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Closing the Umbrella? Two Recent Second Circuit Decisions Address (and Reject) So-Called Umbrella Liability Claims

By Benjamin R. Nagin, A. Cameron Duncan, and Gabriela M. Balbín

In late 2021, the Second Circuit issued two decisions—*In re American Express Anti-Steering Rules Antitrust Litigation* ("*Amex Rules*")[1] and *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group* ("*Schwab Bonds*")[2]—that closely analyzed and rejected so-called "umbrella" liability claims. As discussed below, these two decisions illuminate the narrow path plaintiffs face in asserting umbrella claims particularly in the Second Circuit.

In *Amex Rules*, the Second Circuit waded (once again) into the intersection between payment cards and antitrust law.[3] Two classes filed antitrust actions in *Amex Rules*: a class of merchants that accepted American Express cards and a class of merchants that did not accept American Express cards. Both classes alleged that Amex rules prohibiting merchant steering of customers to lower-cost payment options (such as Visa and Mastercard) at the point of sale resulted in supra-competitive fees to merchants for each transaction. While the Amex-accepting merchants alleged a direct connection between Amex's steering rules and their acceptance fees, the non-Amex accepting merchants alleged that Amex's rules and fees "enabled" other payment networks (whose cards the

[1] *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 138 (2d Cir. 2021).
[2] *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103 (2d Cir. 2021).
[3] *See, e.g.*, *Salveson v. JPMorgan Chase Bank, N.A.*, et al, No. 20-2658 (2d Cir. June 29, 2021); *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *aff'd*, *Ohio v. Am, Express Co.*, 138 S. Ct. 2274 (2018); *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006).

plaintiffs did accept) to raise their fees.[4] Using the umbrella nomenclature, the non-Amex accepting merchants argued, "Amex's practices provide an umbrella under which the other credit card companies that do have a relationship with [these merchants] also raise prices."[5] In other words, their "umbrella theory seeks to hold price-fixers liable for harm allegedly flowing from the illegal conduct even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions.'"[6]

The Second Circuit started its analysis by confirming that antitrust standing requires more than "merely . . . showing injury causally linked to an illegal presence in the market."[7] Instead, a private plaintiff must show both that it suffered a special kind of antitrust injury and that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws.[8] With respect to the "efficient enforcer" prong, the Second Circuit set out the four familiar factors from *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC"*)[9]:

(1) the directness or indirectness of the asserted injury;
(2) the existence of "more direct victims" or the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement";
(3) the extent to which the claim is "highly speculative"; and
(4) "the importance of avoiding the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."[10]

The first *AGC* factor on "directness or indirectness of the asserted injury" is really just a proximate cause inquiry. In that regard, the Second Circuit observed that, "[i]n the context of antitrust standing, proximate cause generally follows the first-step rule" where "injuries that happen at the first step following the harmful behavior are considered proximately caused by that behavior."[11] And, in terms of antitrust standing, that first-step is also often the last step: if a plaintiff is harmed after that first step, it often will lack antitrust standing to pursue damages.[12]

That first-step rule applied with force in *Amex Rules* where Amex allegedly "raised the price for Amex-accepting merchants through the Anti-Steering Rules."[13] But, the court noted, Amex did not raise plaintiffs' fees nor could it have done so as the plaintiffs

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[4] 19 F.4th at 137, 140–41.
[5] *Id.*at 138.
[6] *Id.*(citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1339 (9th Cir. 1982)).
[7] *Id.* (citation omitted).
[8] *Id.*
[9] 459 U.S. 519 (1983).
[10] 19 F.4th at 138 (quoting *AGC*, 459 U.S. at 540–45).
[11] *Id.* at 139–40.
[12] *Id.* at 140.
[13] *Id.*

accepted competitors' payment cards but did not accept Amex's cards.[14] Plaintiffs nevertheless claimed that they were injured when Amex's competitors, "covered by Amex's price umbrella, raised their own prices."[15] The court disagreed that this satisfied the first-step rule: even if Amex's conduct enabled other credit card companies to raise fees charged to plaintiffs, that still would not be enough to establish the direct relationship between injury and antitrust violation.[16]

Notwithstanding its conclusion that the plaintiffs' injuries were not proximately caused by Amex, the Second Circuit also considered the other *AGC* efficient enforcer factors. Having found that the plaintiffs' alleged injuries occurred past the first step, it easily concluded that the second factor (the existence of more direct victims) weighed against antitrust standing because the merchants that accept Amex cards also sued Amex for their alleged injuries.[17] The third factor—the extent to which the claim is "highly speculative"—was a closer call in the court's view. In this regard, the court stated that the operative complaint "presents a compelling prima facie case of foreseeable damages, given the allegation that Amex exercises market power and the district court's finding in [a Department of Justice action against Amex] that the 'prohibitions on merchant steering' have 'enabled . . . higher all-in-fees.'"[18] Noting that the *AGC* factors need not be given equal weight, the court concluded that even if the claimed injury were not speculative, that would not be enough to confer standing.[19] Finally, the damages alleged by the non-Amex accepting merchants did not for obvious reasons overlap with the damages claimed by the Amex-accepting plaintiffs (whose claims were sent to arbitration). The case thus did not "involve pass-on theories that would require a court to divide damages from the same violation among multiple plaintiffs."[20]

Having undertaken the *AGC* efficient enforcer analysis, the Second Circuit ended where it started. Because the plaintiffs could not properly allege proximate cause, they lacked antitrust standing. The court made clear that its decision did not rest on the umbrella nomenclature or the mere fact that the plaintiffs alleged an umbrella theory of harm.[21] Instead, the court focused on plaintiffs' inability to plead "the required direct connection between the harm and the alleged antitrust violation."[22]

Only a month later, the Second Circuit again considered an umbrella liability theory in *Schwab Bonds*.[23] Like the merchants that did not accept Amex cards in *Amex Rules*, the plaintiffs in *Schwab Bonds* ("Bondholder Plaintiffs") alleged that the conduct of banks in setting LIBOR rates as part of a purported conspiracy led them to pay inflated LIBOR rates in unrelated bonds purchased from third parties. According to the Bondholder Plaintiffs,

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[14] *Id.*
[15] *Id.* at 141.
[16] *Id.* (citing *Bank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296, 1306 (2017)).
[17] *Id.*
[18] *Id.* at 142 (quoting *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 88 F. Supp. 3d 143, 216 (E.D.N.Y. 2015)).
[19] *Id.*
[20] *Id.* at 143 (citing *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977)).
[21] *Id.*
[22] *Id.*
[23] 22 F.4th 103 (2d Cir. 2021).

the conduct of the defendant banks created an umbrella under which all prices, even those employed by unrelated third parties, were affected.[24]

As in *Amex Rules*, the Second Circuit considered whether the Bondholder Plaintiffs were efficient enforcers through a review of the *AGC* factors. Here, too, the court started its analysis with the first-step rule and "traditional proximate cause considerations," which "require drawing a line between those whose injuries resulted from their direct transactions with the Banks and those whose injuries stemmed from their deals with third parties."[25] The court determined that the plaintiffs, which purchased from third parties and not the defendant banks, did not satisfy the first-step rule "because the decision of a third party to incorporate LIBOR as a term in a financial instrument could be made without any connection to the actions of the Banks."[26] Of particular importance to the Second Circuit in *Schwab* was that "the reduced-interest payment in no way enriched the Banks, who had no financial stake in the transactions whatsoever."[27] As a result, while plaintiffs alleged that the defendant banks engaged in a conspiracy to set LIBOR rates to increase their profits, "those who purchased from third parties were 'not the target' of such harm; they were 'simply collateral damage.'"[28]

The Second Circuit then directly addressed the question of so-called "umbrella" standing. "To be sure, some courts have occasionally looked past intervening decisions by third parties to find 'umbrella standing,' which allows a consumer who dealt with a non-cartel member to pursue antitrust claims against cartel members who rigged the market as a whole."[29] But the Second Circuit explained that it has "*never adopted* this theory of antitrust standing, and the unique nature of the LIBOR conspiracy makes umbrella standing particularly inappropriate here."[30] In fact, it was the absence of two primary allegations that confirmed the lack of antitrust standing for plaintiffs who purchased from non-defendants: "There is no allegation that the Banks controlled the market for LIBOR-referencing products, nor any claim that the Banks pressured third parties to adhere to a LIBOR-based index."[31] Ultimately, the Second Circuit concluded that "umbrella standing of the sort urged by the [plaintiffs] would yield liability that is far too sweeping and would, therefore, 'raise the very concern of damages disproportionate to wrongdoing' emphasized in cases that reject umbrella standing."[32]

The court also concluded that the other *AGC* factors weighed against a finding of antitrust standing. The second factor—the existence of more direct victims of the alleged conspiracy—"clearly weighs against antitrust standing" as the injuries of victims who

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[24] *Id.* at 111–14.
[25] *Id.* at 116.
[26] *Id.*
[27] *Id.*
[28] *Id.* (quoting *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 65–66 (2d Cir. 2019)). Of course, if the plaintiffs were downstream indirect payors of fees to the defendants through intermediaries, their claims likely would be barred under the *Illinois Brick* doctrine. *See, e.g.*, *Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1520 (2019) ("Incorporating principles of proximate cause into [Section 4 of the Clayton Act], we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." (emphasis in original)).
[29] *Id.* at 116–17.
[30] *Id.* at 117 (emphasis added).
[31] *Id.*
[32] *Id.*(quoting *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 779 (2d Cir. 2016)).

purchased LIBOR-indexed instruments directly from the defendants "are directly linked to the Banks' profit from the conspiracy, thus underscoring the attenuated nature of the harms allegedly flowing from third-party bond sales."[33] The third factor—the speculativeness of the claimed injury—also militated against finding antitrust standing because the Bondholder Plaintiffs' "theory would require the court to speculate about how the third-party sellers would have factored a non-suppressed LIBOR into the transaction."[34] The final factor, related to the risk of duplicative recoveries, did not present an issue as the case did not present *Illinois Brick*-type indirect purchaser issues relating to "upstream and downstream purchasers that is the usual focus of this factor."[35]

Following *Amex Rules*, a plaintiff in the Second Circuit advancing an umbrella-theory antitrust claim might take solace in the court's comment that "it is *not* the appellants' status as umbrella plaintiffs or otherwise that resolves the antitrust standing question but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."[36] That solace, however, seems short-lived given the Second Circuit's pointed statement one month later in *Schwab Bonds* that the court has "never adopted this theory of antitrust standing."[37] So do umbrella liability claims have life in the Second Circuit? It seems safe to say that, at a minimum, such claims face a difficult hurdle getting over the proximate cause "first-step" of the *AGC* factors and will be met with skepticism by the Second Circuit and courts implementing its recent antitrust standing decisions.[38]

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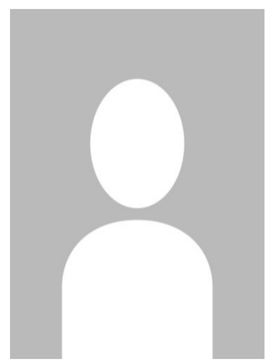

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[33] *Id.* at 118–19.
[34] *Id.* at 119.
[35] *Id.*
[36] *Amex Rules*, 19 4th at 143 (internal quotation marks and citation omitted) (emphasis added).
[37] *Schwab Bonds*, 22 F.4th at 117.
[38] Another case addressing the question of antitrust standing for umbrella plaintiffs was heard in the Southern District of New York in early 2021. The court held that the Plaintiffs were not efficient enforcers and therefore lacked standing, and ultimately granted summary judgment to the Defendants. *In re Aluminum Warehousing Antitrust Litig.*, 520 F. Supp. 3d 455 (S.D.N.Y. 2021). Plaintiffs filed an appeal with the Second Circuit in April 2021, and the case remains on appeal awaiting oral argument as of March 2022.

The Past and Future of the Consumer Welfare Standard or, Putting Brandeis Back in the New Brandeis Movement

By David A. Munkittrick, Colin R. Kass, and John R. Ingrassia

In an interview with the New Yorker last year, FTC Chair Lina Khan said, "Antitrust through the nineteen-seventies was Brandeisian."[1] But what does that mean? What is "Brandeisian" antitrust? In a 2018 article published in the *Journal of European Competition Law & Practice*, Khan, who was then Director of Legal Policy at the Open Markets Institute, sought to explain the so-called "New Brandeis Movement," summing up its philosophy in one word: "anti-monopoly."[2] While she argued "antimonopoly does not mean 'big is bad'," she took issue with "[t]he Chicago School focus on 'consumer welfare." In her now-famous law review note, *Amazon's Antitrust Paradox*, Khan took direct aim at the consumer welfare standard, calling it "misguided."[3] And last year, as Chair of the FTC, Khan rescinded a 2015 FTC policy that stated, "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare" and acts "will be evaluated under a framework similar to the rule of reason."[4]

The consumer welfare standard, of course, has been an anchor of antitrust jurisprudence for over 40 years, and arguably, much longer. Business conduct and mergers are evaluated to determine whether they harm consumers in a relevant antitrust market. And the rule of reason analytical framework has an even longer history. This article takes a brief jaunt through that history in an effort to further understand the historical consequences (if any) of recent policy changes in antitrust enforcement, particularly regarding the consumer welfare standard and vertical conduct. It reveals that if Khan and Jonathan Kanter at the DOJ are trying to establish that they are merely following in history's footsteps, then they picked the wrong horse to ride because Justice Brandeis was not nearly as anti-business or anti-consumer welfare standard as they are.

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[1] Sheelah Kolhatkar, *Lina Khan's Battle to Rein in Big Tech*, THE NEW YORKER (Nov. 29, 2021), https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech.

[2] Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131-132 (2018), *available at* https://academic.oup.com/jeclap/article/9/3/131/4915966.

[3] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017), *available at* https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf.

[4] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf; Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

Justice Louis Brandeis, the Rule of Reason, and the Consumer Welfare Standard.

As a Supreme Court justice (1916-1939), Brandeis recused himself from most monopolization cases that came before the Court. He did, however, engage in collusion cases and penned the now-classic expression of the rule of reason: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[5] What is that if not a precursor to the modern mantra of antitrust jurisprudence: the "antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"[6] Even strains of the consumer welfare standard – that is, the Chicago School's focus on efficiency – can be found in Brandeis's writings. In his 1914 text, "The Curse of Bigness," Brandeis wrote: "The establishment of any rule fixing a maximum return on capital would by placing a limit upon the fruits of achievement, tend to lessen efficiency."[7] Again, that is in line with the antitrust jurisprudence of today:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*[8]

So too, Brandeis: "size may, at least, ***become*** noxious by reason of the means through which it was attained or the uses to which it is put."[9]

So where does the "New Brandeisean" anti-monopoly stance come from? Perhaps the real reason for the paean to Brandeis is simply the title of Brandeis's essay: "The Curse of Bigness," which was later conscripted as the title of a paperback by Tim Wu, antitrust professor and now policy advisor to President Biden. To be sure, Brandeis viewed the trusts of his day as a public menace, and his rhetoric is echoed by the New Brandeiseans. But not without dissonance. Perhaps the area of greatest dissonance between Brandeis himself and the New Brandeiseans is in the area of vertical conduct.

Brandeis on Vertical Restraints

Chair Kahn has argued for an antitrust analysis focused on market structure over market outcomes, focusing in particular on vertical conduct. In a statement accompanying the

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[5] *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

[6] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[7] Louis Brandeis, Shall We Abandon the Policy of Competition?, in *The Curse of Bigness*: *Miscellaneous Papers of Louis D. Brandeis* at 106. (Osmond K. Frankel ed., 1935).

[8] *Verizon Commc'ns., Inc. v. L. Offs. of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[9] Louis Brandeis, *Other People's Money: And How the Bankers Use It*, at 163 (Martino Publishing 2009).

FTC's withdrawal of the 2020 vertical merger guidelines, Khan wrote, "the FTC will assess potential market structure-based presumptions for non-horizontal mergers."[10] She argued, "[t]he 2020 [Guidelines] contravene the text of the statute, devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers." To Khan, vertical and horizontal mergers should not be treated differently because "the statute does not distinguish between 'horizontal' and 'vertical'."[11] Brandeis might have argued otherwise.

Brandeis was a staunch defender of vertical price restraints, and in particular, resale price maintenance ("RPM"). When the Supreme Court conferred "*per se*" illegal status to RPM contracts in 1911 – in effect treating vertical price agreements the same as horizontal price agreements – Brandeis was critical of the decision. He argued that treating RPM contracts as *per se* illegal "failed to draw the distinction between a manufacturer fixing the retail selling-price of an article of his own creation and to which he has imparted his reputation, and the fixing of prices by a monopoly or by a combination tending to a monopoly."[12] To Brandeis, "to so fix the ultimate selling price in a competitive business is not a restraint of trade in any proper case. On the contrary, it stimulates trade, because it gives an appropriate reward to the man who creates…."[13]

He could have written the Supreme Court's seminal 2007 *Leegin* decision. Citing to the just-as-seminal 1977 *Sylvania* decision, Justice Kennedy noted:

> Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. . . . Minimum resale price maintenance can stimulate interbrand competition . . . by reducing intrabrand competition. . . . A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers.[14]

The Court had relied on the same economic reasoning in *Sylvania* in holding that vertical territorial restraints should be analyzed under the rule of reason because such restrictions can enhance interbrand competition. Both decisions are rooted in the consumer welfare standard. *Leegin* called application of the *per se* test "foreign to the Sherman Act" and "[d]ivorced from competition and consumer welfare."[15] And *Sylvania* noted vertical

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[10] Fed. Trade Comm'n, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[11] *Id*. at 3.

[12] Brandeis, *supra* n.7, at 125.

[13] *Id*. at 126.

[14] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-90 (2007) (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc.,* 443 U.S. 36, 54-57 (1977)).

[15] *Id*. at 906.

restrictions, by enhancing interbrand competition, can increase the "availability and quality" of products and services to consumers.[16] *Per se* treatment was wrong because it relied on "'formalistic' legal doctrine rather than 'demonstrable economic effect.'"[17] Again, Brandeis likely would have agreed: "[T]hat which I create, and the good-will which attends it … that is my specific property; I have made it valuable to myself, and I make it valuable to the consumer because I have endowed that specific property with qualities on which everyone who purchases my goods may rely."[18]

<u>The Future Consumer Welfare Standard</u>

While the FTC can decide it will not be constrained to the consumer welfare standard in its analyses, and will ignore efficiencies inherent in vertical mergers, there is zero indication that courts, let alone the Supreme Court, would do the same. The *per se* history of vertical restraints is unlikely to repeat. Indeed, the Sherman Act makes antitrust a forward-looking, common-law-based analysis, not a tribute to history or the economics of the late nineteenth century. As stated in *Sylvania* and reaffirmed in *Leegin*, "[T]he state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws … in the American economy today."[19] The consumer welfare standard – properly understood as a focus on economic impact on total welfare in the market – is not simply a phenomenon of recent decades but has far deeper roots in antitrust jurisprudence.

That said, deals combining two large competitors, or a dominant competitor with a small upstart, can expect robust pre-merger investigation and perhaps challenge, even where there are a number of other competitors in the market or clear efficiencies to be had. Merging companies should consider approaching the agencies with, not just arguments why the merger will not impact competition or increase prices, but also why it will not harm other stakeholders, including workers, suppliers, contractors, and the like. All of this is garnering increased scrutiny in merger review. But at the end of the day, it still boils down to a single, simple question: does the proposed merger, or the challenged conduct, harm competition in a relevant market? In other words, can it be expected to

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[16] *Sylvania*, 433 U.S. at 55.

[17] *Leegin*, 551 U.S. at 888.

[18] Brandeis, *supra* n.7, at 126.

[19] *Leegin*, 551 U.S. at 888 (quoting *Sylvania*, 433 U.S. at 53, n.21).

produce economic effects that harm consumer welfare? If not, antitrust should not care, and Brandeis may not have cared either.

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Antitrust in the Andes: Serving Many Masters?

By Alejandro García de Brigard

To say that antitrust practitioners in Latin America, and particularly in the four member states which make part of the Andean Community of Nations (*Comunidad Andina de Naciones* - CAN) had a rude awakening with Decision 2006 of the CAN's antitrust enforcer, published in May 2018, would be a serious understatement. The effects of the ill-advised decision are still being felt across the region, seriously threatening leniency programs in Colombia, Ecuador and Peru and casting significant doubts over the stability and seriousness of antitrust enforcement in those countries. But as often happens, bad decisions tend to create bad trends, even beyond their initial scope.

A bit of context, however, is perhaps useful. First, what is the CAN? One of the many attempts of regional integration in South America (others include Mercosur and, to a lesser extent, Unasur and Prosur), the CAN was intended to be a true customs union including Bolivia, Colombia, Ecuador, Peru and Venezuela (even though the latter withdrew in 2006). While the success as a trade union is a source of many debates, the fact remains that the founding treaty remains in place and, as of today, the member states have a combined 111 million inhabitants[1] and a total GDP of around USD 650 billion.

Second, why is the existence of the CAN relevant for antitrust enforcement in the region? The founding treaty of the CAN created a common antitrust framework, with a common antitrust authority, the *Secretaría General de la CAN* – SGCAN, meant to have jurisdiction over antitrust cases with impact on trade between member states, and a common court, the *Tribunal de Justicia de la Comunidad Andina* - TJCA, meant to adjudicate cases and to provide judicial review for decisions taken by the SGCAN. The founding treaty of the CAN and the SGCAN regulations have no provisions for a leniency program or for recognition of leniency benefits by member states. As a result, even in recent years, when enforcement has significantly increased in the region, the SGCAN has not been a particularly active authority, with only occasional and marginal activity.

Third, and finally, what exactly did the SGCAN decide in 2018 and why is it such a threat to antitrust enforcement in the region? Eduardo Frade, Vinicius Marques, Carlos Mena and Jaime Barahona – all former senior members of the antitrust authorities of Brazil, Mexico and Chile – have already described the matter in detail in their excellent articles *The end of leniency programs in the Andean Region?*[2] and *A Call to Arms to protect Latin*

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[1] Free translation from Andean Community, Comunidadandina.org. 2022. *¿Quiénes Somos? – Comunidad Andina*. [online] Available at: <https://www.comunidadandina.org/quienes-somos/> [Accessed 29 March 2022]

[2] Frade, E., Marques, V., Mena, C. and Barahona, J., 2022. *The end of leniency programs in the Andean Region?*. [online] Competition Policy International. Available at: <https://www.competitionpolicyinternational.com/the-end-of-leniency-programs-in-the-andean-region/> [Accessed 29 March 2022].

American Leniency Programs[3] but, to summarize, in 2018 the SGCAN decided to impose fines on two multinational companies operating in the region on the basis of conduct that had already been reviewed by the authorities of Colombia, Ecuador and Peru. The parties had already filed leniency applications and secured benefits in Colombia and Peru. But most importantly, the SGCAN's case was entirely based on evidence shared by the Ecuadorian antitrust authority, after it unilaterally decided to refer the case to the SGCAN and to disclose all the confidential information a leniency applicant had shared as part of a leniency application. The decision by the SGCAN was so egregious that both the Colombian and Peruvian authorities took the unprecedented step of filing reconsideration pleas against the decision and have since then been constantly calling for significant reforms.

So given that background, what has transpired since then, and what is the current state of affairs? On the specifics of the case, the parties filed reconsideration pleas before the SGCAN (joined, as mentioned above, by reconsideration pleas filed by the Colombian and Peruvian authorities.). One of the parties also filed judicial complaints in Ecuador and an annulment action before the TJCA. While the Ecuadorian complaints failed to yield positive results, the TJCA did lay out a path forward[4]: while the annulment action was dismissed due to a ripeness issue (the TJCA argued that given the reconsideration pleas, the 2018 SGCAN decision was not yet a final decision and the question of annulment was not yet "ripe" for judicial review), the TJCA specifically indicated that ". . . *statements provided by the leniency applicant or applicants in the context of a leniency program should not be used against the leniency applicant in other proceedings, as doing so would disincentivize future leniency applications, which would in turn negatively impact leniency programs, thus debilitating the fight against cartels.*" Those comments were *obiter dictum* and not part of the TJCA's *ratio decidendi*, but they still gave hope to many that the SGCAN would need to take them into account when deciding on the use of the information it had received from the Ecuadorian authority for its case. Those hopes would turn out to be, as we will see, clearly misplaced.

In the meantime, the first consequence of the decision was a significant slowdown in the number of leniency applications filed in the region. Given the confidential nature of leniency applications, figures are hard to come by, but based on the number of cases decided recently by the Colombian, Peruvian and Ecuadorian authorities, leniency-based decisions are mostly a thing of the past.

Second, and from the perspective of the regional antitrust bar, the Andean countries have become a significant source of uncertainty for decision makers at companies operating in the region. Questions on how to engage and when to engage with local antitrust authorities have given way to a general preference to avoid engagement, when at all possible, given the risk posed by the looming presence of the SGCAN.

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[3] Mena-Labarthe, C., Barahona, J., Marques de Carvalho, V. and Frade, E., 2018. *A Call to Arms to Protect Latin American Leniency Programs.* [online] Lalibrecompetencia.files.wordpress.com. Available at: <https://lalibrecompetencia.files.wordpress.com/2018/08/latam-column-july-2-full.pdf> [Accessed 29 March 2022].

[4] Tribunalandino.org.ec. 2018. *Gaceta Oficial Año XXXV - Número 3412*. [online] Available at: <https://www.tribunalandino.org.ec/decisiones/AN/04-AN-2018.pdf> [Accessed 29 March 2022].

Third, and perhaps more concerning, the heightened profile of the SGCAN has given rise to opportunistic parties attempting to use the SGCAN to pursue cases when local authorities have either decided not to initiate investigations or have not expressed a clear position on the matter. Specifically, in 2020, following a flurry of activity in the tech sector, a complaint was filed simultaneously with national antitrust authorities in the Andean Region and with the SGCAN, listing a number of alleged violations of Andean antitrust law. That same year, the same complainant filed a separate case, also simultaneously before national authorities and the SGCAN, against several vaccine manufacturers, arguing, in broad terms, that lack of access to vaccines and pricing practices in connection with COVID-19 vaccines amounted to restrictive conduct.

While those complaints were dismissed by the SGCAN in 2021 due to lack of evidence and a failure to state proper cause of action, the dismissal was driven more by the ineptitude of the complaints than by a commitment by the SGCAN to respect the jurisdictional sphere of each national authority within the CAN. Furthermore, the filings highlighted, once again, the difficulties companies face when operating in the region given the asymmetries between local and regional antitrust enforcement: first, if any of the companies involved in the complaint would have wished to apply for leniency, any local application would have been rendered useless given the lack of a leniency program at the SGCAN and the SGCAN's continued refusal to honor local leniency grants. Second, the absence of double jeopardy protections would have meant that there was a distinct possibility of concurring national and CAN-based investigations and fines based on the same facts.

Finally and most recently, to make things worse, in 2021, even though the TJCA had signaled its reluctance to allow the use of evidence gathered for a leniency application in other proceedings, the SGCAN decided to plough ahead and confirm its initial decision[5]. In doing so, the SGCAN spent very little time addressing the arguments of the parties on the existence of local leniency agreements and instead provided new arguments on its authority. On the absence of a regional leniency program, the SGCAN argued that since it had the authority to decide on the amount of a given fine, investigated parties could certainly have access to benefits, equivalent to those of a leniency program[6] by fully cooperating with the SGCAN, even if they had already cooperated with other authorities, therefore confirming that it would not honor national leniency agreements. On the specifics of cooperation, and even though the case at hand involved the use of evidence obtained using highly suspect means, the SGCAN did argue that by presenting a defense and failing to yield to its investigation, the parties had disqualified themselves from securing any benefits[7].

So, in sum, as of today, there are two active and parallel antitrust enforcement tracks for CAN member states, with no clear rules preventing prosecution at both a national and regional level. Furthermore, leniency benefits granted by national antitrust authorities

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[5] Comunidadandina.org. 2021. *Gaceta Oficial Año XXXVIII - Número 4369*. [online] Available at: <https://www.comunidadandina.org/DocOficialesFiles/Gacetas/Gaceta%204369.pdf> [Accessed 29 March 2022].

[6] §132

[7] §135

are not binding upon the SGCAN and - as made clear by the SGCAN- will not be honored at a regional level. And finally, the SGCAN has taken the position that the only way to obtain benefits similar to leniency is to yield to the SGCAN and hope for a reduction in fines.

In their 2018 articles, Frade, Mena, Barahona and Marques anticipated that the decision by the SGCAN on the reconsideration pleas filed by the investigated parties would be a game changer. Sadly, the SGCAN's refusal to change course has proven that prediction to be accurate, for all the wrong reasons. Even if the TJCA ends up granting relief to the parties in the 2018 case, now that the SGCAN's decision is final (and thus "ripe" for review), that relief will only concern the use of evidence shared with national authorities as part of a leniency process but is unlikely to solve the tension between national and regional enforcement. So unless serious reforms are undertaken, forcing the SGCAN to honor local leniency agreements and preventing concurring fines, national leniency programs are unlikely to recover and companies will need to carefully plan their activities in the region to avoid parallel enforcement.

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Criminal Monopolization Prosecutions: DOJ's Recent Policy Change, Past Cases, and Potential Obstacles

***By Tiffany Rider, James Hunsberger, and John O'Toole*[1]**

Introduction

On March 2, 2022, while speaking on a panel at the American Bar Association's White Collar Crime Conference in San Francisco, the Antitrust Division's Deputy Assistant Attorney General (DAAG) for Criminal Enforcement, Richard Powers, indicated that the Department of Justice (DOJ) is prepared to bring criminal charges against individual executives or companies for alleged monopolization offenses under Section 2 of the Sherman Act.[2] At the same conference, Doha Mekki, the Principal DAAG of the Antitrust Division, made similar remarks. In various public remarks since then, Jonathan Kanter, Assistant Attorney General (AAG) of the Antitrust Division, and his Deputies have doubled down on the DOJ's new commitment to criminal enforcement of Section 2 when, in their view, "the facts and the law" support it.

As discussed below, the DOJ's recent statements represent a radical departure from its criminal enforcement policy over the last several decades and raise serious questions about the types of cases the DOJ views as warranting criminal prosecution. While it remains to be seen what criminal Section 2 cases the DOJ might bring, below we preview some of the potentially significant obstacles the DOJ may face in any such cases.

Recent DOJ Statements on Criminal Enforcement of Section 2

During his March remarks, Powers reiterated AAG Kanter's statement that the DOJ would utilize "every tool available"[3] for antitrust enforcement, including criminal prosecution of Section 2 violations. Powers added that, "Congress made violations of the Sherman Act, both Section 1 and Section 2, a crime . . . and Section 2 is a felony just like Section 1, and that's been true since the 1970s."[4] Powers also noted, "Historically the division did not

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[1] The authors are attorneys at Axinn, Veltrop & Harkrider LLP in Washington, DC. This article builds on a client alert published by Axinn on March 15, 2022, available at https://www.axinn.com/media-articles-Axinn_Antitrust_Insight_DOJ_Officials_Raise_Specter_Criminal_Monopolization_Prosecutions.html. The authors thank their Axinn colleagues for the helpful comments and thoughts that contributed to the development of this article. The views expressed in this article, however, do not necessarily represent the views of Axinn or its clients.

[2] Section 2 covers monopolization, attempted monopolization, and conspiracies to monopolize. 15 U.S.C. § 2.

[3] Dep't of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[4] MLex, "U.S. DOJ stands ready to bring criminal charges in Section 2 monopolization cases, Powers says" (Mar. 2, 2022), *available at* https://content.mlex.com/#/content/1363181.

shy away from bringing criminal monopolization charges, and frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended to monopolize markets."[5] Powers also indicated that the DOJ may be actively looking to criminally prosecute under Section 2, stating that, "[i]f the facts and the law lead us to the conclusion that a criminal charge based on a Section 2 violation is warranted, then that's what we'll do, we'll charge it."[6]

During opening remarks at the Spring Enforcers Summit on April 4, 2022, about a month after Powers' initial remarks, AAG Kanter emphasized that the DOJ "will aggressively pursue <u>enforcement of the criminal antitrust laws</u> to protect consumers, workers and businesses harmed by unlawful collusion <u>and monopolization</u>."[7] Kanter reiterated the DOJ's justification for its position based on the language of the Sherman Act:

> [W]hen Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law.[8]

During the 2022 ABA Antitrust Law Spring Meeting, multiple DOJ officials commented on the potential for criminal prosecution under Section 2—again pointing to the language of the statute—but none of the officials provided further clarity on the DOJ's policy in this area. During the Enforcers Roundtable on April 8, when prompted on whether there would be further guidance in this area, Kanter responded that "my guidance is to read the cases," noting that "there is over a century of case law relating to criminal antitrust enforcement of Section 1 and Section 2." Kanter concluded his remarks on this point by repeating that the DOJ "will pursue criminal violations when the facts and law suggest that it is appropriate and consistent with the Principles of Federal Prosecution." Similarly, during another Spring Meeting panel, Powers noted there is a "long arc" of criminal Section 2 cases and advised practitioners to "take a look at what's on the books." Neither Kanter nor Powers cited any particular cases or provided any further guidance to the business community.

<u>The DOJ's Prior Policy Statements on Criminal Antitrust Enforcement</u>

The recent comments from DOJ officials stand in stark contrast with the DOJ's approach to Section 2 enforcement over the past few decades. The DOJ has long had the theoretical ability to criminally prosecute violations of Section 2 because, like Section 1 of the Sherman Act, the text of the statute provides that those who violate the statute "shall be

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[5] *Id*.

[6] *Id*.

[7] Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022) (emphasis added), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[8] *Id.*

deemed guilty of a felony."[9] In recent history, however, the DOJ has only brought criminal charges for "hardcore" violations of Section 1 of the Sherman Act, which prohibits concerted action in restraint of trade, such as price-fixing, bid rigging, market or customer allocation, and, in the last few years, no-poach or wage-fixing conduct. Courts have held that classic "hardcore" agreements among competitors, such as those to fix prices, rig bids, or allocate markets, are "unlawful *per se*" under Section 1 and may be condemned without elaborate analysis because they "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit."[10]

Across presidential administrations spanning several decades, the DOJ has made numerous statements outlining its approach of prioritizing criminal prosecution of such per se conduct under Section 1. For example, in 1955, in the Report of the Attorney General's National Committee to Study the Antitrust Laws, the Antitrust Division advised that it would limit criminal prosecution to price-fixing and other violations where there is "proof of a specific intent to restrain trade or to monopolize."[11] The Report also noted, however, that "the use of criminal process . . . was improper" under the antitrust laws where the cases were "wholly without precedent."[12] In 1967, the DOJ reiterated that it would limit criminal prosecution to only "willful" violations of the antitrust laws.[13] Later, in 1995, shortly after the expansion of the Antitrust Division's Criminal Leniency Program, then-AAG Anne Bingaman and Criminal DAAG Gary Spratling specifically highlighted that price-fixing, bid-rigging, and market-allocation schemes were the most important areas of focus for DOJ criminal enforcement.[14] And, in 2003, then-AAG Hewitt Pate said that the DOJ brings criminal charges only against "hard core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior."[15] During the hearings

[9] 15 U.S.C. § 2.

[10] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[11] Dep't of Justice, Report of the Attorney General's National Committee to Study the Antitrust Laws, at 350 (1955), *available at* https://babel.hathitrust.org/cgi/pt?id=umn.31951d02427803y&view=1up&seq=368&skin=2021.

[12] *Id*. at 351. The Report also concluded that, "All criminal cases, however, should be confined to instances where proof of violation is clear and the law is settled." *Id.*; *see also id.* at 349 ("[I]t may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade.").

[13] The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment, at 109-10 (1967) ("Vagueness in the legal definitions of the prohibited acts might raise problems of fairness, or even constitutionality in proceeding criminally. The Supreme Court has held that the Sherman Act is not unconstitutionally vague. But an indictment in a particular case might unfairly attack conduct not known to the defendants to be unlawful. The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law . . . ."), *available at* https://babel.hathitrust.org/cgi/pt?id=uva.x004110310&view=1up&seq=127&skin=2021.

[14] Dep't of Justice, Criminal Antitrust Enforcement: A Joint Address - AAG Anne K. Bingaman And DAAG Gary R.Spratling (Feb. 23, 1995), *available at* https://www.justice.gov/atr/speech/criminal-antitrust-enforcement-joint-address-aag-anne-k-bingaman-and-daag-gary-rspratling.

[15] R. Hewitt Pate, Ass't Att'y Gen., Antitrust Division, Dep't of Justice, Vigorous and Principled Antitrust Enforcement: Priorities And Goals (Aug. 12, 2003), *available at* https://www.justice.gov/atr/speech/vigorous-and-principled-antitrust-enforcement-priorities-and-goals.

for the Antitrust Modernization Commission, Criminal DAAG Scott Hammond added that the DOJ will not prosecute cases in which "there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to."[16]

In fact, even up until the day before the March remarks from DOJ officials, the publicly available Antitrust Division Manual, which guides the criminal and civil prosecutorial and enforcement decisions of Division attorneys, essentially stated that the Division's policy was to use civil process for violations that are subject to the rule of reason, *e.g.*, Section 2 claims, and that even certain conduct that may appear to be a per se violation would not be appropriate to prosecute criminally.[17] As of the date of publication of this article, the webpage for the Manual indicates that it is "undergoing revision."[18]

<u>Past Criminal Prosecutions Under Section 2: How to "Read the Cases"</u>

The DOJ has not pursued criminal prosecutions for Section 2 violations for the past few decades, and for good reason. Section 2 cases are governed by the rule of reason which requires a careful weighing of anticompetitive effects and procompetitive justifications,[19] while criminal Section 1 cases are nearly universally governed by the per se standard, which condemns certain categories of conduct as illegal without a need for detailed assessment of competitive effects.[20] This rarity of criminal prosecution under Section 2 was addressed in an April 2007 report by the blue-ribbon Antitrust Modernization Commission, noting that the last criminal prosecutions for such conduct occurred almost

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[16] Antitrust Modernization Commission, Criminal Remedies Discussion Memorandum (May 4, 2006), at 9-10, *available at* https://govinfo.library.unt.edu/amc/pdf/meetings/CrimRem_DiscMemo_060504-fin.pdf.

[17] The Antitrust Division Manual (Fifth Edition), Chapter III, Section C.1, formerly stated:

> Many investigations conducted by the Division are clearly civil investigations (*e.g.*, merger investigations). Nevertheless, there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation. In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations. <u>Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason</u> as well as some offenses that historically have been labeled "per se" by the courts. There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate. These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.
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> (emphasis added).

[18] Antitrust Division Manual, *available at* https://www.justice.gov/atr/division-manual (noting web page last updated on March 1, 2022).

[19] *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

[20] *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (per se rule limited to cases where the challenged "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output," as opposed to "one designed to 'increase economic efficiency and render markets more, rather than less, competitive'") (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (per se rule applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

fifty years ago and that, despite the statutory authority to do so, the DOJ has forgone criminal prosecutions of unilateral conduct under Section 2 (as well as certain joint conduct where the competitive effects are often ambiguous).[21]

In the most recent criminal Section 2 cases, which are from the 1970s and predate many modern antitrust precedents, the DOJ had a mixed record of success.[22] Notably, the cases where the DOJ alleged criminal violations of Section 2 also included either a traditional conspiracy claim under Section 1 of the Sherman Act, or egregious criminal conduct of a completely different sort from the type of conduct alleged in more modern Section 2 cases. Moreover, only in one of these 1970s cases, *U.S. v. Dunham Concrete Products*, were individual defendants actually indicted and sentenced to jail time.

The indictments in *General Motors* and *Braniff Airways* each alleged both Section 1 and Section 2 claims,[23] indicating that the Section 2 claims may not have been necessary to bring criminal charges. In *General Motors*, the DOJ alleged that the defendants had engaged in a traditional conspiracy to fix prices, in violation of Section 1 of the Sherman Act, as well as a conspiracy to monopolize the market for automobile fleets in violation of Section 2 of the Sherman Act.[24] The court, however, concluded that the DOJ's allegations were incongruous, observing that typically co-conspirators do not raise prices in order to monopolize a market.[25] The court ultimately entered a judgment of acquittal on the second count of the indictment (conspiracy to monopolize), finding that the DOJ did not allege sufficient facts to demonstrate that the defendants had specific intent to monopolize, a necessary element of a conspiracy to monopolize claim.[26] In *Braniff*, the DOJ also brought a traditional conspiracy claim under Section 1 alongside the Section 2 claim, this time alleging a conspiracy to allocate the market and also to prevent rival Southwest Airlines from growing in the Texas market.[27] The DOJ alleged that Braniff and its co-conspirator exchanged flight schedules, ticket fees, and other competitive information as part of a market allocation scheme, and also to prevent customers from

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[21] Antitrust Modernization Commission, Report and Recommendations, "Chapter III: Civil and Criminal Remedies," at 293-297 (Apr. 2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/chapter3.pdf.

[22] *Compare United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978) (one airline defendant pled guilty and the other pled no contest) and *United States v. Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1242 (5th Cir. 1973) (indictment and subsequent conviction of three corporate defendants and their part-owner and manager was upheld), *with United States v. General Motors Corp.*, 369 F. Supp. 1306, 1311 (E.D. Mich 1974) (judgment of acquittal on Section 2 claim) and *United States v. Empire Gas Co.*, 393 F. Supp. 903, 912 (W.D. Mo. 1975) (defendant acquitted at trial, and DOJ dismissed Section 2 claim).

[23] *General Motors*, 369 F. Supp. at 1306; *Braniff*, 453 F. Supp. at 725.

[24] *General Motors*, 369 F. Supp. at 1306, 1311.

[25] *Id*. at 1309-11 ("At this point the court notes a dilemma that has burdened the government throughout the case. In Count I it charged the defendants with a conspiracy to fix prices by *raising* them while in Count II it charged the defendants with a conspiracy to monopolize, that is, to exclude competitors. The government thus put itself into the difficult position of having to prove that the defendants' general intent to conspire to *raise* prices was coupled with a specific intent to *exclude* competitors. This is contrary to common sense and experience. Even in an industry where there are few suppliers, price raising by some is bound to lead to increased sales by the others.").

[26] *Id*.

[27] *Braniff*, 453 F. Supp. at 725, 728-29.

re-booking flights on Southwest in an effort to thwart competition.[28] Unlike in *General Motors*, the court rejected defendants' arguments for dismissal, and the two defendants ultimately pled guilty and no contest, respectively.[29]

In other cases that the DOJ prosecuted criminally under Section 2, there was egregious criminal conduct outside the antitrust context. For example, in *Dunham Concrete Products*, defendants were accused not only of attempting to monopolize certain concrete markets, but also of engaging in other forms of conduct in violation of the Hobbs Act.[30] The indictment charged defendants with engaging in other extreme forms of criminal conduct, such as purposefully obstructing competitors' construction projects and using labor strikes and threats of physical violence as forms of extortion.[31] Notably, the defendants involved in this conduct were affiliated with infamous criminal Jimmy Hoffa,[32] and the conduct occurred before the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) was passed. Similarly, in *Empire Gas*, defendants were accused of intentionally damaging competitors' property as part of an attempt to monopolize the market.[33]

Viewed in this historical context, it is difficult to imagine the DOJ bringing—let alone sustaining—criminal monopolization charges against a company or individuals in the current age without either (a) egregious alleged conduct that is otherwise criminal, or (b) facts sufficient to support a traditional conspiracy claim under Section 1 of the Sherman Act. Given the extreme facts of this dated precedent, and without any further guidance from the DOJ, it remains unclear where the DOJ views the line for conduct to cross into criminal Section 2 territory—particularly in light of the modern rule-of-reason framework for Section 2 monopolization claims.

Potential Obstacles to Criminal Prosecution under Section 2

The recent vague statements by DOJ officials regarding criminal prosecution under Section 2 contrast with the approach that the DOJ took when announcing a change in

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[28] *Id*. at 728-29 ("What is challenged is defendants' seeking, pursuant to a continuing agreement, understanding and concert of action, to impair the ability of Southwest Airlines to commence and maintain operations in competition with them in the tri-city intrastate market of Texas and thereafter to eliminate Southwest from that market. The essence of the indictment, therefore, is that defendants conspired to eliminate Southwest and to thereafter monopolize the intrastate market.").

[29] N.Y. Times, "Braniff Fined In Trust Case" (Dec. 28, 1978), *available at* https://www.nytimes.com/1978/12/28/archives/braniff-fined-in-trust-case.html.

[30] *Dunham*, 475 F.2d at 1242. The Hobbs Act provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a) (emphasis added).

[31] N.Y. Times, "Ex-Teamster is Held Guilty of Extortion" (Feb. 28, 1973), *available at* https://www.nytimes.com/1973/02/28/archives/exteamster-is-held-guilty-of-extortion.html; N.Y. Times, "Witness Against Hoffa Indicted in New Orleans" (June 21, 1969), *available at* https://www.nytimes.com/1969/06/21/archives/witness-against-hoffa-indicted-in-new-orleans-labor-official.html.

[32] *Id*.

[33] *Empire Gas*, 393 F. Supp at 907, 912 (reciting DOJ allegation that defendants "attempted to injure or destroy and threatened to injure or destroy the business or property" of competitors).

policy with respect to so-called "no poach" or "wage-fixing" agreements. There, the DOJ and FTC made a formal policy announcement through the 2016 Guidance for Human Resource Professionals that made clear that going forward the DOJ would be criminally prosecuting no-poach and wage-fixing agreements under Section 1 of the Sherman Act.[34] The DOJ indicated that the Guidance would not apply retroactively and it would not criminally prosecute conduct that had completely terminated before the issuance of the Guidance. Even then, in several of the DOJ's active no-poach cases, defendants have argued (unsuccessfully so far) that the Guidance alone did not provide fair notice to potential defendants, and therefore the DOJ's criminal prosecution of this conduct is unconstitutional.

Likewise here, potential defendants in any future Section 2 criminal prosecutions are likely to raise significant due process objections due to, among other things, lack of fair notice on what conduct constitutes a criminal violation of Section 2. "To satisfy due process, a penal statute must define the criminal offense . . . with sufficient definiteness that ordinary people can understand what conduct is prohibited."[35] Potential defendants in a Section 2 criminal case are likely to argue that the sudden criminal enforcement of Section 2—after a fifty-year gap of criminal prosecution and after numerous policy statements indicating the DOJ would act to the contrary—violates the Due Process Clause of the Constitution.[36] Potential defendants are also likely to argue that the theoretical ability under the statute for the DOJ to bring criminal charges, absent actual prosecution, is not sufficient fair notice of the criminality of such conduct.

In response, the DOJ will likely argue that, unlike the arguments that defendants have raised in the no-poach cases, there is historical precedent for criminally prosecuting Section 2 violations, as discussed above, and the Sherman Act explicitly makes violations of Section 2 a felony. Therefore, the DOJ will likely argue that the government cannot be accused of creating a new category of criminal antitrust conduct, and defendants cannot say there is *no* precedent for such action either. Further, while doing so would certainly promote transparency and good government, the DOJ may hesitate to issue formal guidance on criminal enforcement of Section 2, as it did with no-poach and wage-fixing, to avoid potential arguments from future defendants that the fact such guidance was necessary means they were not on fair notice. While defendants in the DOJ's recent labor-market cases have been unsuccessful in dismissing criminal charges on constitutional grounds, they have prevailed in defeating the DOJ's Sherman Act claims on the merits—with the jury delivering "not guilty" verdicts in both of the DOJ's recent wage-fixing and no-poach trials.[37]

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[34] Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resources Professionals (Oct. 2016), at 3-4 ("Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."), *available at* https://www.justice.gov/atr/file/903511/download.

[35] *Skilling v. United States*, 561 U.S. 358, 402 (2010) (cleaned up).

[36] *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266-67 (1997) (explaining that "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

[37] *United States v. Jindal*, 20-cr-00358-ALM, Verdict of the Jury, ECF No. 112 (E.D. Tex. Apr. 14, 2022) (not guilty on wage-fixing counts; guilty on obstruction of justice); *United States v. DaVita Inc. and Kent Thiry*, 21-cr-00229-RBJ, Verdict, ECF No. 264 (D. Colo. Apr. 15, 2022) (not guilty on no-poach counts).

In addition to the fair notice issues, it is unclear how the DOJ could prove each of the elements of a monopolization or attempted monopolization claim beyond a reasonable doubt, as would be required to obtain a criminal conviction. With respect to the first element of a monopolization claim—monopoly power[38]—claims under Section 2 often involve intense battles between leading economists and other experts on both sides who opine on the parameters of the relevant markets and resulting market shares, as well as direct evidence (or lack thereof) of monopoly power. With respect to the second element of a monopolization claim—anticompetitive or exclusionary conduct—differentiating anticompetitive from procompetitive conduct is notoriously difficult and presents "one of the most vexing questions in antitrust law."[39] Given the difficulty of proving both elements under even a preponderance standard in civil cases, it is likely the DOJ would encounter significant obstacles trying to prove each of these elements beyond a reasonable doubt in a criminal case.

What To Look For Going Forward

Without guidance from the DOJ regarding what conduct crosses the line to warrant criminal prosecution, we expect the DOJ will likely only criminally prosecute conduct under Section 2 when they have some other basis for criminal prosecution anyway. For example, the DOJ may attempt to criminally prosecute a conspiracy among companies to monopolize a relevant market, which the DOJ arguably also could charge under Section 1.

It remains to be seen whether the DOJ statements indicate a real policy change at the DOJ and an omen of indictments to come, or only an attempt to gain leverage against targets or deter future violations. In any event, it is important to revisit antitrust compliance policies and conduct antitrust training for employees to ensure that these issues and others do not result in either criminal or civil enforcement. And it is yet to be seen how modern courts would respond to a criminal prosecution of Section 2 given significant case law developments since the historic criminal prosecutions under Section 2.

[38] *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (Section 2 claim requires (1) "possession of monopoly power in the relevant market"; and (2) "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

[39] 1-2 Antitrust Law Developments 2C (8th ed. 2016); *see also, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (*en banc*) (*per curiam*) ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.").

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Litigation Is Coming: The Top 5 Best Practices for In-House Counsel to Manage Merger Review Risk

By Ashley M. Bauer, Kelly S. Fayne, and Matthew J. Piehl

"I am concerned that merger remedies short of blocking a transaction too often miss the mark." – Jonathan Kanter, Assistant Attorney General[40]

In his first address as Assistant Attorney General (AAG) for the Antitrust Division at the Department of Justice, Jonathan Kanter invoked his "role model" and predecessor, Robert Jackson, who held the AAG position in 1937. According to AAG Kanter, Jackson "embark[ed] on an aggressive campaign of antitrust enforcement to free markets from the grip of monopoly power." Jackson's first year as AAG featured "dozens of cases, including the landmark challenges against Socony-Vacuum Oil Company and the Aluminum Company of America." With Jackson as inspiration, AAG Kanter's Antitrust Division appears poised to wield litigation as a favored tool in merger enforcement.

The Federal Trade Commission, too, has signaled equally aggressive enforcement under Chair Lina Khan, who listed as her first policy priority: "address[ing] rampant consolidation and the dominance that it has enabled across markets. This will require [] finding ways to strength our merger enforcement . . . ."[41]

Merging parties should therefore anticipate antitrust scrutiny, including by preparing for litigation. Being litigation-ready starts well before a complaint is filed, and in-house counsel play a critical role. This article highlights five best practices in-house counsel can adopt today to smooth the road for deals tomorrow.

(1) Understand the Business Objectives: Transaction Rationale Matters at Every Step

The procompetitive rationale for the transaction is a critical theme at trial. But building out the merging parties' procompetitive themes begins long before the Hart-Scott-Rodino (HSR) notification is even filed. Counsel for the merging parties will want to explain the deal rationale at every step: at first contact with the antitrust agencies (and with enforcers outside the U.S.); in the materials likely to be submitted with the HSR filing as "Item 4(c) and (d)" documents; in every letter to and discussion with the investigating agency; in response to the Second Request; and throughout every stage of the litigation (including in the answer, discovery responses, trial briefing, and presentation of the evidence at trial). The FTC or DOJ, on the other hand, will probe deal rationale at every

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[40] *Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section*, U.S. Dept. of Justice (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[41] Memorandum from Chair Lina M. Khan to Federal Trade Commission Staff and Commissioners (Sept. 22, 2021),
https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

stage. Most importantly, enforcers will ask about the deal rationale during investigational hearings and/or depositions.

In-house counsel plays a critical role in developing the themes surrounding deal rationale. As a first step, when working with the business teams negotiating the deal, in-house counsel should make sure that the business teams are clear about their procompetitive objectives. Documents created during the initial stages of negotiations are critical and should accurately reflect deal rationale. In-house counsel can also play a very helpful role in making sure that the business teams understand their document preservation obligations as they begin negotiating the deal.

By understanding the deal rationale from the outset, in-house counsel will be well positioned to explain the procompetitive aspects of the deal to their outside antitrust counsel. In-house counsel should promptly connect the business leaders and key commercial decision-makers at the company to outside counsel so that the business and its advocates are aligned on objectives and messaging. In-house counsel plays a key role in ensuring that everyone involved inside and outside the company understands the deal rationale *before* the parties approach the antitrust agencies.

(2) Be Aware of What the Business Is Drafting: Documents Can Be Determinative

The HSR notification requires a company to produce several categories of transaction-related documents. Once a Second Request issues, the merging parties will be required to produce significant quantities of ordinary course business documents, emails, text messages, Slack messages, data, and more. The FTC and DOJ frequently expect to receive documents from dozens (sometimes more than 100) document custodians. Moreover, if litigation ensues, the reviewing agency may seek additional documents from the parties (including from new custodians) as well as third parties.

Documents, particularly the documents prepared in the ordinary course of business by the merging parties, are often the most critical evidence at trial. Hyperbole, false statements, and comments lacking their full context have frequently increased the degree of difficult for parties in merger reviews and litigations. To that end, at the outset of a transaction, in-house counsel should ensure that all employees understand the ways in which their documents may play a role in antitrust merger investigations litigations. Early on, in-house counsel should work with the business teams and outside counsel to identify and understand the context for any existent documents that could be of interest to the reviewing agency. In light of the potential for discovery of documents created after the deal is signed, in-house counsel should provide employees with advice regarding document preservation before the deal is even signed and continuing throughout the litigation phase.

(3) Know What Your Customer Is Thinking: The Customer Is Always Right—and a Third-Party Witness

The company will want to tell the investigating antitrust agency that its customers support the transaction because the deal will provide enormous benefits. But what will the customers tell the antitrust agency?

During the investigation phase, the investigating agency will solicit feedback from customers in the form of voluntary statements and document productions. The company could do the same. In-house counsel can help the company solicit feedback from its customers, but must do so prudently, keeping in mind that conversations with third parties may not be protected by any privilege and could also end up with the agency. It is important to weigh this risk against being surprised in the litigation phase when customers will testify under oath as third-party witnesses. In addition, counsel will likely research what customers are saying in public and what third-party analysts are telling customers and in-house counsel may want to share those statements with the business team and get the company's perspective.

(4) Hope for Early Termination, But Plan for the Long Haul

In-house counsel can hope that the antitrust agencies approve the transaction with little fanfare, but in transactions that present complex antitrust questions, it is often helpful to plan for an extended review and litigation in the merger agreement itself. In-house counsel should consider early on the company's appetite to pursue a deal through litigation, and the potential costs of doing so. For instance, if merger approval takes more than a year, will it be necessary for the seller to secure additional funding? Similarly, if litigation is a potential path for the deal, the outside date needs to be long enough to comfortably allow time to get through a trial.

It is not just the merger agreement that needs to contemplate litigation, if the agency issues a Second Request, it will likely ask for a timing agreement. In-house counsel will want to consult closely with outside counsel to understand the pros and the cons of entering any such agreement and to determine whether a timing agreement makes sense for the transaction at hand. If there is a real possibility of litigation following the Second Request, in-house counsel should pay very close attention to any litigation conditions included in the timing agreement. Often, the agencies will offer benefits for the merging parties earlier in the process in return for litigation concessions. In-house counsel and outside counsel should consult closely to make sure that the litigation terms are not so onerous as to outweigh any early advantages. Additionally, in-house counsel should ensure that any timing agreement provides room to litigate within the outside date of the transaction agreements.[42]

(5) Coordinate Global Filings with an Eye to Litigation

A cross-border transaction may involve antitrust reviews by non-U.S. agencies, and counsel will need to coordinate global filings across multiple jurisdictions. Two important issues will arise:

First, the various government agencies will want the parties to grant waivers so that the agencies can share the parties' confidential information across borders. In addition to deciding whether and when to grant such waivers, in-house counsel will need to keep in mind privilege issues. Privilege rules may vary by jurisdiction: non-U.S. countries may not recognize certain U.S. privilege rules, such as the attorney-client privilege for advice of in-house counsel. It is important to ensure that the U.S. agency does not receive privileged

[42] The transaction agreement may also need to provide an outside date far enough in the future to allow for an in-depth antitrust investigation and litigation.

materials through its global counterparts or that a party inadvertently waives privilege by disclosing materials to government entities.

Second, in-house counsel must ensure that the disparate filings tell a cohesive narrative and that outside counsel in each jurisdiction understand the deal rationale. In-house counsel may consider implementing a central team to review each filing before it is finalized.

Conclusion

Increasingly aggressive antitrust enforcement may make merger litigation more likely. In-house counsel can play an important role, and that role begins well before any merger agreement is negotiated or HSR notification is submitted. Advanced preparation will increase the odds the transaction withstands the antitrust agencies' challenge and help the parties close the deal.

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