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Keynote Address

Prepared Remarks of Chairman Andrew N. Ferguson*

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Thank you, Julián, for that kind introduction. I am grateful to the International Bar Association, and the conference organizers, for the invitation to speak to you all today.

I'd like to begin by reflecting on the significance of our venue for enforcers of competition law. Florence is not only the birthplace of the Renaissance but also the birthplace of mercantile capitalism.[1] In the late thirteenth and fourteenth centuries, the Florentines invented "double-entry bookkeeping, marine insurance, partnership with branches, holding companies, bills-of-exchange" and developed an international-banking network that stretched outward to France and London.[2] Combined with its famed republicanism, Florence's emerging mercantile capitalist system fostered "expansive liquidity and growth" that enabled greater numbers of its citizens to participate in its social, economic, and political elite.[3]

Like most economic revolutions, the power and wealth of the newly minted Florentine "elite" eventually provoked significant popular discontent, culminating in the rise of a political faction led by one of Europe's most famous reformers: the Dominican friar Girolamo Savonarola. Savonarola did not preach against the acquisition of wealth but rather raged against the Florentine elites' refusal to distribute the benefits of that wealth to the commons.[4] In a word, he wished to retrieve Florentine republicanism from the grips of a corrupt Florentine elite.

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

[1] Paul D. McLean & John F. Padgett, Was Florence a Perfectly Competitive Market? Transactional Evidence from the Renaissance, 26 Theory & Soc'y 209, 209 (1997).

[2] *Ibid.*

[3] John F. Padgett & Paul D. McLean, Economic Credit in Renaissance Florence, 83 J. Modern Hist. 1, 2 (Mar. 2011).

[4] Girolamo Savonarola, Selected Writings of Girolamo Savonarola Religion and Politics, 1490-1498, 197–198 (Donald Beebe, Anne Borelli, & Maria Pastore Passaro eds., 2006).

Ultimately, Savonarola succeeded in his attempts to introduce republican reforms in the city of Florence.[5] But it was short-lived. His excesses led to his immolation just a few blocks from here.

But fellow Florentine Niccolo Machiavelli drew an important lesson from Savonarola's populism. The people "desire neither to be commanded nor oppressed by the great," while the elites "desire to command and oppress the people."[6] From this, Machiavelli concluded that an aspiring ruler would do better to establish his rule by an alliance with the people, as Savonarola did, rather than the elite.[7] That is, a government aimed at pleasing the people, rather than the elites, is more likely to achieve success.

This lesson is relevant to contemporary antitrust enforcement. As enforcers of competition law, we exercise coercive power over actors in the marketplace, but our role is a *limited* one: to protect the people from anticompetitive behavior in the marketplace. Just as our job is *not* to protect the interests of those businesses we regulate, so too our job is *not* to shape markets in accord with our own ideological visions or partisan preferences. Enforcers of competition law should resist the "elitist" temptation either to take a cribbed view of our role and defer to the judgments of the C-Suite, or to take a more expansive view of our power and try to plan the economy from our conference rooms. Instead, we should embrace the American founders' more "populist" vision of a restrained government.

To do so, I think, we need a greater appreciation of the virtue of prudence. Not prudence in the sense of being overly cautious or timid, as it is sometimes thought of today, but the classical view of prudence as a moral virtue by which one identifies, selects, and executes the best means to one's end.[8] It is the virtue by which we can recognize the various constraints and tradeoffs that help us make the best enforcement decisions given present circumstances.

Today, I'd like to offer some thoughts on what it means to exercise prudence as enforcers of competition law and apply those principles to a specific example we confront all the time: vertical transactions.

Prudence as a Virtue

For Aristotle, the prudent man is the one who can give good counsel to others, not just in this or that domain, but in everything that one needs to live a good life.[9] True prudence is not individualistic; instead, one cannot attain one's own good without seeking what serves the good of

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[5] Alison Brown, Introduction to Selected Writings of Girolamo Savonarola Religion and Politics, 1490-1498, xxiv (Donald Beebe, Anne Borelli, & Maria Pastore Passaro eds., 2006).

[6] Niccolo Machiavelli, The Prince, IX, 39 (1532) ("The people … will support the prince as long as he protects them from the elite. They want only not to be oppressed, whereas elites have an appetite to dominate, to oppress, an appetite that is insatiable. The people's desire not to be dominated can be satisfied. Thus, a prince should build his state on those whose demands he can meet.").

[7] *Ibid.*; John P. McCormick, Machiavellian Democracy: Controlling Elites with Ferocious Populism, 95 Am. Pol. Sci. Rev. 297, 298 (June 2001).

[8] Thomas Aquinas, Summa Theologiae II–II, Q. 47, Arts. 6 (including ad 3) & 7 ("Aquinas Summa Theologiae").

[9] Aristotle, Nicomachean Ethics 1140a (D.P. Chase trans.).

one's family and nation.[10] To be a good man or a good woman, one must identify, select, and execute the means most fitted to achieve the flourishing of one's family and nation; that is, one must exercise both domestic and political prudence.[11]

In this regard, prudent enforcement of competition law must proceed not only from a knowledge of the common good of one's nation, but also a love for one's nation. Prudence is only ever about perfecting the means to some pre-determined end. It is *because* we love the common good of our nation that we deliberate about how to achieve and sustain the flourishing of our citizens. Thus, when we think about enforcing competition law, we must keep in mind its *purpose*, namely, to promote the well-being and flourishing of our nation and her citizens. Our laws aim to promote free, fair, and competitive markets *because* long experience has taught us that such a free-enterprise system incentivizes citizens to be productive, innovative, and profitable for every citizen: the laborer as much as the merchant, the farmer as much as the banker.

But too often, some in America at least, lose sight of the purpose of the free-enterprise system. Becoming habituated to the avaricious practices of unscrupulous men and the rootless intellectuals who defend them, we begin to treat profit-seeking itself as the *end* of a political economy rather than the *means* by which we promote the general welfare of our nation's citizens. And as a *means*, profit-seeking must be calibrated to ensure that it serves our citizens rather than reducing them to mere instruments of another's gain. When profit-seeking stimulates production, innovation, and competition among our citizens, it promotes their common flourishing and the well-being of their nation. But when it does not, the profit-seeking motive must be restrained and regulated. Our antitrust and consumer-protection laws are a species of moral restraint, designed to channel the profit-seeking motive into the moral ends of a political economy—the common flourishing of all citizens.

Now, this is not to suggest that profit-seeking is something everywhere and always bad. Far from it. America's free-enterprise system has produced the greatest nation, the strongest economy, and the most innovative and dynamic business culture in the history of the world. It has lifted countless millions from poverty. Liberation from poverty in turn promotes individual, and therefore collective, virtue. As Aquinas explained, man must have sufficient wealth to live becomingly,[12] and the material goods sufficient to live becomingly free men to pursue true virtue.[13] I therefore do not denigrate the profit-seeking motive, because it has helped provide the material comfort that in turn promotes civic and private virtue. I suggest only that Americans must always recall that it is a tool to advance the common good of all, not an object intrinsically worthy of pursuit. After all, even Adam Smith—the patron saint of the libertarian opponents of antitrust enforcement—recognized that monopoly is an enemy of the common good.[14] His solution was not

[10] Aquinas Summa Theologiae at II–II, Q. 47, Art. 10 ad 2.
[11] *Id.* at II–II, Q. 47, Art. 11.
[12] *Id.* at II–II, Q. 32, Art. 6.
[13] Thomas Aquinas, Summa Contra Gentiles, bk. III, ch. 133.
[14] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, bk. IV, ch. II, 191 (1776), https://www.gutenberg.org/files/38194/38194-h/38194-h.htm ("The legislature, were it possible that its deliberations could be always directed, not by the clamorous importunity of partial interests, but by an extensive view of the general good, ought, upon this very account, perhaps, to be particularly careful, neither to establish any new monopolies of this kind, nor to extend further those which are already established.").

to restrain profit-seeking, but to expand the number of individuals and businesses seeking profits in that monopolized industry.[15]

As enforcers of competition law, then, prudence requires us to examine when business practices, motivated by profit, are unlikely to promote the common good of all. And while lawmakers provide us with general principles of enforcement, applying those principles to particular cases often proves difficult. There is an element of indeterminacy here, at least under American antitrust laws, that calls for enforcers of competition law to exercise prudence in identifying, selecting, and executing sound enforcement strategies consistent with the purpose of the antitrust laws—ensuring that the profit-seeking motive remains oriented toward achieving the common good of each and every citizen.[16]

Since the principal end for an enforcer of competition law is to protect competitive marketplaces and the collective benefits that they generated, prudent enforcement of competition law requires one to consider which of his available tools—litigation or settlement in the U.S. context—would be most effective in protecting competition in the relevant market.[17] For a potential merger, prudence requires careful investigation of the facts of the merger and its likely effects on the competitive marketplace. If that investigation demonstrates that the merger will not substantially impair competition, the enforcer's decision is simple: he just needs to get out of the way.

But not every case is that simple. In fact, the most important ones rarely are. In many cases, what you find is that the merger will likely produce some procompetitive effects and some anticompetitive effects. The challenge of enforcement in these circumstances is to determine whether one can disentangle the two, and if so, whether a proposed remedy will provide the same level of protection to competition as would a successful litigation. The answer to that question will turn on an assessment of several interrelated inquiries: whether a settlement will effectively cure the anticompetitive harm associated with the merger; the enforcer's likelihood of success in bringing the litigation at all; and the potential harm to consumers and potential consequences to the agency's enforcement mission going forward should the court deliver an adverse ruling.[18] The

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[15] *Id.* at bk. II, ch. V, 148 ("The capital, therefore, which can be employed in the grocery trade, cannot exceed what is sufficient to purchase that quantity. If this capital is divided between two different grocers, their competition will tend to make both of them sell cheaper than if it were in the hands of one only; and if it were divided among twenty, their competition would be just so much the greater, and the chance of their combining together, in order to raise the price, just so much the less. Their competition might, perhaps, ruin some of themselves; but to take care of this, is the business of the parties concerned, and it may safely be trusted to their discretion. It can never hurt either the consumer or the producer; on the contrary, it must tend to make the retailers both sell cheaper and buy dearer, than if the whole trade was monopolized by one or two persons. Some of them, perhaps, may sometimes decoy a weak customer to buy what he has no occasion for. This evil, however, is of too little importance to deserve the public attention, nor would it necessarily be prevented by restricting their numbers. It is not the multitude of alehouses, to give the most suspicious example, that occasions a general disposition to drunkenness among the common people; but that disposition, arising from other causes, necessarily gives employment to a multitude of alehouses.").

[16] Aquinas Summa Theologiae at II–II, Q. 51, Art. 4.

[17] Cf. Prepared Remarks of Chairman Andrew N. Ferguson, Eleventh-Hour Antitrust Remedy Proposals and Litigating the Fix, at 5 (May 20, 2026).

[18] Statement of Chairman Andrew N. Ferguson, *In the Matter of IonQ, Inc./SkyWater Technology, Inc.*, Matter No. 2610061, at 7 (July 31, 2026) ("Ferguson IonQ/SkyWater Statement").

virtue of prudence is key in balancing these considerations, to guard against faulty deliberation and negative outcomes for competition.

I want to consider how an enforcer might take a prudent approach to vertical mergers in particular and the possibility of curing anticompetitive effects associated with vertical integration via behavioral remedies.

Prudence, Vertical Mergers, and Behavioral Remedies

Vertical mergers pose a special difficulty for prudent antitrust enforcers. Unlike a horizontal merger, it does not involve a merger between actual and potential competitors;[19] rather, it involves a merging of "parties … active at different levels of the same supply chain."[20] Whereas a horizontal merger raises the specters of increased market power and concentration, vertical mergers rarely do.[21] In other words, the loss of a competitor in a *horizontal* merger may shift the incentives of the remaining firms in the relevant market for all their future strategic decisions. A vertical merger, on the other hand, often presents subtler threats to competition. It offers the buyer a set of specific new strategic actions, the effect of which could be to produce both anticompetitive harms and pro-competitive efficiencies for markets and end consumers.[22]

On the anticompetitive harms side of the ledger, the merged firm may have the ability and incentive to foreclose its rivals and to misuse their competitively sensitive information.[23] Both can threaten competition by limiting access to a product, service, or route to market that the merged firm's rivals were previously using to compete.[24] With respect to the first concern, a party that acquires part of its rivals' supply chain may be able to impose unfavorable terms of trade on those rivals while retaining favorable terms for its own business, limiting the rivals' access to the inputs or raising their costs.[25] With regard to the second concern, vertical acquisitions can give the merged firm access to its rivals' competitively sensitive information, which would disincentivize those rivals from future investment and cooperation with the acquired supplier.[26] The threat of limited access to products or services as a result of these new strategic factors can deter rivals and potential rivals from investing in the relevant market generating terrible outcomes for consumers in those markets.[27]

Equally considerable, though, are certain efficiencies associated with vertical integration that may come to pass. For example, a vertical deal can eliminate double marginalization, reduce

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[19] Daniel Francis & Christopher Jon Sprigman, Antitrust: Principles, Cases, and Materials, 401 (4th ed. 2026), https://antitrustcasebook.org/download/Antitrust%20-%20Principles,%20Cases,%20and%20Materials%20Fourth%20Edition%20(7.15.2026).pdf ("Francis & Sprigman on Antitrust").
[20] *Id.* at 402.
[21] *Ibid.*
[22] *Id.* at 465; see also FTC, The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, 11 n.20 (Jan. 2017) ("2017 Remedy Study").
[23] Francis & Sprigman on Antitrust at 402; Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.5 (Dec. 18, 2023) ("2023 Merger Guidelines").
[24] 2023 Merger Guidelines § 2.5.
[25] Francis & Sprigman on Antitrust at 466; see also Ferguson IonQ/SkyWater Statement at 4.
[26] Francis & Sprigman on Antitrust at 402; Ferguson IonQ/SkyWater Statement at 4.
[27] Francis & Sprigman on Antitrust at 466; 2023 Merger Guidelines § 2.5.

transaction costs, and ameliorate contracting problems for the newly merged firm.[28] By eliminating transaction costs, a vertically integrated firm becomes more cost-efficient, which can promote innovation by the merged firm and can also lead to the end user paying lower prices for the merged firm's goods or services.[29] Importantly, these effects occur in nearly every vertical transaction; efficiencies in horizontal acquisitions, by contrast, are highly context specific. When they exist, they are often related to production or distribution synergies for complementary goods, combining technological capabilities, or replacing an under-performing firm's poor leadership.[30]

Vertical mergers are thus a sticky wicket for antitrust enforcers. How should an enforcer approach a vertical transaction that will likely have both pro- and anti-competitive effects?

I return to our earlier discussion of classical prudence. Enforcers should be guided by the goal of competition law: to protect competition and to promote the collective benefits generated by a competitive marketplace. Prudence in antitrust enforcement achieves this end. If we see harm to competition, prudence doesn't ask us merely to *ignore* the harm because of foreseeable difficulties or potential risk associated with a particular enforcement approach; it assists us in discerning the best path to addressing that harm using the tools available to us as competition enforcers. In the United States, of course, the principal tool is litigation. The other is a settlement in which the parties make a commitment enforced by judicial action mitigating or eliminating the anticompetitive concerns.[31]

A settlement with appropriately structured behavioral remedies is sometimes the best approach to vertical-merger problems for two reasons.[32] First, behavioral remedies can reduce or eliminate the anticompetitive harms a vertical merger would pose while facilitating the merger's procompetitive benefits.[33] That is particularly true in cases where a vertical merger raises serious short-term concerns—like temporary supply-substitution difficulties—but generally obvious long-run benefits.[34] Blocking such a merger in litigation would deny society its benefits while eliminating only those concerns that the market likely eventually would have resolved on its own. Crafting a remedy to mitigate or eliminate the short-term anticompetitive effects while preserving the long-term benefits would then be the optimal outcome.

Second, in the United States we must be realistic about vertical-merger challenges in U.S. courts. Since the 1980s, after Judge Bork published his influential work *The Antitrust Paradox*,

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[28] Ferguson IonQ/SkyWater Statement at 3, 4; Francis & Sprigman on Antitrust at 466.

[29] See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 757c (online ed. May 2026) ("Areeda & Hovenkamp Antitrust Law"); see also Ferguson IonQ/SkyWater Statement at 3.

[30] Areeda & Hovenkamp Antitrust Law at ¶ 901a ("Horizontal mergers differ in critical respects. Competing firms typically merge for reasons entirely unrelated to effects on marketwide output or price-for example, to achieve economies of scale or integration, to achieve synergies in the production or distribution of complementary goods, to put inefficiently run assets into the hands of superior management, to resolve management succession for an individually owned enterprise, or for tax or other reasons.").

[31] Statement of Chairman Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak and Comm'r Mark R. Meador, *In the Matter of Synopsys, Inc./Ansys, Inc.*, Matter No. 2410059, at 4 (May 28, 2025) ("Ferguson Synopsys/Ansys Statement").

[32] Ferguson IonQ/SkyWater Statement at 7.

[33] *Ibid.*

[34] *Id.* at 8, 9.

American courts have generally treated vertical integration favorably.[35] From 1980 until 2017, antitrust agencies in the United States did not bring a single vertical-merger case to trial, although they settled a range of cases using behavioral remedies.[36] Since 2017, the U.S. antitrust agencies have litigated five cases challenging vertical mergers, and lost all but one of them.[37] In most of those cases, the parties unilaterally offered behavioral remedies—and courts treated those proffered remedies as weighty evidence against the risk of anticompetitive effects.[38]

Of course, this recent experience in litigating vertical-merger cases does not mean that the prudent antitrust enforcer should forego challenges to vertical mergers altogether. Behavioral remedies cannot fix every vertical merger's antitrust issues. For example, some incentive changes may be powerful enough, or have effects destructive enough, to warrant proceeding to litigation, even though risks of litigation are always high. Indeed, I voted for the government's most recent failed attempt to block a vertical merger.[39] Unless the anticompetitive effects are purely short-run effects, they may injure the markets once the settlement order expires. And even where we predict that behavioral remedies in theory can fix the identified anticompetitive effects for a sufficient time, we should approach that with substantial caution. For one, it is easy for the antitrust enforcer to fall into the trap of cobbling together a remedy that merely papers over a bad deal, be it horizontal or vertical. In the United States in fact, antitrust enforcers in the past became too comfortable accepting structural and behavioral remedies, but particularly behavioral ones, that either collapsed shortly after the ink was dry on the settlement agreement or allowed firms to find ways to circumvent the remedy and avoid oversight entirely.[40] Behavioral remedies especially are difficult to construct, and they may be even more difficult to enforce effectively.[41] Firms subject to a behavioral order may decide to risk some minor violations to achieve major advantages,

[35] *Id.* at 6.
[36] *Id.* at 6 & n.30.
[37] *Id.* at 6, 7 n.31 (citing *FTC v. Tempur Sealy Int'l, Inc.*, 768 F. Supp. 3d 787 (S.D. Tex. 2025) (government loss); *FTC v. Microsoft*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023), aff'd, 136 F.4th 954 (9th Cir. 2025) (government loss); *Illumina, Inc. v. FTC*, 88 F.4th 1036 (generally government win but vacating and remanding to Commission with instructions to consider effect of proffered "remedial agreement" under proper standard); *United States v. UnitedHealth Group Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022) (government loss); *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), aff'd, 916 F.3d 1029 (D.C. Cir. 2019) (government loss)).
[38] *Id.* at 6, 7 n.32 (citing *AT&T*, 310 F. Supp. 3d at 241 n.51 (accepting defendants' argument that their unilateral commitment to customers to arbitrate failures to agree on renewal terms diluted government's theory of vertical harm); *UnitedHealth Group*, 630 F. Supp. 3d at 146–47 (ruling against the government's data-misuse theory because, among other reasons, United unilaterally adopted a firewall policy post-complaint); *Tempur Sealy*, 768 F. Supp. 3d at 858–60 (finding that Tempur Sealy's unilateral commitment to preserve a percentage of competitor slots in Mattress Firm stores helped "resolve[] any lingering concern" about anticompetitive effects)).
[39] Press Release, FTC, FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm: The Commission votes 5-0 to challenge a vertical deal seeking to combine the world's largest mattress supplier and manufacturer with the largest U.S. mattress retailer (July 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm; *FTC v. Tempur Sealy Int'l, Inc.*, 768 F. Supp. 3d 787 (S.D. Tex. 2025).
[40] Ferguson Synopsys/Ansys Statement at 4 & n.16, 5; see also generally 2017 Remedy Study (examining 89 merger orders from 2006 to 2012 and concluding, in a case study of 50 orders, that 69% were successful and 14% were qualified successes—17% failed, meaning they did not maintain the level of pre-merger competition); FTC, A Study of the Commission's Divestiture Process: Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission (1999) (examining merger orders from 1990 through 1994 with a focus on divestitures, highlighting some rules of thumb about what kinds of divestiture orders are most likely to be successful, and recommending certain order provisions and divestiture procedures to correct the informational and bargaining imbalance).
[41] Ferguson Synopsys/Ansys Statement at 4 & n.16.

hoping they will go undetected by the agency or that the agency may lack resources to investigate and punish the violation at the moment it is undertaken.

All of these concerns augur caution, but not the previous administration's categorical rejection of remedies. Outright rejection leaves enforcers with the choice either of killing a deal or doing nothing, which means that anticompetitive mergers will survive.[42] Budget limitations will require forgoing challenges to mergers that could have been remedied with a settlement but for which resources cannot be found for full litigation. Prudence instead demands a sober balancing of the benefits and risks to competition, and the benefits and risks of using various enforcement tools. For the prudent enforcer of competition law, the best means to achieve a procompetitive end will be the one that strikes the best, not necessarily the perfect, balance between the likely benefits and risks to competition. After all, the principal aim of the competition enforcer is to promote the common good by eliminating as many anticompetitive effects as he can with the tools that he has while leaving beneficial transactions untouched.

Prudence also demands a sober appraisal of which behavioral remedies work, and which do not. Behavioral remedies in the United States have a mixed record of effectiveness and can burden competition enforcers with the task of indefinitely monitoring an individual firm rather than guarding competition across the entire economy.[43] Any prudent approach to antitrust-remedy design must consider the facts of each individual case, as well as the history of similar provisions in similar cases. But in addition to requiring the traditional behavioral remedy provisions, like non-discrimination commitments and information firewalls, with which we are all well versed,[44] we must be open to more exacting terms designed to undercut incentives for the merged firm to shirk compliance, to aid in the detection of non-compliance, and to promote quick resolution.

For example, a consent order could include an arbitration provision requiring the merged firm to arbitrate, potentially at its own expense, unresolved contractual disputes with its new customers. Should any disputes arise, arbitration would provide a quick and efficient resolution before customers might experience competitive disruptions.[45] And the cost of arbitration could disincentivize the merged firm from foreclosing in the first instance. A remedy could also include robust whistleblower protections, which would give customers an incentive to provide the agency

[42] Ferguson IonQ/SkyWater Statement at 8.
[43] Ferguson Synopsys/Ansys Statement at 4.
[44] See Debbie Feinstein, Zoe Staum & Alex Weaver, Remedies in Merger Enforcement, 56 Seton Hall L. Rev. 5 (2026) ("Behavioral remedies in vertical transactions include information firewalls, duty-to-deal provisions, and non-discrimination provisions." (citing Steven C. Salop & Jennifer E. Sturiale, Fixing "Litigating the Fix", 85 Antitrust L.J. 620–21, 620 n.5, 621 n. 6 (2024))).
[45] 31 Moore's Federal Practice - Civil § 902.02 (2026), Advantages of Arbitration Over Litigation (arbitration "can result in an economy of both time and money."); Note by the United States, OECD, Working Party No. 3 on Co-operation and Enforcement, Hearing on Arbitration and Competition, at 2, 7–9 (Oct. 26, 2010), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1010arbitrationcompetition.pdf (noting that arbitration has "considerable promise for simplifying certain types of antitrust disputes, particularly those between sellers and customers, or between manufacturers and their dealers, or between franchisors and their franchisees" and cataloguing instances where the U.S. antitrust agencies have included provisions in consent decrees or administrative enforcement orders requiring arbitration of commercial disputes arising between order respondents and third parties in implementing the remedies (quoting Philip E. Areeda & Herbert Hovenkamp Antitrust Law at ¶ 311e)).

with intelligence about noncompliance.[46] And finally, a consent order could include a provision requiring a merged firm to assist customers who have expressed a desire to switch suppliers, such as where the merged firm is the dominant provider in the relevant market or where we might expect new entrants who could supply the merged firm's customers to emerge in a few years in the future but who currently can't match the supply demanded.[47] Such a provision would simultaneously promote orderly switching and disincentivize foreclosure by requiring the merged firm to internalize some of the costs of switching.

Conclusion

In sum, prudent enforcement of competition law requires a sober assessment of the effectiveness of the enforcement paths available informed by prior experience, present circumstances, and likely outcomes. Imprudent enforcement of competition law occurs when enforcers adopt an elitist, rigid, and expansive view of their role—driven either by deference to corporate elites or by an ivory-tower fetish with central planning that blinds them to the real constraints imposed by the law, precedent, and market realities. Prudence requires an openness to behavioral remedies that, informed by rigorous analysis and history, would likely confirm the social benefits of the merger while eliminating the anticompetitive harms. To appreciate these constraints, one needs a humbler vision of one's power and responsibility as an enforcer of competition law. That is the "populist" vision of a pragmatic approach to antitrust. Adopting a more populist vision of antitrust will make us not only more prudent, but also more successful enforcers of competition law.

Thank you.

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[46] Motivated by the same concerns, the Commission recently included a similar provision in a conduct matter settlement. See Stipulated Order for Permanent Injunction and Other Relief, ¶ II.D, *FTC v. Deere & Co.*, No. 3:25-cv-50017 (N.D. Ill. July 8, 2026), Dkt. No. 260-1 (requiring Deere to instruct its dealers not to retaliate against any farmers or IRPs who purchase or use repair resources themselves or those of an independent repair shop rather than using dealer repair services).

[47] See Ferguson IonQ/SkyWater Statement at 9.