

SECRETARIAT 1Q 2023

ECONOMISTS INK

DOJ OBTAINS
PERMANENT
INJUNCTION
IN PENGUIN
RANDOM HOUSE'S
MERGER
WITH SIMON & SCHUSTER

A Systematic Approach
to Managing and Using
Big Data in Litigation

The Future of Antitrust Enforcement
in Healthcare Post President Biden's
"Executive Order on Promoting
Competition in the American Economy"

 **Secretariat**
Economists

FROM THE EDITOR-IN-CHIEF

To our readers, I am excited to share the latest edition of *Economists Ink* with you.

The first article discusses the recently granted permanent injunction blocking the proposed merger of Penguin Random House (PRH) and Simon & Schuster (SS). The second article discusses a systematic approach to managing and using big data in litigation. The third article is an interview with Managing Director Cagatay Koc about the future of antitrust enforcement in healthcare following President Biden's executive order on promoting competition.

In the first article, Jason Albert discusses the Department of Justice's (DOJ) monopsony allegation and market definition in the PRH and SS merger case. Dr. Albert notes that DOJ focused on authors as labor, argued that the merger would result in increased monopsony power, and is likely to focus on labor markets in future monopsony cases.

In the second article, Stuart Gurrea and William Schwartz discuss a comprehensive big-data-management plan and how such a plan should incorporate best practices from the data-engineering industry to satisfy auditability and scientific standards. Drs. Gurrea and Schwartz indicate that this framework can achieve accuracy and cost effectiveness without compromising the speed, flexibility, and auditability required for investigations, litigations, and regulatory proceedings.

The third article offers a new experience for our readers—an interview with Managing Director Cagatay Koc about antitrust enforcement in healthcare following President Biden's executive order. This article highlights Dr. Koc's perspectives on what the executive order has accomplished and the potential role economists may play in both antitrust policy and determinations of specific cases.

Enjoy!



Dr. Stephanie Mirrow
Director

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NEWS & NOTES

Leading Economic Consulting Firm Intensity Joins Secretariat



In February, Secretariat welcomed Intensity, a U.S.-based economic, finance, and data science professional services firm, significantly enhancing the firm's market leading financial and economics expert services with the addition of nearly 50 professionals.

Secretariat Managing Director Don Harvey commented, "The addition of the Intensity team marks an exciting step in Secretariat's growth story. As one of the most respected teams in the industry, their strong economic and econometric skills add significant new capabilities to our roster in critically important areas to our legal clients, including intellectual property and securities, while adding depth to our existing antitrust team."

With the addition of Intensity, the firm's economic and regulatory advisory practice includes more than 100 professionals, including nearly 50 experts who hold a PhD or other advanced degree in their field of expertise.

Julie Solomon Joins Secretariat Economists as Managing Director

In January, we welcomed prominent energy industry economist **Julie Solomon** as our newest Managing Director. Ms. Solomon has more than 25 years of experience specializing in regulatory and utility economics, competition, and restructuring. She regularly advises utility clients and legal counsel on a range of regulatory and litigation matters. She testifies frequently on market power and competition issues, including numerous proceedings before the Federal Energy Regulatory Commission (FERC).



Keith Waehrer's Article Nominated for the Concurrences 2023 Antitrust Writing Awards

Keith Waehrer's article "*Federal Trade Commission vs. Qualcomm: Mangling Microeconomics*" was nominated for the 2023 Antitrust Writing Awards. The article, co-written with **Carl Shapiro** from the University of California (Berkeley), provides an economic analysis of the antitrust case brought by the Federal Trade Commission against Qualcomm regarding Qualcomm's "no-license/no-chips" policy. Read the article at <https://bit.ly/3VIVy01>.

Robert Stoner and Jéssica Dutra Examine the Contribution of Copyright Industries to the U.S. Economy in Report

"*Copyright Industries in the U.S. Economy: 2022 Report*", examines the contribution of copyright industries to the U.S. economy.

This is the 19th report prepared for the International Intellectual Property Alliance (IIPA) since 1990. **Dr. Dutra** and **Dr. Stoner** expanded on previous versions of the report by demonstrating that the core copyright industries of the United States also play a vital role in the digital economy, as well as provide significant value added to Gross Domestic Product (GDP), a significant number of high-paying jobs, real growth that outpaces the rest of the economy, and substantial foreign sales and exports, surpassing many industry sectors. Read the report at <https://bit.ly/3HftHZg>.



DOJ OBTAINS PERMANENT INJUNCTION IN PENGUIN RANDOM HOUSE'S MERGER WITH SIMON & SCHUSTER

BY DR. JASON ALBERT



A United States District Judge for the District of Columbia recently granted the Department of Justice (DOJ) a permanent injunction blocking the proposed merger of Penguin Random House (PRH) and Simon & Schuster (SS). SS's parent company has since decided to allow the purchase agreement to expire.


In its Complaint, DOJ alleged that the proposed merger would combine two of the “Big 5” publishers and substantially lessen competition in the “markets for content acquisition.” Unlike in prior cases with monopsony allegations, DOJ did not allege harm to competition for downstream consumers—for example, in the form of higher book prices. Rather, DOJ’s allegations focused on monopsony power and harm to authors.

DOJ has alleged monopsony concerns in prior merger cases, but these allegations typically have been part of broader complaints that also allege harm to consumers. For example, in *United States vs. Anthem*, DOJ alleged that the merger of Anthem and Cigna would allow the merged firm to lower reimbursements to healthcare providers (monopsony allegation) and would allow the merged firm to raise insurance fees to consumers. In its case against PRH and SS, DOJ focused on authors as labor and argued that the merger would result in increased monopsony power.

DOJ alleged that PRH and SS competed with each other to purchase publication rights to books and that this competition led to higher advances and royalties to authors. The DOJ alleged that the merger would lessen this competition to the detriment

of authors, which would likely lead to a “reduction in the quantity and variety” of published books. DOJ further alleged that this monopsony harm would occur in two relevant product markets. The first market was for the acquisition of U.S. publishing rights to books and the second, more narrowly tailored market, was for the acquisition of publishing rights for anticipated best-sellers.

The parties, on the other hand, argued that they face increasing competition from smaller publishers for publication rights and that adding SS to PRH’s supply chain would yield cognizable pro-competitive benefits for both authors and readers. The District Court however precluded the parties’ efficiency arguments on the grounds that they “failed to verify the evidence.”

This case is thought to be the first enforcement action in which a monopsony theory of harm was alleged without a corresponding allegation of direct consumer harm through higher prices as well. The District Court’s affirmation of DOJ’s monopsony theory of harm is likely to embolden future monopsony enforcement actions by antitrust agencies. Future actions based on monopsony theories of harm are particularly likely to focus on labor markets, where DOJ has recently made a broader push in antitrust enforcement by bringing wage price-fixing and no-poach cases. 

DIRECTOR JASON ALBERT has conducted numerous merger evaluations, for both private parties and antitrust enforcers, across a variety of industries.
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BY DR. STUART D. GURREA
AND DR. WILLIAM K. SCHWARTZ

APPROACH A SYSTEMATIC TO MANAGING AND USING

BIG DATA IN LITIGATION

OVER A DECADE HAS PASSED since big data became common across the business world, and now giant datasets are appearing with growing frequency in the types of investigations, litigations, and regulatory proceedings for which economists offer expert advice and testimony.

A government investigation of foreign exchange manipulation might see high-frequency trading orders; discovery in an antitrust litigation against a retailer might produce a database of all consumer purchases during a class period; and a state health regulator might receive an entire hospital system's patient records. These legal and adversarial settings impose on expert economists constraints that do not always hamper data scientists in industry: limited access to information about the data, limited budgets, and limited time. A wholistic big-data-management plan can alleviate some of the effects of these constraints. Such a plan should incorporate best practices from the data-engineering industry to satisfy auditability and scientific standards and to maintain the agility and accuracy that legal proceedings demand.

THE FIRST STEP of such a plan is assessing the data requirements of the case and the resources available for fulfilling those requirements. While not always possible, the ideal starting

point is to develop testable, quantitative hypotheses and identify what data exist to test those hypotheses. For example, a hypothesis may be that a bank discriminates against loan applicants from certain populations by approving their loans less frequently than other applicants' loans. Data requirements for this analysis include identification of which borrowers are members of the different applicant populations. This starting point allows for the development in some cases of a more focused data request in the discovery process as data not relevant to the hypotheses need not be produced.

The complexity of the data, as well as the monetary and time costs of handling and storing the requested data, also inform the data request. Different orders of magnitude of data require different computer infrastructures and engineering efforts. Specialist "data-warehousing" firms may be able to host and manage the very largest datasets more quickly and cheaply than the economists querying and analyzing the data can. Further, if the data are very large, sampling parts of the data may offer a more practical—or the only feasible—alternative to working on the entire dataset. For example, litigation discovery may constrain the number of retail locations from which consumer data can be retrieved, and (appropriate) sampling is the only statistically reliable approach to draw conclusions about the entire population of interest.

THE SECOND STEP of a big-data-management plan is tracking the "chain of custody" of all raw data upon intake, which involves keeping a written inventory of data sources and ensuring the raw data does not change accidentally. Storage of raw data in a space—which data engineers call a data lake—dedicated for this purpose ensures that audits or reproductions of results will be traceable to the original data sources. Common quality-assurance practices can facilitate agreement among litigants that everyone is looking at identical raw data. Such practices can avoid issues that occur in litigations, such as a third party producing a complete



data file to a plaintiff but a truncated copy to the defendant due to technical errors.


THE THIRD STEP is data cleaning, deduplication, and optimization. This is known as extraction, transformation, and loading (ETL) in data-engineering parlance. To the extent possible, it is important to automate in computer code every step of ETL for auditability and replicability. Extraction moves data from the data lake into software where it can be viewed and modified. Transformation entails cleaning the data to eliminate duplicates and errors and normalizing it to eliminate repeated information within the dataset. For example, to clean a list of a retailer's store addresses, one might check the spelling of street names against USPS's online lookup service. The most important step in transformation is writing a programmatic description of the data's constraints of internal consistency (e.g., "prices are non-negative," or "sales occurred between these specific, known dates"). This facilitates deduplication as well as size and speed optimizations. Finally, loading involves moving the cleaned dataset into a data storage facility and query handler called the data warehouse.

Once data are available in the data warehouse, manual review and validation of the data are critical. The goals of validation are curing errors (e.g., misspelled addresses) not caught during prior steps, further deduplication, and identifying missing data. Validation can be implemented by summarizing the data, e.g., to see that the sum of all of a bank's loans aligns with what they wrote in their regulatory filings. During this process, it is important not to confuse abnormal observations with unreliable

data. For example, abnormally large financial trades may be outliers of investigatory interest rather than erroneous data. For categorical variables (e.g., a loan applicant's race), tabulations can be used to check if any categories have unexpected frequencies (e.g., a higher proportion of loan applicants of one race than live near the bank under investigation).

THE FOURTH STEP of a big-data-management plan is analysis. Analyses include querying the data warehouse to compute statistics of interest, such as averages, frequencies, correlations, and, in more complex cases, regressions. By only ever reading from the data warehouse through its querying interface, experts and economists ensure reproducibility and auditability of the analyses while allowing multiple workstreams to proceed simultaneously.

THE FIFTH AND FINAL STEP is reporting the results of the analyses. In some instances, this may require building interactive visualizations such as geographic maps, charts, and network visualizations. An integrated and automated data management plan provides the flexibility needed to create sophisticated reports even as more data become available or the goals of a case evolve.

The comprehensive approach to data management described above is well suited for the adversarial data science required in investigations, litigations, and regulatory proceedings. While handling vast amounts of data from multiple sources is complex, this framework can achieve accuracy and cost effectiveness without compromising speed, flexibility, and auditability. 

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ASSOCIATE DIRECTOR WILLIAM K. SCHWARTZ has worked on several matters requiring analysis of big data. Dr. Schwartz also conducts academic research on big data issues. wschwartz@secretariat-intl.com



The Future of Antitrust

AN INTERVIEW WITH DR. CAGATAY KOC Enforcement in Healthcare

Post President Biden's
*"Executive Order
on Promoting
Competition in the
American Economy"*

IN September 2022, Secretariat Managing Director Dr. Cagatay Koc participated in an American Health Law Association (AHLA) podcast addressing antitrust policy and enforcement in the wake of President Biden's 2021 executive order "Promoting Competition in the American Economy."

The "Policy" section of the executive order states: "This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in...healthcare markets (including insurance, hospital, and prescription drug markets)..."

What follows is a summary of Dr. Koc's perspectives on what the executive order has accomplished and the potential role economists may play in both antitrust policy and determinations of specific cases.

Q. IS IMPLEMENTATION OF THE "ALL-OF-GOVERNMENT" POLICY ALREADY HAVING AN IMPACT?

A. Important implementation steps are already occurring. First, the Federal Trade Commission (FTC) announced a retrospective study on the physician group and healthcare facility mergers. The FTC requested information from several insurance companies to analyze the impact of consolidations such as physician practice group mergers with hospitals. This study should further our knowledge about the link between physician competition and quality of service.

In addition, there have been antitrust challenges to four major hospital mergers: Lifespan and Care New England, Hackensack Meridian and Englewood Health, Jefferson Health and Einstein Healthcare Network, and Methodist Le Bonheur Healthcare and Saint Francis Hospitals. The Department of Justice (DOJ) also has pursued criminal cases against individuals for alleged wage-fixing agreements, which likely will continue to be an important labor-antitrust issue for the agencies going forward.

Q. SHOULD MERGER REVIEWS CONSIDER WHETHER ENTITIES GAIN SUFFICIENT LABOR MARKET POWER TO DEPRESS EMPLOYEE WAGES?

A. This is a difficult question for economists, who strive to understand merger-induced changes in employer concentration in the context of other sources of variation in employer concentration that have contributed to slower wage growth. An empirical comparison between wage growth in labor markets that experience a concentration-increasing merger and wage growth in otherwise identical labor markets without any merger activity would be helpful, because mergers may also affect wages through mechanisms such as managerial changes designed to reduce labor costs.

"While economic analysis plays an important role, specific market positions and customer options also influence regulators' final decisions."

Some research suggests that the slowing of wage growth following mergers that led to a substantial increase in employer concentration applied only to workers whose skills are less transferable outside of the industry.

Q. HOW WILL ECONOMICS PLAY A GREATER ROLE IN THE ECONOMIC FOUNDATION OF THE GUIDELINES?

A. There will be a greater emphasis on economics in analyzing how transactions are reviewed and evaluated in such areas as:

- Determining a merger's impact on labor markets
- Continuing our use of the "consumer welfare" standard to analyze mergers, versus a broader standard that incorporates a more comprehensive group of stakeholders
- How agencies address the issue of buyer power
- How to account for key areas of the modern economy, such as digital markets
- The importance of multi-sided markets in the healthcare industry

- The types of evidence that should be considered in evaluating non-price effects such as the quality of and access to healthcare
- Guidance on dynamic competition, meaning how to analyze potential competition and innovation in certain industries

Q. WHY DO SOME DEALS GO THROUGH WITHOUT A LEGAL CHALLENGE?

A. While economic analysis plays an important role, specific market positions and customer options also influence regulators' final decisions.


For example, in the case of the Cedars-Sinai and Huntington Hospital merger in 2021, the California AG allowed the transaction to go forward even though an economic analysis determined that cross-market competitive harm was likely. One of the following factors may have led the AG and the FTC to not take any legal action:

- Neither of the merging parties possessed sufficient market power in their geographic markets.
- The parties provided largely non-overlapping products that were complementary to one another's products..
- Common customers could readily protect themselves against the cross-market price increases by purchasing single-market provider networks, for example by slicing their accounts across multiple insurers with distinct networks in each geographic market.

Q. IS THERE A SENSIBLE, ECONOMICS-BASED ALTERNATIVE TO THE "CONSUMER WELFARE" STANDARD?

A. For more than 40 years, the "consumer welfare" standard has provided a consistent basis for the enforcement of antitrust law, asking if prices will increase and quality decrease, if access to services will be compromised, and if innovation will be suppressed.

However, in recent years, there has been debate among economists on whether the "consumer welfare" standard should remain or should the agencies shift to a "total welfare" standard. Proponents of the "total welfare" standard argue that it would allow a merger to be evaluated based on its likely effect on multiple parties, depending on the transaction at issue—for example, consumers, workers, competitors, small businesses, or even policy objectives such as environmental goals.

Economists, as well as others engaged in antitrust matters, are continuing to evaluate these competing views. 

MANAGING DIRECTOR CAGATAY KOC has analyzed hospital, physician, and pharmaceutical mergers and has addressed allegations of monopolization and exclusionary conduct in the healthcare industry. ckoc@secretariat-intl.com



ABOUT SECRETARIAT

SECRETARIAT IS AN EXPERT SERVICES, LITIGATION CONSULTING, AND ECONOMIC ADVISORY FIRM

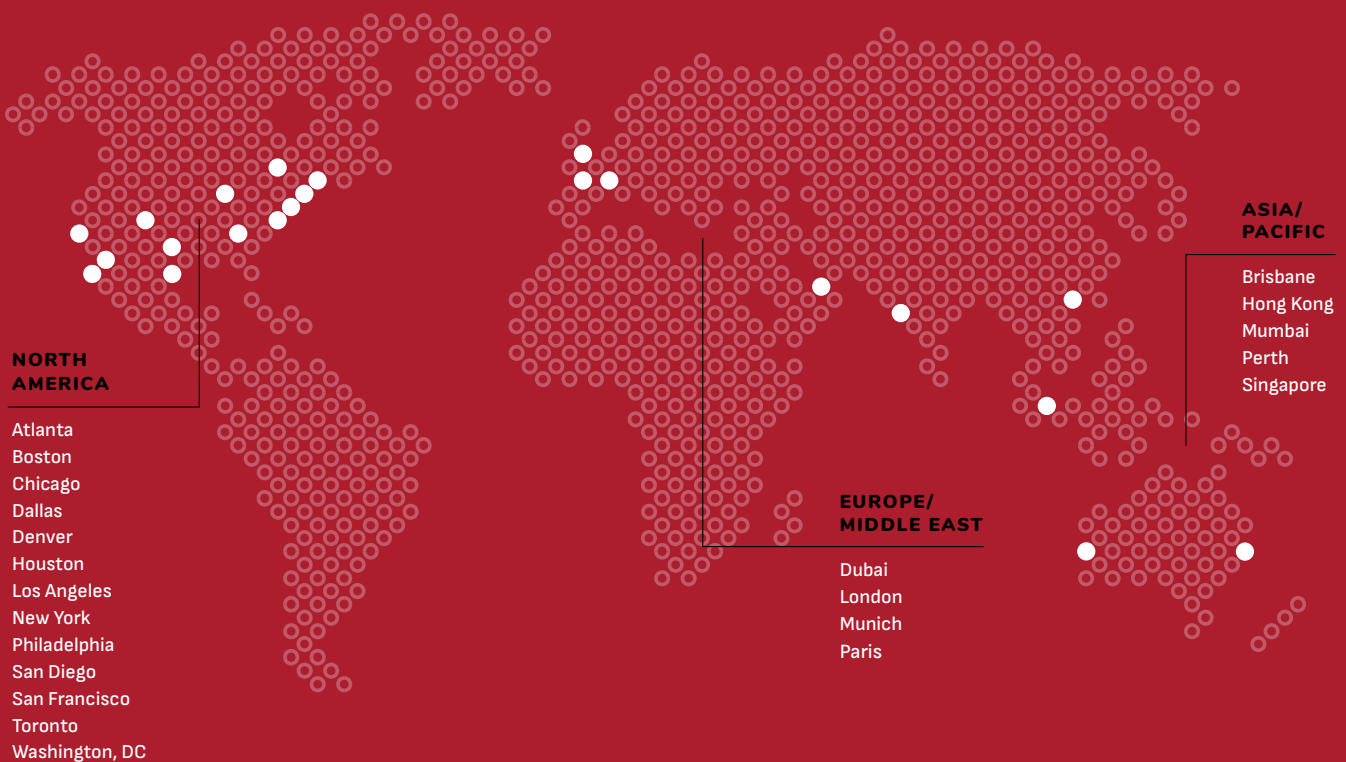
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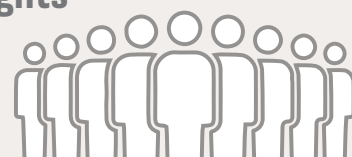


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