comments provided an overview of the economic analysis of penalties and advocate for the adoption of a penalty system more closely aligned with economic principles. The comments urged the agencies to limit the application of monetary penalties to violations for which: (1) the antitrust violation is clear and without any plausible efficiency justification; (2) it is feasible to articulate and calculate the harm caused by the violation; (3) the measure of harm calculated is the basis for any fines or penalties imposed; and (4) no alternative remedy would adequately deter future violations of the law. At the very least, the agencies should not seek monetary penalties for conduct that is widely recognized as having an efficiency justification, for example, unilateral conduct, such as refusals to deal and discriminatory dealing, and vertical restraints, such as exclusive dealing, tying and bundling, and resale price maintenance.

The GAI’s submission to the JFTC also addressed the development of a settlement procedure and due process reform. The comments cautioned the JFTC to develop a settlement procedure that would avoid abusive remedies, and encouraged the JFTC to adopt stronger due process protections.

**Economics of Penalties**

Economic theory teaches that penalties should be set at a level sufficient to induce offenders to bear the full social cost of their illegal conduct. From the perspective of a market participant, there is no meaningful economic distinction between a monetary penalty that is remedial (such as disgorgement) and one that is

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punitive (such as a surcharge). Unlike the amount of a monetary penalty, its form does not affect \textit{ex ante} incentives to commit an antitrust violation.

Optimal deterrence requires that the gains from engaging in the prohibited conduct—the profits that accrue as a result of the anticompetitive behavior—are less than the expected penalty at the time the firm decides to engage in the challenged conduct. The expected penalty equals the magnitude of the total penalty imposed multiplied by the probability of punishment. The expected penalty includes expected fines and penalties, from both private and public enforcement actions. If all anticompetitive conduct is likely to be detected by the national competition agency or by private persons with standing to sue and is fined or penalized at a level equal to its social cost, then any additional penalties are unnecessary to deter antitrust violations. With imperfect detection—that is, a likelihood of detection less than 100 percent—penalties that exceed the social cost of the violation are warranted in order to deter future violations.

The optimal total penalty when only Type II errors are possible (i.e., when firms that have violated the law escape punishment) should equal the harm caused by the violation divided by the \textit{ex ante} probability of punishment. In cases when conduct is most likely to be detected, the total penalty should be less than in cases when anticompetitive conduct is likely to go unnoticed. In cartel cases, the clandestine nature of the agreements requires a larger total penalty to achieve deterrence than is necessary for single-firm violations, which are more easily detected (i.e., a penalty related to the premium over the penalty in a world where all violations are detected). In the case of price fixing cartels and other horizontal conspiracies, we can reasonably expect that regulators and private litigants do not ferret out every illegal conspiracy that exists because such conspiracies are by their very nature clandestine. On the other hand, most potentially anticompetitive single-firm conducts are open and notorious. For example, an upstream input supplier to a downstream monopolist is keenly aware of any restraint on distribution put in place by the monopolist and, to the extent that the supplier is harmed by the restraint, will generally have the appropriate incentive to challenge the conduct.

An antitrust penalty system grounded in economics also must consider Type I errors (i.e., when efficient welfare increasing conduct is mistakenly penalized). Because naked price fixing cartels lack any offsetting efficiency benefits, the costs of Type I error arising from prosecution of cartels is close to zero. In contrast, when evaluating conduct with an ambiguous impact on consumer welfare, the cost of a Type I error is relatively large, so large penalties may deter lawful and procompetitive conduct in these cases. The potential for significant Type I error costs lowers the optimal penalty.

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5 Indeed, the best available evidence implies a probability of detection no greater than 35%. See Ginsburg & Wright, \textit{Antitrust Sanctions}, supra note 4.

6 Of course, the incentive will not always be sufficient because the supplier may place a greater value on continuing to make sales subject to the restraint than on being free of the restraint but risking loss of the customer.
In general, any antitrust enforcement system should seek to minimize the total social costs associated with implementing the policy. These costs include the costs of Type I and Type II errors, and the costs of administering the system. Antitrust scholars have relied upon this decision theoretic framework to identify antitrust rules that best promote competition and protect consumer welfare across a variety of institutional settings. The U.S. Supreme Court has recognized the limitations that courts face when distinguishing between pro- and anti-competitive conduct in antitrust cases and emphasized the need to avoid Type I errors, particularly in monopolization cases. The U.S. Supreme Court has also expressed concern that the cost to consumers arising from Type I errors might be greater than those arising from Type II errors, because “the economic system corrects monopoly more readily than it corrects judicial errors.”

In particular, the cost of overdeterrence is greater when the conduct alleged to violate the antitrust laws is more likely to be procompetitive. Thus, overdeterrence is a more significant concern when the economic literature has identified and substantiated efficiency explanations for the type of conduct at issue. For example, economists have long understood that unilateral conduct (e.g., refusals to deal or discriminatory dealing) and vertical restraints (e.g., exclusive dealing, tying, bundling, and resale price maintenance) are frequently procompetitive. Antitrust enforcement involving these arrangements increase the risk of Type I

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9 Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”) (internal quotations omitted). See Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc., 555 U.S. 438, 451 (2009) (“To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.”); Credit Suisse, 551 U.S., supra note 7, at 283 (“[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.”).

10 Easterbrook, supra note 7, at 15.

11 See, e.g., Cooper et al., supra note 7; Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in HANDBOOK OF ANTITRUST ECONOMICS 391, 409 (Paolo Buccirossi ed., 2008); Daniel P. O’Brien, The...
errors because courts have difficulty determining whether these practices are procompetitive or anticompetitive in a particular case.

Unilateral conduct such as refusals to deal, including when directed at competitors, may enable a firm to engage in the risky and costly research and development and other entrepreneurial behavior that leads to innovation and economic growth. Indeed, forced sharing can deter innovation not only by the firm engaged in the conduct but also by rivals who might be encouraged to free ride instead of creating their own competing technology or goods. In addition, as the U.S. Supreme Court has recognized, forced sharing, particularly among rivals, is “in some tension with the underlying purpose of antitrust law.”12

Similarly, the overall body of evidence supports a fairly strong conclusion that vertical restraints very rarely result in anticompetitive effects and most often benefit consumers. One study, authored by a group of economists from the U.S. Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice, concludes that, although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”13 A recent empirical study concludes that, “it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.”14 Finally, in a paper considering recent empirical evidence concerning the competitive effects of vertical restraints, an FTC economist finds that, “[w]ith few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons” and concludes that vertical restraints “are unlikely to be anticompetitive in most cases.”15

**Relationship between Disgorgement and Fines**

The GAI’s comments to the NDRC urged the agency to clarify how the total amount of the penalties imposed, including disgorgement and fines, relates to the specific harm at issue and the theoretical optimal penalty. Specifically, disgorgement should be a component of the properly calculated total fine as opposed to an additional penalty on top of the optimal fine. Comments to the NDRC also emphasized the need to use economic analysis to determine the appropriate but-for world in calculating disgorgement.

**Extraterritoriality**

Both the NDRC’s Draft Guidelines and the JFTC’s consultation included provisions allowing the agencies to calculate fines based upon sales outside of the country. The GAI’s comments encouraged the agencies to limit the application of fines and surcharges to the economic harm caused in their jurisdiction. A penalty

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13 *Cooper et al.*, *supra* note 7, at 658.
14 *Lafontaine & Slade*, *supra* note 11, at 409.
15 *O’Brien*, *supra* note 11, at 76.
based in part upon extraterritorial sales to extraterritorial purchasers invites conflict with foreign agencies and risks overdeterrence from duplicative penalties.

**Addressing a Lack of Cooperation with the JFTC**

The JFTC’s consultation identified firms’ lack of incentive to cooperate in investigations as a key problem for the agency. The consultation noted that due to the agency’s inability to mitigate or aggravate surcharges (1) enterprises did not have an incentive to conduct internal investigations, (2) the antagonistic nature of the relationship between the JFTC and enterprises impeded fact-finding and efficient investigations, and (3) enterprises prioritized cooperation with other nations’ agencies over cooperation with the JFTC.

**Mitigation**

Since compliance programs and cooperation in investigations increase detection and prosecution, mitigating surcharges in light of these factors is consistent with optimal penalty theory. Likewise, concealing, destroying, or falsifying evidence decrease detection. In order to deter violations, encourage compliance, and improve the overall effectiveness of the surcharge system, agencies should clearly identify *ex ante* aggravating and mitigating factors and tie those adjustments that generate to measures of harm and the likelihood of detection.

**Settlement**

Settlement procedures can increase cooperation and effectively economize upon agency resources, but settlement policies can also undermine the welfare-enhancing goals of competition policy. Settlement terms that exceed what would have been available to the agency in litigation, require prolonged monitoring, or include conditions unrelated to the anticompetitive harm being penalized can materially harm consumers. Widespread use of settlements can also stunt the development of the case law that firms need in order to conform their behavior to the law and can adversely affect an agency’s case selection. An agency’s approach to settlements should recognize these dangers and take measures to minimize these risks.

**Due Process**

Strong due process protections can increase cooperation and provide substantial benefits to agencies. Although due process protections vary among legal systems, key elements of due process have emerged based upon substantial work by the ICN and OECD. These elements include: (1) legal representation for

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parties under investigation, including the participation of local and foreign counsel of each party’s choosing; (2) notifying the parties of the legal and factual bases of an investigation and sharing the evidence upon which the agency relies, including any exculpatory evidence and excluding only confidential business information; (3) direct and meaningful engagement between the parties and the agency’s investigative staff and decision-makers; (4) allowing the parties to present their defense to the ultimate decision-maker(s); and (5) ensuring a meaningful right of appeal to an independent court.

Fundamental due process protections are likely to provide several benefits to the JFTC. First, due process interactions with the parties’ counsel can improve substantive analysis by helping the agency to develop and vet its case; to focus on dispositive issues; to gain valuable insight from the parties, who are often in a better position to know the specifics of a particular industry; and to evaluate the parties’ evidence and defenses.

Second, due process can improve the reputation of the agency. Legitimate concerns about arbitrary procedures create the impression that substantive results may be flawed, undermining the perceived legitimacy of the agency’s decisions. In contrast, fair, predictable, and transparent procedures bolster the legitimacy of the agency’s enforcement decisions.

Third, due process can improve the deterrent effect of antitrust enforcement by increasing the transparency and predictability of decisions. Increased transparency and guidance allows parties to determine in advance whether their actual or proposed conduct may violate the antitrust laws and facilitates voluntary compliance.

Conclusion
The development of an economically informed system of monetary penalties requires that agencies carefully craft penalties proportionate to the full social harm caused by the infringement and inversely related to the likelihood of detection. When multiple penalties are available, agencies should consider the total penalty. Agencies should take care to avoid chilling welfare-enhancing firm conduct by applying monetary penalties only to violations, such as price-fixing, that are identified \textit{ex ante}, have no plausible efficiency justification, and for which there are no effective alternative remedies. Additional reforms regarding settlement procedures and due process reform may enhance the value of monetary penalties by increasing cooperation, the detection of violations, and respect for agency decisions.

A framework based on the optimal penalties may face hurdles in adoption in both China and Japan, where the antitrust laws include unfair trade practice and abuse of dominance violations. When these violations are based on an \textit{ex post} fairness standard and do not require a showing of harm to competition, enforcement

agencies are likely to apply penalties inconsistent with optimal penalty theory and the primary purpose of antitrust policy, viz., keeping markets competitive. Continued advocacy for economics-based antitrust penalties and procedures is necessary to encourage reform in this area and ultimately to bring about international convergence upon efficient antitrust enforcement policies.
TESTIMONY ON INTERNATIONAL ANTITRUST ENFORCEMENT

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Prepared Statement of Koren W. Wong-Ervin
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Before the
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Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

“International Antitrust Enforcement”
Washington, D.C. May 19, 2017

Chairman Marino, Ranking Member Cicilline, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Koren Wong-Ervin and I am the Director of the Global Antitrust Institute at Scalia Law School at George Mason University, where I also teach courses on global antitrust law and the intersection between antitrust and intellectual property laws.¹ I am also former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission. I am pleased to testify and to discuss my perspectives on the U.S. Chamber of Commerce’s recently released report and recommendations on International Competition Policy (Expert Report).²

As an initial matter, I would like to thank the U.S. Chamber of Commerce and the members of the International Competition Policy Expert Group for their contribution to the critically important issue of economically-sound competition law enforcement and policy both at home and abroad.

In the last 25 years, there has been a remarkable proliferation of foreign competition laws and agencies, expanding from 23 jurisdictions with competition laws in 1990 to approximately 130 jurisdictions to date. Several recent competition investigations, particularly those involving the licensing of intellectual property rights (IPRs), have raised concerns about fundamental due process and the alleged use of industrial policy in competition investigations to lower royalty rates in favor of local implementers. These concerns raise serious problems for innovation, economic growth, and consumers, and are likely compounded by the use of extra-jurisdictional remedies whereby one agency imposes worldwide portfolio licensing remedies, including on

¹ The Global Antitrust Institute promotes the application of sound economic analysis to competition enforcement around the world through training programs, competition advocacy, and research. For additional information, including a list of our economics trainings and comments on foreign draft laws and guidelines, visit https://gai.gmu.edu. My biography is available at https://gai.gmu.edu/about/leadership-staff/koren-w-wong-ervin/.

foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, which may facilitate a lowest-common denominator approach.  

My testimony has three parts.

First, I discuss the problem framed by the Expert Report, namely that “[c]ertain major trading partners are, in some cases, denying foreign companies fundamental due process and, in other cases, applying their competition laws to protect their home markets from foreign competition, promote national champions, and/or force technology transfers.”4 I then offer recommendations to examine those contentions.

Second, I discuss the need for systematic examination prior to using international trade and investment policies to address the problems outlined in the Expert Report. I also propose alternative measures such as public exposure, including expressions of concern at the highest level of the U.S. government, which appear to have been an effective way to achieve some of the desired change in the past.

Third, I discuss the importance of and possible limits to achieving convergence on economically-sound effects-based competition law analysis. I also recommend an interim measure aimed at creating accountability for foreign jurisdictions and providing stakeholders with information necessary to comply with foreign competition laws. Specifically, I recommend requiring transparency as to what factors foreign jurisdictions consider in conducting competition analysis, and how those factors are weighed and balanced.

I. “INAPPROPRIATE” USE OF COMPETITION LAWS

Overall, I agree with the Expert Report that certain foreign governments appear to be using their competition laws (as well as their unfair trade practices acts) in ways that unfairly harm U.S. companies and inappropriately reduce incentives to innovate.5 These acts include denying U.S. companies fundamental due process, protecting their own markets from competition, and, in the case of IPRs in particular, using competition law to reduce royalty payments to U.S. companies to unduly favor their domestic manufacturers.

High profile examples include China’s National Development and Reform Commission’s (NDRC’s) 2015 penalty decision against Qualcomm Incorporated in which the NDRC imposed a nearly $1 billion fine against the company and, among other things, arbitrarily required it to use a

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5 Id.
royalty base of 65% of the net selling price of devices when licensing its 3G and 4G technologies.  

Another example is a 2014 decision by China’s Ministry of Commerce in which the agency conditionally approved Microsoft’s acquisition of Nokia’s devices and services business, imposing numerous conditions on both Microsoft and Nokia, including commitments not to increase royalty rates on specified patents for a period of eight years. In contrast, enforcers in both the United States and the European Union (EU) cleared the transaction without conditions. In global markets (such as in the Microsoft/Nokia case), one would expect the facts to be similar and that enforcers around the world applying sound economic principles would reach similar conclusions. In the European Commission’s closing statement, it stated that: (1) the transaction would not raise any competition concerns, in particular because there are only modest overlaps between the parties’ activities; (2) several strong rivals, such as Samsung and Apple, would continue to compete with the merged entity; and (3) any competition concerns that might arise from Nokia’s licensing conduct post-transaction fall outside the scope of EU merger regulation because Nokia is the seller, whereas the investigation relates to the merged entity.  

A third example is the Korea Fair Trade Commission (KFTC) decision against Qualcomm from earlier this year in which the KFTC essentially sought to act as the world’s competition police by imposing global portfolio-wide remedies including on U.S. and other non-Korean patents.

Imposing worldwide remedies can conflict with principles of international comity and result in significant substantive conflicts with the competition agencies of other countries, particularly given the wide variety of approaches taken globally on competition matters generally and specifically with respect to matters involving IPRs—namely with respect to honoring an IPR holder’s core right to exclude others from using the invention. Extra-jurisdictional remedies

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10 “Economic theory and empirical evidence show that IPRs—a central feature of which is the right to exclude—incorporate the creation of inventions, ideas, and original works. They also facilitate the sale
have the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of one-country’s worldwide prohibition.11

Numerous other examples come to mind involving reported concerns about due process, including: failure to notify the parties of the legal and factual basis upon which an investigation is based; lack of an independent tribunal to review decisions and the ability to stay remedies pending appeal; refusal to allow parties to fully cross-examine witnesses at hearings; failure to provide access to the investigative file, including any exculpatory evidence; failure to protect confidential information and recognize attorney-client and other important legal privileges; and failure to allow participation of international counsel of the parties choosing.12

I recommend that the U.S government conduct a study to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically-flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis.13 I would


11 Wong-Ervin et al., Extra-Jurisdictional Remedies, supra note 3.


begin with a self-study of our own decisions and then move to jurisdictions that have been the subject of frequent complaints by U.S. companies, such as China, the EU, India, and Korea. For example, an analysis could be conducted to determine whether these jurisdictions apply the same process and analysis to both domestic and foreign companies.

Relatedly, I wholeheartedly support the Expert Report’s call “for the Trump Administration to continue to expressly confirm that, as an organizing principle, competition law and policy should focus on eliminating unreasonable artificial impediments to competition, both private and governmental, as a way of promoting economic growth, innovation[,] and consumer welfare.”14 Such an approach is essential if the United States is to remain a leader in promoting economically sound effects-based competition analysis that fosters innovation. Indeed, the failed experiment of the United States in seeking to use its antitrust laws to serve a hodgepodge of social and political goals, many with an explicitly anticompetitive bent such as protecting small traders from more efficient rivals, resulted in the failure of U.S. antitrust laws to promote competition or further consumer welfare.15 This ended in the 1970s when the U.S. Supreme Court shifted the focus of U.S. antitrust law from a mix of economic, social, and political goals to solely economic goals.16

II. THE USE OF INTERNATIONAL TRADE AND INVESTMENT POLICIES AND ALTERNATIVE EFFECTIVE MEASURES

I agree with the Expert Report that the U.S. Government should “systematically examine” the possible use of international trade and investment policies to combat discriminatory or other unsound foreign competition actions. Such an examination is necessary prior to recommending any specific actions.

Based on my experience, it is my belief that public exposure, including expressions of concern at the highest level of the U.S. government, is one effective way to achieve the desired change.17 To that end, I favor the Expert Report’s recommendation to consider creating a listing

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14 Expert Report, supra note 2, at 7.
16 See, e.g., Nat’l Society of Prof’l Engineers v. United States 435 U.S. 679, 690, 695 (1978) (“Under either [the per se rule or a rule of reason] the inquiry is confined to a consideration of impact on competition conditions. … The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription’”).
17 Strategic public shaming has been employed for example by China’s NDRC. “Based on analysis of media coverage and interview findings, [a recent] study finds that the way the NDRC disclosed its investigation is highly strategic depending on the firm’s co-operative attitude toward the investigation. Event studies further show that the NDRC’s proactive disclosure resulted in significantly negative
mechanism for competition enforcement akin to the U.S. Trade Representative’s annual Special 301 listing of foreign nations that have inadequate intellectual property protections.\(^\text{18}\)

The good news is that many, if not most, foreign competition agencies want to be considered part of the international mainstream, and respond to public statements of concern. For example, the allegedly egregious violations of due process by China’s NDRC against U.S. companies, including reportedly locking executives in rooms and ordering them to “confess their sins” under threat of refusing to return their passports,\(^\text{19}\) were in large part remedied through a multi-pronged approach, which included a letter from the then-Secretary of the Treasury Department,\(^\text{20}\) followed by statements from President Obama to China’s President Xi.\(^\text{21}\)

Following these statements, China’s NDRC reportedly provided better process. It also abandoned its previously-stated intention to impose extra-jurisdictional remedies, namely global, portfolio-wide remedies, including on foreign conduct involving foreign patents. Extra-jurisdictional remedies are easier to identify than other problematic forms of “inappropriate” application of competition law such as discriminatory enforcement or industrial policy.

III. THE NEED FOR EFFECTS-BASED COMPETITION ANALYSIS BASED UPON SOUND ECONOMIC ANALYSIS AND METHODOLOGY


\(^\text{19}\) \textit{See generally} Michael Martina & Matthew Miller, “\textit{Mr. Confession}” and his boss drive China’s antitrust crusade, \textit{REUTERS} (Sept. 15, 2014) (“[L]awyers and executives describe meetings with the NDRC as interrogations,’ where raised voices, flaring tempers and verbal reprimands are commonplace.”), http://www.reuters.com/article/us-china-antitrust-ndrc-insight-idUSKBN0HA27X20140915.


\(^\text{21}\) \textit{See, e.g.}, Michael Martina & Matthew Miller, \textit{As Qualcomm Decision Looms, U.S. Presses China on Antitrust Policy}, \textit{REUTERS} (Dec. 15, 2014), http://www.reuters.com/article/us-qualcomm-china-antitrust-idUSKBN0JU0AK20141216 (quoting then-White House National Security Council spokesperson Patrick Ventrell: “The United States government is concerned that China is using numerous mechanisms, including anti-monopoly law, to lower the value of foreign-owned patents and benefit Chinese firms employing foreign technology. … President Obama raised these concerns about the enforcement of China’s anti-monopoly law directly with President Xi when they met in Beijing last month”).
social cost created by errors in assessing competition law liability. There are two types of errors possible: Type I (or false positives) in which procompetitive conduct is mistakenly condemned, and Type II (or false negatives) in which we fail to condemn conduct that is actually anticompetitive. The U.S. Supreme Court has recognized the limitations courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases and emphasized the high rate of Type I error in monopolization cases in particular. The U.S. Supreme Court has also expressed concerns, originally explained in Judge Frank Easterbrook’s seminal analysis, that the cost to consumers arising from Type I errors might be greater than those attributable to Type II errors because “the economic system corrects monopoly more readily than it corrects judicial errors.”

I recognize, however, that the United States may not be able to achieve convergence on these principles in the short term given that many foreign competition laws explicitly provide for the consideration of non-competition factors such as “fairness” or the economic development of the country. For example, China’s Anti-Monopoly Law provides for “promoting the healthy development of the socialist market economy,” and states that “[t]he state constitutes and carriers out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.” Similarly, Japan’s Antimonopoly Act states that purpose of the Act is “to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.” The Introduction to India’s Competition Act states

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22 Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc., 555 U.S. 438, 451 (2009) (“To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.”); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007) (“[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.”); Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” (internal quotations omitted)).


26 Id. Art. 4.

that, in interpreting the Act, the Competition Commission should “keep[] in view . . . the economic development of the country.”

Nevertheless, I strongly agree with the Expert Report about the dangers of using vague and subjective standards such as “fairness” or other non-competition goals in competition analysis, and I believe the United States should continue to advocate for an economic welfare standard. I also think an effective interim measure is to require transparency as to what factors are consider in competition analysis and how those factors are weighed and balanced. In training foreign competition judges and enforcers, I have also strongly urged them to analyze the competitive effects of a particular course of conduct before considering any non-competition goals so they will at least understand any welfare gains or losses associated with their decision. Indeed, it is important for such jurisdictions to carefully consider the tradeoffs of attempting to serve multiple goals. For example, difficulties with weighing and balancing competition and non-competition factors and efficiencies against equity concerns, the latter of which may undermine consumer welfare considerations.

I have often found myself reading certain foreign competition agency decisions and feel as if there were missing pages. The analysis starts off sounding like mainstream competition analysis, for example, beginning with an analysis of market power or dominant position and then articulating a theory of harm, but that analysis is often ignored in the rest of the decision. Conclusions often lacks evidentiary support and leave me puzzling as to what non-competition factors or industrial policy concerns actually motivated (or dictated) the outcome. Requiring transparency in decision making would go a long way towards creating accountability for foreign competition agencies and courts and providing some measure of predictability for stakeholders with global operations who are attempting to comply with foreign competition laws.

IV. CONCLUSION

In closing, I agree with the Expert Report that certain foreign governments appear to be using their competition laws (as well as their unfair trade practices acts) in ways that unfairly harm U.S. companies and inappropriately reduce incentives to innovate. I also agree that the U.S. government should develop a systematic strategy for combating such actions and forcefully advocate for economically-sound effects-based competition law analysis. As a starting point, I would focus on fundamental due process issues such as requiring transparency in decision making and continue to use public exposure, including concerns expressed by those at the highest levels of the U.S. government.


29 For a discussion of the difficulties of balancing numerous factors across different markets, balancing efficiency concerns against equity concerns, and balancing static and dynamic concerns, see Wong-Ervin, Due Process, supra note 3, at 6-7.
Responses to Questions Submitted
for the Record from Subcommittee Chairman Marino

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Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

“Recent Trends in International Antitrust Enforcement”
Hearing Date: June 19, 2017
Responses to Questions: August 17, 2017

QUESTIONS AND RESPONSES

1. Most of the members are probably familiar with a few headline grabbing cases in which foreign antitrust agencies have seemingly acted out of hand. How systemic of a problem is this?

Law enforcement’s effect on private conduct is often shaped by headline grabbing cases. For example, a headline announcing the government’s execution of an individual for shoplifting would almost assuredly have a deterring effect regardless of whether the punishment is systematic. In the same way, headline cases reporting government threats against companies that seek to defend themselves in competition law investigations, or impose penalty decisions that substantially diminish the value of intellectual property rights, can have a chilling effect on those seeking to defend themselves or deciding whether to invest in costly research and development to create new technology.

Such headline grabbing cases include:

- China’s National Development and Reform Commission’s (NDRC’s) nearly $1 billion fine against Qualcomm based on “unfairly high” or “excessive” pricing theories.¹ In contrast, U.S. antitrust law does not regulate price, given the risk of

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¹ Nat'l Dev. & Reform Comm'n, Administrative Penalty Decision No. [2015] 1 (Feb. 9, 2015) (“The NDRC finds that the Party [Qualcomm] violated Article 17, Paragraph 1, Item 1 of AML [Anti-Monopoly
deterring meritorious competition and incentives to innovate. Moreover, high prices in and of themselves do not harm the competitive process. Instead, high prices signal to a marketplace that a particular sector is profitable, which attracts new or expanded entry, which leads to lower prices.  

- **China’s Ministry of Commerce’s 2014 decision in Merck-AZ** based on the controversial “conglomerate effects” theory, under which the agency imposed remedies even though the parties had no overlaps in the relevant markets and AZ’s worldwide photoresist share was only 30%. Remedies included prohibiting the companies from offering bundled sales of liquid crystal and global photoresist products and imposing price limitations and other restrictive terms on intellectual property rights. In contrast, enforcers in the United States, Germany, and Taiwan cleared the merger without conditions.

- **The Competition Commission of India’s (CCI’s) 2013 and 2014 prima facie orders against Ericsson** based on unfairly high or excessive pricing theories.

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2 Absent information about the prices of unconstrained market transactions, it can be particularly difficult to identify a “fair” price. Indeed, it is even more difficult to assess the “fairness” of prices associated with licensing intellectual property rights both because the fixed costs of innovation require prices well above marginal cost in order to secure an adequate return on investments in innovation, and because intellectual property rights themselves are highly differentiated products, which makes reliable price comparisons difficult, if not impossible. The risk of placing overly strict limitations upon prices, or royalties, for intellectual property is that the return to innovative behavior is reduced, which means firms will reduce their investment in further innovations, to the detriment of consumers. Douglas H. Ginsburg et al., *Excessive Royalty’ Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate*, COMPETITION POL’Y INT’L ANTITRUST CHRON. (Mar. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748252.

3 See e.g., William J. Kolasky, Deputy Assistant Attorney General, U.S. Department of Justice, Address Before the George Mason University Symposium: Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels (Nov. 9, 2001) (“After fifteen years of painful experience with these now long-abandoned theories [of competitive harm from conglomerate mergers], the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. We could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output. We recognized, conversely, that conglomerate mergers have the potential as a class to generate significant efficiencies.”), https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels; Damien J. Neven, *The Analysis of Conglomerate Effects in EU Merger Control*, in HANDBOOK OF ANTITRUST ECONOMICS 183 (Paolo Bucchicossi ed. 2008) (finding that there is little support in economic literature to suggest that conglomerate mergers raise significant anticompetitive issues unless there is no effective competition).

Among other things, the commission preliminarily concluded that Ericsson violated India’s Competition Act by including non-disclosure agreements (NDAs) in licensing agreements for standard-essential patents upon which the company had made a commitment to license on fair, reasonable, and non-discriminatory terms. Given that the proper purpose of competition law is to protect the competitive process and not individual competitors, it is difficult to see how including NDAs in a license could harm the competitive process. Indeed, in practice (i.e., outside of litigation), licensees generally demand NDAs as frequently as licensors because license agreements can be quite revealing about the licensee’s business practices, risk preferences, and priorities, all information licensees would like to keep from their rivals.

With respect to whether certain foreign governments are using competition law to achieve industrial policy or other non-competition public interest goals, many foreign competition laws explicitly require the considerations of such factors. For example, China’s Anti-Monopoly Law states that the law “is enacted for the purpose of . . . promoting the healthy development of the socialist market economy,” and that “[t]he state constitutes and carries out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.” Similarly, Japan’s Anti-monopoly Act states that purpose of the Act is “to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.” The Introduction to India’s Competition Act states that, in interpreting the Act, the Competition Commission should “keep[] in view . . . the economic development of the country.”


8 Id. Art. 4.


With respect to due process, given the difficult if not impossible task of reliably measuring factors such as whether an agency provides meaningful opportunities for engagement, the best available evidence is likely anecdotal and circumstantial.

Based (at least in large part) on receiving numerous first-hand reports from a variety of companies of egregious due process violations, the U.S. antitrust agencies have spent significant resources over the last decade to address these issues. Multilateral organizations such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD) have joined these efforts, which include hosting roundtables, working with agencies around the world to develop guidance and best practices documents, and writing articles and giving speeches for domestic and foreign audiences.

2. How would you evaluate the progress of international organizations to date to promote the adoption of best procedural and substantive competition law standards? What can U.S. antitrust agencies better do to support such standards?

As a threshold matter, it is important to understand what I (and many others) consider to be “best practices.” Fundamentally, I am referring to economically-sound effects-based analysis

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that is limited to prohibiting conduct that harms the competitive process, and does not seek to achieve other objectives such as industrial policy, redistribution, or other political goals. (For an explanation of the dangers of and tradeoffs from considering non-competition goals in competition analysis, see my opening testimony pages 5-9, https://judiciary.house.gov/wp-content/uploads/2017/06/Wong-Ervin-Testimony.pdf)

Multilateral organizations play a critical role in promoting international convergence on best practices through soft law instruments such as recommended practices, as well as through the agency-to-agency interaction facilitated by such organizations (for example, interactions ranging from sharing experiences to providing peer pressure to conform with best practices). As one example of the ICN’s achievements, over half of its member agencies that have merger enforcement have made changes to their laws and practices inspired by ICN merger recommendations. The U.S. antitrust agencies are critical leaders in these efforts.

Independent bodies are an important complement to the excellent work of multilateral organizations. Independent review is particularly important given that multilateral organizations are often led primarily by competition enforcement agencies that may have incentives to protect and even expand their enforcement powers, as well as to protect against reform efforts that threaten to limit their authority.

3. You note in your testimony that the preliminary way of addressing foreign competition enforcement agencies is public exposure and expressions of concern by the U.S. Government. Is there a sliding scale of responses that can be implemented? What would that look like?

Yes. At one end of the sliding scale are statements by U.S. antitrust agency officials to foreign competition enforcers. Further along the sliding scale are statements made by those at the highest-levels of our government to those at the highest-levels of foreign governments. Based on my experience, it is my belief that strong public statements of concern on issues such as due process, departures from economically-sound effects-based competition analysis, and the misuse of competition law to lower royalty rates for U.S. intellectual property rights in order to unduly benefit foreign implementers, are one effective means to spur needed change.

4. In your testimony you note significant concerns regarding the use of extraterritorial remedies, specifically recent decisions of the Korea Free Trade Commission. Can you elaborate on why that is such cause for concern?

Foreign regulation of conduct involving U.S. property and markets, including dictating the royalty rates and other terms upon which U.S. intellectual property right holders can license their U.S. property rights, likely conflict with U.S. sovereignty and principles of international comity. This is particularly the case when the conduct at issue has no direct effects on foreign consumers (i.e., consumers in the regulating jurisdiction), but rather is regulated in order to protect the regulating jurisdiction’s local manufacturers or national champions. For example, the worldwide remedies imposed by the Korea Fair Trade Commission against Qualcomm apply to Korean companies even with regard to their operations outside Korea.
Imposing extra-jurisdictional remedies can also result in significant substantive conflicts with the competition agencies of other countries, particularly given the wide variety of approaches taken globally on competition matters generally and specifically with respect to matters involving intellectual property rights—namely with respect to honoring an IPR holder’s core right to exclude others from using the invention.\textsuperscript{14} Contradictory rulings place U.S. firms in the untenable position of being unable to comply with all orders at the same time. In addition, one agency imposing worldwide portfolio licensing remedies, including on foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, is likely to facilitate a lowest-common denominator approach.\textsuperscript{15} Lastly, extra-jurisdictional remedies have the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of one-country’s worldwide prohibition.\textsuperscript{16}

5. \textbf{Consistent with the ICPEG Report, you recommend that the U.S. conduct an evaluation of the issues being discussed today; however, you note that we should begin with a self-study. Are there similar concerns foreign agencies have expressed about U.S. enforcement actions?}

Foreign competition enforcers and judges frequently rely on U.S. enforcement and other actions to justify their conduct. For example, foreign enforcers and judges have pushed back when I have raised concerns about the use of competition law to achieve discriminatory industrial policy objectives, stating that the United States itself discriminates. One common example relied upon by foreign enforcers and judges is the U.S. Trade Representative’s veto of the International Trade Commission’s decision to grant an exclusion order in favor of a Korean company (Samsung) against a major U.S. company (Apple).\textsuperscript{17}

Other common examples cited by foreign enforcers and judges to justify their own enforcement include the FTC’s consent orders against Bosch and Motorola Mobility/Google and the U.S. Department of Justice Antitrust Division’s (DOJ’s) Institute of Electrical and

\textsuperscript{14} “Economic theory and empirical evidence show that IPRs—a central feature of which is the right to exclude—incentivize the creation of inventions, ideas, and original works. They also facilitate the sale and licensing of intellectual property (IP) by defining the scope of property right protection and lowering transaction costs, and they produce incentives to develop alternative technologies as well as improvements and other derivative uses.” Comment of the Global Antitrust Institute, Antonin Scalia Law, George Mason University, on the Anti-Monopoly Commission of the State Council’s Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights at 3 (Apr. 13, 2017) (internal citations omitted).


\textsuperscript{17} Letter from Michael B. G. Froman, United States Trade Representative, to Irving A. Williamson, Chairman, United States International Trade Commission, https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.
Electronics Engineers (IEEE) Business Review Letter (BRL). For example, enforcers in Asia have relied on the two FTC consents to support the use of the controversial “essential facilities” doctrine—a doctrine that the U.S. Supreme Court has made clear it will treat with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.\(^\text{18}\) Similarly, within days of the DOJ’s issuance of its IEEE BRL, Chinese enforcers remarked that the DOJ’s letter validates China’s unfairly high pricing decision against Qualcomm, pointing to the section of the letter that essentially endorses the use of component (e.g., chipset) over end-user device licensing in arms-length licensing agreements.\(^\text{19}\)

6. You have worked extensively with the FTC over the years. How would you evaluate the coordination between the various executive agencies that are responsible for interacting with foreign antitrust/competition agencies? Where do you see the most room for improvement?

In order to solve the problem of inappropriate use of competition laws, one must first clearly understand the problem. To that end, I reiterate my prior recommendation that the U.S. government (led by the U.S. antitrust agencies) sponsor a study (bringing together enforcers, academics, and industry professionals) to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically-flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis. The level of government intervention and interaction will necessarily depend on the nature of the problem. For example, discriminatory enforcement is likely best (and most effectively) addressed at high levels of the U.S.

\(^{18}\) See Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) (“We have never recognized [the essential facilities] doctrine . . . and we find no need either to recognize it or to repudiate it here.”); see also Maureen K. Ohlhausen, Remarks at GCR Live Conference: Antitrust Enforcement In China – What Next? (Sept. 16, 2014) (“During one of the . . . conferences I attended in China, I was listening to a presentation on the U.S. and Chinese antitrust laws and the FTC’s decision in Google SEPs came up. The lecturer argued that the U.S. has a strong essential facilities doctrine and then drew a line from this supposed precedent (with no mention of Trinko) and similar European decisions to the Chinese Anti-Monopoly Law and other Chinese laws that prohibit unreasonable refusals to deal as to essential facilities. . . Turning to a slide that said ‘inspiration from Google case,’ the presenter reasoned that the FTC’s decision in the Google SEPs matter meant that an ‘unreasonable’ refusal to grant a license for a standard-essential patent to a competitor should constitute monopolization under the essential facilities doctrine.”), https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf. See also Koren W. Wong-Ervin & Joshua D. Wright, Intellectual Property and Standard Setting, 17 FEDERALIST SOC’Y REV. 52, 56-58, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878955.

\(^{19}\) See generally Koren W. Wong-Ervin, Righting the Course: What the DOJ Should Do About the IEEE Business Review Letter, COMPETITION POL’Y INT’L (Aug. 13, 2017) (“The DOJ should also renounce the sections of the prior administration’s IEEE BRL that endorse certain policies . . . [that] went well beyond the DOJ’s statutory mandate, which is limited to opining on whether the amendments raised antitrust issues, and were wholly unsupported by any evidence of their consequences, much less net benefits.”), https://www.competitionpolicyinternational.com/righting-the-course-what-the-doj-should-do-about-the-ieee-business-review-letter/.
government, whereas the U.S. antitrust agencies (along with educational institutes such as my own at Scalia Law School) are particularly well-suited to address economically flawed analysis through economic and other training programs.

7. ChemChina and Sinochem are planning to merge next year, creating the world’s largest chemicals group with $100bn of revenue. Under the current Coverage Rules, Section 802.52, this transaction might be exempt from Hart-Scott-Rodino (HSR) review since both companies are essentially state owned, despite the significant impact such a merger would have on the U.S. market. Do we need to update our Coverage Rules to ensure such transactions are properly reviewed?

   a. SPECIFIC PROVISION: Section 802.52 – a proposed transaction will be exempt from HSR review if (a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and (b) The acquisition is of assets located within that foreign state or of voting securities or non-corporate interests of an entity organized under the laws of that state.

Anticompetitive harm caused by state-owned enterprises (SOEs) and state-supported enterprises is a serious issue that needs to be studied and addressed. Indeed, conferring upon SOEs privileges and immunities that are not available to their privately-owned competitors, or are not based on superior performance or efficiency, distorts competition in the market between state-owned and privately-owned rivals. In general, SOEs are not as efficient as privately-owned firms given that, unlike private firms, which are generally driven by profit, SOEs may have a number of other objectives including employment, social goals, or wealth distribution. Use of SOEs to achieve non-market goals is generally a costly way to achieve such goals. These incentives can significantly affect their performance in the market and unnecessarily increase the costs of achieving those non-market goals.

With respect to Section 802.52 in particular, I defer to others as this is outside my areas of expertise. I note, however, that while transactions such as ChemChina/Sinochem may be exempt from the HSR Act, they are not exempt from Section 7 of the Clayton Act, i.e., the U.S. antitrust agencies can still investigate and challenge the merger. In addition, the motivation for Section 802.52 appears to be a recognition that U.S. antitrust laws should not interfere with sovereign decisions of other countries, following principles of international comity and the Act of State doctrine. Any efforts to amend this section should include a rigorous study that examines, among other things, issues of reciprocity and appropriate enforcement mechanisms (e.g., the ability to enforce non-compliance through fines or court orders with respect to companies over which the United States may not have jurisdiction).

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