RETHINKING U.S. ANTITRUST POLICY IN THE WAKE OF ABI'S ACQUISITION OF SABMILLER

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Anheuser-Busch InBev ("ABI") won antitrust approval for its $101 billion acquisition of SABMiller in July of 2016. The main reason the deal was allowed to go through was because ABI agreed to divest SABMiller's 59% equity stake in the MillerCoors joint venture to Molson Coors Brewing for approximately $12 billion, transforming a would-be horizontal merger into a conglomerate merger. It is estimated that, after the merger closes, ABI will end up with 46% of the world's beer profits. The transaction is expected to be the third largest acquisition ever made. It is unclear what the effect on consumer welfare will be from the ABI-SABMiller combination, but it is necessary to scrutinize current U.S. antitrust merger policy by checking the effectiveness of merger remedies. In doing so, this Note compares U.S. merger antitrust policy across the Atlantic Ocean to learn from Europe. It also analyzes the potential anticompetitive effects of ABI's approved plan to acquire SABMiller.

"[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of [the] few . . . ."

—Justice John Marshall Harlan, 1911[1]

TABLE OF CONTENTS

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1. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring).

I. INTRODUCTION

As general merger activity is on the rise,[2] and because pre-merger divestures consistently pave the way for U.S. antitrust approval,[3] it is necessary to scrutinize current U.S. antitrust merger policy by checking the effectiveness of merger remedies. In doing so, this Note compares U.S. merger antitrust policy to its European counterpart. This Note also analyzes the potential anticompeti-

2. *See* Bourree Lam, *2015: A Merger Bonanza*, ATLANTIC (Jan. 9, 2016), http://www.theatlantic.com/business/archive/2016/01/2015-mergers-acquisitions/423096/.

3. *See, e.g.*, *Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition*, DEP'T OF JUST. OFF. PUB. AFF. (Jul. 20, 2016), https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and
-alter-beer [hereinafter *AnheuserBusch InBev to Divest*]; *see also* Maria Raptis et al., *Antitrust and Competition: Trends in US and EU Merger Enforcement*, SKADDEN'S 2016 INSIGHTS - GLOBAL M&A, https://www.skadden.com/insights/antitrust-and-competition-trends-us-and-eu-merger-enforcement (last visited Sept. 2, 2018).

tive effects of Anheuser-Busch InBev's 2016 approved plan to acquire SABMiller.[4]

Alternative antitrust policies and remedies should be explored to minimize the anticompetitive effects of mergers. Some antitrust scholars have noted the lack of factual evidence supporting the efficacy of merger remedies.[5] The efficacy of the divestiture remedy is a crucial premise upon which antitrust correctives have historically been structured,[6] and should, therefore, be analyzed with great care to ensure the popular, economic mission of antitrust authorities is properly executed. This Note argues that the outmoded antitrust goal of diffuse ownership of capital should be reprioritized because of social contract concerns. Additionally, this Note shows that, while pre-merger divestitures are a common avenue to win antitrust approval, they may be less effective at reducing the anticompetitive effects of horizontal mergers than is traditionally believed. When a divestiture causes a merger to avoid an increased market concentration, there still may be substantial anticompetitive effects worthy of antitrust scrutiny.

Anheuser-Busch InBev ("ABI") won antitrust approval for its $101 billion acquisition of SABMiller in July of 2016.[7] The main reason the deal was allowed to go through was because ABI agreed to divest SABMiller's 59% equity stake in the MillerCoors joint venture to Molson Coors Brewing for approximately $12 billion, transforming a would-be horizontal merger into a conglomerate merger.[8] Part of the deal also involved an agreement to refrain from exclusionary practices that would restrict the output of smaller breweries.[9] Commentators were surprised by the lenient outcome because similar "cable, office supplies and oil drilling" deals were shut down in the past; it is believed that the divestiture of SABMiller, as part of the initial deal plan, got the transaction through the antitrust gauntlet.[10]

A look back into the dusty rearview mirror of U.S. Supreme Court antitrust case law from the 1960s reveals a history of distrust against brewery mergers with lower market shares than those of ABI:

> These facts show a very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers. If not stopped, this decline in

4. David McLaughlin, *U.S. Clears Way for $101 Billion AB InBev-SABMiller Mega-Beer Merger*, CHI. TRIB. (Jul. 21, 2016, 7:23 AM), http://www.chicagotribune.com/business/ct-ab-inbev-sabmiller-antitrust-approval-20160720-story.html.

5. *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 2 (2015).

6. FED. TRADE COMM'N, NEGOTIATING MERGER REMEDIES: STATEMENT OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION 5 (2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

7. McLaughlin, *supra* note 4.

8. *Id.*; Chad Bray, *Merger of Anheuser-Busch InBev and SABMiller Faces Final Hurdle*, N.Y. TIMES (Sept. 27, 2016), https://www.nytimes.com/2016/09/28/business/dealbook/merger-of-anheuser-busch-inbev-and-sabmiller-faces-final-hurdle.html.

9. McLaughlin, *supra* note 4.

10. *Id.*

> the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands. The merger of Pabst and Blatz brought together two very large brewers competing against each other in 40 States. In 1957 these two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area of Wisconsin, Illinois, and Michigan, and 4.49% of the sales throughout the country. In accord with our prior cases, we hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of Section 7 in each and all of these three areas.[11]

Despite the divestiture of MillerCoors to Molson, the result of the acquisition on competition in the beer market is suspect. It is estimated that, after the merger closes, ABI will end up with 46% of the world's beer profits.[12] The transaction is expected to be the third largest acquisition ever done.[13] The new ABI is expected to control 27% global market share of the beer with a substantial foothold in every geographic market.[14] This Note argues that the Department of Justice ("DOJ") incorrectly defined the relevant product market as beer when it should have been more narrowly defined as premium beer. It is unclear what the effect on consumer welfare will be from the ABI-SABMiller combination, but it is worth re-evaluating U.S. antitrust policy, especially since American antitrust policy is subject to top-down change from new leadership with the election of new U.S. presidents.[15]

Part II of this Note reviews the history of adaptation in antitrust law, current antitrust law, the key concepts relevant to market competition, and corrective remedies. Part III analyzes the beer industry in which the ABI and SABMiller deal took place. Specifically, market concentration, barriers to entry and expansion, and price changes relative to currency inflation are examined. Part III also evaluates the divestiture remedy and analyzes U.S. merger policy. Lastly, it briefly explores comparative antitrust laws from Europe to provide ideas on how to improve the American system. Part IV explains that pre-merger divestitures are not as efficacious as antitrust authorities would hope and makes

11. United States v. Pabst Brewing Co., 384 U.S. 546, 551–52 (1966). Although, per changing economic thinking, antitrust authorities have raised the threshold for market shares that they consider to raise the probability of anticipative effect since *Pabst*. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2d [hereinafter *2010 Guidelines*].

12. Tripp Mickle, *SABMiller, AB InBev Shareholders Approve $100 Billion-Plus Merger*, WALL ST. J. (Sept. 28, 2016), https://www.wsj.com/articles/sabmiller-ab-inbev-shareholders-approve-100-billion-plus-merger-1475059015.

13. Bray, *supra* note 8.

14. *Id.*

15. *See* Kevin Carty, *An Unpredictable Upcoming Matchup: Donald Trump vs. Big Business*, ATLANTIC (Nov. 16, 2016), https://www.theatlantic.com/business/archive/2016/11/donald-trump-vs-big-business/507878/ ("The president-elect [Donald J. Trump] may seem an unlikely trust-buster, but he's indicated an openness to reviving America's once-robust anti-monopoly apparatus."). *See also* William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 688 (2014).

recommendations to antitrust authorities. Part V concludes on the ABI-SABMiller acquisition and summarizes reforms that Congress and antitrust regulators can take to improve the U.S. antitrust regime.

II. BACKGROUND

The U.S. antitrust laws developed as a bulwark against the anticompetitive tendencies of self-interested, profit-maximizing firms.[16] Antitrust law's goal is to maintain fair competition for the benefit of consumers in the form of competitive price equilibrium, high-quality and wide-ranging products, innovation, and low barriers to entry such that new firms can enter the market or increase their output.[17] In other countries, antitrust law is referred to as "competition law," perhaps more aptly.[18] Together, the antitrust laws find a balance between allowing capitalists to pursue their self-interest and barring restraints on trade that harm competition.[19] This Part discusses (1) the history and significance of antitrust laws, and why they change, (2) the economic underpinnings of mergers and acquisitions, and (3) the indicia of competition that will be used in Part III's analysis of the beer industry.

A. History and Significance of the Antitrust Laws

In broad strokes, antitrust regulation of horizontal mergers aims to prevent harmful supracompetitive prices (pricing above competitive equilibrium), price-fixing, and anticompetitive cooperation.[20] Price-fixing is simply an agreement between competitors affecting prices,[21] which naturally opposes consumers' preference to buy goods and services at a price determined by the economic effects of supply and demand.[22] For example, an agreement to keep prices at a stable level is price-fixing, even if that price might seem low or fair to some consumers or producers.[23] The chief evil of price-fixing is, therefore, higher prices for the benefit of the price fixers.[24]

The evolution of antitrust law illustrates the centuries-long struggle against monopolists who develop innovative strategies to maximize their prof-

16. *See Antitrust Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

17. *See id.* (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §5, at 20 (1977)). This Note uses "products" to mean both products and services.

18. *See, e.g.*, *Competition Law—How Does Competition Law Apply to Me and My Business*, COMP. & CONSUMER PROT. COMM'N, http://ccpc.ie/compliance-business/competition-law-how-does-it-apply-me-and-my-business (last visited Sept. 2, 2018).

19. *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Sept. 2, 2018).

20. *Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects (last visited Sept. 2, 2018).

21. *Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Sept. 2, 2018).

22. *Id.*

23. *Id.*

24. *Id.*

its within the contours of the existing law.[25] Throughout history, people have sought to increase their wealth by concentrating production. Even the invention of the corporation represents a "centralization of the control of productive assets."[26] Unfortunately for consumers, centralization may result in negative externalities—namely, increased prices.[27]

It was once remarked that "[a]ntitrust [law] is not that complicated."[28] The simplicity of the antitrust laws reflects a legislative intent for the implementation of the laws to change with the dynamic economic landscape.[29] Indeed, the U.S. Supreme Court has noted:

> It will be found that, as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning.[30]

Congress and the antitrust agencies must be vigilant against behavior that harms competition. Authorities should monitor the effects of mergers to develop new antitrust laws and demand more effective remedies. From the common law to the Clayton Act[31] and its amendments, governmental bodies have coped with economic changes through the dynamic laws of antitrust.

1. Common Law Origin

The common law has long recognized that price-fixing is an evil to be punished by the government.[32] The doctrine of the restraint of trade is the

25. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 43 (2000), for the alternative suggestion that the field of economics caused the evolution of antitrust law.

26. DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 312 (1959).

27. *See E. Glen Weyl, Basic Monopoly Theory p1*, YOUTUBE (Oct. 29, 2011) https://www.youtube.com/watch?v=n-xAYCat7a0&t=0s&index=3&list=PLC18BDB444A6D50B2 (lecture). This Note frequently uses "price" as shorthand for the full range of actual anticompetitive effects, those being price, quality, innovation, and variety. *See* Joseph Farrell, *Thoughts on Antitrust and Innovation*, DEP'T OF JUSTICE (Jan. 25, 2001), https://www.justice.gov/atr/speech/thoughts-antitrust-and-innovation ("[E]ven if antitrust analysis *appears* to focus on price effects, this can and should be understood as *synecdoche*: the part standing for the whole. . . . [P]rice analysis can often proxy for a fuller competitive analysis.").

28. Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J. 123, 125 (2013) (quoting Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543, 557 (2012)).

29. ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE 60 (3d ed. 2017) (quoting William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–63 (1982)) ("The antitrust laws were written with awareness of the diversity of business conduct . . . .").

30. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 57–58 (1911).

31. Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2012); 29 U.S.C. §§ 52–53 (2012)).

32. *See* FORDHAM CORP. LAW, INTERNATIONAL ANTITRUST LAW & POLICY 16 (Barry E. Hawk ed., 2004); *see also* Ditlew M. Frederiksen, *The Old Common Law and the New Trusts*, 3 MICH. L. REV. 119, 119 (1904).

common law antecedent to the modern antitrust laws.[33] An early recorded example can be traced back to 1414 in *The Dyer's Case*, which held that "the condition [to not trade dye in the plaintiff's town for half a year] was against the common law."[34] The judge swore, "by God . . . if the plaintiff were here, he would go to prison, until he has made a fine to the king."[35] The English took price-fixing very seriously.

Price-fixing was one of the ways to restrain trade unreasonably. To confront the problem of price-fixing, the English government set prices for essential goods and services, which could not be adjusted by contract during the Middle Ages.[36] But unauthorized price-fixing was not allowed.[37] In 1266, King Henry III laid out "severe penalties" for the price-fixing laws, describing violators as "oppressors of the poor and the community at large and enemies of the whole country."[38] By 1599, the common law was punishing price-fixing associations between merchants.[39] In 1621, Sir Edward Coke summarized an example of unauthorized price-fixing during a debate on patent monopolies:

> John Peache . . . was complained of for that he had gotten the sole selling of sweet wines. This sole selling sheweth it to be a plain monopoly; hereby the price was enhanced. He was committed to the Tower [of London] and paid fine and ransom. But some may say these be but poor fellows, shew an example of a great man.[40]

In 1624, the Statute of Monopolies provided a remedy of "triple damages and double legal costs" for harmed victims of an illegal monopoly.[41]

Thus, even before American federal antitrust laws were passed, monopolistic anticompetitive conduct had fallen under the scrutiny of the government's regulation because of its negative effects on the public. Throughout the ages, English lawmakers recognized the need to continually reassess competition policy against the perpetually shifting economic realities.

33. Albert A. Foer & Robert H. Lande, *The Evolution of United States Antitrust Law: The Past, Present and (Possible) Future*, AM. ANTITRUST INST. (Oct. 20, 1999), http://www.antitrustinstitute.org/files/64.pdf.

34. YB 2 Hen. 5, fol. 5b, Pasch, pl. 26 (1414) (Eng.), *in Legal History: The Year Books*, B.U. SCH. L., http://www.bu.edu/phpbin/lawyearbooks/display.php?id=16494 (last visited Sept. 2, 2018) (translated).

35. *Id.*

36. Frederiksen, *supra* note 32, at 119. Ironically, the monarch's policy would, today, be viewed as a *per se* price-fixing violation. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) ("Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions.").

37. *Socony-Vacuum Oil Co.*, 310 U.S. at 221.

38. FORDHAM CORP. LAW, *supra* note 32 (internal quotations omitted) (quoting 1266, 51 & 52 Hen. III, stat. 6 (Eng.)).

39. Darcy v. Allin (1599) 74 Eng.Rep. 1131, 1139–41 (KB).

40. Sir Edward Coke, Conference with the Lords in the Painted Chamber Concerning Sir Giles Mompesson and Monopolies (Mar. 8, 1621), *in* Sir Edward Coke, *Selected Writings of Sir Edward Coke*, ONLINE LIBRARY OF LIBERTY, http://oll.libertyfund.org/titles/coke-selected-writings-of-sir-edward-coke-vol-iii?q=monopoly#
Coke_0462-03_64 (last visited Sept. 2, 2018). Coke is noteworthy for leading the battle against patent monopolies granted by the English monarchy. KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 36 (2003).

41. Andrew Scott, *The Evolution of Competition Law and Policy in the United Kingdom* 4 n.8 (London Sch. Econ. and Pol. Sci. L. Soc'y & Econ. Working Papers, Paper No. 9, 2009).

2. United States Federal Antitrust Law

Federal antitrust law and its amendments illustrate the need to periodically reassess anticompetitive trends in the economy that evade the reach of contemporary law. This Section surveys the antitrust laws and how they have evolved to combat changing landscapes. The trend, which has persisted from the common law, is that of adaptation; as businesses devise new methods to bypass the antitrust and competition laws, Congress adopts new laws such as the Clayton Act, which was, for example, "[a]n Act to protect trade and commerce against unlawful restraints and monopolies."[42] Antitrust laws build on each other. The frequency and content of antitrust law amendments illustrate the necessity of reevaluating the antitrust laws—namely, the dominance of the divestiture remedy.

a. The Sherman Act

Although the common law provided American states with restraint of trade causes of action,[43] the U.S. did not have a federal antitrust law until the Sherman Anti-Trust Act of 1890 ("Sherman Act").[44] The Sherman Act was passed with significant public support.[45] It passed in the Senate with only one vote against it and in the House of Representatives unanimously.[46] The Sherman Act's purpose was to regulate "trusts," or combinations of firms, when they raised prices to a level detrimental to the public welfare.[47] Trusts gained prominence as industrialization, namely railroads and telegraph communication systems, blazed the way for rapid economic growth in the 1870s.[48] Technology also played a major role. For example, new batch processing technology enabled sugar refineries to triple production, but as a result of the massive cost-

42. Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2012); 29 U.S.C. §§ 52–53 (2012)).

43. *See, e.g.*, Keeler v. Taylor, 53 Pa. 467, 467 (Pa. 1866) ("The general rule is that all restraints of trade, if nothing more appear, are bad.").

44. Sherman Anti-Trust Act of 1890, Pub. L. No. 190, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (2012).

45. *See* William Kolasky, *Senator John Sherman and the Origin of Antitrust*, 24 ANTITRUST 85, 89 n.27 (2009) (citing HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION, 136–43 (1955)) ("*The New York Times*, for example, published articles and editorials about the growing danger posed by these trusts every day during the month of February 1888, and other regional newspapers wrote about the issue almost as frequently."); for a discussion on the debate and arguments for and against the Sherman Act, see Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, *in* THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 131–34 (E. Thomas Sullivan ed., 1991) (summarizing that antitrust law was a balance between property and competition, and liberty and equality relationships).

46. *Sherman Anti-Trust Act (1890)*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=true&doc=51 (last visited Sept. 2, 2018).

47. Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2280 (2013).

48. *Id.* at 2282–83.

savings, 60% of the country's refineries were run out of business.[49] Due to the threat of being technologically outpaced, groups of companies formed trusts.[50] The growth of trusts was the impetus for the development of the antitrust laws.[51]

In the modern era, the U.S. Supreme Court described the importance of antitrust laws and the Sherman Act in *United States v. Topco Associates*, stating, "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[52] In 1914, when the Sherman Act was still the only federal antitrust law, President William Howard Taft, who was then a law professor at Yale University, summarized:

> The federal anti-trust law is one of the most important statutes ever passed in this country. It was a step taken by Congress to meet what the public had found to be a growing and intolerable evil in combinations between many who had capital employed in a branch of trade, industry, or transportation, to obtain control of it, regulate prices, and make unlimited profit.[53]

Justice Harlan's concurring opinion, in Standard Oil Co. of New Jersey v. United States, painted a picture of the political landscape when the Sherman Act was passed:

> All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then mminent [sic], and all felt that it must be met firm-

49. *Id.* at 2290. *But see* Thomas O. Barnett, Dep't of Justice, Section 2 Remedies: What to Do After Catching the Tiger by the Tail 2 (June 4, 2008), https://www.justice.gov/atr/file/519591/download.

> [I]t is in the nature of successful firms, like tigers, to pounce and devour, and to deprive other hunters of their prey. I prefer to watch tigers and successful firms—even dominant firms—from a safe distance and without interfering with their natural activities, confident that any harm they visit on competitors will—in general—redound to society's benefit.

Id.

50. Collins, *supra* note 47, at 2292 ("A New York State Senate committee studying trusts at the time reported that '[c]ombination rarely exists except as a result of excessive competition.'").

51. *See id.* at 2293.

52. 405 U.S. 596, 610 (1972).

53. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 2 (1914). *Cf. Trusts and Mergers*, N.Y. TIMES Apr. 15, 1901, http://query.nytimes.com/mem/archive-free/pdf?res=9C06E5DE1030E132
A25756C1A9629C946097D6CF (praising trusts as the "ideal system of industrial consolidation" and that "political demagogues and the sensational newspapers" led public opinion to support the Sherman Act).

> ly and by such statutory regulations as would adequately protect the people against oppression and wrong.[54]

Thus, the Sherman Act was a keystone accomplishment for consumer interests. It represented the nation's collective disdain for restraints on trade.

Section 1 of the Sherman Act states: "Every 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, is declared to be illegal."[55] The Sherman Act's guiding principle is that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ."[56] One of the most triumphant trust breakups was the dissolution of the Standard Oil Company, which held the stock of forty corporations in trust.[57] Despite its foundational importance, the Sherman Act's initial scope was limited. Some critics deemed the young Sherman Act a "paper tiger" because it was not always effective at preventing restraints of trade.[58] For example, in *United States v. E. C. Knight Co*., the Supreme Court held monopolies of sugar manufacturers did not violate the Sherman Act because Congress only possessed the constitutional power to regulate interstate commerce, which did not include manufacturing, even though the monopoly controlled 98% of the sugar trade.[59] The Sherman Act also failed to adequately address mergers between corporations, as opposed to trusts.[60] The Sherman Act's inadequacies resulted in the passage of the Clayton Act.

b. The Clayton Act

In 1914, the Clayton Antitrust Act ("Clayton Act") was passed to respond to the issue of mergers between corporations, which were employed as a workaround to achieve the same anticompetitive goals as the trusts and contracts prohibited under the Sherman Act.[61] The Congressional record reveals an intention to regulate "holding companies" and prevent "the secret acquisition of competitors through the purchase of all or parts of such competitor's stock."[62]

54. Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 83–84 (1911) (Harlan, J., concurring).

55. 15 U.S.C. § 1 (2012).

56. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

57. *Standard Oil Co.*, 221 U.S. at 34; see also *Standard Oil Company Must Dissolve in 6 Months; Only Unreasonable Restraint of Trade Forbidden*, N.Y. TIMES (May 15, 1911), http://www.nytimes.com/learning/general/onthisday/big/0515.html, for contemporaneous opinions. Another major Sherman Act victory was N. Sec. Co. v. United States, 193 U.S. 197, 360 (1904).

58. FRED S. MCCHESNEY & WILLIAM F. SHUGHART II, THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 138 (1995); *The Trust Buster*, U.S. HIST., http://www.ushistory.org/us/43b.asp (last visited Sept. 2, 2018); *see, e.g.*, United States v. U.S. Steel Corp., 251 U.S. 417, 457 (1920).

59. *United States v. E. C. Knight Co*.,156 U.S. 1, 17 (1895).

60. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Sept. 2, 2018).

61. *Trusts and Mergers*, *supra* note 53.

62. Brown Shoe Co. v. United States, 370 U.S. 294, 314 (1962).

The Clayton Act, before it was amended in 1950 by the Celler-Kefauver Act,[63] however, was deemed to be "merely a 'plugging of the loophole,'" as it only "prohibited one corporation from acquiring *stock* in another corporation, if the acquisition might have the effect of substantially lessening competition *between* the acquiring and the acquired corporation."[64]

Today, the Clayton Act is the U.S. government's primary tool for regulating mergers and acquisitions ("M&A") that are likely to reduce competition.[65] Section 7 of the Clayton Act makes it unlawful to acquire "the whole or any part of the stock or other share capital" when "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[66] In many regards, the goals of Section 7 are duplicative of Section 1 of the Sherman Act, but its passage was necessary to curtail abuses of corporate mergers with more specific language.[67] With the Clayton Act in place, the stage was set for modern antitrust law to form in the 1980s with the influential Chicago School.[68]

c. The Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") was passed to require advance notice of substantial M&A activity to antitrust authorities, which could result in a preliminary injunction.[69] HSR was a legislative response to the issue of lengthy litigation that resolved after "five or six years" of illegal merger profits.[70] The Federal Trade Commission ("FTC") frequently needed to file suits after the acquisitions were completed as a result of the inadequacy of the previous regime.[71] It was "extremely difficult" for antitrust authorities to contest mergers if they were not noticed and given relevant economic data.[72] Thus, to avoid these ill-gotten gains and the difficulty of

63. Celler-Kefauver Act, H.R. 2734, 81st Cong. (1950). The Celler-Kefauver Act was passed to "prevent economic concentration in the American economy by keeping a large number of small competitors in business . . . . The period from 1940 to 1947 . . . had been characterized by a series of mergers between large corporations and their small competitors . . . ." United States v. Von's Grocery Co., 384 U.S. 270, 275–76 (1966).

64. MARTIN, *supra* note 26, at 311.

65. *Id.* at 311–12.

66. 15 U.S.C. § 18 (2012).

67. MARTIN, *supra* note 26, at 20.

68. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925 (1979).

> [T]he distinctions between [the Harvard School and Chicago School] . . . have greatly diminished [and] has occurred largely as a result of the maturing of economics as a social science, and, as a corollary thereto, the waning of the sort of industrial organization that provided the intellectual foundations of the Harvard school.

Id.

69. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (2012)); John Warren Titus, *Stop, Look and Listen: Premerger Notification Under the Hart-Scott-Rodino Antitrust Improvements Act*, 1979 DUKE L.J. 355, 355. For HRS procedure, *see infra* Subsection III.B.2.a.

70. Titus, *supra* note 69, at 356–57.

71. *Id.* at 358.

72. *Id.* at 357.

breaking up a combination, HSR was designed to nip the illegal merger in the bud before it could blossom.[73] HSR represents just one of the many ways Congress has tinkered with the antitrust laws to adapt to the modern economy.

d. The Economy Today

Today, the U.S. economy is ripe for a re-evaluation of antitrust laws and premises. Over 75% of the economy has seen an increase in market concentration.[74] Over 50% of public companies have disappeared over the past twenty years because of combination.[75] As a result, some studies have concluded that market power through merger activity has led to "higher profit margins, positive abnormal stock returns, and more profitable M&A deals."[76] Although more profits are a positive thing for society because it benefits the shareholding public, in the aggregate, this phenomenon may cost society more by reducing consumer surplus in the form of a higher price.[77] Ultimately, these scholars suggest that "the nature of the U.S. products markets has undergone a structural shift that has weakened competition."[78] They also suggest that U.S. antitrust enforcement policy correlates with the increase in market concentration.[79] The study found "positive correlation between the more relaxed compliance requirements and the increase in concentration . . . ."[80]

Others similarly point out that America's economy has seen increased profits and concentration over the past ten years.[81] Due to this fundamental change in the structure of the economy, a Pew research study found that "two-thirds of Americans, including a majority of Republicans, have come to believe that the economy 'unfairly favours powerful interests.'"[82] Antitrust law was founded on populism, and the DOJ and FTC may need to harken their policies back to the early days of *anti*-trust to maintain their legitimacy in the eyes of the American people, when, for example, Justice Harlan powerfully described market concentration as "the slavery that would result from aggregations of capital in the hands of a few individuals and corporations . . . ."[83]

73. *Id.* at 358; *see* FTC v. University Health, Inc., 938 F.2d 1206, 1217 n.23 (11th Cir. 1991) ("[O]nce an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'").

74. Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?*, CHINA INT'L CONF. IN FIN. 1 (June 2016), http://www.cicfconf.org/sites/default/files/paper_388.pdf.

75. *Id.* at 2.

76. *Id.* at 1.

77. *See infra* Subsection II.B.1.

78. Grullon et al., *supra* note 74, at 1.

79. *Id.* at 5.

80. *Id.* at 35.

81. *Too Much of a Good Thing*, THE ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing.

82. *Id.*

83. Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring).

The U.S. Supreme Court in 1966 elaborated that one of the original purposes of antitrust law has been to preserve an un-concentrated economy with many owners of businesses:

> Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market. The period from 1940 to 1947, which was at the center of attention throughout the hearings and debates on the Celler-Kefauver bill, had been characterized by a series of mergers between large corporations and their smaller competitors resulting in the steady erosion of the small independent business in our economy.[84]

Justice Harlan's message from 1911 and the Court's message in 1966 are not dissimilar to that of the Occupy Wall Street movement of 2011 and the populist swell that nearly brought U.S. Senator Bernie Sanders to Democratic presidential nomination in 2016.[85] Of AT&T's 2016 proposed acquisition of Time Warner, Sanders proclaimed "[t]his proposed merger is just the latest effort to shrink our media landscape, stifle competition and diversity of content, and provide consumers with less while charging them more."[86]

B. Introduction to the Economics Behind Mergers and Acquisitions

Understanding the basic concepts underpinning M&A antitrust policy is an important component in analyzing the current regime's efficacy. This Section examines basic market theory, introduces mergers and acquisitions, and briefly describes the current remedial tools available to the DOJ and FTC.

1. Market Theory

In an ideal world, perfect competition between companies yields competitive (typically lower) product prices to the benefit of consumers.[87] In the economist's perfect world, the market where goods and services are exchanged will be efficient, meaning that firms, seeking to maximize profit, are rivals with

84. United States v. Von's Grocery Co., 384 U.S. 270, 275–76 (1966).

85. *See* Ray Sanchez, *Occupy Wall Street: 5 Years Later*, CNN (Sept. 16, 2016, 3:50 PM), http://www.cnn.com/2016/09/16/us/occupy-wall-street-protest-movements/; *U.S. Primary and Caucus Results*, WASH. POST, https://www.washingtonpost.com/2016-election-results/us-primaries/?utm_term=.c1c7daf3ae46 (last visited Sept. 2, 2018).

86. Everett Rosenfeld, *Bernie Sanders Is Trying to Single Handedly Kill AT&T's $85 Billion Purchase of Time Warner*, CNBC (Oct. 27, 2016, 8:34 AM), http://www.cnbc.com/2016/10/26/bernie-sanders-is-trying-to-single-handedly-kill-atts-85-billion-purchase-of-time-warner.html.

87. *See* NIAMAH DUNNE, COMPETITION LAW AND ECONOMIC REGULATION: MARKETING AND MANAGING MARKETS 7 (2015).

each other and set prices by supply and demand.[88] As a result, the resources available on the market are allocated in the most efficient way.[89] Unfortunately, the world is not perfect.[90] The efficient market and fair competition can be hindered by many things, including monopoly, anticompetitive mergers, or high barriers to entry.

A true monopoly is the existence of a single seller who sells a unique product that often results in the exercise of market power, which then reduces output and increases prices.[91] Although the monopolist will lose some marginal consumers who are priced-out and buy substitute products, this loss will be outweighed by the increased revenue derived from artificially-inflated prices.[92] Thus, the monopolist extracts undue riches at the consumer's expense, converting consumer wealth to producer wealth.[93] A monopoly grants the producer market power, which is a company's wherewithal to elevate prices at a profit above market equilibrium for a sustained period of time.[94]

The danger of enhanced market power in a monopoly applies in equal force to horizontal mergers because the resulting limited number of firms can "approximat[e] the performance of a monopolist, by either explicitly or implicitly coordinating their actions," or if the result is to "significantly increase" market concentration, the firms can raise prices because there are fewer substitutable products.[95] This configuration is called an oligopoly.[96] When there are fewer substitute products or fewer substitute producers in a geographic market, consumers will have fewer alternatives and will consequently be forced to buy products at supracompetitive prices (prices above a competitive level) if the producers raise prices (*i.e.*, exercise market power).[97] As a result of supracompetitive prices, consumer surplus[98] will be converted to producer surplus.[99] Therefore, horizontal mergers extract economically and socially desirable wealth from consumers, and they transfer this wealth to a singular producer.[100] The goal of antitrust law is to preserve the economist's perfect

88. *Id.*

89. *Id.*

90. *See* Robert Nielsen, *There Is (Almost) No Such Thing as Perfect Competition*, WHISTLING IN THE WIND (Aug. 23, 2012), https://whistlinginthewind.org/2012/08/23/there-is-almost-no-such-thing-as-perfect-competition/.

91. DUNNE, *supra* note 87, at 15.

92. *Id.*

93. *Id.*

94. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf [hereinafter 1997 MERGER GUIDELINES].

95. *Id.* at 2, 4.

96. *Oligopoly*, INVESTOPEDIA, http://www.investopedia.com/terms/o/oligopoly.asp (last visited Sept. 2, 2018).

97. GAVIL ET AL., *supra* note 29, at 28–32.

98. "Consumer surplus" is the social benefit of consumers buying products at a price below what they are willing to pay, allowing them to spend their money elsewhere in the marketplace. *Consumer Surplus*, INVESTOPEDIA, http://www.investopedia.com/terms/c/consumer_surplus.asp (last visited Sept. 2, 2018).

99. GAVIL ET AL., *supra* note 29, at 28–32.

100. *See id.* U.S. antitrust authorities prefer consumer surplus to producer surplus, although there is some literature that suggests the aggregate surplus of both consumer and producer surplus should be the gold stand-

world where prices are set by supply and demand. Antitrust seeks to maintain robust competition because it causes firms to sell more at lower prices.[101]

2. Mergers and Acquisitions

Three types of mergers exist, and they can be mixed with one another: vertical, conglomerate, and horizontal. A vertical merger occurs when the products or services of the merging firms are consumed at differing levels of production, yielding cheaper end products because of a reduction of profit-maximizing intermediary costs.[102] Vertical mergers typically are consummated between customer and supplier or the input firm and the output firm.[103] An example of a vertical merger is a hop farmer being acquired by a beer manufacturer.

A conglomerate merger is defined by the dearth of economic relations between two firms.[104] An example of a conglomerate merger is the combination of a dental office and a pediatric clinic. Antitrust authorities released a comment on these mergers, stating: "The vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas."[105]

A horizontal merger occurs when firms who produce the same goods or provide the same services join.[106] The Supreme Court defined horizontal mergers as "[a]n economic arrangement between companies performing similar functions in the production or sale of comparable goods or services."[107] For example, a merger between the national drugstores Walgreens and CVS Pharmacy would be a horizontal merger. Horizontal mergers have the potential of restricting trade because the merging parties are "actual or potential competitors;" thus, they are often presumed unlawful because they are combinations that unreasonably restrain trade between direct competitors through the exercise of market power.[108]

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ard of merger approval. *See generally* Russel Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, U.S. DEP'T OF JUSTICE (June 2007), https://www.justice.gov/atr/consumer-surplus-appropriate-standard-antitrust-enforcement.

101. ADI AYAL, FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK 37 (2014).

102. ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 365 (4th ed. 2015) [hereinafter ABA ANTITRUST SECTION ON M&A].

103. *Id.*

104. *Id.* at 405 (citing FTC v. Procter & Gamble Co., 386 U.S. 568, 577 n.2 (1967)).

105. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES v (2006), https://www.justice.gov/atr/file/801216/download.

106. *See Glossary of Industrial Organisation Economics and Competition Law*, ORG. FOR ECON. CO-OPERATION & DEV. 58 (1993), http://www.oecd.org/regreform/sectors/2376087.pdf.

107. Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1962).

108. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 79 (5th ed. 2002) [hereinafter ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS].

There are several positive reasons why companies choose to merge or acquire all or parts of each other. A merger will often result in "synergies," which are efficiencies that allow output to be increased and cost to be decreased based on cooperation and coordination.[109] Combinations can "reduce costs or improve products in ways unavailable to the merger partners individually; . . . improve the profitability of the acquired assets by replacing ineffective management; . . . [and create] tax advantages . . . ."[110] Indeed, some efficiencies require a combination because they require an "intimate integration of the parties' unique, hard-to-trade assets."[111] Some mergers result in positive externalities for consumers.[112] The revised 1997 Merger Guidelines released by the DOJ and FTC noted that the majority of mergers "are either competitively beneficial or neutral."[113] Some scholars suggest that "market concentration fosters innovation, as larger firms funded by supracompetitive profits innovate more than smaller ones."[114] While the majority of mergers do not have unlawful anticompetitive effects,[115] and are, in all likelihood, beneficial to consumers,[116] horizontal mergers still carry the highest probability of the merger types for violating Section 7 of the Clayton Act because of the resulting reduction in competitors. Horizontal mergers, thus, frequently come under the scrutiny of the antitrust authorities. [117]

When markets "[i]ncrease[] in concentration above certain levels," they are expected to "raise[] a likelihood of interdependent anticompetitive con-

109. Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST L.J. 685, 693 (2001).

110. GAVIL ET AL., *supra* note 29, at 674.

111. Farrell & Shapiro, *supra* note 109, at 692–93.

112. *See* DUNNE, *supra* note 87, at 16 (explaining that "monopoly may be the most efficient way to structure an industry.");

113. 1997 MERGER GUIDELINES, *supra* note 94, at 3.

114. *See* DUNNE, *supra* note 87, at 16 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY (Taylor & Frances e-Library 2003) (1943) (ebook)).

115. Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 159.

116. Carl Shapiro, *Many Mergers Can Make Sense for Consumers*, N.Y. TIMES: OPINION PAGES (Mar. 10, 2013, 8:41 PM), http://www.nytimes.com/roomfordebate/2013/03/10/mergers-are-back-something-to-cheer-or-fear/many-mergers-can-make-sense-for-consumers; *see, e.g.*, Tom Zeller, Jr., *Blockbuster Ends Bid for Rival*, N.Y. TIMES (Mar. 26, 2005), http://www.nytimes.com/2005/03/26/business/media/blockbuster-ends-bid-for-rival.html?_r=0 ("Blockbuster Inc., the video rental giant, dropped its bid yesterday to acquire the Hollywood Entertainment Corporation, the second-largest video rental chain, citing the likelihood that the Federal Trade Commission would reject the deal on antitrust grounds."). It is possible Blockbuster would not have declared bankruptcy in 2010 if it had merged with Hollywood Entertainment. *But see* Greg Satell, *A Look Back at Why Blockbuster Really Failed and Why it Didn't Have to*, FORBES (Sept. 5, 2014), http://www.forbes.com/sites/gregsatell/2014/09/05/a-look-back-at-why-blockbuster-really-failed-and-why-it-didnt-have-to/#42f57fd3261a (explaining that Blockbuster failed because its revenue depended on late fees).

117. U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, WORKLOAD STATISTICS, FY 2000–2009 1 (2012), https://
www.justice.gov/sites/default/files/atr/legacy/2012/04/04/281484.pdf (showing an average of 107 annual merger reviews under Section 7 of the Clayton Act).

duct."[118] In other words, there is a "tendency of a merger to further oligopolistic coordination."[119]

Mergers also have the potential to harm consumers by allowing the exercise of market power, notably in three ways.[120] First, mergers enable the remaining, more concentrated set of producers to coordinate and collude.[121] Collusion allows rivals to raise prices through "parallel conduct after the merger."[122] Second, mergers may allow the resulting entity, if it has enough market share, to unilaterally raise prices as a monopoly or something close to a monopoly.[123] These are called "[u]nilateral effects," because the singular producer can raise prices without the fear of losing gains when consumers jump to a substitute product to avoid the price increase.[124] Unilateral effects are dangerous only when barriers to entry are high; in contrast, when entry into the market is easy, new entrants will start to compete and offer products at a lower price, bringing the price of goods back down to competitive levels.[125] Third, mergers may also create an environment where market power can be achieved by exclusionary conduct.[126] An example of exclusionary conduct is when a producer limits its rival's access to important inputs required for its production or vital distribution outlets.[127] The exercise of market power is harmful for consumers because it enables the producer to drain consumer wealth by raising prices.[128]

3. Antitrust Merger Remedies

a. Filing under Hart-Scott-Rodino

The HSR requires that merging parties notify the FTC and DOJ.[129] The FTC manages HSR filings on behalf of both regulatory bodies through its Premerger Notification Office ("PNO").[130] The HSR filing contains relevant information to help the DOJ and FTC determine if there will be a likely anticompetitive effect as a result of the merger.[131] Notices are required based on thresholds set as a proportion to the economy; thus, in 2013, mergers over

118. FTC v. H.J. Heinz Co., 246 F.3d 708, 715–16 (D.C. Cir. 2001) (quoting United States v. General Dynamics, 415 U.S. 415, 497 (1974)).

119. DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY 53 (2015).

120. GAVIL ET AL., *supra* note 29, at 674–75.

121. *Id.* at 675.

122. *Id.*

123. *Id.*

124. ABA ANTITRUST SECTION ON M&A, *supra* note 102, at 147.

125. ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS, *supra* note 108, at 239.

126. GAVIL ET AL., *supra* note 29, at 675.

127. *Id.*

128. *See id.* at 676 (depicting "The Williamson Diagram," in which quantity outputted is reduced to increase price, which "transfer[s] [wealth] from buyers to sellers").

129. 15 U.S.C. § 18a (2012).

130. *Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program (last visited Sept. 2, 2018).

131. 15 U.S.C. §18a(d) (2012); *see also* ABA ANTITRUST SECTION ON M&A, *supra* note 102, at 40.

$283.6 million had to be reported.[132] The thresholds are gradually increased to account for inflation.[133] In 2017, the threshold was raised to $323 million; the threshold was originally $200 million when HSR was first passed in 1976.[134] Smaller transactions as low as $80.8 million are also covered by HSR if some other requirements are met regarding the size of the parties.[135] After filing with PNO, the parties must wait for a thirty-day period before consummation (or fifteen days for a cash tender offer or bankruptcy sale).[136] The PNO can end the waiting period early to let the parties merge (termed "early termination"), allow the parties to merge by waiting for the period to expire, or ask for more information and extend the period for further investigation (termed "second request").[137] Only a small fraction of reported mergers are challenged.[138]

Merger review involves defining the market through product and geography definitions, determining market share, evaluating the likelihood of anticompetitive effects or conduct, and lastly, balancing this determination with the prospect of new entrants to offset market concentration or any procompetitive efficiencies.[139] Typically, merging parties attempt to pre-empt DOJ and FTC antitrust suits by so-called "fix-it-yourself" remedies.[140] Fix-it-yourself corrective action involves "complex and intense" negotiations with the government, primarily because parties do not want to divest enterprises they have created or helped succeed.[141] Antitrust authorities may sue to enjoin the merger and seek a divestiture remedy, or they may try to halt the merger entirely.[142] The majority of pre-merger negotiations settle.[143]

b. Divestiture remedy

In 1968, the DOJ released its first merger guidelines to help businesses plan mergers to avoid antitrust issues.[144] Market share and concentration (such as "structural criteria") were core predictors of likely anticompetitive effects for

132. KWOKA, *supra* note 5, at 9.

133. *See, e.g.*, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 82 Fed. Reg. 16, 8524 (Jan. 26, 2017) (amending 16 C.F.R. §§ 801–803); *United States Inflation Rate*, TRADING ECON., http://www.tradingeconomics.com/united-states/inflation-cpi (last visited Sept. 2, 2018).

134. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 82 Fed. Reg. 16, 8524 (Jan. 26, 2017) (amending 16 C.F.R. §§ 801–803).

135. *Id.*; 15 U.S.C. § 18a(a)(2) (2012).

136. 15 U.S.C. § 18a(b)(1)(B) (2012).

137. 15 U.S.C. §§ 18a(a), (b)(1)–(2), (e) (2012); *How Mergers are Reviewed*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review (last visited Sept. 2, 2018).

138. Frankel, *supra* note 115, at 162–63.

139. *Id.* at 164.

140. Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D.L. REV. 165, 165 (2010) (internal quotations omitted).

141. *Id.*

142. *Id.* at 171; *see, e.g.*, United States v. Atl. Richfield Co., 297 F.Supp. 1061 (S.D.N.Y. 1969).

143. Horton, *supra* note 140, at 166.

144. KWOKA, *supra* note 5, at 13.

antitrust review at the time.[145] When the 1982 guidelines were released, antitrust authorities began to incorporate non-structural factors into their analysis.[146] Currently, the DOJ's policy is that for "horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions."[147] The "key" to winning antitrust approval, however, is "finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare."[148]

In horizontal mergers, the FTC typically will require a divestiture.[149] The consent order will involve a "divestiture trustee" who is empowered to divest assets.[150] The divestiture trustee ensures these assets are properly maintained to ensure the competitiveness of the divested business unit.[151] The "divestiture package" seeks to "maintain[] or restore[] competition in the relevant market."[152] Thus, this usually involves the merging company getting rid of "an ongoing, stand-alone, autonomous business."[153]

4. Competition Factors Analyzed

In *United States v. Arnold, Schwinn & Co*., the Supreme Court stated the general rule of what constitutes an unreasonable anticompetitive effect.[154] The Court explained such an effect existed when "the effect upon competition in the marketplace is substantially adverse."[155] This Section explores three indicators of substantially adverse anticompetitive effects: market concentration, barriers to entry, and expansion and price changes.

a. Market Concentration

Market concentration plays "a leading role" in determining the anticompetitive effect of a merger.[156] The theory is that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive

145. *Id.* at 13–14.

146. *Id.* at 15.

147. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf [hereinafter 2011 MERGER REMEDIES].

148. *Id.*; *see also* United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 325–26 (1961) (holding that "[t]he required relief therefore is a remedy which reasonably assures the elimination of that tendency [which is prohibited by Section 7 of the Clayton Act]").

149. *See Frequently Asked Questions About Merger Order Provisions*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq (last visited Sept. 2, 2018).

150. *Id.*

151. *See id.*

152. *Id.*

153. *Id.*

154. ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS, *supra* note 108, at 61.

155. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 n.5 (1967), *overruled on other grounds by* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58–59 (1977).

156. JONATHAN B. BAKER, MARKET CONCENTRATION IN THE ANTITRUST ANALYSIS OF HORIZONTAL MERGERS, ANTITRUST LAW & ECON. 1 (2010).

levels."[157] A sufficiently high level of market concentration makes out a *prima facie* case that a merger is anticompetitive.[158] When market concentration is very high, the merging firms must prove that there are "extraordinary efficiencies" to be gained for consumers to pass antitrust scrutiny.[159] The first step in determining market concentration is market analysis, which requires a "[m]arket definition" for proper context.[160] Ultimately, the market consists of goods and services that have a high cross-elasticity of demand. "'Cross-elasticity of demand' measures the extent to which modest variations in the price of one good affect customer demand for another good."[161] The enforcement agencies employ the "hypothetical monopolist test" to define the relevant market.[162] The agencies test whether "a small but significant and non-transitory increase in price ('SSNIP')" by a hypothetical, profit-seeking monopolist would be unprofitable by consumers diverting to a substitute product.[163] If it is unprofitable, then the product that consumers switched to is deemed a substitute and is part of the relevant market.[164]

There are two dimensions to consider when defining the relevant market: product and geographic.[165] In *Brown Shoe Company v. United States*, the Court explained how to define the product market:

> 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. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as 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. . . . [I]t is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[166]

The geographic market is the area in which consumers are willing to travel to purchase the goods or services, and the distance beyond which consumers are not willing to travel delineates the geographic market from other markets.[167] The Supreme Court explained the geographic market is the "area of effective

157. FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986)).

158. *Id.* at 716.

159. *Id.* at 720.

160. BAKER, *supra* note 156, at 4.

161. McWayne, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015).

162. *2010 Guidelines*, *supra* note 11.

163. *Id.*

164. *See id.*

165. BAKER, *supra* note 156, at 4.

166. 370 U.S. 294, 325 (1962).

167. ABA ANTITRUST SECTION ON M&A, *supra* note 102, at 113.

competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies."[168]

The predominance of market concentration as a compelling factor in the competition inquiry was captured in *United States v. Philadelphia National Bank*, in which the Supreme Court held that the merger between two banks violated Section 7 of the Clayton Act.[169] The Court found that the proposed merger would have "result[ed] in a single bank[] controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area."[170] The Court was also persuaded by the fact that the market concentration between the two largest banks in Philadelphia would have controlled 59% of the commercial banking business if the merger went through, and the top four banks would account for 78% of the market.[171] The Court reasoned, "[o]ur conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one," despite the lack of an express threshold in the Clayton Act.[172]

b. Barriers to Entry and Expansion

Although market concentration is a significant indicator of market power, the presence of substantial barriers to entry and expansion also is highly indicative.[173] "Barriers to entry" (the commonly used shorthand) are "a cost that would have to be borne by an entrant that was not and is not borne by the incumbent, or any condition that is likely to inhibit other firms from entering the market on a substantial scale in response to an increase in the incumbent's prices."[174] When barriers are low, new entrants can easily undercut price increases by the attempted monopolist by offering their goods and services at lower prices.[175] But when barriers are high, incumbent firms can raise prices without the threat of other incumbents expanding their output or new entrants starting production.[176]

Notable barriers include "legal license requirements; control of natural advances or supplies; limited demand for the product or service; intellectual

168. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963) (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)).

169. *Id.* at 371–72.

170. *Id.* at 364.

171. *Id.* at 365, 366.

172. *Id.* at 365. The Supreme Court also reasoned:

> There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions.

Id. at 366–67.

173. ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS, *supra* note 108, at 237–38.

174. *Id.* at 238.

175. *Id.* at 239.

176. *Id.* at 238–39.

property rights; specialized marketing practices, including exclusivity arrangements; and brand name or reputation (or the entrenched buyer preference)."[177] Additionally, high startup costs are often barriers, especially when economies of scale are in play.[178] Economies of scale put incumbent firms in a very advantageous position because it enables them to produce more for less.[179] Barriers to expansion are relevant because firms must be able to react quickly to price changes to thwart a monopolist's price hikes.[180] Also, courts consider "the relative size and strength of competitors, economies of scale and scope, probable development of the industry, the elasticity of consumer demand, the homogeneity of products, dwindling market demand, and potential competition."[181] Network effects are an additional barrier to entry because it requires that a company reach a critical mass of users to be valuable, which is the case in, for example, social media companies.[182] Barriers to entry are considered in the aggregate to see if the combination permits the inference that incumbent firms possess monopoly power.[183]

c. Industry Price Changes

Price changes in an industry over time may indicate the exercise of monopoly power.[184] Horizontal mergers are suspect because they allow firms to price higher without the fear of a former competitor undercutting the price; in fact, a study found an increase of 4.3% for prices after mergers when it looked at 119 mergers.[185] A set of facts that would illuminate the possibility of market power would be a showing of supracompetitive pricing over a substantial period in which new entrants did not respond by increasing output to lower price.[186] Changes in price might be caused by an intended "reduction of output."[187] An example of anticompetitive reductions in output include broadcasting limits for professional sports games.[188] Some courts, however, are reluctant to use price-related factors as an indicator of market power.[189] For example, Judge Richard Posner reasoned "not only do measured rates of return reflect accounting conventions more than they do real profits (or losses), as an economist would understand these terms, but there is not even a good economic theory that associ-

177. *Id.* at 239–40.

178. *Id.* at 240–41.

179. *Economies of Scale and Scope*, ECONOMIST (Oct. 20, 2008), http://www.economist.com/node/12446567.

180. ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS, *supra* note 108, at 241.

181. *Id.* at 241–42.

182. *Id.* at 242.

183. *Id.* at 241.

184. *Id.* at 243.

185. KWOKA, *supra* note 5, at 155.

186. *Id.*

187. FTC v. Indiana Fed. Dentists, 476 U.S. 447, 460–61 (1986) (quoting P. AREEDA, ANTITRUST LAW 429 (1986)).

188. ABA ANTITRUST SECTION ANTITRUST DEVELOPMENTS, *supra* note 108, at 66 (citing Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992)).

189. *Id.* at 243.

ates monopoly power with a high rate of return."[190] Further, Judge Schnacke of the United States District Court for the Northern District of California wrote:

> Consistent supra-normal profits may be attributable to an ability to control price. Here IBM's profits have been very substantial . . . . But the inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one. Good management, superior efficiency and differences in accounting provide explanations that are just as plausible, and none of those explanations is inconsistent with an effectively competitive market.[191]

Therefore, price will carry less weight in this Note's analysis. As pricing is the means by which monopolists extract anticompetitive riches, however, it is considered in this Note's analysis in an endeavor to capture the whole economic picture.

III. ANALYSIS

This Part analyzes the beer industry. For the purposes of this Note, the beer industry and brewery industry are used interchangeably. This Part will examine market concentration, barriers to entry and expansion, and price changes, concluding that the beer industry is ripe for anticompetitive effects. The beer industry was selected for this Note's analysis due to the trend of increasing global concentration amongst breweries.[192] Additionally, this Part presents potential flaws with the divestiture remedy, a critique of American antitrust law, and draws lessons from Europe's more competitor-friendly antitrust system.

A. Beer Industry

Successful breweries are built by their powerful brand names, distribution access, differentiated products, high quality products, and economies of scope (more outputs using common inputs to decrease costs).[193] The beer industry has a history of consolidation. Breweries are natural M&A targets because they lend themselves easily to synergies in the form of more efficient "management and distribution."[194] In 2007, the number two brewer, SABMiller, merged with the number three brewer, Molson Coors, to form a joint venture known as MillerCoors.[195] The combination was expected to reduce costs by $500 million a

190. Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir. 1999) (citations omitted).

191. *In re* IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 981 (N.D. Cal. 1979).

192. Mickle, *supra* note 12.

193. *See Id.*; *Economies of Scope*, INVESTOPEDIA, http://www.investopedia.com/terms/e/economiesofscope.asp (last visited Sept. 2, 2018).

194. *Bringing Home the Beer: InBev Succeeds in its $52 billion bid for Anheuser-Busch*, ECONOMIST (Jul. 14, 2008), http://www.economist.com/node/11735531.

195. Andrew Martin, *Merger for SABMiller and Molson Coo*rs, N.Y. TIMES (Oct. 10, 2007), http://www.nytimes.com/2007/10/10/business/worldbusiness/10beer.html.

year.[196] The other notable merger activity to occur in the last decade was the 2008 Anheuser-Busch acquisition by InBev.[197]

1. Market Concentration

Market concentration is the chief metric for providing antitrust authorities with a reasonable inference of an anticompetitive environment.[198] It is considered the most useful tool in understanding competitiveness for horizontal mergers because horizontal mergers reduce the quantity of competitors and increase the quality of the surviving firm.[199] Market concentration allows firms to raise prices to supracompetitive levels because there are fewer substitute goods on the market, so consumers are forced to buy goods at the higher price.[200]

a. Market Definition

The next step is defining the relevant market. Defining the relevant market is important because it is used as direct evidence to demonstrate elasticity of demand between competing products (*i.e.*, substitutability), and thereby a reasonable inference of the presence of illegal market power.[201] Markets are defined on product and geography dimensions.[202] The product dimension is determined by what consumers consider substitutes.[203]

The product will be defined simply as beer, although it may more appropriately be defined narrowly as premium beer, as this Note later explains. The DOJ also defines the product market as beer in its complaint of ABI's acquisition and does not attempt to define it more narrowly, only noting that "[o]ther alcoholic beverages, such as wine and distilled spirits, are not sufficiently substitutable to [price] discipline."[204]

There are six different types of beer products.[205] The first is premium beer (*e.g.*, Bud Light), sometimes called "macro brews,"[206] which is expected to account for 50.7% of the U.S. industry in 2018; the second is sub-premium beer

196. *Id.*

197. Michael J. de la Merced, *Anheuser-Busch Agrees to Be Sold to InBev*, N.Y. TIMES (Jul. 14, 2008), http://www.nytimes.com/2008/07/14/business/worldbusiness/14beer.html.

198. BAKER, *supra* note 156, at 1.

199. *Id.*; *see also* discussion *supra* Subsection II.B.4.a.

200. *See* GAVIL ET AL., *supra* note 29, at 28–32.

201. *Id.* at 489.

202. Janice Hauge & Mark Jamison, *Analyzing Telecommunications Market Competition: Foundations for Best Practices*, PUB. UTIL. RES. CTR 11 (Oct. 29, 2009), http://warrington.ufl.edu/centers/purc/purcdocs/papers/0928_hauge_analyzing_telecommunications_market.pdf.

203. GAVIL ET AL., *supra* note 29, at 489.

204. Complaint at 9, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

205. CHRISTOPHER LOMBARDO, IBIS WORLD, TAPPED OUT: CONCERNS SURROUND THE LONG-TERM GROWTH OF THE INDUSTRY'S INTERNATIONAL BREWERS 14–17 (2018).

206. *See* DANIEL TORO-GONZALEZ ET AL., SUBSTITUTION BETWEEN MASS-PRODUCED AND HIGH-END BEERS 2 (Nov. 8, 2011), http://aic.ucdavis.edu/cwe/McCluskey.pdf.

(*e.g.*, Keystone Light), which is expected to account for 27.8% of the market; the third is super-premium beer (*e.g.*, Michelob Ultra), which is expected to account for 7.6% of the market; the fourth is craft beer (*e.g.*, Revolution Brewing's Anti-Hero IPA), which is expected to account for 8.9% of the market; the fifth is "progressive adult beverages" (*e.g.*, Mike's Hard Lemonade), which is expected to account for 3.6% of the market; and the sixth is malt liquor (*e.g.*, Colt 45), which is expected to account for 5.0% of the market.[207] Premium beer includes flagship brand beers such as Coors and Miller High Life.[208] Premium beer also includes the flagship variants or "light" low-calorie versions such as Bud Light, Coors Lite, and Miller Lite.[209] In contrast to premium beer, craft beer is often a higher quality beer because it uses more expensive inputs, such as "two-row barley instead of the cheaper six-row barley."[210] But the term craft beer says more about the producer than the product, at least according to the Brewers Association; for them, craft beer can only be produced by a brewery that produces less than six million barrels a year (or roughly 3% beer market share) and is owned mostly by craft brewers (75% is the threshold).[211]

The geographic dimension of the market definition is "set by studying the location of suppliers from which a customer might purchase products deemed to be acceptable substitutes . . . ."[212] As the major beer brands are entrenched throughout the U.S. market,[213] and because data is limited, the geographic space will be the national market. Similarly, the DOJ's complaint defines the geographic market nationally because "[d]ecisions about beer brewing, marketing, and brand building typically take place on a national level. In addition, a significant portion of beer advertising is placed on national television, and brewers commonly compete for national retail accounts. General pricing strategy also typically originates at a national level."[214] Therefore, the relevant market will be defined simply as *beer in the United States*.

207. LOMBARDO, *supra* note 205.

208. *Id.* at 14.

209. *Id.*

210. *What is Craft Beer*, CRAFTBEERRESTAURANT.COM, http://craftbeerrestaurant.com/Craft_Beer_Restaurant/What_is_Craft_Beer_1.html (last visited Sept. 2, 2018).

211. *Craft Brewer Defined*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/craft-brewer-defined/ (last visited Sept. 2, 2018). *But see* Jonathan Stempel, *MillerCoors Gets Blue Moon 'Craft Beer' Lawsuit Thrown Out*, REUTERS (June 17, 2016), http://www.reuters.com/article/millercoors-bluemoon-lawsuit-idUSL
1N1990UQ. As an aside, the Brewers Association's definition of "craft brewer" may, itself, be a Section 1 of the Sherman Act violation because it could be seen as restricting the output of other craft brewers to less than six million barrels annually. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 99 (1984) ("By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.").

212. GAVIL ET AL., *supra* note 29, at 489. Ironically, "finis opus coronat" or the achievement of monopoly in the business context, is definitionally impossible for craft brewers. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (1945).

213. *See Sales of the leading domestic beer brands of the United States in 2017 (in million U.S. dollars)*, STATISTA, https://www.statista.com/statistics/188723/top-domestic-beer-brands-in-the-united-states/ (last visited Sept. 2, 2018).

214. Complaint at 10, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

This market definition is, however, over-inclusive because of the product definition. All "beer" includes products like malt liquor, which are very likely not acceptable substitutes for consumers of either craft beer or premium beer.[215] Similarly, one study has found that "the cross-price elasticity of craft beer and premium beers is very inelastic," meaning that premium beers are not a substitute of craft beers, at least in the Chicago market in 2011.[216] As a result, ABI's market share under this market definition is lower than it should be because the relevant market should only include premium beer but includes other beer types due to the practical limitations of this Note. It is true that craft beer is eating up market share from premium beers,[217] but this does not make the two types of beer substitutes of each other. In fact, the opposite is likely true. The switching is probably a result of changing preferences favoring smaller breweries and higher quality.[218] In other words, there has been a bifurcation in demand, and two separate demands means two distinct products.[219]

Although the DOJ defines the product market as "beer,"[220] it probably defined the product market overly-broad by determining that non-premium beers were substitutes of premium beer, as the Chicago study tends to indicate.[221] Under the hypothetical monopolist test, which the antitrust agencies use "to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms," non-premium beer would likely be excluded from the product market.[222] For example, a sophisticated beer drinker, who treats drinking craft beer as a hobby, would likely not find "a small but significant and non-transitory increase in price" of 5% to 10%, a sufficiently high increase to cause her to buy a premium beer.[223] Similarly, an undergraduate student who plans to buy a thirty-pack of Bud Light premium beer would not change his mind and buy sub-premium Keystone Light or more expensive craft beer in response to a SSNIP. Only the rare, price conscious beer drinker will divert to a different type of beer from a SSNIP (*e.g.*, a $0.80 price increase to a $8.00 six-pack); and as the Chicago study noted, beer consumers are not responsive to price changes.[224]

215. *Beer*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

216. TORO-GONZALEZ ET AL., *supra* note 206, at 2, 15.

217. CHRISTOPHER LOMBARDO, *supra* note 205, at 30 (noting that ABI has lost sales in its premium beers and "have transitioned away . . . in favor of craft beer styles that have been popularized by US microbreweries."). The craft beer industry grew significantly in the past five years, with 2013 revenues hitting 10.8%. *Id.* at 8.

218. *Craft Beer: America's Fastest Growing Alcoholic Beverage Industry*, IBISWORLD (Mar. 20, 2015), https://www.ibisworld.com/media/2015/03/20/craftbeerindustry/.

219. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 20–22 (1984) (noting that there are "two distinguishable product markets" when "there is a sufficient demand for the purchase of [one product] separate from [another product] to identify a distinct product market in which it is efficient to offer [the first product] separately from [the second product].").

220. Complaint at 8–9, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

221. TORO-GONZALEZ ET AL., *supra* note 206, at 2, 15.

222. *2010 Guidelines*, *supra* note 11.

223. *Id.*

224. TORO-GONZALEZ ET AL., *supra* note 206, at 15.

In *Brown Shoe*, the U.S. Supreme Court recognized that within a broader market, there may be submarkets that "in themselves, constitute product markets."[225] Premium beer is likely its own submarket. The Court provided "practical indicia" that may help determine whether a narrower market exists.[226] Non-premium beer does not have a different use than premium beer, but it does have "peculiar characteristics" because it is made with different ingredients.[227] Also, there are distinct customers and correspondingly distinct prices based on the different characteristics of these beer types.[228] As a result of the plausibility of this alternate market definition, antitrust authorities should examine future beer activity under more narrow submarkets and, therefore, infer a greater likelihood of collusive effects due to the increased market concentration.

In some ways, because the ABI will divest MillerCoors, defining the market properly is rendered moot because market concentration will not increase.[229] But starting off with a higher market concentration due to a narrower market has some ramifications on the competitive effect analysis. Specifically, the antitrust authorities will view mergers with greater scrutiny if the merging firms already have high market concentrations.[230]

For purposes of this Note, the relevant market is nevertheless beer in the U.S. The inclusion of non-premium beer in the market definition may have a low impact on the accuracy of the overall competitive analysis because non-premium beer represents a minority of the market share. In fact, the Chicago study combined the premium and sub-premium beer types under the label "mass," with a substantial 86.4% of the market share.[231] Additionally, the Chicago study was just one study from 2011; it may no longer be accurate and may have never been accurate in the first place. Finally, it is not improbable that for many consumers, the craft beer and sub-premium beer would be acceptable substitutes if there was a SSNIP in premium beer. But this may change as younger people dominate the market, and young people do not view them as substitutes.[232]

225. 370 U.S. 294, 325 (1962).

226. *Id.*; *see supra* Subsection II.B.4.a.

227. Brown Shoe, 370 U.S. at 325; LOMBARDO, *supra* note 205.

228. LOMBARDO, *supra* note 205.

> [Premium beer is] typically made with consumer budgets in mind . . . . [Sub-premium beer is] known mainly for [its] affordability. . . . [Super-premium beer is] typically marketed as the brewer's most prestigious offering . . . . [C]raft beer is expected to be made with very high quality hops, barley, water, yeast and other ingredients. . . . [Progressive adult beverages] are rarely the central focus of industry brewers' product lineup. . . . [Malt liquor] holds alcohol content that exceeds its jurisdiction's local limit on which products may be legally defined as beer.

Id.

229. *AnheuserBusch InBev to Divest*, *supra* note 3.

230. *2010 Guidelines*, supra note 11.

231. TORO-GONZALEZ ET AL., *supra* note 206, at 5.

232. *See* LOMBARDO, *supra* note 205 (noting that a majority of beer sales go to consumers between the ages of twenty-one and thirty-five); *see also* Nicholas Duva, *Elitism, or Something Else? Millennials and the War on Big Bear*, CNBC (Nov. 8, 2014, 11:00 AM), http://www.cnbc.com/2014/11/07/why-those-elitist-millennials-hate-big-beer.html ("The 21- to 27-[year old] beer drinker is, and always has been, the critical de-

b. Beer Market Concentration

The brewery industry is highly concentrated.[233] The four largest beer producers are responsible for 68.2% of the industry's total revenue.[234] A very highly concentrated industry, for example, is the online search engine market, with only four competitors who accounted for 98.5% of the market in 2012.[235] ABI controls 37.5% of the beer market, and MillerCoors controls 21.5% of the market.[236] The beer landscape has changed over the past years, however, as smaller breweries have penetrated the market with the growing consumer preference for craft beer.[237] The result is that craft breweries have grown by large margins, but the majority of revenues are still earned by premium and other less expensive beer products.[238] Because ABI is divesting SABMiller's 58% stake in MillerCoors in connection with its acquisition of SABMiller, the status quo market shares will stay intact.[239] Notwithstanding the maintenance of the status quo, the market is still highly concentrated.

U.S. antitrust policy is far afield from times past when such market concentration would be quickly condemned.[240] When Pabst acquired Blatz in 1959, the resulting 4.5% market share was grounds for reversing the merger.[241] Today, ABI's substantial 41.2% share is palatable, in large part, because of the gradual increase in concentration foreseen by the Supreme Court in *Pabst Brewing*, which acclimated antitrust authorities to higher concentrations.[242] ABI's market share is similar to U.S. Steel, which the Supreme Court found not to have monopoly power when it commanded 41% of the market.[243] Despite the lack of monopoly power, ABI still may possess the ability to exercise market power through collusion or exclusionary practices as there are only a few major firms.[244] Further, ABI's market share may be higher than 41.2% as the market may be, in fact, narrower than the broad beer market definition used here. Therefore, ABI's high market share weighs in favor of the inference of anticompetitive effect as a result of the merger.

mographic, and they're shifting towards craft . . . I think that there's a move toward innovation, flavor, variety, and all those spell craft . . . .").

233. LOMBARDO, *supra* note 205.

234. *Id.*

235. *Top 10 Highly Concentrated Industries*, IBISWORLD (Feb. 10, 2012), http://news.cision.com/ibisworld/r/top-10-highly-concentrated-industries,c9219248.

236. LOMBARDO, *supra* note 205.

237. *Id.*

238. *Id.*

239. *AnheuserBusch InBev to Divest*, *supra* note 3.

240. *See* United States v. Pabst Brewing Co., 384 U.S. 546, 551–52 (1966).

241. *Id.*

242. *Id.* at 352.

243. United States v. U.S. Steel Corp., 251 U.S. 417, 465 (1920); GAVIL ET AL., *supra* note 29, at 472.

244. *See* GAVIL ET AL., *supra* note 29, at 43; Phil Howard & Ginger Ogilvie, *Concentration in the U.S. Beer Industry* (Aug. 2011), https://msu.edu/~howardp/beer.html.

2. Barriers to Entry and Expansion

Barriers to entry and expansion in the brewery market are high.[245] There are many costs keeping new entrants out of the beer producing business. First, consumers are intensely loyal to their brands, and this competition has increased at a regional level.[246] Breweries must regularly expense ongoing branding costs to compete for loyal beer consumers.[247] But as a result of their own marketing, smaller beer brands are gaining market share from craft beer sales.[248] Nevertheless, the "significant economies of scale achievable in brewing means that large producers can earn enough revenue to spend significant amounts on branding, advertising and other promotions to attract new customers and maintain customer loyalties."[249]

Second and relatedly, entry for small craft breweries, is relatively cheap because they can "lease[] preexisting turnkey facilities and production space."[250] The entrance of craft breweries can be gleaned from the fact that in 2010, there were only 963 breweries, but in 2017, there were 5,922.[251] While the increase in enterprises is dramatic, their ability to increase output or undercut price increases by premium beer monopolists is unlikely due to the high capital requirements of breweries.[252] On the other hand, new entrants who want to start off with large-scale production face high barriers to entry because they must purchase large and expensive manufacturing facilities to start brewing.[253] Further, if the market is more narrowly-defined as premium beer, craft beer entrants could not easily enter for this reason.

Third, as distribution channels are essential to success, new entrants must navigate a highly dense network of long-term distribution contracts with major companies who can operate more profitably than the smaller breweries.[254] To maintain good relationships with distributors, the major breweries also import a large variety of beers, making it more difficult for smaller firms without those foreign partners to secure distribution contracts.[255] The distribution landscape represents a significant barrier. To make matters worse for new entrants, distributors are "heavily regulated and limited on a regional basis."[256] Further, as a

245. LOMBARDO, *supra* note 205.
246. *Id.*
247. *Id.*
248. Beppi Crosariol, *When It Comes to Beer, Megabrand Loyalty is Going the Way of the Stubby*, GLOBE & MAIL (Jan. 7, 2014), https://www.theglobeandmail.com/life/food-and-wine/wine/when-it-comes-to-beer-megabrand-loyalty-going-way-of-the-stubby/article16209931/.
249. LOMBARDO, *supra* note 205.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*

matter of practicality, retailers only have so much room for beer on their shelves and refrigerators.[257]

Fourth, investors prefer larger breweries because they can produce and import a more diverse array of beer products for a safer portfolio.[258]

Fifth, the brewery business must comply with regulations that pose a barrier to many potential entrants.[259] Brewers must gain approval from federal regulators before they can sell beer or brand it with a label.[260]

As a result of all of these factors, barriers to entry and expansion in the beer industry are very high, which weighs in favor of inferring that the merger will result in anticompetitive effects.

3. Price

This Note was unable to acquire ABI's pricing data, so industry data is used as a rough proxy for ABI's pricing. Under the consumer price index (CPI), grocery-store bought beer prices increased 30.2% from 2003 to 2015, whereas beer purchased for consumption outside of the home increased 42.5%.[261] When inflation is taken into account, one would expect a 28.8% increase in prices.[262] Therefore, average beer prices remained steady (because 28.8% is roughly in-between 19% and 42.5%). Other studies show that the price of beer has not changed.[263] These studies show that a pint of beer, when adjusted for inflation, has remained at a steady price of $4.00 since 1983.[264]

One wrinkle with these measures is that they are the price that consumers pay for beer, not the price beer distributors pay to breweries.[265] But one would expect that changes in price for distributors would cause changes in price for consumers. Therefore, this factor does not show a clear historical exercise of market power.

257. *Id.*; Shelving space is thus a market concentration microcosm. *Id.*

258. *Id.*

259. *Id.*

260. Matthew Mitchell & Christopher Koopman, *Trouble Brewing for Craft Beer*, U.S. NEWS (June 3, 2014, 9:35AM), http://www.usnews.com/opinion/economic-intelligence/2014/06/03/craft-brewing-industry-stifled-by-regulation; *see Brewery Qualification*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/beer/qualify.shtml (last visited Sept. 2, 2018).

261. *Consumer Prices for Alcoholic Beverages Since 2003*, BUREAU LAB. STAT. (Dec. 1, 2015), https://www.bls.gov/opub/ted/2015/consumer-prices-for-alcoholic-beverages-since-2003.htm.

262. *Inflation Calculator*, IN2013DOLLARS.COM, http://www.in2013dollars.com/2003-dollars-in-2015?amount=100 (last visited Sept. 2, 2018) (describing an average inflation rate of 2.13% per year from 2003 to 2015 with $100 inflating to $128.81).

263. Alison O'Brien, *The Cost of a Beer: Then and Now*, STATE (Jul. 18, 2016 10:23 AM), http://www.thestate.com/news/databases/article90255907.html.

264. *Id.*

265. *Id.*

4. Conclusions on Beer Industry and ABI-SABMiller Acquisition

To recap, the beer industry is highly concentrated and has high barriers to entry.[266] Additionally, historic prices in the beer industry have not exhibited any signs of supracompetitive profits.[267] The purpose of examining price is to see if there have been any substantial increases in price that might illuminate supracompetitive pricing. Without an unexplainable and dramatic increase in price,[268] however, it is difficult to infer anything from price without "a complete survey of our economic organization and a choice between rival philosophies."[269] In *United States v. Andreas*, a lysine manufacturing cartel raised prices from as low as $0.70 per pound of lysine to $1.20.[270] At one point, the cartel sold lysine for as high as $3.00 per pound.[271] *Andreas* is a good example of a dramatic price increase from which one could infer supracompetitive pricing.[272] In contrast, prices in the beer industry have remained constant.[273] Price, however, is not always indicative of anticompetitive harm; as the Supreme Court has noted, "price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices."[274] Further, it is nearly impossible to determine what price is reasonable or if it is at the actual competitive level.[275]

The fact that the real price of beer has remained stable since the 1980s,[276] while not sufficient to clearly establish supracompetitive pricing, is somewhat curious. It shows that beer prices have been stable for a very long time. Price stability may, in fact, be a result of anticompetitive collusion between breweries, which would only be unlawful under the current antitrust laws if there was an agreement; "parallel but independent decisions to raise prices— [which] may generate even greater profits (compared to competitive pricing) if costs are falling" is not an antitrust violation.[277] Although artificial price stability is not illegal, it is still anticompetitive if it is above the competitive price.[278] Therefore, the fact that beer prices have remained at approximately $4.00 a pint since 1983 shows that competition has not pushed prices down to a more competitive level and that the beer industry is not very competitive on this dimension.[279]

266. *See supra* Section III.A.
267. *Id.*; *see supra* Subsection II.B.4.c.
268. *See, e.g.*, United States v. Andreas, 216 F.3d 645, 652 (7th Cir. 2000).
269. United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927).
270. 216 F.3d at 651–53.
271. *Id.* at 651.
272. *Id.*
273. *See supra* Subsection III.A.3.
274. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 236 (1993).
275. United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927).
276. *See supra* Subsection III.A.3.
277. *In re.* Text Messaging Antitrust Litigation, 782 F.3d 867, 871–72 (7th Cir. 2015).
278. *Id.* at 868–74.
279. *See supra* Subsection III.A.3.

Although thousands of small craft breweries have been setting-up shop over the past several years as craft beer has grown in demand, the barriers to entry are still very high for large-scale operations due to the high plant and equipment costs; therefore, it is unlikely that the increase in quantity of firms necessitates that they have sufficient excess capacity to undercut supracompetitive price increases by ABI because they likely do not have the requisite economies of scale.[280] Plus, by definition, craft brewers may not produce more than six million barrels of beer annually, which necessarily restrains their capacity to compete at the premium-beer company level.[281] Additionally, as the DOJ pointed out in its complaint, building a beer brand is costly as breweries need to secure distributorship contracts, pay for marketing strategies to ensure retailors want to carry the brand, and carry the costs associated with reputation development.[282] Furthermore, some raw ingredients like hops are susceptible to environmental conditions, which may pose serious threats for the ability of smaller breweries to compete with the new ABI giant if these smaller breweries cannot afford higher hop prices due to their lower profit margins.[283] Finally, beer distributors want to buy imported beer along with domestic beer.[284] ABI's acquisition of SABMiller, a foreign brewery, will give it the upper hand in securing contracts from distributors who (1) want to offer imported beers for their customers for product variety reasons and (2) want a more diverse portfolio of beer inventory for risk avoidance reasons.[285] The barriers to entry and expansion remain high.

The divestiture of MillerCoors will leave ABI's beer market share at 41.2%, but the market is already "highly concentrated."[286] In *United States v. Philadelphia National Bank*, the Supreme Court stated "we are clear that 30% presents that threat."[287] Although *Philadelphia National Bank* was decided in 1963 and is, thus, from a different period in antitrust thinking, it is clear that ABI's 41.2% market share should have aroused more antitrust scrutiny.[288] Consider also that if the market was defined more narrowly, *i.e.*, only premium beer rather than beer generally, ABI's market share would likely be significantly larger. A narrower market definition is consistent with the study that showed that macro beer and micro beer are not substitutes of each other.[289] In such a market definition, ABI would probably have a monopoly on premium beer.[290]

280. *See supra* Subsection III.A.2.

281. *Craft Brewer Defined*, *supra* note 211.

282. Complaint at 12–13, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

283. Nigel Hunt & Michael Hogan, *Craft Beer Fans Face Squeeze with Hops in Short Supply*, REUTERS (Apr. 11, 2016, 9:30 AM), http://www.reuters.com/article/us-beer-hops-shortage-idUSKCN0X81OS.

284. LOMBARDO, *supra* note 205.

285. *Id.*

286. Complaint at 10, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

287. 374 U.S. 321, 364 (1963).

288. *See supra* Subsection III.A.1.b.

289. TORO-GONZALEZ ET AL., *supra* note 206, at 15.

290. *See supra* Section III.A.

Further, although ABI's market share will remain the same, its global revenues will increase and may give it the financial wherewithal to fuel brand advertising campaigns to gain market share and push out smaller competitors in, for example, craft beer. One of ABI's express goals is to "premiumiz[e]" their craft beers, which is a repositioning strategy to increase beer prices and gain sales from craft beer drinkers, which may not come with higher quality beer in the case of ABI's brands.[291]

Through a series of recent acquisitions, ABI has bought nine craft breweries, including Goose Island and Elysian.[292] With this flurry of acquisitions in craft beer, antitrust authorities might make out a differentiated products unilateral effects theory against ABI. Specifically, if the craft breweries ABI bought are close substitutes of one another and are price-constraining forces in the relevant market, their acquisitions may violate the Clayton Act.[293] This would be anticompetitive because ABI, for example, could increase the price of one craft beer product and expect to lose some profit from the diversion of marginal consumers, but it would recapture that lost profit from consumers who switched to ABI's other craft beer brand it acquired.[294] Further, and more on point, ABI could raise the price of its beer so that distributors import more beers; and buying beers from SABMiller brands would make out a unilateral effects case because ABI could recapture lost profit from its price increases in the U.S. by imports by SABMiller. Lastly, for consumers who view craft beer as a substitute of premium beer, there may be a unilateral effects theory here, too, because they might switch to ABI's craft beer brands in response to a price increase in its premium beer.

Additionally, the acquisition will give ABI significant efficiencies, which may be harmful to the consumers' interest in maintaining high quality beer with a wide variety of brands.[295] While efficiencies are considered pro-competitive under the U.S. antitrust regime,[296] they have the potential to squeeze-out the many microbreweries that have joined the fray by cutting access to important customers or raw ingredients or flooding the market with their excess capacity (thereby incurring substantial costs to rival craft brewers).[297] Although the premium beer that ABI and other large breweries produce are not highly substi-

291. AB INBEV, FULL YEAR 2015 RESULTS 10 (2016), https://www.ab-inbev.com/content/dam/universaltemplate/ab-inbev/investors/reports-and-filings/quaterly-reports/2016/ABInBev_Full_Year_2015_Investor_
Presentationt_External.pdf. John Kell, *What You Didn't Know About the Boom in Craft Beer*, FORTUNE (Mar. 22, 2016), http://fortune.com/2016/03/22/craft-beer-sales-rise-2015/ ("'Premiumization' is an industry term for the willingness by consumers to spend more money on beers that command higher price points.").

292. John Kell, *Anheuser-Busch InBev Buys 9th Craft Brewer*, FORTUNE (Nov. 3, 2016), http://fortune.com/2016/11/03/ab-inbev-buys-karbach-craft/.

293. *See* United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 55 (D.D.C. 2011).

294. *See Horizontal Merger Guidelines,* DEP'T OF JUSTICE, https://www.justice.gov/atr/horizontal-merger-guidelines-0#22 (last visited Sept. 2, 2018).

295. Complaint at 12–13, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016); *see also supra* Subsection II.A.2.d.

296. ABA ANTITRUST SECTION ON M&A, *supra* note 102, at 229.

297. *See* Hunt & Hogan, *supra* note 283.

tutable with craft beer,[298] these oligopolists may use their capital to switch to, or acquire, craft beer production and undercut the prices of smaller breweries, which is likely given craft beer's growing demand.[299] True, price undercutting is the essence of good competition,[300] but a probable anticompetitive effect is the reduction in product quality and variety by running higher-quality craft brewers out of business. One study found that mergers lead to lower quality, but higher quality for firms that are not merger participants.[301] This phenomenon may be what has been happening in the beer industry: as larger beer companies like ABI have been buying up smaller breweries like Goose Island,[302] more craft breweries have started brewing higher quality craft beer to compete better.[303] The question is whether this, on balance, benefits or harms competition. ABI's efficiencies likely harm competition because the harm caused by a reduction in craft beer variety is greater than the benefit of ABI's efficiencies.

Furthermore, the status quo's market concentration is not insignificant. The top eleven breweries control over 90% of the market.[304] According to the DOJ's estimation, ABI and MillerCoors account for 72% of the market.[305] This concentration suggests that American breweries can relatively easily form a cartel and exercise monopoly power; with fewer major firms, it will be easier for them to "reach consensus on the terms of their collaboration, deter cheating on those terms, and forestall or co-opt new competition."[306] The fact that prices have remained steady for the past thirty years tends to show that there may already be some form of parallel behavior between breweries.[307] Although market concentration will not increase and exclusionary conduct that might cut off competitor's access to customers is prohibited under the settlement,[308] the beer industry is already anticompetitive due to its high barriers to entry and moderate market concentration. In fact, prior to the settlement announcement, the DOJ was investigating ABI based on allegations that it was causing distributors to restrict access to the lifeblood of microbreweries: grocery stores.[309] This

298. *See supra* Subsection III.A.1.a.

299. *Id.*; *see, e.g.*, Nick Hines, *18 Defining Moments in the History of Craft Beer*, VINE PAIR (Feb. 22, 2017), http://vinepair.com/articles/18-most-defining-moments-craft-beer/.

300. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–24 (1993).

301. Kurt R. Brekke et al., *Horizontal Mergers and Product Quality*, 50 CANADIAN J. ECON. 1063, 1074 (2017).

302. Mike Newman, *9 Craft Beers You Didn't Know Weren't Craft Beers*, COOL MATERIAL, http://coolmaterial.com/feature/9-craft-beers-you-didnt-know-werent-craft-beers/ (last visited Sept. 2, 2018).

303. *Small and Independent Brewers Continue to Grow Double Digits*, BREWERS ASS'N (Mar. 22, 2016), https://www.brewersassociation.org/press-releases/small-independent-brewers-continue-grow-double-digits/.

304. Jason Notte, *These 11 Brewers Make over 90% of All U.S. Beer*, MARKETWATCH (Jul. 28, 2015), http://www.marketwatch.com/story/these-11-brewers-make-over-90-of-all-us-beer-2015-07-27.

305. Complaint at 10, United States v. Anheuser-Busch InBev, No. 1:16-cv-01483 (D.D.C. filed July 20, 2016).

306. GAVIL ET AL., *supra* note 29, at 311.

307. *See supra* Subsection III.A.2.

308. *AnheuserBusch InBev to Divest*, *supra* note 3.

309. Diane Bartz, *Justice Department Investigates Beer Industry Anti-Competition Accusations*, WASH. POST (Oct. 12, 2015), https://www.washingtonpost.com/business/economy/justice-department-investigates-beer-industry-anti-competition-accusations/2015/10/12/7dc29502-712a-11e5-8248-98e0f5a2e830_story.html?utm_term=.369b63ff66c0.

backdrop explains the injunctive relief under the settlement,[310] but it nonetheless goes to show the anticompetitive atmosphere in the beer industry.

ABI's permitted acquisition of SABMiller—in a highly concentrated market with high barriers to entry and suspect price stability—can be a catalyst for antitrust law reform. The acquisition exemplifies the need to reassess and amend the antitrust laws of the U.S. The antitrust authorities should narrow their future market definitions for beer as a result of changing consumer preferences. Courts should be wary of the danger of unilateral effects in differentiated products markets like beer. Congress should use its legislative power to tell the DOJ and FTC that they have gone off course and they should consider "keeping a large number of small competitors in business" as another goal of antitrust law.[311]

B. A Critique of Divestiture as a Remedy

Divesture, the process of selling an autonomous competing business unit, is the government's corrective weapon of choice for breaking up horizontal merger plans.[312] Structural remedies, *i.e.*, divestiture, "has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure."[313] One of the major problems of the antitrust regulatory apparatus, however, is that it is often more "corrective" than prophylactic as a whole.[314] Indeed, this was one of the reasons why HSR was passed: because the government would only get involved many years after a merger was consummated, and then force a divestiture after the entity was fully merged and in business.[315] In the 1960s, academics criticized the antitrust laws and enforcement mechanisms as too slow to react to monopolistic trends.[316] As a result, the post-monopoly antitrust remedy was frequently divestiture.[317] At that time, there was entrenched judicial reluctance over ordering divestitures, "especially where 'violations . . . [could] be eliminated by means of the other provisions of the judgment [and] . . . divestiture . . . [was] not necessary to foster competi-

310. *AnheuserBusch InBev to Divest*, *supra* note 3.

> The settlement also prohibits ABI from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals, including high-end craft and import beers. Moreover, the settlement precludes ABI from acquiring beer distributors or brewers – including non-HSR reportable craft brewer acquisitions–without allowing for department review of the acquisition's likely competitive effects.

Id.

311. United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966).

312. *See, e.g.*, *AnheuserBusch InBev to Divest*, *supra* note 3. *But see* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 74 (2015) (rejecting Sysco and U.S. Food's remedial divestiture proposal for their merger).

313. KWOKA, *supra* note 5, at 128 (quoting United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 330–31 (1961)).

314. *Aspects of Divestiture as an Antitrust Remedy*, 32 FORDHAM L. REV. 135, 135 (1963).

315. *See supra* Subsection II.A.2.c.

316. *Aspects of Divestiture as an Antitrust Remedy*, *supra* note 314, at 135.

317. *Id.* ("[D]ivestiture of corporate stocks or assets . . . [is] the epitome of *corrective* antitrust enforcement.").

tion . . . .'"[318] Remedies were sometimes guided by the interpretations of the Sherman era; the original legislative intent behind the antitrust laws was seen as one of "restraint rather than . . . dissolution, except where restraint alone is inadequate."[319] U.S. antitrust authorities should consider exercising similar apprehension with using divestitures as a cure-all.

In *United States v. Microsoft Corp.*, the D.C. Circuit opined, "divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain."[320] Divestiture may not be enough to create a worthy competitor for the surviving merged entity.[321] In *FTC v. Sysco Corporation*, the District Court for the District of Columbia held a divestiture of food distribution centers to the third largest regional distributor, Performance Food Group ("PFG"), as an insufficient merger remedy to effectively compete with the combination of Sysco and U.S. Foods ("USF").[322] The court reasoned:

> PFG's short-term effectiveness will depend in large part on its ability to incorporate the 11 formerly-USF-held distribution centers. Even assuming that PFG can do so seamlessly, the new PFG will have only 35 distribution centers—far fewer than the at least 100 distribution centers owned by the combined Sysco/USF. Having only one-third of the merged company's distribution centers will put PFG at a significant disadvantage in competing for national customers.[323]

In the case of ABI's acquisition of SABMiller, Molson will need to similarly incorporate MillerCoors. Antitrust regulators must engage in an inherently uncertain analysis of anticompetitive effect because, as Section 7 of the Clayton Act states, violations occur when "the effect of such acquisition *may be* substantially to lessen competition, or to *tend to* create monopoly."[324] One major part of that uncertainty is the assumption that antitrust regulators make about market structure.[325] High market concentration and having a high market share are indicators of likely anticompetitive effect in the current antitrust regime,[326] but doing so accurately requires correctly defining the market.[327]

The process for determining the relevant market and allocating shares, however, is fraught with potential error.[328] Defining the relevant market involves determining what goods and services are substitutes, or in other words, what consumers consider interchangeable for their needs.[329] For example, in *United States v. Aluminum Co. of America*, Judge Learned Hand found that the

318. *Id.* (quoting United States v. Gen. Elec. Co., 115 F. Supp. 835, 871 (D.N.J. 1953)).

319. *See id.* at 136 (quoting United States v. Great Lakes Towing Co., 217 F. 656, 658 (N.D. Ohio 1914)).

320. 253 F.3d 34, 80 (D.C. Cir. 2001).

321. *See, e.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1, 74 (D.D.C. 2015).

322. *Id*. at 15, 74.

323. *Id.* at 74.

324. 15 U.S.C. § 18 (2012) (emphasis added); Frankel, *supra* note 115, at 163.

325. GAVIL ET AL., *supra* note 29, at 474.

326. *2010 Guidelines*, supra note 11.

327. Jeffrey T. Macher & John W. Mayo, *Making a Market out of a Mole Hill? Geographic Market Definition in Aspen Skiing*, 6 J. COMPETITION L. & ECON. 911, 912 (2010).

328. GAVIL ET AL., *supra* note 29, at 474.

329. ABA ANTITRUST SECTION ON M&A, *supra* note 102, at 84.

relevant market for aluminum only included virgin ingot, which made the defendant control 90% market share—notwithstanding the fact that scrap aluminum substantially competed with virgin ingot—merely because the company could adjust its output to account for competition in the scrap aluminum market.[330] Had scrap metal been included in the market definition, the defendant's share would have been a much more ambiguous 64%.[331] Critics have called Judge Hand's reasoning "unclear."[332]

A clearer example of an erroneous market definition is *Aspen Skiing Co. vs*. *Aspen Highlands Skiing Corp*.[333] The district court defined the geographic market as the "downhill skiing in the Aspen area."[334] Most would believe, in contrast, that the relevant market is much broader because people come from around the world to ski because they are on vacation and willing to travel.[335] Commentators have called this definition "quizzical" and "perfectly absurd."[336] These cases illustrate that mistakes in market definition are possible and can have powerful effects on the outcome of antitrust lawsuits.[337]

Divestiture also may not adequately respond to the tendency of individuals to engage in collusive behavior after the companies have separated. Adam Smith famously wrote, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[338] Smith highlighted—over two-hundred years ago—the predisposition of competitors to act in concert unlawfully,[339] in what is today a violation of Section 1 of the Sherman Act.[340] In *Bell Atlantic v*. *Twombly*, the U.S. Supreme Court suggested that telephone companies might be engaged in behavior harmful to consumers post-divestiture, albeit not technically illegal in the context of the case.[341] The Court considered the 1984 divestiture of AT&T's local telephone businesses and the Telecommunications Act of 1996, which attempted to break apart the network of regional service monopolies.[342] As a result of AT&T's divestiture, the regional service monopolies did not pursue business opportunities in their competitors' markets.[343] The Court points out:

330. 148 F.2d 416, 425 (2d Cir. 1945).

331. *Id.* at 424 ("[I]t is doubtful whether sixty or sixty-four percent would be enough [to constitute a monopoly].").

332. GAVIL ET AL., *supra* note 29, at 473.

333. 472 U.S. 585, 605–11 (1985).

334. *Id.* at 587.

335. Macher & Mayo, *supra* note 327, at 921.

336. *Id.* at 924.

337. *Id.*

338. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 591 (2007) (quoting Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, *in* 39 GREAT BOOKS OF THE WESTERN WORLD 55 (R. Hutchins & M. Adler eds., 1952)).

339. *Id.*

340. 15 U.S.C. § 1 (2012).

341. *Twombly*, 550 U.S. at 567–68.

342. *Id.* at 548–49.

343. *Id.* at 567.

> But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception.[344]

Although there was no conspiracy in this scenario (at least as far as the Court could tell without discovery), the Court nevertheless submits reasoning that supports the conclusion that a divestiture can lead to anticompetitive effects for consumers: here, it is a set of monopolists who, by virtue of their divestiture, understand how to "live by the sword," as the Court puts it.[345] As former colleagues, the divesture gave the firms' management in *Twombly* the knowledge that "sitting tight, expecting their neighbors to do the same thing," was the best way to maximize their profits in an anticompetitive manner.[346] Although the plaintiffs failed to make it past the pleading stage in *Twombly*, this case shows the effect of being previously combined on the market, post-divestiture.

Consider a company that divests a division or subsidiary in connection with a merger. If individuals in the old company and new company had an understanding before the divestiture, and that understanding persists to influence the policy of the new company, although there has been no agreement with the new company, there is still, in essence, a mutual understanding or in other words, an agreement.[347] True, mere parallel changes, such as multiple firms increasing price on the same day, without additional factors showing agreement, is insufficient to make out a violation of the Sherman Act.[348] But when there is parallel action between previously combined firms, their conduct is fairly characterized as being controlled by an unlawful agreement. It would be reasonable for a fact-finder to determine that parallel actions taken by previously combined firms "tends to exclude the possibility of independent action."[349] Such a conspiracy could usher in the full range of anticompetitive effects against consumers by the company's pre-divestiture, intrafirm collusion, which was then-proper, but would be transformed into harmful collusion post-divestiture. For example, in the ABI divestiture of MillerCoors, officials from both firms might have previously set a policy to reduce output to, therefore, cause a price increase, or to erect barriers to entry and expansion for new entrants and current rivals (*e.g.*, by buying up raw material input firms like barley farmers and exhausting the market). After the divestiture, ABI and MillerCoors will be two distinct competing entities who are, by virtue of their previous combination,

344. *Id.* at 567–68.

345. *Id.* at 568.

346. *Id.*

347. *Contra* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (holding that a corporation cannot conspire with a wholly-owned subsidiary for purposes of Section 1 of the Sherman Act because they share economic interests).

348. Theatre Enterprises v. Paramount, 346 U.S. 537, 541 (1954).

349. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

capable of concerted action. Divestiture, therefore, must be used carefully to ensure it is not a hallow remedy.

C. U.S. Antitrust Merger Policy

There are several aspects of current U.S. antitrust policy that should be acknowledged as potential weaknesses, including underdeterrence, false negatives, and a structural, market-share based approach to analyzing probable competitive effects. First, horizontal mergers often slip through the cracks of antitrust authorities' scrutiny.[350] This may be because antitrust authorities are understaffed and only have the resources to focus on mega-mergers.[351] The merger approval and investigation process has become more expensive and is taking longer to complete because of the increase in e-discovery and econometric analyses.[352] But the unfortunate fact remains that antitrust authorities do not oppose the majority of mergers that result in increased prices.[353] Specifically, "[o]f all mergers that resulted in price increases, the agencies acted in only 38[%] of cases . . . ."[354]

Unfortunately, as smaller and middle-market mergers and acquisitions increase,[355] anticompetitive market share will be consolidated and will likely increase price-fixing tendencies.[356] Indeed, post-merger prices increase on average at a rate of 5.88%.[357] Thus, a major cost of current antitrust policy is underdeterrence. The ABA Antitrust Section reported that between 1950 and 2010, there has been an overall decline in DOJ, FTC, and private antitrust lawsuits.[358] True, some firms also suffer from over-deterrence for fear of antitrust challenges.[359] There are undoubtedly some mergers that would not have an anticompetitive outcome, and indeed, the major policy goal of having rigorous and expensive econometric analyses is to permit such a showing.[360] Nonetheless, antitrust authorities should exercise greater scrutiny before they approve HSR filings.

350. KWOKA, *supra* note 5, at 155.

351. *See* ALBERT A. FOER, THE FEDERAL ANTITRUST COMMITMENT: PROVIDING RESOURCES TO MEET THE CHALLENGE 2 (1999), http://www.antitrustinstitute.org/files/whitepaper_021120071704.pdf.

352. ABA SECTION OF ANTITRUST LAW, CONTROLLING COSTS OF ANTITRUST ENFORCEMENT AND LITIGATION 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.authcheckdam.pdf [hereinafter ABA ANTITRUST SECTION ON CONTROLLING COST].

353. KWOKA, *supra* note 5, at 155.

354. *Id.*

355. *See* Bob Rubino, *10 M&A Trends for the Middle Markets*, FORTUNE (May 4, 2015), http://fortune.com/2015/05/04/10-ma-trends-for-the-middle-markets/.

356. KWOKA, *supra* note 5, at 155.

357. *Id.*

358. ABA ANTITRUST SECTION ON CONTROLLING COST, *supra* note 352, at 1. Although this may be caused by a shift from a DOJ focus on nonmerger conduct and mergers. *Id.*

359. AYAL, *supra* note 101, at 55–57.

360. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007); *see also* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011).

Second, U.S. antitrust policy focuses its efforts on market structure, not market behavior.[361] As mergers affect market structure, merger enforcement has been the touchstone of antitrust policy.[362] The "*main purpose* of Section 7" of the Clayton Act is to "limit mergers that increase market power."[363] Lawsuits require proving market power to break up a merger by showing market share and "deciding whether it is large enough to support an inference of the required degree of market power."[364] The U.S. authorities' reliance on market structure is supported by early studies by industrial organization economists that showed that as market share and concentration increased, "mergers would predictably result in higher profits, prices, and margins."[365] Indeed, one of the basic assumptions in antitrust violation analysis is that *per se* illegal price-fixing is facilitated by having substantial market share.[366] It is true that under the 2010 Horizontal Merger Guidelines, there is no single "uniform application," and it is a "fact-specific process"; indeed, the Guidelines recognize that competition can be retrained by "coordinated, accommodating, or interdependent behavior among rivals."[367] In practice, however, determining whether there will be an anticompetitive effect as a result of a merger hinges on structural issues, *i.e.*, market share; thus, the preferred remedy is divestiture because, to antitrust regulators, it is easy and fixes high market share.[368] The DOJ's preference is captured by the following statement: "In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions."[369] Scholars have noted that under HSR, there is a "de facto regulatory regime of merger approval . . . [that] consider[s], *ex ante*, the likely structural consequences of a merger . . . ."[370] The structural screening process under HSR is imprecise and does not catch all of the anticompetitive mergers.

Additionally, market concentration is not a foolproof indicator of anticompetitive effects.[371] Some mergers that resulted in high concentration have been good for competition and others bad, flying in the face of statistical models.[372] For example, studies have shown that some highly concentrated mergers

361. Alfred E. Kahn, *The Relevance of Industrial Organization in* INDUSTRIAL ORGANIZATION, ANTITRUST, AND PUBLIC POLICY 3 (John V. Craven ed., 1983).

362. Willard F. Mueller, *The Anti-Antitrust Movement in* INDUSTRIAL ORGANIZATION, ANTITRUST, AND PUBLIC POLICY 22 (John V. Craven ed., 1983).

363. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) (emphasis added).

364. *Id.* at 938.

365. KWOKA, *supra* note 5, at 40.

366. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10 (1979) (holding that a literal price fixing arrangement in a de facto duopoly should be analyzed for its reasonableness in whether it restrains trade, signaling the Court's shift in its jurisprudence to economic analysis and market share); *see also* GAVIL ET AL., *supra* note 29, at 142.

367. *2010 Guidelines*, *supra* note 11.

368. 2011 MERGER REMEDIES, *supra* note 147, at 6.

369. *Id.* at 2.

370. Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 52 (2008).

371. KWOKA, *supra* note 5, at 41.

372. KWOKA, *supra* note 5, at 41.

actually resulted in less tacit collusion.[373] The majoritarian American perspective is that higher market concentration is not a bad thing; rather, it is a sign of good company policies.[374] An illustrative example is the proposed merger of Heinz and Beech-Nut: a horizontal merger between the second and third biggest producers of baby food in the U.S.[375] Although the market was highly concentrated—Heinz possessed 17.4% market share and Beech-Nut had 15.4%, and the leader in the market, Gerber, had 65% market share—observers note that, on balance, significant efficiencies would have been gained for consumers.[376] The Beech-Nut plant was decaying and the dowry Heinz offered was newer, more efficient facilities with excess capacity.[377] Combination would have reduced production costs by 10.48%.[378] Economists suggest that more than half of this 10.48% cost reduction would have been passed on to consumers as a result of the more concentrated market post-merger.[379] The D.C. Circuit ultimately denied the merger because Heinz could not produce sufficient evidence of procompetitive efficiencies to overcome the high market concentration.[380] The appropriate weight of market share should thus be reassigned a more nuanced role in merger review to allow procompetitive mergers to pass through while ensuring that anticompetitive mergers do not pass go simply because market concentration shows a likelihood that the merger is kosher.[381]

D. Europe's Antitrust Policy

Eighty-four countries have passed antitrust laws to combat the problem of anticompetitive restrictions on trade.[382] This Section provides a comparative overview of Europe's antitrust laws and suggests potential takeaways. The United States' antitrust laws could be improved by implementing a more robust anti-conglomerate merger review like the European Commission's and by protecting smaller competitors under the aegis of antitrust law.

European and American antitrust law ostensibly adhere to the same basic concepts of competition and are "broadly similar."[383] In practice, however, Europe's laws are applied differently.[384] Europe's foundational antitrust law is the 1957 Treaty of Rome, and it tracks the language of the Sherman Act.[385] In 1989, the European Union ("E.U.") adopted its version of the Clayton Act for

373. GIFFORD & KUDRLE, *supra* note 119, at 40 (citing JOE S. BAIN, INDUSTRIAL ORGANIZATION (1968)).
374. *Id.*
375. FTC v. H.J. Heinz Co., 246 F.3d 708, 711–12 (D.C. Cir. 2001).
376. *Id.* at 711; GIFFORD & KUDRLE, *supra* note 119, at 49.
377. GIFFORD & KUDRLE, *supra* note 119, at 50.
378. *Id.* This figure is "measured against the output of the combined entity." *Id.*
379. *Id.*
380. *Heinz*, 246 F.3d at 720.
381. GIFFORD & KUDRLE, *supra* note 119, at 40.
382. XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW 10 (2014).
383. GIFFORD & KUDRLE, *supra* note 119, at 1.
384. *Id.*
385. *Id.* at 1–2.

merger regulation.[386] Antitrust scholars explain the divergence between the largely similar laws:

> The relative absence of the residue of feudalism left the American Republic largely free of both reactionary and revolutionary impulses. The convulsive history of Europe since the French revolution has generated a far broader array of basic postures toward government and its role in the economy, both within states and among them.[387]

Although European regulators assert their analyses are informed purely by economics, there is still divergence between the parallel regimes.[388] One major difference between European and American antitrust law stems from America's capitalist foundations.[389] The prevailing perspective in the American system is that monopoly, in and of itself, is not an anticompetitive evil unless there has been "exclusionary conduct," *i.e.*, "conduct that makes no economic sense but for its tendency to eliminate or lessen competition."[390] The E.U., by contrast, has a broader framework that prohibits "abuse by one or more undertakings of a dominant position."[391] The European view is that there is "a special responsibility not to allow [firm] conduct to impair genuine undistorted competition in the common market."[392] The E.U.'s broader standard makes short work of possible procompetitive efficiencies that would be available defenses under an American rule of reason analysis.[393] The benefit of the E.U.'s broader rule is that a dominant firm with significant market share, who would otherwise be able to maximize its wealth (*i.e.*, producer surplus) at the cost of consumer and competitor wealth, would be constrained from doing so.[394]

In the U.S., by contrast, when producer surplus is increased, there may be sufficient efficiencies gained in the aggregate to justify whatever constraint may be involved (*e.g.*, a horizontal merger between competitors) to save the deal.[395] This is often the case when a Republican controls the White House.[396] Some American economists believe that the European perspective is "fatally flawed" because the efficiencies gained from producer surplus (*e.g.*, becoming more profitable by reducing management costs from a merger) drive innova-

386. *Id.* It is called the Merger Regulation of 1989 and was revised in 2004. *Id.*

387. *Id.* at 3.

388. *Id.* at 40.

389. *See* William A. Galston, *The U.S. is Still a Capitalist Country*, BROOKINGS (Mar. 11, 2009), http://www.brookings.edu/opinions/the-u-s-is-still-a-capitalist-country/. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (5th ed. 1904) (1776).

390. Alden F. Abbott, *A Brief Comparison of European and American Antitrust Law*, U. OF OXFORD CTR. FOR COMPETITION L. & POL'Y (Feb. 2005), http://www.law.ox.ac.uk/sites/files/oxlaw/cclp_1_02-05.pdf.

391. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) 47, 89.

392. Abbott, *supra* note 390 (citing Case 322/81, NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities, 1983 E.C.R. 3461).

393. *See id.*

394. *See id.* at 11.

395. *See id.*; Broad. Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20 (1979) (finding no antitrust violation for a monopoly because of the procompetitive efficiencies gained by making available a unique product otherwise unavailable to consumers).

396. *See* GIFFORD & KUDRLE, *supra* note 119, at 48.

tion.[397] These economists believe that improving total aggregate surplus (the "surplus" or wealth of both consumers and producers), whether or not it also improves consumer surplus, too, is a proper objective of antitrust law.[398] Ultimately, arguments over whether efficiencies, or benefits to consumer surplus, can save a merger with predictably anticompetitive effects are not clear cut winners or losers; instead, courts utilize "a kind of 'sliding scale': if there is a prospect of market power increase then there must be a likelihood of a compensating decline in marginal cost so that price does not rise."[399] Additionally, they justify "aggressive market leader" conduct because it helps push out inefficient firms and "reallocat[es] . . . scarce resources to higher valued uses . . . ."[400] Ultimately, American and E.U. authorities both agree, however, that increasing producer surplus through cost-savings gained by mergers is improper when it is combined with unnecessarily higher prices.[401]

Merger review between the U.S. and Europe is also somewhat divergent.[402] European competition officials "weigh seriously competitor's complaints."[403] In contrast, American antitrust is "concern[ed] with the protection of competition, not competitors."[404] Antitrust authorities are generally skeptical of competitor objections because they "may be expected to oppose transactions that render the merging parties relatively more efficient than the complainers," and therefore require compelling evidence that the complaining competitor is offering legitimate pro-consumer arguments to consider them.[405]

European authorities are also "more willing to accept theories of harm in the absence of hard facts" under their broader antitrust regime in what are called "possibility theorems."[406] In contrast, American authorities deploy a heavy econometric analysis to permit the reasonable inference of anticompetitive effects.[407] Critics call Europe's wider array of anticompetitive evidence "dubious."[408]

Any discussion regarding the differences between U.S. and E.U. antitrust policy cannot be replete without a discussion of the General Electric ("GE")

397. Abbott, *supra* note 390, at 11.

398. *Id.*

399. GIFFORD & KUDRLE, *supra* note 119, at 49.

400. Abbott, *supra* note 390, at 11.

401. GIFFORD & KUDRLE, *supra* note 119, at 41.

402. Abbott, *supra* note 390, at 17.

403. *Id.* at 14.

404. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

405. Abbott, *supra* note 390, at 14.

406. *Id.* at 15.

407. *Id.*; *see also Filing Fee Information*, FED. TRADE COMM'N (Jun. 6, 2016), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information (requiring an expensive fee of $45,000 for mergers valued between $78.2 million and $156.3 million, $125,000 for mergers between $156.3 million and $781.5 million, and $280,000 for mergers over $781.5 million). *See generally* Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* (Stan. L. & Econ. Olin, Working Paper No. 328, 2006).

408. Abbott, *supra* note 390, at 15.

and Honeywell proposed merger.[409] The deal was a conglomerate merger with complementary products of jet engines and avionics.[410] In 2001, European enforcers famously prohibited the merger because of "'mixed bundling' discount plans and future possible vertical foreclosure," which might have forced some competitors to leave the market.[411] On the other side of the Atlantic, however, the GE/Honeywell merger was approved.[412] European authorities employed "portfolio effects theory" to show anticompetitive harm resulting from conglomerate mergers,[413] which are largely considered harmless by U.S. antitrust regulators.[414] The European Commission's winning theory was that the jet engines and avionics would be offered in a bundled product, and rivals would be unable to compete with their complementary product package.[415]

The range of unlawful anticompetitive harm, in Europe's eyes, incorporates harm to competitors; the portfolio effects theory postulates that, if GE/Honeywell became a "more effective competitor[]," it would be dangerous for consumers.[416] Portfolio effects occur when complementary goods or services are available at potentially a lower cost, but also are subject to anticompetitive effects such as tying or bundling that constrain consumer choice.[417] In the long run, such effects that make the firm more effective at competition will be the ruin of market rivals.[418] Fewer rivals means fewer products or services for consumers; it also means more market power for the conglomerate firm, and more market power may mean supracompetitive pricing. Thus, one goal of European antitrust law is to protect smaller firms.[419] Incidentally, European antitrust authorities also see gargantuan firms as a "political threat."[420]

Although there have been updates to the E.U.'s merger policies to bring them in line with American policy, including taking post-merger efficiencies more seriously, European authorities still scrutinize conglomerate mergers more than their American counterparts.[421]

In contrast, the DOJ stated that using portfolio effects (or "range effects" as it calls them) as a basis for conglomerate merger approval was too specula-

409. *See generally* Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME (Jul. 8, 2001), http://content.time.com/time/business/article/0,8599,166732,00.html.

410. GIFFORD & KUDRLE, *supra* note 119, at 58–59.

411. Abbott, *supra* note 390, at 15.

412. Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST (Cover Stories, Berkeley, CA), Fall 2001, at 18.

413. *Id.*

414. *See* U.S. DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES 24–25 (1984), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf (considering market concentration as a factor when evaluating conglomerate mergers, which essentially neutralizes possible harmful effects from the U.S. standpoint).

415. GIFFORD & KUDRLE, *supra* note 119, at 58–59.

416. Patterson & Shapiro, *supra* note 412, at 18.

417. ORG. FOR ECON. CO-OPERATION & DEV., PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS 1 (2001), http://www.oecd.org/competition/mergers/1818237.pdf.

418. *Id.*

419. GIFFORD & KUDRLE, *supra* note 119, at 40.

420. *Id.*

421. *Id.* at 59–60.

tive because it "require[ed] making guesses about the future conduct of the merged firm, its customers and its rivals . . . ."[422] The DOJ's reticence to update the 1984 Non-Horizontal Guidelines underscores the divide between the two jurisdictions.[423] Additionally, American antitrust authorities are inclined to reject portfolio effects theory because a core American antirust pillar is that it is "concern[ed] with the protection of competition, not competitors."[424] Although competitive pricing should remain the goal of antitrust law, U.S. antitrust authorities should consider protecting competitors as a *means* to an end like their European counterparts, despite the degree of speculation that might be required.

IV. RECOMMENDATION

Although divestiture is often the *sine qua non* of antitrust merger remedies,[425] U.S. antitrust authorities often combine divestiture with other remedies such as ABI's prohibition on excluding rivals' beer with their independent beer distributors.[426] Broadly, these remedies include stopping the merger altogether, a consent decree, or a "fix-it-first" remedy that modifies the transaction to preserve competition.[427] Conduct remedies typically prohibit business behavior after the merger is consummated.[428] Additionally, courts and antitrust litigants should feel obligated to implement whatever measures are necessary, on a case-by-case basis, to preserve competition. The necessity of employing effective remedies is a vital component of antitrust law, especially as the rate of mergers and acquisitions rise.[429]

Antitrust authorities should *continue* to make merger approval contingent on contractual remedies crafted on a case-by-case basis according to the circumstances of the industry.[430] Currently, the DOJ's merger remedy guiding principles are: "First, effectively preserving competition is the key to an appropriate merger remedy. Second, the remedy should focus on preserving competition, not protecting individual competitors. Third, a remedy needs to be based on a careful application of legal and economic principles to the particular facts

422. *Id.* at 58 (quoting U.S. DEP'T OF JUSTICE, RANGE EFFECTS: THE UNITED STATES PERSPECTIVE 4 (2001), https://www.justice.gov/sites/default/files/atr/legacy/2015/01/26/9550.pdf).

423. *Id.* at 61.

424. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

425. *See supra* Section III.B.

426. *See AnheuserBusch InBev to Divest*, *supra* note 3; s*ee also* KWOKA, *supra* note 5, at 115 (finding seven instances of divestiture and five conduct or condition remedies in a study); U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (Oct. 2004), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf [hereinafter 2004 MERGER REMEDIES].

427. 2004 MERGER REMEDIES, *supra* note 426, at 26–30.

428. 2011 MERGER REMEDIES, *supra* note 147, at 6.

429. *See* Lam, *supra* note 2.

430. 2011 MERGER REMEDIES, *supra* note 147, at 2 ("Mergers come in a wide variety of shapes and sizes. As a consequence, effective merger remedies also come in a wide variety of shapes and sizes."); FED. TRADE COMM'N, *supra* note 6, at 1 ("Each merger is unique, however, and any proposed remedy is evaluated on the particular facts of the case.").

of a specific case."[431] These goals are well-calibrated to the primary goal of preserving competition and well-balanced with the need to maintain some flexibility in crafting a proper merger remedy. As a new U.S. executive has taken office with a different approach to governance—with known tendencies toward deregulation—it is worth stating that a continuation of the current policy is advisable.[432] Contractual remedies should be geared toward the ultimate goal of achieving a competitive price equilibrium. To that end, settlements and consent decrees should focus on lowering barriers to entry and expansion, hindering price-fixing practices and effects, maintaining product quality, and maintaining an adequate rate of innovation. For example, in the ABI and SABMiller merger, ABI had to agree to avoid creating barriers to entry and expansion.[433] ABI was "prohibit[ed] . . . from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals[.]"[434] This contractual remedy "preserve[d] the ability of smaller brewers . . . to compete against ABI by protecting their access to important distribution networks."[435]

Additionally, divestiture as a remedy should *continue* to involve safeguards against post-divesture hamstringing.[436] These safeguards include "hold[ing] separate provisions, provisions for operating, monitoring and selling trustees, and the right to disapprove a proposed purchaser."[437] Holding separate provisions ensure that the divested entity is "separate, distinct, and saleable" to maintain the "independence and viability" of the disposed business.[438] This often includes an "asset preservation clause," which sustains the value and goodwill of the divested assets.[439] Operating trustees ensure that the divestiture genuinely preserves competition.[440]

The antitrust remedy regime can, however, be improved. For divestiture, the divested business and the newly merged entity should be monitored to ensure they are not colluding. As previous business partners, there may be an incentive to illegally conspire to restrain trade. As a practical matter, a consent decree could require very harsh penalties for future collusion. Additionally, enforcement might consider making available very lavish whistleblower prizes to detect antitrust violations for newly divested business units.

431. 2011 MERGER REMEDIES, *supra* note 147, at 2.

432. *See, e.g.*, Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, THE ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007/.

433. *AnheuserBusch InBev to Divest*, *supra* note 3.

434. *Id.*

435. *Id.*

436. 2011 MERGER REMEDIES, *supra* note 147, at 25.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at 26.

A whistleblower program has been suggested in the past.[441] It could mirror the substantial Office of the Whistleblower for the U.S. Securities and Exchange Commission.[442] Whistleblowers could rat out their bosses and provide evidence of concerted behavior between the recently separated firms. Additionally, an antitrust whistleblower program would have the potential to reveal exclusionary trade practices and artificial barriers to entry that tamper on competition. For example, if ABI circulates a high-level internal memo stating an inintention to acquire barley and hop producers and to only engage in exclusive contracts—with the express purpose of restricting access to rivals, thereby increasing rivals' cost of barley and hops—then an ABI employee could file a whistleblower claim with the DOJ or FTC for monopolization.[443] True, "exclusive dealing arrangements are not *per se* unlawful," but they can be anticompetitive and illegal when they are used by a dominant firm to "maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors."[444] Thus, exclusive dealing contracts should be covered by the whistleblower program despite their potential for nonliability. In return for the whistleblower's insider information, he or she might receive a financial prize or leniency in future prosecution. Additionally, the whistleblower program would make it illegal to fire employees who use the program.

The practice of divestiture should not be discontinued. It should not be a rubber stamp of antitrust merger approval, however, as it has been in times past.[445] Divestiture should be carefully monitored with whistleblowers and market analysis to ensure firms are acting competitively after the merger. Additionally, antitrust authorities should employ a more thorough approach in their analysis of the costs and benefits of the proposed divestiture and subsequent merger. Although the cost of econometric analyses is costly, it is worth devoting more resources to the FTC and DOJ to more rapidly and accurately determine the anticompetitive effects of a merger.[446] Legislation could be put in

441. Ari Yampolsky, *Whistleblowers in Antitrust Enforcement: Has the Time Come?*, CONSTANTINE CANNON (Sept. 28, 2015), http://constantinecannon.com/whistleblower/whistleblowers-in-antitrust-enforcement-has-the-time-come/#.WMhs0fnytPY.

442. *Office of the Whistleblower*, SEC, https://www.sec.gov/whistleblower/ (last visited Sept. 2, 2018).

443. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Id.; *see, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 821 (11th Cir. 2015).

> Internal documents reveal that McWane's express purpose was to raise Star's costs and impede it from becoming a viable competitor. McWane executive Richard Tatman wrote "[w]e need to make sure that they [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return."

McWane, Inc., 783 F.3d at 821.

444. *McWane*, 783 F.3d 814, 832 (11th Cir. 2015) (emphasis added).

445. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961) ("[I]t is appropriate to review some general considerations concerning that most drastic, but most effective, of antitrust remedies—divestiture.").

446. ABA ANTITRUST SECTION ON CONTROLLING COST, *supra* note 352, at 2.

place expanding HSR to investigate past antitrust complaints more thoroughly and survey vertically aligned firms to see if there are exclusionary practices limiting access to inputs or outputs instead of focusing on market structure. Alternatively, the depth of the current approach may be sufficient, but it may be worth hiring more antitrust attorneys to cast a wider net and to examine more potential violations of Section 7 of the Clayton Act for pending and past merger activity. In the same vein, state governors might consider devoting more resources to enforcing their respective antitrust laws to both decrease the workload of the federal government and to reduce the occurrence of false positives and negatives that slip through the cracks of federal enforcement. Additionally, state enforcement agencies should collaborate more with the federal government and outside economic watchdogs and think tanks.[447]

The European antitrust system also offers an attractive alternative to the American antitrust policy goal of protecting competition, not competitors because of changing societal preferences toward smaller businesses.[448] Americans today want marketplaces with numerous small businesses.[449] Big businesses are no longer in favor.[450] In fact, a Gallup poll found that 60% to 70% of Americans have substantial confidence in small businesses whereas the figure is only 21% for big businesses.[451] Thus, Europe's greater willingness to protect smaller competitors from abuse by dominant firms is more aligned with contemporary American society's opinions on the economy.[452] American antitrust laws should, therefore, be recalibrated to meet the economic goals of its people. Congress could pass a new antitrust law allowing harm to competitors to be a cognizable antitrust injury. Such a law would emphasize the necessity of a "critical mass" of smaller businesses for a robust marketplace of high quality and diverse products and services.[453] This law could be enforced by tearing down barriers to entry through injunctive relief. Further, Congress could pass an amendment that brings antitrust scrutiny back to its original populist vision that was touched on in *Von's*.[454] Additionally, U.S. antitrust regulators should take conglomerate merger review more seriously; a conglomerate merger, although without effect on market concentration, may nonetheless harm consumers by harming competitors.[455]

447. *See, e.g.*, CONSUMER WATCHDOG, http://www.consumerwatchdog.org/ (last visited Sept. 2, 2018); AM. ANTITRUST INST., http://www.antitrustinstitute.org/ (last visited Sept. 2, 2018).

448. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); GIFFORD & KUDRLE, *supra* note 119, at 40.

449. Andrew Dugan, *Americans Still More Confident in Small vs. Big Business*, GALLUP: ECON. (Jul. 6, 2015), http://www.gallup.com/poll/183989/americans-confident-small-big-business.aspx.

450. *Id.*

451. *Id.*

452. Abbott, *supra* note 390.

453. *See* Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

454. United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966).

455. *See supra* Section III.D.

V. CONCLUSION

ABI's permitted acquisition of SABMiller brings U.S. antitrust into question.[456] Although the beer market's concentration in the U.S. will not increase, global brewery concentration will surely rise as the top two global producers of beer combine.[457] There may also be substantial unilateral effects as beer is a differentiated product market. The combination comes in an industry with high barriers to entry as there are high capital costs and expensive branding requirements of beer.[458] The DOJ let the merger go through because market concentration will not increase and ABI will not be able to cut off distribution access to its rivals.[459] But surely there is more at play. There are other barriers that ABI can use against its competitors such as the high branding costs and access to inputs.[460] With the acquisition, ABI will have a colossal competitive advantage that will likely force many breweries out of the market as their costs increase. In the end, consumers will have fewer beer options and prices may increase; or prices might remain at their suspiciously stable price, which might already be supracompetitive.[461]

Market structure and divestiture should be de-emphasized in U.S. antitrust analysis. The DOJ and FTC should refocus Section 7 Clayton Act merger remedies on contract remedies and other tailor-made correctives. In doing so, they should pay attention to the barriers to entry and expansion that might prevent firms from undercutting supracompetitive price increases. Additionally, Congress should consider enacting legislation that empowers antitrust authorities to payout prizes to whistleblowers to enhance detection. Further, Congress might take a lesson from Europe and bring into law a new antitrust policy goal of protecting smaller rival businesses from dominant firms to preserve product variety and quality. For mergers, remedies need to be re-prioritized so that merely divesting assets with a few conduct prohibitions will not be perceived as a sufficient prophylactic to win antitrust approval. Merging parties should be on notice that they need to do more than preserve market share-based competition. Antitrust authorities should endeavor to keep the markets open for smaller businesses to thrive and restrain undue market power.

456. *AnheuserBusch InBev to Divest*, *supra* note 3.
457. *Id.*
458. *See supra* Subsection III.A.2.
459. *AnheuserBusch InBev to Divest*, *supra* note 3.
460. *See supra* Subsection III.A.2.
461. *See supra* Subsection III.A.3.