

After the Obama Administration: What Comes Next in Antitrust Merger Enforcement Policy?

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MOST COMMENTATORS ON THE Obama administration's antitrust policy have focused on what they characterize as a more aggressive approach to antitrust merger enforcement than that implemented by the preceding administration. It is true that the Obama Antitrust Division and the Federal Trade Commission probably challenged several mergers that their predecessors would have cleared. But the administration's potentially longer-lasting impact was that it persuaded a number of courts to adopt the administration's preferred doctrinal approach to analyzing unilateral effects in transactions that involved differentiated product markets. The administration also altered the antitrust agencies' tactical strategies for investigating and litigating challenges to these types of mergers. These changes are significant because the large majority of the agencies' litigated merger challenges involve alleged unilateral effects in differentiated product markets.

Doctrinally, the Antitrust Division and the FTC during the Obama administration convinced courts in merger trials to define narrow product markets based on "direct effects" evidence and at the same time continue to apply the decades-old "structural" presumptions (based on market shares and concentration levels) when analyzing whether a merger is likely to reduce competition. This approach gave the administration the best of both worlds for litigation purposes: defining narrow product markets, which yield high market shares and concentration levels, and then using those market shares and concentration levels to argue that the transaction was presumptively unlawful.

Tactically, the agencies modified their investigation and trial strategies, choosing to conduct the investigations to pre-

pare for litigation and rely more heavily on cross-examination of the parties' witnesses in their cases-in-chief, while reducing their dependence on customer witnesses. Combined, these doctrinal and tactical strategies were instrumental in convincing the courts to block a number of transactions in unilateral effects cases and produced published decisions that favor the antitrust agencies.

The open question is what comes next: Will the Trump administration's leadership team at the Antitrust Division and the FTC continue or depart from the Obama administration's doctrinal and tactical approach in unilateral effects merger cases? Given the prevalence of these types of cases, the answer is likely to have a significant impact on the new administration's merger enforcement policy.

The "Challenge" of Unilateral Effects

For the first century of the development of antitrust law in the United States, merger enforcement generally focused on preventing transactions on the ground that they would enable the remaining companies in the market to more easily coordinate their prices.¹ The theory underlying these cases was that, as market concentration levels increased, the remaining companies would become more likely to coordinate their decisions on prices and output.

This emphasis on coordinated effects started to diminish when the U.S. antitrust agencies formally introduced the concept of unilateral effects in the 1992 version of the Horizontal Merger Guidelines.² They did so because of the growing recognition among lawyers and economists that the potential source of a reduction in competition for a large percentage of the mergers the agencies reviewed was not post-merger coordination among remaining competitors. Coordination among competitors was in fact far less likely in many sectors than previously thought, either because competitors' decisions on prices and output levels were not sufficiently transparent or the products in the "market" were sufficiently differentiated that coordination was not feasible. In contrast, the primary antitrust inquiry for many transactions was whether the merging parties could *unilaterally* raise prices post-deal because a substantial number of customers viewed the merging parties as their preferred alternatives and, consequently, would not switch to other options in response to a price increase by the merged companies.³

Among antitrust practitioners and scholars, there was (and remains) a general consensus on the basic economics of unilateral effects.⁴ However, the introduction of unilateral effects analysis and differentiated product markets into the Merger Guidelines created three primary impediments to merger litigation because the concept was often at odds with the legal standards contained in decades of Supreme Court and lower court merger jurisprudence.

First, defining product markets is often challenging in cases that involve differentiated products. When products are differentiated by features and price (unlike commodities, which generally are differentiated only by cost), it is often harder to

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discern clean functional “breaks” between the products that are “inside” and “outside” the putative product market. This difficulty complicates market definition. The problem extends to the language used to identify the contours of a relevant product market. The more heterogeneous the market sector the more adjectives are sometimes required to describe the market, which in turn increases the likelihood that the court will conclude that the agencies have “gerrymandered” or “rigged” the market.⁵ Because the Supreme Court has held that market definition is a “necessary predicate” in a Section 7 case,⁶ the difficulty of defining markets in unilateral effects cases that involve differentiated products can pose a substantial litigation obstacle for the antitrust agencies.

Second, the economics of unilateral effects cases in differentiated product markets can make reliance on nominal market shares and concentration levels, and therefore the use of structural presumptions, less important.⁷ The focus of unilateral effects analysis is on the degree of competitive proximity of the products produced by the merging parties relative to the proximity of products produced by third parties.⁸ While a firm’s share of a market can be relevant to this inquiry, in many cases the relative degree of head-to-head competition between firms is far more probative. The challenge that arises from this dynamic is that it puts pressure on the agencies to demonstrate with “direct effects” evidence that the transaction will reduce competition.

While it is easy to say (as the agencies have said from time to time) that merger analysis should focus on direct evidence about competition between the merging parties and other competitors, gathering and persuasively presenting such evidence can present substantial challenges. In contrast, using basic arithmetic to show high market shares and concentration levels, and then relying on the *Philadelphia National Bank* and *Brown Shoe* structural presumptions,⁹ is generally a much easier route for the government in court.

Third, unilateral effects cases in differentiated product markets often involved price discrimination and bid markets, in which the agencies maintained that the merger would harm certain vulnerable customer groups but leave others unharmed. The economics of price discrimination were well understood, but there was little case law to support merger cases that focused on harm to only segments of the parties’ customers. The difficulties of proving price discrimination in court were exacerbated by challenges in finding evidence to demonstrate that the merging parties had the ability to identify and target a well-defined set of purportedly vulnerable customers.

Each of these challenges arose in merger cases during the Bush administration, most notably in the *SunGard/Comdisco* and *Oracle/PeopleSoft* cases,¹⁰ and the results had a substantial impact on the Obama administration’s subsequent approach to merger cases years later.

SunGard/Comdisco. In 2001, the Antitrust Division challenged the combination of SunGard and Comdisco, alleging that the transaction would reduce competition in the

provision of shared hot-site disaster recovery services, which it contended was a relevant product market. The Antitrust Division alleged that shared hot-sites was a distinct relevant product market and the merger was most likely to harm companies that utilized large-scale enterprise and/or mixed-platform data processing centers. However, the Division did not specifically allege the existence of a price discrimination market that consisted of these customers.¹¹

The trial lasted only two days and consisted of cross-examination of expert witnesses and argument by the lawyers.¹² There was no live fact testimony. To support its case, including its allegations concerning the product market, the Division relied heavily on 50 detailed declarations from customers.¹³ Moreover, the Division’s testifying economist based a significant part of his analysis on the customer affidavits.¹⁴

The court held that the Division failed to prove its putative shared hot-site relevant product market. Critically, the court ruled that the customer affidavits were not sufficient to meet the Division’s burden. The court concluded that the customer affidavits were “often vague and confused, perhaps due to the complexity of the issues and the difficulty in framing specific questions regarding the financial viability of switching from an external hot-site service to an internal solution.”¹⁵ The court also ruled that it could not rely on the affidavits because the Division failed to establish that the views expressed in them were representative of those of other customers: “there are more than 7,500 customers that currently use defendants’ shared hot-sites. Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hot-site client base.”¹⁶ Among antitrust lawyers, the challenge of demonstrating that testifying customers were reliable and representative of the market as a whole became known as the *SunGard* problem.

Oracle/PeopleSoft. Whereas *SunGard* was a sprint, *Oracle* was a marathon in demonstrating the difficulties of proving that a merger would cause unilateral effects in a differentiated product market. In *Oracle*, the Antitrust Division conducted a nearly nine-month investigation, followed by four months of litigation discovery and a four-week trial in October 2004 to challenge Oracle’s proposed acquisition of PeopleSoft.

The Antitrust Division alleged that the transaction would reduce competition in the provision of high-function financial management systems (FMS) and human relations management (HRM) software. As in *SunGard*, the Antitrust Division alleged that a certain category of customers was most at-risk but did not explicitly plead a price discrimination case. During the trial, the Antitrust Division called ten customers in its affirmative case, including Verizon, Pepsi, and Cox Communications.¹⁷ The Antitrust Division did not call any of the parties’ witnesses in its case-in-chief.

The court rejected the government’s customer-centric presentation, finding that the customers had failed to substantiate their concerns about the transaction:

The preferences of these customer witnesses for the functional features of PeopleSoft or Oracle products was evident. But the issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle. Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle.¹⁸

Still more problematic from the Antitrust Division's standpoint was that the *Oracle* court issued rulings about the elements of proof required in a differentiated products unilateral effects case that set a high bar for the government.¹⁹

First, the court held that, given that "narrow" product markets can exist in differentiated product sectors, the government was required to demonstrate that the parties would have a "post-merger monopoly or dominant position" in the market: "In a unilateral effects case, a plaintiff is attempting to prove that the merging parties could unilaterally increase prices. Accordingly, a plaintiff must demonstrate that the merging parties would enjoy a *post-merger monopoly or dominant position, at least in a 'localized competition' space.*"²⁰

Second, and relatedly, the court cast doubt on the reliability of market share and concentration presumptions in unilateral effects cases involving differentiated product markets:

[D]efining the relevant market in differentiated product markets is likely to be a difficult task due to the many non-price dimensions in which sellers in such markets compete. . . . The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases. . . . [I]t is generally misleading to suggest that a firm "controls" a certain market share in the absence of an analysis beyond market concentration. . . . *Accordingly, a strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context.*²¹

Consistent with its holding deemphasizing structural presumptions in unilateral effects cases, the court also critiqued the 1992 Merger Guidelines' treatment of unilateral effects, including its presumption that a transaction that produced a firm with a 35 percent market share would cause anticompetitive effects:

The Guidelines adopt a structural approach for addressing unilateral effects claims that closely mirrors traditional structural analysis. *See* Guidelines § 2.211. The biggest weakness in the Guidelines' approach appears to be its strong reliance on particular market share concentrations. . . . A presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true.²²

Had other courts adopted the approach and doctrinal holdings in *SunGard* and *Oracle*, they could have caused material difficulties for the antitrust agencies' ability to bring differentiated products unilateral effects merger cases. When

the Obama administration took office, *SunGard* and *Oracle* were still good law and the leadership at the Antitrust Division and the FTC set out almost immediately to address the challenges they presented in merger litigation.

The Obama Administration Tackles Unilateral Effects

The Obama administration leadership at the Antitrust Division and the FTC put in place a three-pronged strategy to improve the agencies' odds in litigation challenges involving unilateral effects in differentiated product markets.

Step 1: Change the Merger Guidelines. As the *Oracle* court explained, the 1992 Merger Guidelines' treatment of unilateral effects in differentiated product cases neither reconciled the concept with the traditional structural merger framework nor provided a clear analytical alternative.²³ Shortly after taking office, leadership of the Antitrust Division and the FTC sought to address this analytical tension and make the Merger Guidelines more litigation-friendly. The new version of the Merger Guidelines that the agencies issued in August 2010 is filled with statements designed to facilitate litigating unilateral effects merger cases.²⁴

First, to address market definition challenges, the 2010 Merger Guidelines maintain that relevant product markets in differentiated product sectors are often narrow and may not comport with standard industry views. The 2010 Merger Guidelines also state that "[r]elevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term 'market.'"²⁵ These principles potentially make it simpler for the agencies to prove product markets even when there is no clean functional break that delineates the outer boundaries of the market.

To further ease the market definition task, the 2010 Merger Guidelines state that market definition need not be the starting point of merger analysis and suggest it is appropriate to at least partially reverse-engineer product markets from competitive effects evidence: "Evidence of competitive effects can inform market definition . . . [such as] evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly[, which] can itself establish that those products form a relevant market."²⁶ In other words, the agencies said that if documents and/or merger simulation showed likely price effects from a merger, those price effects could satisfy the market definition test that the merging parties (and any very close competitors) by themselves constituted a relevant product.²⁷ In essence, the agencies were advocating for courts to run the Merger Guidelines backwards if needed to define relevant markets.²⁸

The 2010 Merger Guidelines also took aim squarely at the *Oracle* court's holding that the government was required to show that a merger needed to produce a monopoly or dominant firm in a localized area of competition in order to satisfy its burden in a unilateral effects case involving differen-

tiated products. The Guidelines state that mergers can cause unilateral effects in differentiated product markets even when a majority of customers do *not* view the merging parties as their first and second choices:

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice. *However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority.*²⁹

Finally, the 2010 Merger Guidelines attempt to make it easier for the agencies to prove price discrimination cases by providing a detailed exposition about how parties to mergers could cause competitive harm to some, but not all customers, through targeted price increases. And foreshadowing a reduced emphasis on customer testimony, the 2010 Merger Guidelines also note that customers may not be the preferred source of information about a merger's competitive effects: "The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely."³⁰

Step 2: Change How the Cases Are Investigated and Litigated. At the same time that the Obama administration was changing the Merger Guidelines, the leadership of the Antitrust Division and the FTC, along with the career lawyers and economists, reevaluated how to investigate and litigate unilateral effects cases. Most importantly, while customers remained key sources of information (and did testify for the agencies in several cases),³¹ the agencies structured their investigations in anticipation of cross-examining the parties' witnesses in their affirmative case. To this end, the agencies used their timing agreements to incentivize the parties to produce quickly documents from key executives and then deposed those executives *during the investigation* with the objective of obtaining a transcript that they could use for cross examination at trial.

Relatedly, the agencies continued a practice that the Bush administration started of incentivizing the parties to produce the documents and data relevant to their efficiencies claims early in the process and then taking 30(b)(6)-style efficiencies depositions during the investigation. The purpose of this strategy was to "lock in" the parties' executives before the parties had fully prepared their efficiencies claims in order to rebut more effectively any efficiencies evidence if the agencies challenged the transaction in court.

Step 3: Change the Case Law Through Litigation. With the new Merger Guidelines in place, and armed with well-developed records often obtained through lengthy investigations, the Obama administration litigated more merger cases than any administration in the modern era. These cases both exemplified and resulted in significant changes in how the agencies tried cases and produced decisions that substantially refined the case law that applies to unilateral effects and price discrimination.

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H&R Block/TaxAct. The Antitrust Division's first merger trial during the Obama administration was in its challenge to H&R Block's acquisition of TaxAct.³² Consistent with the revamped litigation strategy, the Antitrust Division did not call customers or proxies for customers but instead focused on cross-examining the defendants' witnesses. Doctrinally, the Antitrust Division, relying on the 2010 Merger Guidelines, argued that the court should not use the framework for analyzing unilateral effects cases adopted by the *Oracle* court.³³

The district court enjoined the merger, and in the process specifically declined to adopt several of the *Oracle* court's key holdings. The court held that "[t]he fact that Intuit [a third party] may be the closest competitor for both HRB and TaxACT" did not "prevent a finding of unilateral effects for this merger."³⁴ The court also rejected the *Oracle* court's holding that the combined parties must constitute a monopoly or have a dominant position³⁵ and added that the government may not even need to define a relevant market in order to prove a Section 7 violation based on unilateral effects.³⁶

Bazaarvoice.³⁷ With its 2013 challenge to Bazaarvoice's acquisition of PowerReviews, the Antitrust Division returned to the Northern District of California for the first time since the 2004 *Oracle* decision. The Antitrust Division alleged that the transaction would reduce competition in the market for ratings and review platforms, which are software products used to enable Internet sites to collect and display customer views of the products. Notwithstanding the statements in the 2010 Merger Guidelines that market shares and concentration ratios are generally less relevant for unilateral effects cases involving differentiated products,³⁸ the Antitrust Division aggressively argued that it was entitled to a structural presumption under *Philadelphia National Bank* that the trans-

action would reduce competition.³⁹ Bazaarvoice disagreed, citing work by the Division's testifying economist, Carl Shapiro, and passages of the Merger Guidelines that advocated for a reduced role for market shares and concentration measures in unilateral effects cases.⁴⁰ The court ruled in favor of the Antitrust Division, holding that it was appropriate to use market shares and structural presumptions in unilateral effects cases and that the Antitrust Division had established a presumption that the transaction was anticompetitive.⁴¹

The case also validated the Antitrust Division's strategic decision to not rely on customer testimony as part of its litigation strategy. As in *H&R Block*, the Division did not call any customer witnesses. Instead, it was the parties that unsuccessfully offered extensive customer testimony in support of their case. "Bazaarvoice pointed out that none of the 104 customers whose depositions [were] part of the record complained that the merger has hurt them."⁴² The court rejected this evidence because, among other reasons, it held that "[i]t is difficult for those customers to discern what is actually happening in the market."⁴³ The court also found that "the customers were not privy to most of the evidence presented to the Court, including that of the economic experts" and there was the possibility of bias because they "had to testify about their market strategy in front of a vendor with whom most would be negotiating within a short time."⁴⁴

Aetna/Humana and Anthem/Cigna.⁴⁵ The Antitrust Division did not limit the use of its new strategy for bringing unilateral effects cases to mergers in the technology sector. In its last year in office, the Obama administration used the doctrine to block two large health insurance transactions: Aetna's attempted acquisition of Humana and Anthem's attempt to buy Cigna. The Division alleged that both transactions would produce unilateral effects, while continuing the dual-pronged approach of calling the parties' executives in their affirmative cases and aggressively advocating for their preferred doctrinal framework.

In the *Aetna/Humana* litigation, the Division argued that the transaction would reduce competition in the provision of Medicare Advantage plans. In its affirmative case, the Division called six of the parties' executives, including Aetna's Chief Executive Officer, President, and head of exchange business, and Humana's head of Medicare. As in the *H&R Block* and *Bazaarvoice* cases, the Division obtained the doctrinal holdings it wanted. The court fully endorsed the use of the structural presumption for analyzing whether a transaction is likely to reduce competition in a unilateral effects case.⁴⁶ At the same time, the court continued the D.C. District Court's rejection of the key holding in *Oracle*, holding that "[m]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition. . . . That can be true even where the merging parties are not the only, or the two largest, competitors in the market."⁴⁷

The Division's trial tactics in the *Anthem/Cigna* case were comparable to those that it used in the *Aetna/Humana* litigation. In its affirmative case, the Division cross-examined

Anthem's and Cigna's CEOs and several of the defendants' vice presidents. The court also made two key doctrinal rulings in favor of the Division. It again applied the structural framework in the unilateral effects case, finding that the Division had established a presumption that the transaction would reduce competition in the sale of commercial health insurance to national accounts, given the parties' high combined share of the market.⁴⁸ The court also held that Anthem's contention that United, not Cigna, is its closest competitor is "beside the point" because, in light of the structural presumption, an acquired firm need not be the buyer's closest competitor for the combination to cause an anticompetitive effect.⁴⁹

Federal Trade Commission

During the Obama administration, the FTC achieved results that were similar to those of the Antitrust Division. The Commission litigated nine merger cases (winning all but one of them), and several of the decisions produced opinions that endorsed key components of the administration's preferred doctrine for unilateral effects. Moreover, in the *Sysco*⁵⁰ and *Staples*⁵¹ cases the D.C. District Court specifically endorsed the use of price discrimination markets, relying on the 2010 Merger Guidelines.⁵²

Sysco/U.S. Foods. In 2015, the FTC challenged Sysco's proposed acquisition of U.S. Foods on the ground that it would reduce competition in the sale of broadline foodservice distribution to both regional and national customers. In contrast to the Antitrust Division's approach in *SunGard* and *Oracle*, the FTC specifically alleged that the affected customers constituted a price discrimination market. The FTC alleged that there was a "distinct product market for broadline foodservice sold to National Customers."⁵³ Defendants responded that such a market was "contrived" and "factually and economically meaningless."⁵⁴

The FTC's strategy succeeded, resulting in a holding that will aid the agencies in future unilateral effects cases. After conducting a detailed review of the parties' documents and third-party studies, the district court held that, while "defining a product market based on a type of customer seems incongruous . . . the customer's requirements [can] operate to define the product offering itself."⁵⁵ The court then cited the 2010 Merger Guidelines' treatment of price discrimination, and the Areeda and Hovenkamp treatise's discussion of the issue.⁵⁶ The court did express some concern about the possibility of these authorities supporting a finding that a single customer could constitute a product market.⁵⁷ However, the court still held that application of the *Brown Shoe* practical indicia framework to the evidence in the records supported a finding on the evidence presented in that case that broadline distribution to a specific category of customers, national customers, is a relevant product market.⁵⁸

Staples/Office Depot.⁵⁹ The FTC's 2016 challenge to the Staples/Office Depot transaction led to additional endorsement of price discrimination markets by the D.C. District

Court. The Commission alleged that the sale and distribution of consumable office supplies to large business-to-business customers was a relevant product market.⁶⁰ As in *Sysco*, the court cited favorably the Merger Guidelines' doctrinal approach to price discrimination markets. The court then found that the evidence demonstrated that "[t]here [was] overwhelming evidence in this case that large B-to-B customers constitute a market that Defendants could target for price increases if they are allowed to merge."⁶¹

Implications for the Future

The Antitrust Division's and FTC's track records in unilateral effects merger cases during the Obama administration have the potential to have significant implications for merging parties during the Trump administration. There are now a number of court decisions that endorse the 2010 Merger Guidelines' treatment of unilateral effects and price discrimination when defining markets, and at the same time still allow the agencies to rely on the government-friendly *Philadelphia National Bank* and *Brown Shoe* structural presumptions to prove that a transaction will produce anticompetitive effects. These holdings are somewhat in tension with the research and statements of two of the new Deputy Assistant Attorneys General for the Antitrust Division, who have emphasized that they believe the agencies should make enforcement decisions by relying on direct effects evidence rather than market shares and market concentration metrics.⁶²

A key indicator of the Trump administration's merger enforcement policy will be whether it clears transactions with nominally high market shares but where the direct effects evidence indicates that the transaction is not likely to reduce competition. Relatedly, parties and the bar should closely watch whether and how heavily the administration relies on market shares and structural presumptions in litigation.

Tactically, the Trump administration will need to decide whether to continue the Obama leadership's strategy of proactively using investigations to prepare for litigation and then rely heavily on cross examination at trial. It was these tactics, as much as any lowering of the substantive antitrust bar for making enforcement decisions in a handful of matters, which made the Obama administration's antitrust enforcement efforts "feel" exceptionally aggressive to parties and their counsel.

Until there are clearer indications of how the Trump administration's antitrust team will handle these issues, we continue to recommend that parties adopt highly proactive strategies for strategic deals that are likely to generate antitrust scrutiny. In particular, for strategic deals where litigation is a possibility, parties should consider the following strategies:

- Parties should prepare and make robust presentations to the antitrust agencies early in the process, including incorporating formal economic analyses when appropriate. The element of surprise is usually overrated, and often counterproductive, as a merger clearance strategy. It is far more

important to keep the reviewing antitrust agency from ever putting the investigation into a "litigation mode."

- Parties should consider the costs and benefits of complying with a second request more rapidly than is the norm. In a number of the cases described above, the parties gave the antitrust agencies a "long runway" to prepare for litigation. During the Obama administration, parties rarely achieved their objectives after prolonged merger investigations.
- Executives should prepare for Antitrust Division and FTC investigative depositions as if they are trial depositions to reduce the likelihood that the agencies obtain damaging testimony. Counsel must explain to their clients that Antitrust Division and FTC depositions during investigations are rarely neutral "fact-finding" proceedings. Rather, the agencies' attorneys often use them to obtain admissions that can harm the parties and to obtain a transcript for use in cross examination at trial.
- For transactions with material antitrust risk that require a filing in the United States, parties should prepare for the possibility of litigation from the outset of the matter. Litigation readiness is essential not only to ensure victory at trial but also to ward off unreasonable settlement demands by presenting a credible strategy and capability to defeat the agencies in court.

Over the last eight years, the antitrust agencies have reworked their doctrinal and tactical approach to merger cases that involve unilateral effects in differentiated product markets. It remains uncertain whether the Trump administration will continue these strategies or reverse course. Regardless, merging parties would do well to prepare to respond to the new case law and the real possibility that antitrust agencies will not abandon their revamped investigation and litigation strategies. ■

¹ See, e.g., *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.) (The "ultimate issue" in contemplating whether to permit companies to merge is "whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level").

² See U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* (1992, rev. 1997), <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf> ("A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings."); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 *ANTITRUST L.J.* 701, 712 (2010) ("The biggest shift in merger enforcement between 1992 and 2010 has been the ascendancy of unilateral effects as the theory of adverse competitive effects most often pursued by the Agencies.").

³ Lawyers and economists have written extensively about the economic and legal consequences of the unilateral effects doctrine. See, e.g., Mary Coleman, *Key Issues in Proving Unilateral Effects After Oracle*, *ANTITRUST*, Spring 2005, at 26; Andrew R. Dick, *Merger Policy Twenty-Five Years Later: Unilateral Effects Move to the Forefront*, *ANTITRUST*, Fall 2012, at 25; Joseph Farrell & Carl Shapiro, *Recapture, Pass-Through, and Market Definition*, 76

- ANTITRUST L.J. 585 (2010); David Scheffman & Joseph Simons, *Unilateral Effects for Differentiated Products: Theory, Assumptions, and Research*, ANTITRUST SOURCE, Apr. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_Scheffman4_14f.authcheckdam.pdf; Marc G. Schildkraut, *Oracle and the Future of Unilateral Effects*, ANTITRUST, Spring 2005, at 20; Scott A. Sher & Andrea Agathoklis Murino, *Unilateral Effects in Technology Markets: Oracle, H&R Block, and What It All Means*, ANTITRUST, Summer 2012, at 46; Gregory J. Werden, *Unilateral Effects with Differentiated Consumer Products: A Response to Scheffman and Simons*, ANTITRUST SOURCE, June 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Werden6_24f.authcheckdam.pdf; Jonathan B. Baker et al., *Roundtable Discussion: Unilateral Effects Analysis After Oracle*, ANTITRUST, Spring 2005, at 8.
- ⁴ See 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 913a (3d ed. 2009) [hereinafter AREEDA & HOVENKAMP] (“The economics literature on unilateral effects—and the expert economist conducting empirical tests—often dispenses with a conventional market definition in such cases, preferring to measure market power directly . . .”). There are, however, significant differences of opinion about what types of evidence are sufficient to prove unilateral effects. See, e.g., James A. Keyte & Kenneth B. Schwartz, “Tally Ho!”: UPP and the 2010 Horizontal Merger Guidelines, 77 ANTITRUST L.J. 587, 627 (2011) (“[T]he UPP [Upward Pricing Pressure] screen is incapable of providing reliable guidance to a court attempting to assess whether a proposed transaction may have a likely ‘unilateral’ anticompetitive effect in any line of commerce.”); Jerry A. Hausman & Gregory K. Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 GEO. MASON L. REV. 321, 337, 342 (1997) (“The DOJ and FTC’s [Merger Guidelines] recognize[] the possible unilateral price increasing effects of a merger. However, we view the analysis in the [Merger Guidelines] as incorrect. . . . In the wide range of oligopoly situations typically encountered in the real world, empirical evidence does not support the [Merger Guidelines] approach. Indeed, the [Merger Guidelines] cutoff points are not based on any actual empirical (or even theoretical) analysis that we have seen.”).
- ⁵ See, e.g., *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1172 (N.D. Cal. 2004) (“Oracle wholly rejects plaintiffs’ ‘gerrymandered’ market definition”).
- ⁶ *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).
- ⁷ See AREEDA & HOVENKAMP, *supra* note 4, ¶ 914a (“In differentiated markets mergers between firms making ‘adjacent’ or similar product variations can have a much more significant anticompetitive effect than mergers between firms making more remote products.”).
- ⁸ See *id.*
- ⁹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).
- ¹⁰ *Oracle*, 331 F. Supp. 2d 1098; *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001).
- ¹¹ *SunGard*, 172 F. Supp. 2d at 181.
- ¹² *Id.* at 179.
- ¹³ *Id.* at 192.
- ¹⁴ *Id.* at 191.
- ¹⁵ *Id.* at 183.
- ¹⁶ *Id.* at 192.
- ¹⁷ *Oracle*, 331 F. Supp. 2d at 1125–29.
- ¹⁸ *Id.* at 1131. The Antitrust Division’s efforts to support its case with customer testimony were complicated by testimony from customers that the parties offered in support of the transaction. See *id.* at 1133 (“Oracle [customer] witnesses testified about concrete and specific actions that they had taken and been able to complete in order to meet their firms’ information processing needs, apart from relying on the three ERP vendors that plaintiffs contend are a market unto themselves. Hence, the court finds on this basis, as well as an assessment of the witnesses’ credibility, that the testimony of the Oracle customer witnesses was more believable than that of the plaintiffs’ witnesses, despite the greater number of the latter.”). An additional challenge for the government was that PeopleSoft aided the government’s antitrust challenge to the transaction.
- ¹⁹ See *id.* at 1139 (“The court *must* demarcate such a ‘node’ or area of localized competition between Oracle and PeopleSoft as a prerequisite to finding any likelihood of unilateral anticompetitive effects.”), 1172 (“[P]laintiffs have failed to prove that there are a significant number of customers (the ‘node’) who regard Oracle and PeopleSoft as their first and second choices. If plaintiffs had made such a showing, then the court could analyze the potential for exercise of monopoly power over this ‘node’ by a post-merger Oracle”).
- ²⁰ *Id.* at 1118, 1123 (emphasis added).
- ²¹ *Id.* at 1121–22 (emphasis added) (citations omitted).
- ²² *Id.* at 1122–23.
- ²³ See *id.* at 1117 (“[T]he Guidelines . . . are not sufficient to describe a unilateral effects claim.”). The court also explained that the case law that preceded *Oracle* provided little help. See *id.* at 1113 (“There is little case law on unilateral effects merger analysis. Few published decisions have even discussed the issue.”).
- ²⁴ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010), <http://ftc.gov/os/2010/08/100819hmg.pdf>.
- ²⁵ *Id.* § 4.
- ²⁶ *Id.*
- ²⁷ The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See *id.* § 4.1.1.
- ²⁸ Indeed, the 2010 Merger Guidelines state that “[t]he ‘Agencies’ 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, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.” *Id.* § 4.
- ²⁹ *Id.* § 6.1 (emphasis added).
- ³⁰ *Id.* § 3. It is important to point out that while the Obama administration’s antitrust leadership drove the new Merger Guidelines, the authors of the 2010 Merger Guidelines drew in part on the Commentary on the Horizontal Merger Guidelines that the Bush administration issued in 2006. U.S. Dep’t of Justice & Fed. Trade Comm’n, *Commentary on the Horizontal Merger Guidelines* (2006), <https://www.justice.gov/atr/file/801216/download>.
- ³¹ See *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 132–34 (D.D.C. 2016).
- ³² *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).
- ³³ See *id.* at 84–85.
- ³⁴ See *id.* at 83.
- ³⁵ *Id.* at 84–85 (noting that “[s]ome commentators have criticized this [Oracle] standard” and “declin[ing] the defendants’ invitation, in reliance on *Oracle*, to impose a market share threshold for proving a unilateral effects claim”).
- ³⁶ *Id.* at 84 (“[A] market definition itself may not even be required for proving a Section 7 violation based on unilateral effects.”).
- ³⁷ *United States v. Bazaarvoice, Inc.*, Case No. 13-cv-00133-WHO, 2014 WL 203966, at *64 (N.D. Cal. Jan. 8, 2014).
- ³⁸ The 2010 Merger Guidelines state that analyzing unilateral effects does not require market definition or calculating market shares or concentration levels because “[t]he Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.” Merger Guidelines § 6.1.
- ³⁹ *Bazaarvoice*, 2014 WL 203966, at *64.
- ⁴⁰ *Id.* at *36 (“Bazaarvoice complained that Dr. Shapiro has previously written that market shares, HHIs, and other market concentration measures have little relevance to unilateral effects cases involving differentiated products, like this one.”).
- ⁴¹ *Id.* at *112 (“A firm’s market share is usually a primary measure of that firm’s presumed competitive significance.” (citing *Philadelphia National Bank*, 374 U.S. at 321)).

⁴² *Id.* at *13.

⁴³ *Id.*

⁴⁴ *Id.* at *13–14 (“Bazaarvoice’s business conduct after the merger was likely tempered by the government’s immediate investigation . . . [T]he basis of Bazaarvoice’s (and other R&R platforms vendors’) pricing proposals in negotiations are opaque to customers . . . [and] the potential for witness bias was greater in this case than most.”). The parties’ efforts were also hampered by very damaging internal documents.

⁴⁵ *United States v. Anthem Inc.*, Civil Action No. 16-cv-1493 (ABJ), 2017 WL 685563 (D.D.C. Feb. 21, 2017); *United States v. Aetna Inc.*, Civil Action No. 16-1494 (JDB), 2017 WL 325189 (D.D.C. Jan. 23, 2017).

⁴⁶ The court held:

There is no suspense about the outcome of this HHI analysis here: the Aetna-Humana merger easily surpasses the Guidelines’ concentration thresholds in all 364 of the complaint counties. Indeed, in more than 75% of the counties, the post-merger HHI would be greater than 5,000, and in more than 70% of the counties, the merger would cause an HHI increase of more than 1,000 points. And in 70 counties where Aetna and Humana are the only MAOs currently in the market, the post-merger HHI would reflect a merger to monopoly. Based on these compelling concentration figures, the government has established its prima facie case. Defendants do not attempt to argue otherwise. Thus, the government is entitled to a presumption that the merger would substantially lessen competition in the sale of individual Medicare Advantage plans in all 364 complaint counties.

Aetna, 2017 WL 325189 at *29 (citations omitted).

⁴⁷ *Id.*

⁴⁸ *Anthem*, 2017 WL 685563 at *37.

⁴⁹ *Id.* at *33.

⁵⁰ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

⁵¹ *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016).

⁵² See, e.g., *Sysco*, 113 F. Supp. 3d at 38–39.

⁵³ *Id.* at 37 (internal quotation marks omitted).

⁵⁴ *Id.* at 38.

⁵⁵ *Id.*

⁵⁶ See *id.* at 38–39 (citing 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 534d (3d ed. 2007)).

⁵⁷ See *id.* at 39–40.

⁵⁸ See *id.*

⁵⁹ *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016).

⁶⁰ *Id.* at 118 (“The parties vigorously disagree on how the market should be defined.”).

⁶¹ *Id.* at 127.

⁶² See, e.g., Separate Statement of Commissioner Kempf, Antitrust Modernization Commission Report and Recommendations (Apr. 2, 2007) (“To me, the ‘basic framework’ used by the agencies—as articulated by them in their Merger Guidelines—is fundamentally flawed . . . [T]he Merger Guidelines have rested on the erroneous notion that increasing concentration leads to decreasing competition.”), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm; Luke Froeb, From Theory to Praxis: Quantitative Methods in Merger Control, Presentation at Summit at Como: A Discussion of Competition Policy, Law and Economics (Oct. 30, 2004) (“Market shares may be poor proxies for competitive positions of firms.”).