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Overview of Antitrust and Competition Law in the United States

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I. The Objectives of Antitrust and Competition Law in the United States

A. Federal and State Antitrust and Competition Laws in the United States.

In the 1800s, there were several giant businesses, called “trusts,” that controlled vast sections of the United States economy. Two of the more prominent trusts, U.S. Steel and Standard Oil, monopolized the steel and oil industries, respectively. Additional trusts existed in the sugar, railroad, and whiskey industries. The trusts controlled entire lines of business without competition and prices skyrocketed as a result. In order to protect consumers, then President Theodore Roosevelt broke up trusts by enforcing what came to be known as “antitrust laws.” Roosevelt became known as the “trust-buster” for his numerous political reforms that increased trust regulation.

The goal of the antitrust laws is to protect consumers by promoting fair competition in the market place. Antitrust laws do not necessarily seek to protect businesses from failing or from facing aggressive competition. They support the prevailing U.S. economic theory that while competition is tough for businesses, consumers ultimately benefit from the free

¹ The authors would like to thank Pamela Amaechi for her contributions.

competition amongst sellers. As such, several U.S. states began instituting antitrust laws even before the federal government entered the stage in 1890.

1. Sherman Antitrust Act

The United States first antitrust law, the Sherman Antitrust Act, was passed by Congress in 1890. Perhaps the most significant of the federal antitrust laws, the Sherman Act was intended to combat the “business trusts” of the American economy during the late 19th century, and to this day it remains the bedrock of antitrust enforcement. Roosevelt became the first president to successfully invoke the Sherman Act against big business. The Sherman Act prohibits two broad categories of conduct. First, it declares to be illegal “[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Second, it prohibits efforts to “monopolize . . . attempt[s] to monopolize, or . . . conspir[acies] . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations.” Penalties for violating the Sherman Act can be either civil or criminal in nature. Congress bolstered the growing antitrust sentiment by enacting additional competition laws and departments to enforce the laws.

2. Federal Trade Commission Act and Clayton Antitrust Act

In 1914, Congress enacted two new antitrust laws. First, Congress enacted the Federal Trade Commission Act, which created the Federal Trade Commission (“FTC”) and gave it the authority to enforce U.S. antitrust laws. Second, Congress enacted the Clayton Antitrust Act, which was intended to supplement the enforcement of antitrust laws. This law expanded the definition of prohibited conduct to include “mergers and acquisitions where the effect may substantially lessen competition,” and also gave state attorneys general the ability to enforce the

federal antitrust laws. A few decades later, Congress enacted the Robinson-Patman Act to further strengthen the existing laws.

3. Robinson-Patman Act

The Robinson–Patman Act of 1936 is an amendment to the Clayton Act. This Act prohibits anti-competitive practices by producers, specifically price discrimination. The need for the Robinson-Patman Act grew out of practices in which chain stores were allowed to purchase goods at lower prices than other retailers. The Act prevented unfair price discrimination for the first time by requiring that the seller offer the same price terms to customers at a given level of trade. Similar to the Sherman Act, the Robinson-Patman Act also provides for criminal penalties.

B. What Do Antitrust Laws Prohibit?

Section 1 of the Sherman Act broadly prohibits “[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Generally speaking, a restraint of trade is an agreement among two or more persons or entities that affects the competitive process. Courts have limited § 1 (and the corresponding section of state antitrust laws) as applying only to “unreasonable” restraints of trade. Over the years, two different methods have evolved to analyzing conduct under § 1. Courts now apply either a *per se* analysis, or a broader “Rule of Reason” analysis to evaluate potentially illegal conduct. Several *per se* and Rule of Reason violations are explained fully below.

1. Per se Antitrust Violations

a. *Price fixing.*

Price fixing, a *per se* violation, is an agreement among competitors to raise, lower, or otherwise stabilize the price range, or any other competitive term that will be offered for their products or services. Competitive terms that competitors may not agree to include anything from financing terms and warranties to discounts and shipping fees. The important factor is whether there is an agreement which directly or indirectly affects prices. An example of price-fixing is exhibited in the recent case, *United States of America v. Mitsubishi Heavy Industries Ltd.*, 2:13-cr-20711 (D.D.C). *Mitsubishi* involves one of the longest running international cartels spanning from the United States to Japan. Nine auto parts firms and two executives pled guilty to price fixing in the U.S. Justice Department's largest antitrust investigation. The auto parts companies had a price-fixing scheme under which the prices of seat belts, radiators, windshield wipers, and air-conditioning systems were fixed from 2000 to 2010. The conspiracies affected more than \$5 billion in parts sold to U.S. manufacturers. The settling Japanese firms, Hitachi Automotive, Jtekt, Mitsuba, Mitsubishi Electric, Mitsubishi Heavy Industries, NSK, T.RAD, Valeo Japan and Yamashita Rubber agreed to pay \$740 million in fines, with some executives entering plea agreements which included sentences of more than one year in prison. The case is ongoing against other companies and executives.

b. *Bid Rigging.*

Price fixing can be conducted jointly with bid rigging, which refers to coordinated conduct among competing bidders that unfairly undermines the bidding process. Bid rigging was famously uncovered in the GE-Westinghouse price-fixing scandal during the 1960s, *In the*

matter of General Electric Company, et al., 24 F.T.C. 881. In that matter, top executives from General Electric Co. and Westinghouse Electric Corp., as well as other electrical manufacturing firms, were meeting secretly to conduct bid rigging for major government contracts. Each company took turns being the low bidder for the contract, but at a price that was profitable to the winning firm. Seven executives were found guilty and a federal judge assessed damages at over \$16 million. Interestingly, GE was recently embroiled in another bid-rigging scandal. In October 2012, three former GE executives were sentenced to between three and four years in prison for their roles in a bid-rigging scheme involving the municipal bond market.

c. *Market or Customer Allocations.*

Market or customer allocation, as a *per se* violation, is an agreement among businesses not to compete for customers. For example, an agreement to allocate or divide sale territories, assign certain customers to particular sellers, or reduce output in order to control supply, would be *per se* illegal under the Sherman Act. An example of this illegal practice was exhibited recently by a U.S. insurance company. In 2006, the Ohio Attorney General alleged that Zurich American Insurance Company conspired with Marsh & McLennan to eliminate competition by dividing its commercial customers. *In re Insurance Brokerage Antitrust Litigation*, MDL No. 1663, Civil No. 04-5184. Allegedly, Zurich misled consumers by inflating its premiums for commercial casualty insurance policies in Ohio. The high premium quotes would deceive the customer into believing the winning quote was the best available premium. Zurich American agreed to pay \$5 million in civil penalties.

d. *Group Boycotts.*

Group boycotts are also a serious *per se* violation. Such boycotts are defined as an agreement among competitors to engage in a form of orchestrated conduct. This may mean agreeing not to conduct business with a particular person or entity, or doing so only on certain terms agreed upon by the group members. In 1945, the United States sued the Associated Press in the case *Associated Press v. United States*, 326 U.S. 1 (1945) for a large scale group boycott. The United States alleged that the Associated Press was prohibiting their more than 1,200 member newspapers from selling or providing news to non-member organizations and making it difficult for non-members to join the Associated Press. Because news is traded between states, the Supreme Court interpreted it as interstate commerce and found that it was essentially a group boycott, in violation of the Sherman Act.

e. *Tying Arrangements.*

A tying arrangement conditions the availability of one product - the “tying” product - on the purchase of another product (the “tied” product). A tying arrangement is presumed to be illegal where (1) the tying and tied products are separate items, as opposed to separate components of a single product; (2) the availability of the tying item is conditioned on the purchase (or rental or license) of the tied item; and (3) the business imposing the arrangement is in a position to use its strength in the market for the tying item to harm competition in the market for the tied product.

A well-known example of a tying arrangement being prosecuted in court is the case *United States v. Microsoft Corporation*, 253 F.3d. 34 (D.C.C. 2001). In 1998, the Department of Justice (“DOJ”) brought suit against Microsoft for a number of antitrust violations, one being the

tying of Internet Explorer browser and the Windows 98 operating system. The DOJ argued that not only was the browser difficult to remove from the computer, but that the arrangement kept the price of Windows higher than it should normally have been. In 2001, the DOJ reached an agreement with Microsoft to settle the case. Over the objection of several states which pushed for harsher penalties, the settlement required Microsoft to share its application programming interfaces with third-party companies and appoint a panel with full access to Microsoft's systems, records, and source code in order to ensure compliance.

2. Antitrust Violations Under the Rule of Reason

Oftentimes, instances arise in which the effect on competition and consumers is not as clear or straightforward as in the case of a *per se* offense. In those instances, evaluating whether the conduct is illegal requires a broader assessment than the *per se* rule; instead, the conduct must be evaluated under an approach known as the "Rule of Reason." The Rule of Reason analysis requires full consideration and balancing of the harms and benefits of the conduct at issue. If a court determines that the competitive harms of the agreement outweigh its benefits, it is deemed an illegal restraint of trade. Samples of some of the types of agreements reviewed under the rule of reason are explained below.

a. *Restraints in the Supply Chain.*

A restraint in the supply chain can be an offense under the rule of reason analysis. It refers to any agreement involving parties along the supply chain who are in a so-called vertical relationship. Vertical restraints generally range from agreements on price or sales territory to how a retailer must display or market a supplier's product.

One form of a vertical agreement is resale price maintenance, which is an agreement between firms to set either a price floor or a price ceiling. Historically, such arrangements were considered *per se* illegal under the federal antitrust laws, but recently the courts have reversed course. However, the practice could be found illegal under the Rule of Reason if there are sufficient anti-competitive effects associated with the agreement that outweigh any pro-competitive benefits. The FTC's recently resolved case against Toys "R" Us, *Toys "R" Us, Inc. v. FTC*, No. 98-4107, involved the enforcement of a prohibited vertical arrangement. In 1998, the FTC ordered Toys "R" Us to stop enforcing restrictive distribution policies with major toy manufacturers which limited the manufacturers' ability to sell their toys to warehouse clubs such as Costco and Sam's Club. The company was found to have violated this order and continued the practice from 1999 – 2010. As a result of the continued violations, the Company agreed to pay the FTC a \$1.3 million fine to resolve the case against it in 2011.

b. *Exclusive Dealing.*

Exclusive dealing is the next common violation under the rule of reason analysis. A common form of exclusive dealing is a contract between a supplier and retailer under which the retailer agrees to exclusively carry the supplier's product. It varies widely, but common forms include agreements forbidding a buyer from purchasing a product from a competitor or a contract preventing the distributor from selling the products of a different manufacturer. Courts generally view these types of agreements as competitively neutral or even pro-competitive, but they can be found illegal under federal and state antitrust laws where the one imposing the agreement has market power and uses the exclusive dealing contracts in a manner to distort competition or by making it more difficult for competitors to gain a foothold. In 2010, the FTC issued a complaint

against Transitions Optical (“Transitions”) alleging exclusive dealing with firms at multiple levels of the eye glass market. Transitions controlled more than 80 percent of the market of photometric lens sales, and was the dominant supplier of photochromic treatments. Transitions refused to deal with or threatened to terminate any lens caster that did not sell its lenses on an exclusive basis. It also had long-term exclusive dealing agreements with over 50 optical retailers and 100 wholesale optical laboratories.²

II. Who Enforces the Antitrust Laws?

The enforcement of antitrust and competition laws can be performed by several actors. Both public and private entities are capable of helping to enforce the law. Enforcement is largely multi-pronged, as the federal government, states, and individuals have the ability to file suit against accused firms. The federal government holds the largest responsibility in enforcing antitrust law, as it has two departments designated to investigate and take legal action regarding relevant claims.

A. Federal Government Enforcement

The DOJ’s Antitrust Division and the FTC share responsibility for investigating and litigating cases under the Sherman Act and they both also review potentially anticompetitive mergers under the Clayton Act. Only the DOJ has the authority to criminally prosecute individuals for violating the Sherman Act. Typically the DOJ will review mergers in transportation industries, such as airlines or railroads, as well as the telecommunications industry. The DOJ is currently reviewing the proposed \$11 billion merger between two U.S. based airlines, American Airlines and US Airways in the case *United States v. U.S. Airways Group, Inc.*, 1:13-cv-1236 (D.D.C. 2013). The DOJ is seeking to block the merger because is

² <http://www.ftc.gov/os/caselist/0910062/index.shtml>

alleges that it would eliminate competition and put consumers “at risk of higher prices and reduced service.” For example, the merger would allow control of 69 percent of the takeoff and landing slots at Reagan National Airport in Virginia.³ On the other hand, the DOJ allowed the 2008 merger between Sirius Satellite Radio and XM Satellite Radio. After a thorough review of that proposed merger, the DOJ determined that there was little to no evidence showing that the merger would substantially lessen competition or enable the parties to profitably increase prices.

The FTC generally focuses its enforcement responsibility in the oil and gas, pharmaceutical, and health care industries. In 2012, the FTC secured an injunction and blocked the merger of two Illinois based hospitals, in the case *FTC v. OSF Healthcare Sys.*, 2012 U.S. Dist. LEXIS 48068 (D. Ill. 2012). The FTC argued that the deal would reduce competition for general acute-care inpatient services and primary care physician services in the Illinois area. On the other hand, the FTC approved the 1984, \$5.7 billion takeover of the Superior Oil Company by Mobil Corporation. That same year, the FTC allowed two other multibillion dollar oil company mergers.

B. State Attorneys General

Like the federal government, state attorneys general also have authority to enforce federal and state antitrust laws. Typically, states investigating a matter arising under the federal antitrust laws will jointly investigate with either the DOJ or the FTC, or may conduct a separate investigation. In addition, state attorneys general have the authority to seek restitution on behalf of the citizens of their states that have been harmed as a result of violations of either the federal or state antitrust laws. Some states also have criminal authority under their antitrust laws.

³ <http://www.marketplace.org/topics/business/why-department-justice-trying-block-american-us-airways-merger-takeoff>

C. Private Litigation

Finally, United States antitrust laws can be enforced by private parties through litigation. In fact, the United States, while not the only country which relies on both public and private enforcement of antitrust laws, is unique in that the number of private suits greatly outnumber suits brought by governmental agencies. Under both federal and state antitrust law, any person who is “injured in his business or property” by a violation of antitrust laws is entitled to bring an action in court. A prevailing plaintiff is eligible to recover treble damages, costs of suit, as well as attorneys’ fees. Private parties are also authorized to obtain injunctive relief to prevent threatened losses or damages. The majority of antitrust suits are in fact brought by private litigants seeking damages for violation of federal and state antitrust laws. Because these antitrust actions are often aimed at business practices that affect interstate commerce, private antitrust actions often take the form of a class action seeking damages and restitution for consumers across the country. However, there are certain limitations imposed by the court on individual private parties seeking damages. One such limitation is made on the distinction between direct purchasers and indirect purchasers.

1. *Private Litigation: Direct Purchaser and Indirect Purchaser Litigation.*

Although causes of action exist under both federal and state laws for direct purchasers of products - those who purchased directly from the defendants, the ability of indirect purchasers -- those purchasers who are overcharged down the stream of commerce as a result of alleged anti-competitive conduct -- are more limited. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977), the United States Supreme Court held that indirect purchasers did not have standing to sue for monetary damages under federal law. Although several exceptions to the holding in

Illinois Brick have arisen over the years, indirect purchasers remain limited in their pursuit of monetary damages under federal law, though they are not prevented from seeking injunctive relief. Fortunately for indirect purchasers, a majority of the states have passed laws in response to *Illinois Brick* which provide indirect purchasers a cause of action in those states.

2. *State Antitrust and Competition and Unfair Trade Practice Laws.*

Every state in the United States has adopted laws which provide their residents with varying levels of protection and various causes of action related to anti-competitive behavior. These additional protections help bolster the strength of individual parties. States often have different privileges available to them in enforcing competition laws that the federal government lacks.

a. State Antitrust Claims

Like the federal government, state governments are considered to be persons when they bring antitrust claims on behalf of themselves as injured parties. A state can also bring *parens patriae* actions, which are made on behalf of state citizens who are not corporations. The number of such cases has been steadily increasing in the United States, and states often combine with other states to bring a joint action. Federal antitrust claims are frequently supplemented by claims in state courts. After the *Illinois Brick* Doctrine, many states now allow civil damages for indirect purchases, in contrast to the federal courts which only allow damages for direct purchasers.

b. State Antitrust Laws

State antitrust law does not differ radically from the federal government's laws. Nearly all U.S. states have enacted antitrust laws that closely resemble federal antitrust statutes. In

addition to this, some states have enacted general consumer protection and unfair trade practice laws that permit actions for conduct that may be anticompetitive, but do not require injury to be shown to competition. This expands protections available to consumers and citizens. Despite their similarity to federal antitrust laws, courts have decided that state laws are not necessarily blocked or invalidated by federal laws. States, nonetheless, are unable to punish conduct wholly outside of or unconnected to their state. Though a few states limit recovery to actual or double damages, most states allow treble damages in civil damage actions. Some states only authorize damages for “willful and flagrant” violations.

c. State Class Action Suits

In regards to class action lawsuits, states have similar rules to the federal government. Recently, more class action antitrust suits have been filed in state courts in an effort to avoid the stricter decisions that occur in federal court. However, the 2005 passage of the Class Action Fairness Act subjected many state antitrust class actions to removal to the federal arena, even if the suit was brought under state statutes. The statute mandated that federal courts have jurisdiction over class actions in which the matter exceeds \$5 million. It also allocates federal jurisdiction in any class action in which any of the class members are citizens of a state different from the defendant, unless two-thirds of the members and the primary defendants are citizens of the state in which the action was filed.

III. Market Definition in the United States

In order to determine whether a business is exhibiting behavior that is anticompetitive, it is sometimes necessary to gauge how much market power that business holds. Market power refers to the ability of a business to alter the price of its product, without consumers turning to a

substitute. Firms that exist in a completely competitive market would have little to no market power, whereas firms that have significant market power can raise prices without losing consumers to other firms. The relevant market, also known as market definition, defines the market in which several goods compete. Enforcement of competition law would be impossible without first defining or determining the market in which the competition takes place. The elasticity of demand for the product market is key to determining the relevant market in different cases. The role of market definition in the United States, tests for obtaining market definition and the possible movement away from using market definition in the United States are discussed in detail below.

Market definition is required by the Clayton Act and by case law. In *Brown Shoe v. United States*, 370 U.S. 294 (1962), the Supreme Court held that “proper definition of the market is a ‘necessary predicate’” to determine the anti-competitive effects of a merger in the context of a suit to enjoin a proposed merger. As discussed below, the question of whether market definition is required in the context of damages claims under Sections 1 and 2 of the Sherman Act, is much less clear. In merger cases, plaintiffs must define the relevant product and geographic markets at the pleading stage, and they bear the burden of proving that the evidence supports their definition. “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe v. United States*, 370 U.S. at 325. The geographic market is defined as the “area in which the seller operates, and to which the purchaser can practicably turn for supplies.” *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (U.S. 1961).

Determining product market definitions can be accomplished in many ways, one of which is the Hypothetical Monopolist Test.

A. How Markets Are Defined In the United States

1. *Hypothetical Monopolist Test.*

The product market definition is typically determined by reference to the “hypothetical monopolist test.” Under the recently enacted 2010 Horizontal Merger Guidelines (“HMGs”), the “hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”), likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market...” HMG at § 4.1. “The hypothetical monopolist’s incentive to raise prices depends *both* on the extent to which customers would likely substitute away . . . *and* . . . on the profit margins earned on those products.” HMGs at § 4.1.3. The test essentially boils down to whether it is profitable for a hypothetical monopolist to impose a small price increase.

The hypothetical monopolist test is applied by: (1) establishing the SSNIP, usually at 5%; (2) starting with one of the overlapping products at issue; (3) adding the best substitute product; (4) calculating the profit-maximizing prices for a hypothetical monopolist over these products; (5) comparing that to current prices; and (6) repeating (3) to (5) until the monopolist’s prices exceed current prices by the SSNIP.

The next test, Practical Indicia, was provided by the Courts as guidance in defining relevant markets.

2. *Practical Indicia of Markets.*

In *Brown Shoe, Inc.*, the Supreme Court listed seven “practical indicia” for use in defining markets -- “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325. Although this was an apparent attempt by the Supreme Court to give lower courts guidance defining markets, in practice it has resulted in seemingly indefensible decisions and additional confusion.

3. *Other Tests for Determining Markets.*

There are several other tests that exist for determining markets in the United States, especially ones that use econometric analysis as a means of measurement. Different quantitative analysis techniques are used in antitrust proceedings to determine competition issues, or analyze markets and market power. Antitrust cases usually involved opposite opinion concerning “a) what occurred, b) what caused what to occur[ed], and c) what would have occurred ‘but for’ some event.” Facts that validate these questions can be ascertained using econometric analysis tests, which apply statistical techniques to quantitatively measure variables. Other tests that don’t use statistical techniques can also be utilized to isolate and measure a variable of interest. Both types of tests are of much practical value to attorneys conducting antitrust litigation. One invaluable test to attorneys is price concentration analysis.

a. Price Concentration Analysis

Price concentration analysis “explores the degree to which higher levels of concentration coincide with higher prices and margins in order to give an insight into the likely competitive impact of an increase in market concentration.”⁴ This method can be used to infer the effect of a merger on prices. Higher concentration in a market is associated with greater market power, which then leads to higher prices. The method is particularly helpful in cases where geographical data of different areas with different concentration levels exists. The test is conducted by comparing prices in different markets to see if the market in which the price is higher also possesses a higher concentration. In relation to mergers, the test reveals whether an increase in concentration has affected prices.

b. Herfindahl Hirschman Index

The next test that can be used is the Herfindahl Hirschman index. The Herfindahl Hirschman index (“HHI”) collapses the different market shares of all the suppliers in a market into a single indicator. It measures the level of firm concentration in a market and is calculated by the sum of the squares of all the individual market shares. It is primarily used in antitrust analysis to screen mergers and identify those that are highly concentrated. The United States Horizontal Merger Guidelines uses the HHI to set a certain threshold on whether a horizontal merger impacts competition. A pre-merger market is defined as being un-concentrated if the HHI is under 1,000, and concentrated if the HHI is above 1,800. If a merger increases the HHI by over the threshold, it is scrutinized to determine its effects on competition.

⁴ http://www.crai.com/ecp/assets/quantitative_techniques.pdf

c. Shock Analysis

Shock analysis is another test used to determine market definition. Shock analysis is the analysis of discrete events affecting competition in the market to get insight into competition between products or regions. It is key to defining relevant product and geographic markets. It relies on the reactions of consumer and producers to certain events to gauge information about the nature of competition in a market. This analysis is most effective when the shock takes place at a time when no other major change was occurring. Shock analysis provides effective supplementary evidence for other market analysis tests and is a quantitative technique that is more intuitive rather than overly complex.

d. Price Elasticity Analysis and Econometric Analysis

Econometrics uses historical data, mathematics, and statistical methods to determine the impact of different factors on a given variable. Econometric analysis is used in a price elasticity analysis to ensure higher accuracy. Price elasticity analysis defines the market by examining whether a monopolist of certain products would be able to raise prices and increase profits. This is the same test as the hypothetical monopolist test, or the SSNIP test. It assesses demand responsiveness of the product to a change in price. A higher elasticity of demand makes it less likely for an increase in price to be profitable for the employer.

e. Residual Demand Analysis and Econometric Analysis

Residual demand analysis is another test to determining the definition of a market. It also uses econometric analysis and measures the demand of an individual business' products after allowing for the reactions of rival firms. This determines an estimate of the firm's market power and can be examined to see if a proposed merger would increase its market power. Estimating

the market power of a firm is usually difficult, and a downside to econometric analysis is it necessitates long and consistent series of relevant data, which can be hard to ascertain and time-consuming.

IV. New Developments in United States Antitrust Laws

A. Is United States Moving Away from Market Definition?

There has been new data to suggest that the use of such tools of analysis may be decreasing in the United States. The HMGs contain new language suggesting that the DOJ and FTC will no longer rely as heavily on formal market definition in conducting merger analysis. “The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects. The [DOJ and FTC] analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition . . . Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects . . . Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.” HMG § 4.

Recent case law, however, demonstrates that, although there may be a movement away from market definition in certain instances, the courts still recognize its importance. “Merger analysis begins with defining the relevant product market. ‘Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[] in question almost always depends upon the market power of the parties involved.’ Indeed, the relevant market definition is often ‘the key to the ultimate resolution of this type of case because of the relative

implications of market power.” *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50, (D.D.C. 2011) (internal citations omitted).

Furthermore, a number of prominent United States commentators have recently called into question the value of market definition as a mode of analysis in antitrust law. Professor Louis Kaplow of Harvard Law School describes his criticism as a “wholesale assault on the core logic of the methodology” of market definition. Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv.L.Rev. 437, 440 (2010). Kaplow argues that “the market definition process should be abandoned.” *Id.* at note 22. Kaplow argues that much of what passes for “market definition” analysis really is nothing more than “a purely results-oriented market definition stratagem under which one first determines the right legal answer and then announces a market definition that ratifies it.” *Id.* Professor Herbert Hovenkamp, one of the most influential antitrust scholars in the United States, has also taken a forceful position against a requirement of market definition, at least in merger cases. Herbert Hovenkamp, *Markets in Merger Analysis; Merger Policy, Structuralism, and the Legacy of Brown Shoe* (Oct. 2011).

B. Reverse Payments Litigation in Pharmaceutical Industry

The evaluation of future trends in the antitrust field is incomplete without examining the effect of innovation on antitrust rulings in the courts. Patent litigation settlements in the pharmaceutical industry have been the subject of FTC enforcement actions and private litigation for more than a decade. In such a settlement, a patent holder pays a generic company not to produce a product based on its patent. On June 17, 2013, the United States Supreme Court held in *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2227 (2013), ruled that “reverse payment” patent settlements between a pioneer drug maker and would-be generic competitors are subject to “Rule

of Reason” antitrust analysis, holding that “reverse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws.” The Court’s decision reversed the decision of the Eleventh Circuit Court of Appeals, which had held that such settlements were lawful so long as the agreement not to produce and market the generic product fell within the exclusionary potential of the patent.

As a result of the ruling, large reverse settlement payments will likely receive greater antitrust scrutiny. In contrast, settlements that contain no payment are much less likely to receive significant scrutiny.

In a recent decision in a case in which Shepherd Finkelman Miller & Shah, LLP is co-counsel for the plaintiffs, the United States District Court for the District of Massachusetts issued a decision denying several motions to dismiss brought by various generic drug manufactures in a case involving AstraZeneca’s drug for heartburn, which is sold under the brand name Nexium. *In Re: Nexium (Esomeprazole) Antitrust Litigation*, 1:12-md-02409 (D. Mass. 2013). Plaintiffs allege that Defendants violated state and federal antitrust laws by delaying the entry of generic Nexium to the market by entering into anticompetitive agreements to keep generic Nexium off the market. As a result, Plaintiffs allege that they and consumers were damaged as they were forced to pay high prices for brand name Nexium. On September 11, 2013, the Court issued an opinion finding that Plaintiffs adequately alleged that AstraZeneca and Defendants entered into these agreements to prevent generic Nexium from coming to market.

V. Similarities and Differences Between United States and CARICOM Antitrust and Competition Laws

The Caribbean Community (“CARICOM”) is an organization composed of 15 Caribbean nations. Its purpose is to promote economic integration and increase international competition.

To this effect, CARICOM has established its own competition laws and structures to achieve this economic goal. The United States and CARICOM's competition laws have many similarities and distinctions. Each entity's laws are unique in a way that allows them to address issues specific to their region.

A. CARICOM Single Market and Economy

Unlike the U.S., the small size and concentrated market structure CARICOM inherited from its colonial period, as well as strong cultural traditions; make the workings of its competition different. CARICOM has a higher amount of concentrations than the U.S., which may be necessary in such an economy to achieve productive efficiency. The small size of CARICOM's firms leaves them with an insubstantial impact on world trade. Furthermore, the small population size of its member states leads to limited demand and diseconomies of scale. Thus, major differences underline the competition laws of the U.S. and CARICOM.

The 15 member states of CARICOM aimed to promote regional economic integration by establishing the CARICOM Single Market and Economy ("CSME") in 2001, as well as signing the Revised Treaty of Chaguaramas. This revision was deemed necessary to promote the internationally competitive production of goods and provision of services. The Revised Treaty has nine additional protocols, which concern e-commerce, government procurement, trade in goods from free zones, free circulation of goods, and the rights contingent on the free movement of persons.⁵

The United States' competition laws are wider in scope than CARICOM's competition laws; however, the U.S.'s laws pertain to just its borders, whereas CARICOM's reach across

⁵ http://www.caricom.org/jsp/community/revised_treaty.jsp?menu=community

borders to encapsulate numerous nation-states. The distinctions between the two entities' laws are well portrayed in Chapter 8 of CARICOM's Revised Treaty.

B. Chapter 8 of the Revised Treaty: Anticompetitive Practices

Chapter 8 of the Revised Treaty specifies what constitutes anti-competitive conduct. It establishes rules of competition and consumer protection, as well as the sanctions for the breach of those rules.⁶ Generally, these rules prohibit business practices which hinder competition or allow a competitor to abuse a position of dominance in the market. However, unlike the U.S., these rules of competition are applicable to both the smaller, unviable economies in CARICOM, as well as its stronger ones. Certain provisions are made to adjust the rules for the less developed countries, referred to as LDCs.

The same *per se* antitrust violations that are prohibited in the U.S. are also similarly prohibited in the Revised Treaty. However, the Revised Treaty also adds on an extra prohibition not found in U.S. antitrust law, which is forbidding "engaging in any business conduct that results in the exploitation of its customers or suppliers." Further similarities between the two sets of laws are found in the prohibited anticompetitive agreements.

1. *Anticompetitive Agreements.*

Article 177 of the Revised Treaty prohibits any "agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the community." This is similar to the Sherman Act, which prohibits agreements in restraint of trade and commerce. Further similarities are found in both CARICOM's and the U.S.'s treatment of abuse of dominant positions.

⁶ <http://www.theintegrationistcaribbean.org/economic-integration/the-revised-treaty-of-chaguaramas/>

2. *Abuse of Dominant Position.*

If a business possesses a market power that far exceeds its rivals' own, and can set prices "without taking into account how competitors would react," then that business is considered to be dominant in the market. Having a dominant position is not necessarily anti-competitive in CARICOM, but exploiting that position of power is considered abuse. U.S. courts have interpreted cases using a similar stance, ruling that monopoly is not "unlawful *per se*, but only if acquired through prohibited conduct."

Both cartelization and serious concentrations exist in the CARICOM economies, leaving them exposed to the abuse of market power. Its higher concentration of markets, as opposed to the U.S., can be partially explained by the need to achieve minimum efficient scale due to its small populations and firm sizes. Even though CARICOM is largely open to international trade and investment, there exists a sizeable, non-tradeable sector which harbors much anticompetitive behavior. Unlike in the U.S., the skewed distribution of wealth in CARICOM has historical roots and a racial divide, which partly prevents the entrance of new players.

Furthermore, as no law prohibits collusion in CARICOM, there is no significant sense of wrongdoing amongst the businesses. The small economies in CARICOM tend to dislike fierce competition, as many businessmen are friends and interact socially. Some displays of collusion, such as competing firms meeting for dinner, are considered normal practice in CARICOM. The interpersonal nature of the CARICOM society, as well as absent competition authorities, also diminishes the occurrence of whistle blowing. This predilection toward what would ordinarily be considered collusion brings a focus on how monopolization is treated in the CARICOM community, as opposed to in the U.S.

3. *Monopolies.*

Unlike Section 2 of the Sherman Act, the Revised Treaty does not prohibit the creation of monopolies if the monopolies have not actually injured competition. Second, the treaty does not prohibit mergers that can potentially establish a monopoly. The creation or maintenance of public and private monopolies is allowed in CARICOM, though Article 31 of the Treaty does state that such monopolies must respect competition laws to the extent that the application of these laws does not “obstruct the execution of the special task assigned to them.”

4. *Mergers.*

CARICOM’s sentiment toward monopolization carries over to its treatment of mergers. The Clayton Act prohibits mergers and acquisitions that substantially reduce market competition, but the Revised Treaty of Chaguaramas does not address the issue of regulating mergers in this region. This is partly due to member states believing the small size of the firms necessitates a degree of merging to promote competition. In fact, Article 51 of the Revised Treaty lists “linkages among economic sectors and enterprises” as an objective of the CSME. The Fair Trading Commission of Barbados states that “mergers represent perhaps the most effective means of increasing market share whether through assimilating the share of a rival, or creating the scale of output that will allow firms to better compete for market share.” Prohibiting mergers is rare among the CARICOM competition authorities. Though mergers and acquisitions may have an anti-competitive effect, they are nonetheless permitted here.

C. Comparing Exemptions from Antitrust Regulations

Regarding potentially anticompetitive agreements, the Revised Treaty exempts a few agreements from regulation. It allows for potentially anticompetitive conduct if the activity

contributes to “production or distribution of goods or services, or improves efficiency,” especially through economic or technical progress. Similar to the Revised Treaty, the United States also exempts patent owners in the Sherman Act, as it tends to favor agreements that incentivize innovation. CARICOM also allows for “collaboration” as long as such collaboration does not eliminate competition in a substantial part of the market. The Commission may authorize a non-compete agreement or permit a collusive business practice if it is satisfied that the agreement or practice is likely to promote the public welfare.

1. *Exemptions for Professional Organizations.*

The Revised Treaty next provides for “exclusions and exemptions” to employee associations, collective bargaining arrangements, professional associations, specific sectors or enterprises determined by the Council for Trade and Economic Development, a pre-requested exempted action by a Member State, and anti-competitive conduct which have just a minimal impact on the Community Market. Similarly, both the U.S. and CARICOM provide exemptions for labor unions and other professional organizations.

2. *Difference in U.S./CARICOM Exemptions.*

However, CARICOM law makes no exemption for securities, whereas the U.S. does. The US Supreme Court recently ruled in 2007 in *Credit Suisse Securities (USA) v. Billing*, 551 U.S. 264 (2007), that if securities regulation and antitrust law were incompatible, then the “securities regulation prevails and individuals who would otherwise violate antitrust law receive antitrust immunity.” United States antitrust laws also recognize another major exemption under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine, unique to United States law, recognizes a constitutional exception for lobbying government officials. This ensures that

private entities are immune from liability in attempts to influence the passage or enforcement of laws, even if the laws have anticompetitive effects. This is grounded in the free speech protections of the 1st Amendment. The Revised Treaty makes no such exemption for lobbying. Furthermore, the U.S. exempts the insurance industry in the McCarran-Ferguson Act (“MFA”). The MFA explicitly exempts the “business of insurance” from the federal antitrust laws to the extent it is “regulated by State Law” and does not constitute “boycott, coercion, or intimidation.”⁷

D. Comparing CARICOM and U.S. Enforcement Mechanisms

The CARICOM and U.S. enforcement mechanisms are very distinct from one another, due, in large part, to the fact that the U.S. is a single nation, and CARICOM is a compilation of nations. United States antitrust laws are enforced by individuals, state governments and the federal government. The FTC and the DOJ enforce the federal antitrust laws. The DOJ has the power to bring criminal charges. As discussed herein, U.S. antitrust laws are also enforced by private parties. Article 171 of the Revised Treaty established the CARICOM Competition Commission (“the Commission”) to enforce cross-border anticompetitive business conduct. However, unlike the DOJ, the Commission is unable to bring criminal proceedings. The Treaty directs member states to “enact legislation to ensure that determinations of the Commission are enforceable in their jurisdictions.” It is up to each member state to create its own national competition authority to enforce the competition laws within their borders. However, as of this writing, only Jamaica, Barbados, and Guyana have so far set up these authorities.⁸ Treaty provisions must be given legal effect under the domestic law of individual member states, which has proved difficult so far.

⁷ <http://www.antitrustinstitute.org/sites/default/files/Stutz.pdf>

⁸ <http://www.theintegrationistcaribbean.org/economic-integration/the-revised-treaty-of-chaguaramas/>

In CARICOM, both individuals and businesses may issue complaints to the appropriate national commission if the suit is on a national level. At the broader CARICOM international level, only member states or the Council for Trade and Economic Development (“COTED”) can request the Commission to conduct an investigation. Individuals or firms are directed to submit their complaints to their national government first, which then submits a request to the Commission. The Commission will investigate if it has “sufficient reason” to suspect anticompetitive conduct has taken place.⁹ COTED can also request the Commission to investigate if it also has sufficient reason to suspect cross-border anti-competitive behavior. The Commission itself can also request a national competition author to investigate a firm that is conducting anti-competitive behavior. A member state that is dissatisfied with the Commission’s ruling may appeal to the Caribbean Court of Justice.

E. Damages for Antitrust Violations

United States antitrust laws recognize four separate types of legal sanctions: criminal fines and imprisonment, injunctions, treble damages, and forfeiture. Under the *Illinois Brick* doctrine, federal courts generally restrict the recovery of damages to direct, versus indirect, purchasers. Criminal fines for antitrust violations can be significant. The Sherman Act sets a maximum corporate fine at \$10 million, while the government’s alternative sentencing guidelines enable it to recover up to twice the defendant’s gain.

In similar fashion to the U.S., the Commission is able to impose fines, issue cease and desist orders, as well as compensation payments. The Commission is also able to order the termination or nullification of any agreement or activity. Article 174.4(d) of the Revised Treaty endows the Commission with such power to impose fines and penalties. Unlike the U.S., the

⁹ “Competition Policy and Law in the CSME.”
[http://www.caricomcompetitioncommission.com/en/publications/booklets>.](http://www.caricomcompetitioncommission.com/en/publications/booklets>.”)

Treaty does not enumerate guidelines to determining the amount of these financial penalties. There is no set amount, no rules as to how they should be determined, or a limitation period imposed. The Commission is currently establishing and finalizing its own rules of procedure regarding financial penalties.