

# Dominance Counseling in an Era of Uncertainty

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**C**OUNSELING A DOMINANT (OR JUST conceivably dominant) firm in today's competition law environment is extraordinarily difficult. Developments over the past 20 years have led to conflicts between U.S. standards and those in the rest of the world, and the U.S. itself is as unpredictable as ever. Agency cases are increasingly brought based on competitor complaints, rather than consumer harm, and many cases are challenging competition itself. In many instances, the only safe legal advice is for the firm to stop competing so aggressively. So counseling is difficult. But it is not impossible. Some counseling suggestions are provided before we go.

## Uncertainty: A History

It has always been difficult to distinguish lawful competition from unlawful abuse or exclusionary conduct. As the U.S. Supreme Court explained in the *Trinko* case, "Under the best of circumstances, applying the requirements of § 2 [of the Sherman Act] can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad."<sup>1</sup>

Unpredictability has been an unfortunate feature of the Sherman Act from the beginning. Mergers were only subject to the Act following a closely divided decision in the *Northern Securities* case, over a famous dissent from Justice Holmes.<sup>2</sup> Tying arrangements were originally held lawful, then made (sort of) illegal per se, and later made subject to a modified rule of reason.<sup>3</sup> Exclusive dealing arrangements had a similarly checkered past.<sup>4</sup> In response to the argument that all this made the Sherman Act void for vagueness, Justice Frankfurter remarked that "The vagueness of the Sherman Law was saved by imparting to it the gloss of history,"<sup>5</sup> a reference to antitrust's foundations in the common law. Judges were thus assigned the task of adding clarity to the law—a hard task if ever there were one.

**Per se Rules.** Initially, at a time when competition economics was less mature, courts adopted per se rules both as

a response to the uncertainty and as a measure of administrability. Even though the *scope* of any per se rule was often in doubt, a per se rule provided better legal clarity for businesses that sought to avoid conduct that was illegal per se. Counsellors knew, for example, that their supplier client could not dictate resale prices to its distributor customers. The plethora of per se rules made counseling somewhat easier but prevented a lot of strongly procompetitive conduct.

Conduct that was not condemned as illegal per se was subject to the rule of reason—which until the 1977 *Sylvania* decision meant in reality that the defendant almost always won.<sup>6</sup> *Sylvania* served as a reversal of much antitrust thought. Many of the activities that were per se illegal before *Sylvania* (such as resale price maintenance and vertical exclusive territories) came under the rule of reason—and many are rarely even challenged today.

**Single-Firm Conduct.** Monopolization jurisprudence did not really start until the *Alcoa* decision in 1945.<sup>7</sup> And that decision was as interventionist as you can get. It held that obtaining a monopoly position was unlawful unless the monopoly was "thrust upon" the defendant; if the market share was grabbed intentionally, it was illegal, irrespective of the means used. In *Alcoa*, the principal offense was increasing plant capacity to meet anticipated demand. The 1953 decision in *United Shoe*<sup>8</sup> was almost as interventionist in its language (although an easy case on the facts). *Utah Pie*<sup>9</sup> in 1967, applying the Robinson-Patman Act, held that lowering prices in a given geography to create a "declining price structure" there was illegal too. From 1945 through the 1970s, these cases were the law of monopolization. Large companies could compete only at their peril.

This regime was not sustainable. Concerns were being raised about the impact of this hyper-aggressive antitrust enforcement and its effects on American competitiveness.<sup>10</sup> The first dent came from *Telex v. IBM* in 1975.<sup>11</sup> IBM had developed new computers that would only use IBM-made peripherals. That of course excluded rival peripherals that had worked fine on earlier IBM machines. The conduct was surely "intentional" under *Alcoa*, but the court held that it did not violate section 2. Then, a few years later, *Alcoa* was largely overruled by the Second Circuit's decision in *Berkey*.<sup>12</sup>

**Uncertainty in the 21st Century.** In the wake of *Sylvania*'s emphasis on economic analysis, the changes in monopolization law accelerated. They culminated in the 2004

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*Trinko* decision,<sup>13</sup> which narrowed section two law considerably. The Court said: “Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”<sup>14</sup> The Court added that: “The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”<sup>15</sup> This was a sharp break from even the then-recent past where monopolists were “tolerated but not cherished.”<sup>16</sup>

Under the Biden administration, both the FTC and the Justice Department’s Antitrust Division, cheered on by most State attorneys general, adopted an approach that can only be described as hostile to the *Trinko* decision,<sup>17</sup> with some success (albeit limited) in the courts. Their approach has the virtue of being more consistent with competition regimes abroad. But it has exacerbated the very serious problem of giving reliable advice to large firms because the outcomes in court are so unclear. This is a particular problem for U.S. tech firms, the focus of most of recent cases.

In the U.S. today, *Trinko* remains the law. The agencies have had some successes, notwithstanding *Trinko*, in their various actions against Google, Meta, and Amazon; but none of those cases has reached the Supreme Court, so the outcomes are in doubt.<sup>18</sup> What will happen in the Trump administration is entirely unclear, although it does seem that tech firms will be constant targets. In Europe, emulated by many other nations outside the U.S., the standards resemble those applicable in the U.S. in the 1960s. The upshot is that advising large firms, especially those with international operations, is especially difficult today. The problem is made worse by the ability of rivals operating in limited areas around the world to seek remedies that would apply globally.

### **Dominance in Narrower Product Markets**

Market definition is of course critical in dominance cases. Before and during the 1960s, when the Supreme Court was developing its highly interventionist approach to antitrust, markets were generally much less narrow. Examples included oil, aluminum, retail grocery, commercial banking, and beer—all consistent with a layman’s understanding. Most of the cases were mergers, but largely the same standards were applied in monopolization cases as well.

The 1982 *Merger Guidelines*<sup>19</sup> changed market definition from the ad hoc nature of earlier case law to the more mathematically calculable “hypothetical monopolist” test or HMT. It was originally feared that the HMT would lead to irresponsibly broader markets.<sup>20</sup> That view quickly proved completely wrong. The reality is that the HMT has largely been adopted by the courts and permits very

narrow markets—such as “fresh *Agaricus* mushrooms,”<sup>21</sup> “droplet-based genetic analysis products,”<sup>22</sup> rock concerts (excluding pop and other types of music),<sup>23</sup> or “premium, natural, and organic supermarkets.”<sup>24</sup> These narrowed markets make it far easier to allege dominance based on market shares.<sup>25</sup> The problem is exacerbated by the attempted use of “submarkets,” i.e., even narrower markets within other markets.<sup>26</sup>

Enjoying the liberty these perspectives provide, private plaintiffs and even government enforcers are alleging in some cases very narrow markets—with a resulting increase in the chances of proving dominance. In the U.S., a market share of 70% is the typical threshold for inferring monopoly power,<sup>27</sup> although attempted monopolization can be alleged at lower levels such as 50% and, in rare cases, as low as 30%.<sup>28</sup> These market share levels are far easier to obtain the narrower the market alleged, and plaintiffs have seized on these opportunities to allege “relevant” markets that exclude the most relevant competition. A good example is the “play store” cases against Apple and Google.<sup>29</sup> There the various plaintiffs have asserted that the relevant market is limited to iOS devices in the Apple case and to Android devices in the Google case. But it is just about judicially noticeable that play store and smartphone OS competition more generally in reality is *between* Google and Apple. Isolating them ignores that competition. One can answer by saying, correctly, that allegations are not the law and may never prevail in the end. But the mere assertion does cause the parties to spend lots of time and money that might otherwise be devoted to more productive endeavors.

### **Differing Conduct Standards Outside the U.S.**

With *Trinko* and the Supreme Court’s later decision in *linkLine*,<sup>30</sup> proving exclusionary conduct under section 2 has become increasingly difficult. Refusal to deal, product design, and predatory pricing claims are nearly impossible; price squeeze allegations do not state a viable claim; and exclusive dealing and tying claims have become harder to bring as well.<sup>31</sup> That is emphatically not true in the European Union and much of the rest of the world. (Nor has the case law deterred recent U.S. enforcers, as explained below.)

In the European Union, where the case law is the most developed, these claims are often successful—even apart from regulation under the Digital Markets Act. For example, while price or margin squeeze allegations fail to state a claim in the U.S., they are viable and often pursued in the EU.<sup>32</sup> Refusals to deal are generally upheld in the U.S. under *Trinko*, but not in Europe.<sup>33</sup>

Some fact patterns actually generate opposite results. So, in *Bayou Bottling v. Dr Pepper*,<sup>34</sup> Coca-Cola/Dr Pepper was alleged to have a 75 percent to 80 percent market share in the local market. It placed vending machines and coolers on the condition that they be stocked exclusively with Coca-Cola and Dr Pepper products—and no Pepsi. The U.S. court of appeals said: “Without anything more, these

practices are not barred by the antitrust laws. They are competitive acts. . . . Even monopolists must be allowed to do as well as they can with their business.”<sup>35</sup> But given European law (as well as, presumably, the cost, time, and likely outcome of an enforcement proceeding), Coca-Cola agreed that up to 20% of European convenience store cooler space could be allocated to Pepsi and other rivals.<sup>36</sup>

More recently, in the Google Shopping case, the European Commission concluded that it was an abuse to place Google Shopping links over links to comparison shopping engines.<sup>37</sup> In direct contrast, the Federal Trade Commission unanimously dismissed its inquiry into the same issue because “side-by-side” experiments with users made clear that users preferred this display posture over links to comparison shopping engines.<sup>38</sup> Since much of the rest of the world follows the EC on competition issues, rather than the U.S., this sort of direct conflict makes counseling unusually difficult (at least for global tech companies).

There may be at least a partial explanation for these differing results. In evaluating these cases and claims, the European Commission regularly relies on complaints from competitors, such as the comparison-shopping engines in the Google Shopping case; and they pursue a far more competitor-oriented antitrust policy. In the U.S., in contrast, antitrust is supposed to be for the “protection of competition, not competitors.”<sup>39</sup>

### What Market Behavior Is Abusive?

Large companies as well as firms who might be alleged to be dominant in some narrow market should be able to know what they can and cannot do. But that is just not the case.

Take the very high-profile DOJ case against Google in Washington, DC, alleging that Google has monopolized Internet Search.<sup>40</sup> The claim is that it did so by securing exclusive *defaults* on iOS, Firefox, and Android. Let’s unpack that. First, defaults may be “sticky,” but a user *can* change to a different default search engine in a matter of minutes. Exclusive dealing law generally finds even actual exclusivity agreements lawful if they *can be* terminated in *one year*.<sup>41</sup> A few minutes are less than a year. So basing illegality on exclusive defaults is problematic from the outset. Second, Google obtained the iOS and Firefox results by *bidding against Microsoft*, beginning at a time many years ago, when it was just starting out and was not even arguably dominant, and then continuing in later years. The Android defaults were offered in a context where the Android OS license itself is *free*, and the means by which Google gains any revenue (and thus any return on its many billions of dollars in investments) is by its share of search ad revenue on the device. And there are many options to add other search engines if the user so chooses. Third, users overwhelmingly prefer Google search to Bing or others. On Windows PCs, which are pre-loaded with Bing as the default, and where users are constantly prompted to use Bing, the vast majority of users choose Google, either on Internet Explorer/Edge or

by downloading and switching to Chrome. Some users continue to use Bing thinking they are using Google. A Google default may be sticky, but a Bing default clearly is not.

Until very recently, no reasonable antitrust counsellor would have advised Google that competing against Microsoft for the iOS and Firefox defaults would put it in antitrust trouble.<sup>42</sup> There was no claim that Google engaged in predatory pricing by outbidding Microsoft.<sup>43</sup> The law has been clear for some time that all we have here—competition for the contract—is lawful, even for a monopolist.<sup>44</sup> That is especially so where, as in the Google case, it is the customer that is seeking the exclusive.<sup>45</sup> DOJ is seeking to punish Google for the sin of competing against Microsoft.

Although the Google case is, at this point, the most well-known, it is not alone. Amazon, for example, is being sued by the FTC for, among other things, requiring third-party merchants to use Amazon fulfillment services to be included in the “Prime” category.<sup>46</sup> Having a merchant use the Prime label with a delivery service that lacks the consistency in terms of timing or care of Amazon’s selection would severely impair Amazon’s reputation for quality. Again, no reasonable counsellor would have told Amazon not to do this.

These are far from the only cases sustaining antitrust claims against what are really product design decisions and refusals to deal. And what we are seeing is several lower court decisions sustaining or at least refusing to dismiss challenges to conduct that would never have been brought in earlier times.

To name just a few more:

- Epic cases against Apple and Google.<sup>47</sup> In these cases, Apple’s and Google’s play stores were challenged for disallowing (or in the Google case, adding extra steps and a warning against) app downloads outside their respective play stores. In the Apple case, the district court (affirmed on appeal) held that this conduct was lawful under the Sherman Act but unlawful under California’s unfair trade practices statute. In the Google case, even though Google actually allows apps from outside its play store, with a warning, the court found a Sherman Act violation, and the Ninth Circuit affirmed.
- *Gamboa v. Apple Inc.*<sup>48</sup> Here the district court denied a motion to dismiss alleging that it was unlawful to inhibit third party cloud providers from offering cloud storage on iPhones.
- *Inform Inc. v. Google LLC.*<sup>49</sup> The Eleventh Circuit denied a motion to dismiss a challenge to Google’s decision to switch from Flash to HTML5 for displaying video content.
- *Yelp Inc. v. Google LLC.*<sup>50</sup> In this case, the district court denied a motion to dismiss a claim alleging that including local search results on Google search result pages was an illegal tying arrangement.
- *United States v. Apple, Inc.*<sup>51</sup> The district court declined to dismiss DOJ’s challenge to Apple’s restrictions on interoperability of various features with non-party rivals.

■ Rumble, Inc. v. Google LLC.<sup>52</sup> Here, the court sustained a claim based on ranking YouTube videos higher than the plaintiff's on Google search results pages. (Rumble's case was later dismissed on summary judgment based on limitations grounds.)

■ The FTC's challenge to Meta's decades-old (and agency-approved) acquisitions of Instagram and What's App.

When plaintiffs bring cases like these, the counsellor's job is really hard. It is difficult enough to advise on competition issues given the ever-present ambiguity in separating competitive harm from procompetitive conduct. But when the agencies and private plaintiffs pursue theories that would have been laughed out of court in the past, the job becomes next to impossible.

### DMA Rules

The European Commission, followed now by the United Kingdom and by some others around the world, has announced new and harsh rules for "gatekeepers." In the EU, gatekeepers are firms that offer "core platform services" and (i) have annual EU revenue of €7.5 billion, (ii) have 45 million or more EU end users and 10,000 or more business users; and (iii) have or are expected to have an entrenched and durable position. At the outset, the EC designated five U.S. companies and one Asian company—but no European companies—as gatekeepers: Alphabet (Google), Amazon, Apple, Meta (Facebook, Instagram), Microsoft, and ByteDance (Tik Tok). Eight months later, the first European "gatekeeper," Booking.com, was also designated. Gatekeepers are required to submit an annual compliance report outlining, in a detailed and transparent manner, the measures that they have implemented to ensure DMA compliance. Violations will generate huge fines.

The DMA imposes both affirmative and negative obligations. Gatekeeper platforms are obligated:

- to allow third parties to interoperate with the gatekeeper's own services;
- to allow their business users to access the data that they generate in their use of the gatekeeper's platform;
- to provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper; and
- to allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform.

Gatekeepers may no longer:

- self-preference, i.e., they may no longer treat their own products and services "more favorably in ranking than similar services or products offered by third parties on the gatekeeper's platform";
- prevent consumers from linking up to businesses outside their platforms; prevent users from uninstalling any pre-installed software or app if they wish so;

- track end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.<sup>53</sup>

How this will look in markets where there are two or more "gatekeepers" is not entirely clear.

Whether all these per se rules will improve competition and consumer welfare is dubious. Some of the requirements, such as allowing users to uninstall pre-installed software or apps if they wish to, are clear enough to allow reasonable counselling. Others, such as forced access to data that a business user generates can be quite unclear in practice. Still others, such as the per se ban on "self-preferencing" and forced interoperability, will be difficult to apply (and thus counsel) in practice and represent doubtful policy. They represent utility-style regulation in contexts where every gatekeeper faces some, often quite a lot, of competition—contexts, in other words, when regulation prevents competition *by the gatekeeper* that would benefit consumers.<sup>54</sup>

Take self-preferencing.<sup>55</sup> Some of what that term might prevent is solid antitrust policy. For example, what Microsoft did in excluding Netscape can be described as self-preferencing. In a pre-broadband era, Microsoft entered into coercive agreements with Apple, with online service providers such as AOL, and with other sources of Internet access, barring distribution of Netscape; and made removal of Internet Explorer difficult. The D.C. Circuit appropriately concluded that those activities, which surely "preferred" Internet Explorer, were unlawful.<sup>56</sup> Microsoft had precluded arrangements with *third-party* distributors that were necessary (at that time) for access to consumers. These were not simple and easily reversed defaults. The agreements precluded access altogether. You could download Netscape, of course, but in that pre-broadband era, the downloads could take hours.

Preferring your own services on your own platform is completely different. Where, as in the FTC's 5-0 decision to drop the Google Shopping decision, elevation of the platform's own properties has been tested with and approved by representative consumers, prohibition makes no sense at all. But even where there has been no such test, there should at least be a threshold inquiry as to the potential consumer benefits from the move. Why would a platform make a move designed to harm its users? Unfortunately for the practitioner, explaining to a client why they cannot or should not take an action that would benefit consumers is no easy task.

Where the complaints come from rivals, agencies and regulators should be cautious. Competitors stand to benefit from crippling their larger rivals. Higher prices, lower quality, reduced innovation, and lower output benefit competitors but not consumers. The late greats Will Baumol and Janusz Ordover condemned the "Use of Antitrust to Subvert Competition."<sup>57</sup> Depending on how they are implemented, the Digital Markets Act and similar legislative efforts elsewhere threaten just that.

## Impact of Uncertainty

So what to do? In days of yore, to respond to a complex client inquiry, we would commission a detailed 25–30-page memorandum from an associate detailing the statutory and case law. Today, it is a rare client that wants (or would pay for) such a memo. Typically, clients want the answer right then and there on the telephone. For antitrust advice, especially on dominance issues, that can be pretty tough.

There are, nevertheless, good ways to provide advice. They may not all work, but there are good questions to ask and steps to follow to make the effort as accurate as you can get.

- First, find out whether the client have operations just in the U.S. or also operates in a number of nations or globally?
- Next, determine whether the client is or plausibly could be alleged to be dominant. Assume tiny markets. In the U.S., dominance begins at least with a 30-50% share in an attempt case, and roughly 70% or higher for actual monopolization. In the EU and many other countries, 40% is considered dominant. If the client has been designated as a gatekeeper, the DMA obligations apply and dominance is presumed accordingly.
- Find out how risk-adverse the client is. Advice must be geared to the client's risk tolerance.
- If the client is international, can the proposed action be taken differently in different areas of the world to reduce risk?
- Crucially, find out whether there are less competition-risky ways of achieving the same business results.
- Ask who would be harmed by the proposed activity, and the likelihood that they would complain (or, worse, sue).
- Assess which agencies would investigate on hearing a complaint and the degree of intervention that they typically pursue.
- Find out whether the client is open to more conservative approaches that can result in less harm to rivals while not destroying the business goal? Erring on the side of conservatism—and, sadly, competing less aggressively—is the safer course these days given the approach taken by enforcers around the world.

Asking all these questions is important but is also hard to accomplish in a brief phone call. Yet, based on one's knowledge of and prior experience with the client, some good, educated guesses can often work.

Of course, the degree of acceptable risk is a business decision. The safest advice will often be to suggest different ways, with less antitrust risk, to achieve the same results. The counsellor's job is to find ways to “get to yes,” rather than just saying no. No one ever said it would be easy. ■

<sup>1</sup> Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004).

<sup>2</sup> Northern Securities Co. v. United States, 193 U.S. 197, 200-01 (1904) (“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”). In this one matter, of course, Holmes was completely wrong.

<sup>3</sup> Henry v. A.B. Dick Co., 224 U.S. 1 (1912) (lawful); North Pac. Ry. v. United States, 356 U.S. 1 (1958) (illegal per se); Illinois Tool Works v. Independent Ink, 547 U.S. 28 (2006) (modified rule of reason). Section 3 of the Clayton Act superseded the A.B. Dick decision.

<sup>4</sup> Compare *In re* Corning, 51 F. 205 (N.D. Ohio 1892) (exclusive dealing leading to dominant market share upheld) with, e.g., McWayne, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015), United States v. Dentsply Int'l, 399 F.3d 181 (3d Cir. 2005), and PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101 (2d Cir. 2002).

<sup>5</sup> FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 405 (1953) (Frankfurter, J., dissenting).

<sup>6</sup> Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

<sup>7</sup> United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The Second Circuit was designated by Congress to hear the case as the court of last resort in light of multiple recusals on the Supreme Court.

<sup>8</sup> United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

<sup>9</sup> Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

<sup>10</sup> See the papers collected in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston, eds.) (1974).

<sup>11</sup> Telex Corp. v. IBM, 510 F.2d 894 (10th Cir. 1975).

<sup>12</sup> Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979). It is unusual for one panel to overrule another, but when the prior panel was effectively acting as the Supreme Court, as here, the overruling makes quite a statement.

<sup>13</sup> Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004).

<sup>14</sup> *Id.* at 407-08.

<sup>15</sup> *Id.* at 407.

<sup>16</sup> *Berkey*, 603 F.2d at 274.

<sup>17</sup> This approach was previewed in “Investigation of Competition in Digital Markets,” Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary 334-37 & n.2500 (October 6, 2020), at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

<sup>18</sup> To date, the agencies' major success—subject of course to a ruling on remedy and then appeals—is *United States v. Google LLC*, 2024 WL 3647498 (D.D.C. Aug. 5, 2024). I was involved in the case briefly in pre-trial on behalf of Google. Having said that, nothing I say here (or anywhere else) in any way reflects the views of Google or anyone from Wilson Sonsini—who, if asked, would disavow what I say completely.

<sup>19</sup> U.S. DEP'T OF JUSTICE, *MERGER GUIDELINES*, 47 Fed. Reg. 28,493, 28,494 (1982), available at <https://www.justice.gov/archives/atr/1982-merger-guidelines>.

<sup>20</sup> See, e.g., Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 587 (1983).

<sup>21</sup> *In re* Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 698 (E.D. Pa. 2007).

<sup>22</sup> *Bio-Rad Labs. v. 10X Genomics*, 2020 U.S. Dist. LEXIS 76156, at \*27 (D. Mass. 2020).

- <sup>23</sup> Nobody in Particular Presents v. Clear Channel, 311 F. Supp. 2d 1048, 1083, 1091 (D. Colo. 2004).
- <sup>24</sup> FTC v. Whole Foods Market, 548 F.3d 1028 (D.C. Cir. 2008). *But see* United States v. United States Sugar Corp., 73 F.4th 197 (3d Cir. 2023) (rejecting DOJ allegations of narrow sugar product market; district court also rejected the narrow alleged geographic market); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (rejecting DOJ allegations of market limited to certain large customers).
- <sup>25</sup> For an important and useful discussion, see Christine Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55 (2021).
- <sup>26</sup> Keith Klovers and I address this erroneous analysis in *The Overlapping Markets Fallacy*, 86 ANTITRUST L.J. 365 (2024). The analytical excesses are not limited to product markets; there are geographic market allegations that are equally improper. See, e.g., Apani Sw., Inc. v. Coca-Cola Enters., 300 F.3d 620, 626 (5th Cir. 2002) (rejecting geographic market defined as “twenty-seven facilities owned by the City [of] Apani”).
- <sup>27</sup> See generally ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (“ALD”) 229-31 (9th ed. 2022).
- <sup>28</sup> *Id.* at 344-46.
- <sup>29</sup> See, e.g., Epic Games, Inc. v. Google LLC, No. 24-6256 (9th Cir. July 31, 2025); Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023). For what it is worth, I had no involvement in any of these cases.
- <sup>30</sup> Pacific Bell Telephone v. linkLine Commc’ns, 555 U.S. 438 (2009).
- <sup>31</sup> See, e.g., *In re* Epipen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig., 44 F.4th 959 (10th Cir. 2022); Eisai Inc. v. Sano-fi-Aventis U.S., 821 F.3d 394 (3d Cir. 2016); Allied Orthopedic Appliances v. Tyco Health Care Grp. LP 592 F.3d 991 (9th Cir. 2010).
- <sup>32</sup> Compare *linkLine*, 555 U.S. 438 (2009) with Judgment of the Court (First Chamber), 17 February 2011, Case C-52/09, Konkurrensverket v. Telia-Sonera Sverige AB.
- <sup>33</sup> E.g., Case C-7/97, Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs, 1998 E.C.R. I-7791.
- <sup>34</sup> 725 F.2d 300 (5th Cir. 1984).
- <sup>35</sup> *Id.* at 304.
- <sup>36</sup> Coca-Cola, COMP/A.39.116/B2 (EC) (June 22, 2005) ¶ 46 (“the customer may use at least 20% of the beverage cooler for any products of his choosing.”).
- <sup>37</sup> Case C-48/22 P, Google LLC and Alphabet Inc. v. European Commission (September 10, 2024).
- <sup>38</sup> *In re* Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), available at [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmttoftcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmttoftcomm.pdf). When users search for a product or service to buy, they typically want to go the sites where they can actually purchase what they want. Comparison shopping engines add an extra step in the search process, which many consumers dislike.
- <sup>39</sup> Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).
- <sup>40</sup> Note my disclosure in footnote 18 above.
- <sup>41</sup> See, e.g., Methodist Health Servs. v. OSF Healthcare, 859 F.3d 408 (7th Cir. 2017) (“most of the contracts expire every year or two, giving other hospitals . . . a shot at obtaining the next contract.”); CDC Techs. v. IDEXX Labs., 186 F.3d 74, 81 (2d Cir. 1999) (contracts terminable on short notice upheld).
- <sup>42</sup> For what it’s worth, I was not involved in any advice on these issues.
- <sup>43</sup> United States v. Google LLC, No. 20-cv-3010, 3715, 2024 WL 3647498, at \*128 n.16 (D.D.C. Aug. 5, 2024).
- <sup>44</sup> Race Tires America v. Hoosier Racing Tire Corp., 614 F. 3d 57, 76 (3d Cir. 2010); Paddock Publ’ns v. Chicago Tribune Co., 103 F.3d 42, 46 (7th Cir. 1996); Menasha Corp. v. News Am. Mktg. In-Store, 354 F.3d 661, 663 (7th Cir. 2004).
- <sup>45</sup> NicSand, Inc. v. 3M Co., 507 F.3d 442, 454 (6th Cir. 2007).
- <sup>46</sup> FTC v Amazon.com, Inc., No. 2:23-cv-01495, Complaint ¶¶ 351-367 (filed Sept. 26, 2023).
- <sup>47</sup> Epic Games v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023); Epic Games v. Google LLC, No. 24-6256 (9th Cir. July 31, 2025).
- <sup>48</sup> No. 24-cv-01270-EKL (N.D. Cal. June 16, 2025).
- <sup>49</sup> No. 21-13289 (11th Cir. 2022).
- <sup>50</sup> 2025 WL 1168900 (N.D. Cal. Apr. 22, 2025).
- <sup>51</sup> 2:24-cv-04055-JXN-LDW (D.N.J. June 30, 2025).
- <sup>52</sup> No. 21-cv-00229-HSG (N.D. Cal. July 29, 2022), *summary judgment granted*, No. 21-cv-00229-HSG (N.D. Cal. May 21, 2025).
- <sup>53</sup> European Commission, The Digital Markets Act: ensuring fair and open digital markets (2023).
- <sup>54</sup> See Jonathan Jacobson, *Competition vs. Regulation*, Harry First: A Global Vision for Competition Law—Liber Amicorum 329 (Concurrences 2025).
- <sup>55</sup> I have written on this subject in the past. *Competition or Competitors? The Case of Self-Preferencing*, 38 ANTITRUST, No. 1, pp. 13-20 (Fall 2023) (with Ada Wang).
- <sup>56</sup> United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
- <sup>57</sup> 28 J.L. & Econ. 247 (1985).