ESSAY

CONTROL CAPTURE AND COMPETITION

D. Daniel Sokol * and Robert J. Rhee **

Note to UCLA Workshop Participants: This is a **very** early draft and some ideas, particularly in the Third Part, need to be fleshed out in greater detail. We thank you for helping us particularly in responding to our conceptual framework as well as identifying possible extensions.

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* Carolyn Craig Franklin Chair in Law, Professor of Law and Business, USC Gould School of Law and Marshall School of Business.

** John H. and Mary Lou Dasburg Professor of Law, University of Florida Levin School of Law.

Abstract

This Essay identifies an emerging problem in antitrust law and policy, particularly in the technology industry. Antitrust doctrine has historically revolved around internal control of firm, *i.e.*, through equity acquisition. This is capture of internal control based on ownership and governance rules. The prototypical mergers and acquisitions trigger review. Anticompetitive behavior arises from within the merged firm. However, one can capture control through various ways. An emerging problem in antitrust law is external exertion of control through contract. Competition can be stifled, and thus price, non price, and innovation factors can be manipulated, from outside the firm. Contracts may permit all manner of control without internal control; they permit control without accessing the levers of governance rules, and thus can achieve the same anticompetitive behavior. This problem is an emerging phenomenon in technology although it exists for all kinds of firms, and it reveals a gap in antitrust law specific to merger control. This Essay discusses how contracts can achieve control of another firm without equity acquisition. Analogizing to the basic principle of agency law and corporate law, this Essay argues that the de facto control of another firm, manifesting in anticompetitive results, should trigger merger review. The proper test for enjoining a merger should encompass the various ways in firms are subject to contractual control capture resulting in behavior and outcomes that are potentially anticompetitive.

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If Microsoft and Nvidia, using their sky high stock valuations, decide to acquire start up companies that may raise competition concerns, should these mergers be subject to serious antitrust scrutiny? The answer should be yes. In these examples, the answers are clear because we see two factors: equity acquisition facilitating potentially anticompetitive results. These two factors constitute the paradigm antitrust case under the antitrust merger control regime.[1] The first is the means via control (the actus), and the second is the resulting social harm.[2]

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[1] Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2039-48 (2021) (addressing tech acquisitions); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (explaining merger control generally).

[2] This is not the first time that antitrust has addressed vertical restraints in a technologically fast moving industry. See e.g., Barack Orbach, *The Paramount Decrees: Lessons for the Future,* 19 Antitrust Source, no. 5, 2020.

What happens when market actors can achieve the same social harm but without the paradigm actus, an equity acquisition? Suppose a firm manufactures a critical component of a large market sector, such as for example artificial intelligence or for the chips that power such AI products, and it can impose material limitations on all purchasers through contractual arrangements such as tying, bundling, or exclusive dealing so that the broader market exhibits characteristics of an anticompetitive market. In these transactions, there are no potential coordinated (collusive) or unilateral (monopolistic) effects as part of equity acquisitions, which trigger merger control review under the Hart Scott Rodino (HSR) Act of 1976[3] and the Clayton Act for stock or asset acquisitions.[4] Should control capture through contract and anticompetitive results trigger antitrust review? We believe so. Our conclusion is based on the underlying principle that substance over form should prevail when legal policy is grounded in avoidance of specific bad outcomes.[5] This essay offers a framework that antitrust can use, based on control and economic effects, to better address these concerns while not chilling investment both in tech and non tech sectors.

In this Essay, we advance a proposition that is both a natural extension of the law and economics of antitrust and yet something quite radical that has profound implications on antitrust merger law and policy: that is, equity acquisition is not the only means of control. Contracts can be structured so that one firm can capture control of another firm or of a market through bilateral action that does not fit the definition of a merger for purposes of antitrust merger law but for which we propose a contract may be a change of control that under certain circumstances should require a mandatory merger filing. This proposal addresses a gap in the current enforcement paradigm but one that can be addressed with similar analytical tools without significant administrative burden.

This Essay advances the general principle of what we term "control capture" in antitrust law. Firms can be organized in one of two ways.

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[3] See Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2018)). See also D. Daniel Sokol, *Debt, Control, and Collusion*, 71 EMORY L. J. 695 (2022) (noting that debt does not constitute a reportable transaction unless it is convertible debt).

[4] 15 U.S.C. § 12 (2018).

[5] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466–467 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.")

Control can be captured internally through equity acquisition (or internal growth) or externally through contract.[6] Such contractual restraints have the effect of vertical integration.[7] The form of control should be irrelevant, although often it is not always under antitrust doctrines.[8] For example, the same behavior that orchestrates different actors that would be collusive, and violate Sherman Section 1, would be shielded from antitrust liability if it is conducted by a single entity.[9] Similarly, from an economic perspective, tying is potentially a form of bundling,[10] yet the antitrust doctrines of tying and bundling are distinct.[11] Such formalistic approaches to law are not helpful from the standpoint of enforcement against potential anti-competitive behavior.

Control capture has particular importance in a vertical setting where firms often choose to acquire capabilities via merger rather than via contract.[12] If the control occurs via a merger, the Clayton Act governs and there is merger notification and review. If the control results via contract, then antitrust liability may attach largely under Sherman Sections 1 and 2 as well as certain aspects of other antitrust statutes but for which this change in control escapes merger review. However, the idea that economic activity that functionally is equivalent to an acquisition for which there is control and for which control may be used to achieve anticompetitive outcomes and that such action should be prevented *ex ante* via a merger review process has long been disfavored.

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[6] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 85-96 (1985) (discussing vertical integration and the make versus buy decision).

[7] Roger D. Blair & David L. Kaserman, *Vertical Integration, Tying, and Antitrust Policy*, 68 AMER. ECON. REV. 397 (1978).

[8] Texaco Inc. v. Dagher, 547 U.S. 1, 2 (2006) (addressing joint ventures in antitrust).

[9] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[10] David S. Evans and Michael Salinger, *Why Do Firms Bundle and Tie? Evidence From Competitive Markets and Implications for Tying Law*, 22 YALE J. REG. 37, 41 (2005) ("tying is a special case of bundling in which consumers do not have the choice of buying the 'tied' product without the 'tying' product.").

[11] Compare PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Vols. VIII-IX (2024).

[12] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1962 (2018); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 297 (1978).

I. AN EMERGING PROBLEM IN ANTITRUST

A. Antitrust Law's Focus on Equity Rather Than Control

Our hypotheticals are motivated by recent events. Recently, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) began investigating Microsoft and Nvidia for terms for its AI and semiconductors, respectively.[13] The stakes regarding competition and AI are significant. If the facts are as alleged, such restraints on trade might negatively affect competition in the AI space. However, these sorts of vertical contracts as non-financial investment may not be limited to just tech giants. Indeed, vertical contracting is used across the economy. While antitrust largely uses Sections 1 and 2 of the Sherman Act to address potential anticompetitive effects in both platform industries[14] as well as more traditional industries,[15] one could imagine that some contractual investments are set up to purposely skirt merger law. Given the difficulty of structural conduct remedies in antitrust,[16] often the best way to address anti-competitive behavior that is a change of control may not be *ex post* but *ex ante* as with traditional mergers.

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[13] Foo Yun Chee, Nvidia's business practices in EU antitrust spotlight, sources say, Reuters, Dec. 6, 2024, available at: https://www.reuters.com/technology/nvidias-business-practices-eu-antitrust-spotlight-sources-say-2024-12-06/; David McCabe, U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI, NY Times, June 5, 2024, available at https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html.

[14] Erik N. Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1517-18 (2022).

[15] See e.g., Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

[16] Such remedies have been used only sparingly. See United States v. Microsoft, 97 F. Supp. 2d 59 (D.D.C. 2000), vacated by 253 F.3d 34 (D.C. Cir. 2001), cert. denied, 70 U.S.L.W. 3107 (U.S. Oct. 9, 2001); United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) aff'd sub. nom., Maryland v. United States, 460 U.S. 1001 (1983); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).; United States v. Am. Tobacco Co., 221 U.S. 106 (1911); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. Paramount Pictures, 334 U.S. 131 (1948); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954); United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub. nom., Maryland v. United States, 460 U.S. 1001 (1983).

Traditionally, merger control has reviewed contracts but only in the context of an underlying change of ownership. Two recent merger challenges offer examples. Both merger challenges address an often-analyzed merger concern – a change in ownership impacting contracts. Currently courts analyze this issue only with a change of ownership transaction. Antitrust merger review would not be triggered if the same underlying contracts led to a change in control without a change in ownership.

In *US. v. AT&T*,[17] the government challenged a vertical merger between AT&T and Time Warner. The government was concerned about contractual power that the merged firm would have. The government alleged that the merged firm, under a Nash bargaining model, would have greater leverage in its distribution related contracts.[18] Further, the government contended that the proposed merger would lead to price increases for the Time Warner content because the combined firm bargaining leverage would prove the combined AT&T and Time Warner the ability raise the costs of distribution over its rivals. Such as a successful strategy, the government alleged, would allow the merged firm to raise prices to consumers.[19]

In a different merger challenge, *United States v. Anthem, Inc.*,[20] the Department of Justice challenged contractual based theories of harm regarding a change in ownership of health insurance providers. The merger would have combined the second- and third-largest sellers of health insurance in the United States. Of concern was that the merged firm would not bring lower prices to consumers through bargaining with its contracts with its hospital counterparties.[21]

These mergers for which there were challenges can be contrasted with control contracts. Companies like Microsoft or Nvidia may evade traditional merger control notification (based on size of person and transaction thresholds) because there is no equity involved in a deal. The

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[17] 916 F.3d 1029 (D.C. Cir. 2019).

[18] [cite]

[19] Id. at 1035-36. See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (exploring the theory that served as the basis for the case).

[20] 855 F.3d 345, 349 (D.C. Cir. 2017).

[21] [cite]

deal is instead contractual in nature which is akin to an investment but with terms that might, if a corporate financial investment through ownership, raise antitrust merger concerns.

B. Gaps in Equity-Centric Control

In spite of its title, merger control in antitrust does not focus on control but on equity considerations. Yet, corporate governance suggests that control need not be based on equity. The literature in law,[22] economics,[23] strategy,[24] marketing,[25] and operations suggests that contracts can be used as a form of control.

Antitrust also recognizes that contracts may create opportunities to use market power to dictate terms. As Oliver Williamson explained, "although vertical integration commonly yields transaction cost savings, strategic consequences that pose antitrust concerns occasionally arise."[26] It is because of these types of antitrust concerns should invite antitrust ex ante merger scrutiny as the significant investment via contractual terms that lead to a change of control beyond a traditional merger. While this concern holds generally, there may be specific concerns that make such issues more salient in a technology oriented context.

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[22] Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. Corp. L. 885 (2020); Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009).

[23] See e.g., Vianney Dequiedt & David Martimort, *Vertical Contracting with Informational Opportunism*, 105 AMER. ECON. REV. 2141 (2015); Daniel S. Nagin, et al., *Monitoring, Motivation, and Management: The Determinants of Opportunistic Behavior in a Field Experiment*, 92 AMER. ECON. REV. 850 (2002). Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988).

[24] See e.g., Stephen J. Carson et al., *Uncertainty, Opportunism, and Governance: The Effects of Volatility and Ambiguity on Formal and Relational Contracting*, 49 ACAD. MGMT. J. 1058 (2006); Steven S. Lui & Hang-Yue Ngo, *The Role of Trust and Contractual Safeguards on Cooperation in Non-Equity Alliances*', 30 J. MGMT. 471 (2004); Nicholas Argyres, *Evidence on the Role of Firm Capabilities in Vertical Integration Decisions*, 17 STRAT. MGMT. J. 129 (1996).

[25] Tinglong Dai & Kinshuk Jerath, *Salesforce Contracting Under Uncertain Demand and Supply: Double Moral Hazard and Optimality of Smooth Contracts*, 38 MKTG. SCI. 733 (2019), Desmond (Ho-Fu) Lo et al., *The Incentive and Selection Roles of Sales Force Compensation Contracts Opens a new window*, 48 J. MRKT. RESRCH. 781-798 (2011); Anthony Dukes & Esther Gal-Or, *Negotiations and Exclusivity Contracts for Advertising*, 22 MKTG. SCI.. 222 (2003).

[26] Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 955 (1979).

This discussion of contracts is part of a broader understanding of boundaries of the firm.[27] Quite a number of firms choose to internalize the cost of production while others decide to use contracts to manage such production. That is, why do firms choose to integrate via merger versus contract. Coase famously asked, why "does the entrepreneur not organize one less transaction or one more?"[28] The choice is largely a function of the transaction costs of each of these alternatives – internal production (including through merger) or contracting. Williamson also suggested hierarchy. In the digital context, the firm has been inverted with most of the production outside of the firm through its ecosystem and the platform orchestrates behavior across different firms through various contractual mechanisms[29] such as Apple's iPhone orchestrating behavior of apps. This too has been subject to antitrust scrutiny.[30]

There may be concern of many contractual investments is that many lack "control" but they are investments nevertheless. Not all contracts are ones of control, as the next section will reveal. However, the idea that transaction cost economics has long played a role in antitrust.[31] Yet, if we take the lessons of transaction cost economics seriously,[32] then the current logic of what gets notified via antitrust merger control falls apart.

Ironically, Williamson, who served under Donald Turner at in the Department of Justice Antitrust Division and who drafted the 1968 merger

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[27] See generally, OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, AND RELATIONAL CONTRACTING (1985); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES (1975); OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE (1996).

[28] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 393–94 (1937). For antitrust specific treatment, see Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 71-74 (2012).

[29] [cite Marshall]

[30] Cite Epic.6

[31] See e.g., Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 963-64 (2014) (Bork "may have been the first author who simultaneously offered transaction cost explanations for partial integration and cited Coase's *The Nature of the Firm* to support his argument."); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298 (1978); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 274 (1986).

[32] Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. REV. 77; Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L., ECON. & ORG. 95, 104 (2002).

guidelines[33] did not anticipate how transaction cost economics might be useful to understand that merger control might also impact contractual arrangement where there might be a change of control in those guidelines. To use his own language, we focused not on the rules of the game but on the play of the game.[34] That is, he focused on the existing framework and on optimizing rules based on that framework rather than undertaking a reframing of antitrust.

In this Essay, we suggest a departure from the existing framework to actually focus on economic effects and to take substance over form more seriously. Antitrust claims to focus on economic analysis and has a long history of the Supreme Court expressly saying so. However, judges sometimes take arguments of form over substance in antitrust law. For example, judges begin with market definition even though from an economic perspective, it may not be necessary to define the market but instead look at economic effects. The current[35] and prior merger guidelines make this explicit although modern courts refuse in a merger or conduct context to dispense with market definition.[36]

C. Control Capture Through Contracts

There is a basic decision that every firm needs to undertake – make, buy or ally.[37] The make option focuses on internal resources.[38] The buy option focuses on mergers and acquisitions, while the ally option focuses on contracting. Ownership is a fully integrated firm. This provides greater protection for specific investments but an alternative is a hierarchy via contractual relationships including various forms of strategic alliance.

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[33] **[Cite to Williamson on the merger guidelines]**

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[35] [2023 MG]

[36] [2010 HMG]

[37] Abhishek Borah & Gerard J. Tellis, *Make, Buy, or Ally? Choice of and Payoff from Announcements of Alternate Strategies for Innovations*, 33 MRKT. SCI. 114, 114 (2014)

[38] See e.g., Allan C. Eberhart, William F. Maxwell, Akhtar R. Siddique, *An Examination of Long-Term Abnormal Stock Returns and Operating Performance Following R&D Increases*, 59 J. FIN. 623 (2004).

In contrast, contracting may be used to leverage intangible resources.[39] Theoretical work addresses that some firms remain vertically integrated specific to technologically innovative industries.[40] More generally, strategic alliances create value but the value varies across different dimensions.[41]The rationale for partnering may be because one firm lacks internal resources.[42] In some cases vertical mergers may be a better approach than vertical contracting.[43] However, there are situations in which a vertical contract may be superior to a vertical merger.[44]

Specific to contracts, larger firms may use contractual terms as a form of investment. Often, smaller counterparties use evidence of such agreements to legitimize their business model to potential investors or customers. This may occur for example in a licensing setting. Such

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[39] Enghin Atalay, Ali Hortaçsu & Chad Syverson, *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120 (2014). For specific thoughts about the organization on a tech firm and such allocation of rights, see Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology Intensive Firms*, 157 U. PA. L. REV. 1649 (2009).

[40] Constance E. Helfat & Miguel A. Campo-Rembado, *Integrative Capabilities, Vertical Integration, and Innovation Over Successive Technology Lifecycles*, 27 ORG. SCI. 249 (2016).

[41] Mitchell P. Koza & Arie Y. Lewin, *The Co-Evolution of Strategic Alliances*, 9 ORG. SCI. 255 (1998); Bharat N. Anand & Tarun Khanna, *Do firms learn to create value? The case of alliances*, 21 STRAT. MGMT. J. 295 (2000); Belén Villalonga & Anita M. McGahan, *The choice among acquisitions, alliances, and divestitures*, 26 STRAT. MGMT. J. 1183 (2005); Ranjay Gulati, *Alliances and networks*, 19 STRAT. MGMT. J. 293 (1998).

[42] Weijian Shan, *An Empirical Analysis of Organizational Strategies by Entrepreneurial High-Technology Firms*, 11 STRAT. MGMT. J. 129 (1990).

[43] See e.g., Gregory S. Crawford, Robin S. Lee, Michael D. Whinston & Ali Yurukoglu, *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86 ECONOMETRICA 891, 893–94 (2018) (finding merger efficiencies in the cable industry); Fernando Luco & Guillermo Marshall, *The Competitive Impact of Vertical Integration by Multiproduct Firms*, 110 AM. ECON. REV. 2041, 2043 (2020) (finding that vertical integration via merger is superior due to nonintegrated firms increased in price by 1.2 to 1.5 percent, while prices for integrated firm products decreased by 0.8 to 1.2 percent). This is not to suggest that vertical mergers are always pro-competitive. See Simon Loertscher & Leslie M. Marx, *Incomplete Information Bargaining with Applications to Mergers, Investment, and Vertical Integration*, 112 AM. ECON. REV. 616, 616 (2022) ("We show that, in this model, there is no basis for the presumption that vertical integration increases equally weighted social surplus, while it is possible that horizontal mergers that appropriately change bargaining weights increase social surplus.").

[44] Robin S. Lee & Michael D. Whinston & Ali Yurukoglu, *Structural Empirical Analysis of Contracting in Vertical Markets, in* HANDBOOK OF INDUSTRIAL ORGANIZATION, Vol. 4 (Kate Ho, Ali Hortacsu, Alessandro Lizzeri eds., 2021).

contractual agreements occur both in traditional[45] and technology based industries.[46] Further, situations in which boundaries of the firm may be unclear include that there might be situations in which there is control because of a minority position or simply contractual rights in the firm still allows for the investor to call the shots or through other types of agreements such as joint R&D, agreements that deal with supply, sourcing, marketing, or distribution.[47]

Thus, if contracting externally is more viable, firms may use contracts to govern relations. Such contractual terms may matter when a firm has monopoly power. As Oliver Williamson explained, "although vertical integration commonly yields transaction cost savings, strategic consequences that pose antitrust concerns occasionally arise."[48] It is because of these types of antitrust concerns should invite antitrust ex ante merger scrutiny as the significant investment via contractual terms that lead to a change of control beyond a traditional merger.

While this concern holds generally, there may be specific concerns that make such issues more salient in a technology oriented context. Contract design focuses not merely on bargaining power of the two sides but also of asset specificity. To return to the Microsoft and Nvidia examples, this is to suggest that assets that are relationship-specific shape the nature of the contractual relationship. Thus, in a relationship between an upstream and downstream firm will require relationship-specific investments to the downstream firm.

There are myriad reasons why firms may decide to partner via contract or merger rather than go it alone. There are many procompetitive reasons that firms partner via contract with others. This may include to move faster on a particular project that a firm could with its own internal resources.[49] This may focus on identifying the internal capabilities of the firm and its

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[45] [cite]

[46] 13 Joshua S. Gans & Scott Stern, Incumbency and R&D Incentives: Licensing the Gale of Creative Destruction, 4 J. ECON. & MGMT. STRAT. 9 (2000); 14 n/a; 15 Oliver Hart & J. Moore, Contracts as Reference Points, 123 Q.J. ECON. 1 (2008)

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[48] Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 955 (1979).

[49] Ashton Hawk, Jeffrey J. Reuer, & Andrew Garofolo, *The Impact of Firm Speed Capabilities on the Decision to Partner or Go It Alone*, 6 STRAT. SCI. 191 (2021).

resources.[50] There may be a specific dynamic in technology settings where the decision to create a contractual alliance rather than a merger may create demand for such relationships.[51] Because of dynamic features, where the combination of network effects, data driven markets, scale and scope, and complementary assets, these markets have particular salience for antitrust.[52] This is particularly true in the merger context, where many

[50] Jay B. Barney, *How a firm's capabilities affect boundary decisions*, 40 SLOAN MGMT. REV. 137 (1999); Michael A. Hitt, David Ahlstrom, M. Tina Dacin, Edward Levitas, & Lilia Svobodina, *The institutional effects on strategic alliance partner selection in transition economies: China vs. Russia*, 15 ORG. SCI. 173 (2004).

[51] David J. Teece, *Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy*, 9 J.L. ECON. & POL'Y 97, 107-108 (2012) ("In this sense, cooperation is the handmaiden of competition. This has been recognized historically, as vertical relationships-- integration--were seen to support horizontal competition."); Ron Adner, Phanish Puranam, & Feng Zhu, *What Is Different About Digital Strategy? From Quantitative to Qualitative Change*, 4 STRAT. SCI. 253 (2019).

[52] Michal S. Gal & Daniel L. Rubinfeld, *Algorithms, AI, and Mergers*, 85 ANTITRUST L.J. 683 (2024); D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357 (2018); David Emanuelson & Danielle Drory, *The Potential Chilling Effects of Lowering Standards for Tech M&A Enforcement*, 34-SPG Antitrust 14 (2020); Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1 (2021).

cases have been under review regarding tech acquisitions by both "Big Tech"[53] as well as other firms.[54]

Increasingly there has been work devoted to value creation in mergers.[55] This includes typologies of mergers[56] as well as work specific to

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[53] Compare Zhuoxin Li & Ashish Agarwal, *Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram*, 63 MGMT. SCI. 3438 (2017) (finding that Facebook's acquisition of Instagram benefitted consumers); Tiago S. Prado & Johannes M. Bauer, *Big tech platform acquisitions of start-ups and venture capital funding for innovation*, 59 INFO. ECON. & POLC'Y 100973 (2022) (finding pro-competitive benefits of big tech acquisitions on venture capital); Ginger Zhe Jin, Mario Leccese, Liad Wagman, *How do top acquirers compare in technology mergers? New evidence from an S&P taxonomy*, 89 Int'l J. INDUST. ORG., 102891 (2023); Yang Pan & Wei-Ling Song, Tech Giants and New Entry Threats (June 2023) (unpublished manuscript) (available at https://perma.cc/YD9F-GWD8) (finding no negative effects of tech acquisitions focusing on patents); Sai Krishna Kamepalli, Raghuram G. Rajan, & Luigi Zingales, Kill Zone, Becker Friedman Institute Working Paper NO. 2020-19 (2020) (showing a negative change in venture capital investment after big tech acquisitions); Ke Rong, D. Daniel Sokol, Di Zhou, & Feng Zhu, Antitrust Platform Regulation and Entrepreneurship: Evidence from China (January 1, 2024). Harvard Business School Technology & Operations Mgt. Unit Working Paper No. 24-039, USC CLASS Research Paper No. 24-16, available at SSRN: https://ssrn.com/abstract=4697283 (finding that antitrust M&A ban of Chinese big tech led to less entry and reduced VC investment).

[54] André Hanelt, Sebastian Firk, Björn Hildebrandt, & Lutz M. Kolbe, *Digital M&A, digital innovation, and firm performance: an empirical investigation*, 30 EURO. J. INFO. SYST. 3 (2021); Ginger Zhe Jin, Mario Leccese, & Liad Wagman, *M&A and technological expansion*, 33 J. ECON. & MGMT. STRAT. 338 (2024).

[55] Jaideep Shenoy, *An Examination of the Efficiency, Foreclosure, and Collusion Rationales for Vertical Takeovers*, 58 MGMT. SCI. 1482, 1500 (2012) ("Collectively, our findings indicate that firms use corporate takeovers to expand their vertical boundaries consistent with an efficiency improvement rationale as predicted by the transaction cost economics and property rights theories.").

[56] Emilie R. Feldman & Exequiel Hernandez, *Synergy in Mergers and Acquisitions: Typology, Life Cycles, and Value*, 47 ACAD. MGMT. REV. 549 (2022).

operational efficiencies,[57] financial efficiencies,[58] technological/innovation efficiencies,[59] and product differentiation.[60]

Contracts may have potential anticompetitive effects that hurt consumers. Let us imagine a simple situation[61] of foreclosure where a negotiation with upstream monopolist firm A and downstream firm B impacts upstream competitor C because the contract might put B at a competitive disadvantage regarding consumers.

In the merger context, merger cases have addressed this type of concern but only when there is an actual merger, not as a contractual matter.[62] Antitrust needs to refocus its efforts less on formalistic mechanisms for merger control and more on the sorts of relationships at the boundaries of the firm that led to the exercise of monopoly power.

To better understand the importance of control and contracts from a governance framing, in a control contract situation, the monopolist Firm A is taking the place of the board in Firm B in the decision-making by exerting control. This is akin to what would happen in a merger – where there is a change in the control of the firm. Antitrust law does not typically address these sorts of concerns at the merger stage. Rather, antitrust waits until the

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[57] Vithala R. Rao, Yu Yu, & Nita Umashankar, *Anticipated vs. Actual Synergy in Merger Partner Selection and Post-Merger Innovation*, 35 MKTG. SCI. 934 (2016); Erik Devos, Palani-Rajan Kadapakkam & Srinivasan Krishnamurthy, *How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies*, 22 REV. FIN. STUD. 1179 (2009); Bruno Cassiman, Massimo G. Colombo, Paola Garrone & Reinhilde Veugelers, *The Impact of M&A on the R&D Process: An Empirical Analysis of the Role of Technological- and Market-Relatedness*, 34 RSRCH. POL'Y 195, 196 (2005); Gautam Ahuja & Riitta Katila, *Technological Acquisitions and the Innovation Performance of Acquiring Firms: A Longitudinal Study*, 22 STRAT. MGMT. J. 197, 200 (2001).

[58] See e.g., Michael Jensen & Richard S. Ruback, *The market for corporate control: The scientific evidence*, 11 J. FIN. ECON. 5 (1983).

[59] Luís Cabral, *Merger policy in digital industries*, 54 INFO. ECON. & POL'Y 100866 (2021).

[60] Gerard Hoberg & Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 REV. FIN. STUD. 3773 (2010).

[61] One could complicate the situation with non-linear models of pricing such as conditional pricing practices. Bogdan Genchev & Julie Holland Mortimer, *Empirical Evidence on Conditional Pricing Practices: A Review*, 81 ANTITRUST L.J. 343, 370 (2017) (providing a survey of the literature).

[62] See e.g., United States v. AT&T Inc., 310 F. Supp. 3d 161, 254 (D.D.C. 2018); United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017).

conduct stage. Yet, this is particularly important given the importance of significant types of vertical integration via contract.

Antitrust is not totally immune from such thinking. While we suggest that generally antitrust needs a rethink, this rethink is grounded in antitrust theory and practice in related settings. Antitrust regularly has captured this in the context of mergers both domestically (e.g., the American Airlines/JetBlue joint venture) Providing a larger framing for doing so may prevent significant harm from occurring prior to the consummation of the significant contracts.

In United States v. American Airlines Group Inc.,[63] involves blocking a joint venture between American Airlines and JetBlue that was short of a full merger for joint operations in Boston and New York and for American to lease some of JetBlue's slots in busy airports that were underutilized.[64] The nature of the joint venture was not a financial investment. Rather, it was "codesharing, schedule coordination, revenue sharing, reciprocal loyalty benefits, and joint corporate customer benefits."[65] The Department of Justice challenged the joint venture under Section 1 of the Sherman Act and undertook a rule of reason analysis and argued that the anti-competitive benefits outweighed the pro-competitive benefits. After losing at the district court, American Airlines and JetBlue appealed and lost before the First Circuit. The appeal centered on how the economic effects did not support the pro-competitive justifications offered by the parties. So far so good. However, looked at not in isolation, the decision shows what is wrong with merger law. The case could not be brought as a Clayton Act Section Seven case and therefore could not benefit from the structural presumption under *Philadelphia National Bank*[66] and could not as easily draw from other merger cases. This has made joint venture analysis, which does examine contracts short of merger, untethered from merger analysis and push case law forward in a meaningful way to other industries and situations in which contracts lead to a change of control. Further, the lack of internal antitrust coherence means that while the importance of contracts

[63] United States v. Am. Airlines Grp. Inc., 121 F.4th 209 (1st Cir. 2024).

[64] Id. at 217.

[65] Id.

[66] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963). For academic commentary, see e.g., Peter C. Carstensen, The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World, 80 Antitrust L.J. 219 (2015); George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176 (1955); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (1960).

are understood in Section 1 context, this emphasis on economic substance in the decision cannot easily help shape the future of merger law nor can merger law respond easily to similar changes in Section 1 related joint venture law.

II. CONTROL CAPTURE OF FIRMS

A. Internal and External Control of Firms

A central concern when thinking about behavior of firms in general is control. Who has is? Various laws concerning firms revolve around inuring control and imposing duties and liabilities as a result of control.

We tend to think about control of firm from the perspective of internal affairs and governance. Consider the corporation as the prototypical firm. The board has ultimate power to manage the business and affairs.[67] A controlling shareholder, such as a parent corporation, controls by virtue of equity ownership. All managerial powers derive from these two factors. However, we must acknowledge that control of firms has both internal and external facets.

Firms are controlled externally through various means. Obviously, law controls firms. Firms may be substantively regulated, such as in financial services, energy, defense, and myriad other regulation of various industries. Setting aside this obvious source of external control, we see that firms are externally controlled through two principal means.

Markets are one way in which firms are controlled. Markets ensure that firms are controlled as to their predatory behavior such as monopoly pricing and collusion. We normally don't think of antitrust law as means to enable control. It is thought more conventionally as abrogating control when control is seen through the lens of internal affairs. Antitrust law seeks to deny control by firms. However, there can be no doubt that the ultimate end of competition law is to ensure that markets control firms, and not the other way around.[68] Competition law seeks to ensure that prices are subject to and controlled by market forces.

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[67] *See* DEL. CODE ANN. tit. 8, § 141(a).

[68] Markets are construed broadly. One facet is the demand side of the consumer market that may affect prices. The focus of this Essay is the supply side of competition among firms.

The other principal means of controlling firms is contracts. Without acquisition of equity resulting in internal control, contract is the only way in which one firm can exercise material control over another. Contract is the principal means of external control in inter-firm relations. Consider the agency relationship in which the agent contracts to do the principal's bidding and generally to be subject to the principal's control.[69] Although control defines the core element in a principal–agent relationship, commercial contracts can always exert some level of external control. For example, a licensing agreement may contain specific terms and conditions of use, and a supply or purchase agreement may contain certain provision or purchase requirements. We do not need to belabor the point that contractual terms bind parties, and legal obligations, such as they are, impose some degree of control.

Contrary to the core assumption of antitrust law, control of firms can be gotten through various means. Accordingly, antitrust law ought to be sensitive to the reality of control capture. Control of decisionmaking within the firm is not strictly limited to the endogenous powers granted to the board and shareholders under corporation law. Control capture can result from contracts. The core idea of this Essay is a simple one: The reality of de facto control should govern legal policy when control is a point of fact, and control is used in ways that thwart the law's underlying policy.

We see evidence of the connection between control and legal policy at work in the laws of business firms and agency. In these fields, the substantive reality of control governs rather than the form of law.

B. Control in Laws of Business Firms

Control is the central concept in the laws of business firms. If democracy derives its legitimacy from the consent of the governed, then the laws of business firms derive legitimacy from the control of owners. In the realm of partnerships, control is direct.[70] Berle and Means famously

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[69] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2007). Of course, agency is based on an assentual relationship, and a contract is not needed to create a principal–agent relationship. *Id. cmt. d* ("[T]he the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency.").

[70] *See* UNIF. P'SHIP ACT § 401(h) (Unif. L. Comm'n 1997 and amended 2013) (providing that partners manage); UNIF. LTD. P'SHIP ACT § 406(a) (Unif. L. Comm'n 2001 and amended 2013) (providing that general partners manage).

observed that modern corporations separate ownership and control.[71] This separation is reality for public companies, but control by nonowner managers must still be legitimized. Corporation law envisions a form of abstract control where shareholder control lies in the "fluid aggregation of unaffiliated stockholders."[72] Consistent with this idea, shareholders have certain rights that support such notion of control, principally the right to vote on certain matters.[73] When the atoms of dispersed financial claims are reconstituted, a controlling shareholder can acquire more direct control similar to that of partners in a partnership.

Control is the critical factor that is at the heart of the core issues of the laws of business firms: power, duty, and liability. Obviously, control means the power to manage and make decisions. All decisions on the firm's business and affairs are the product of control and authority. Laws assign managerial power to certain presumptive persons within the firm, such as partners, members, managers, and directors.[74] The control of managerial decisionmaking means that the person incurs duties and liabilities.

Only persons who manage or have managerial authority owe fiduciary duties. Partners, managers, directors, officers, and controlling shareholder owe fiduciary duties.[75] Limited partners, members of manager-managed limited liability companies, and shareholders generally do not owe fiduciary duties.[76] They do not have the power of control.

The corollary principle is that persons who lack control do not bear liability beyond their investment. Limited partners, members of limited liability companies, and shareholders have limited liability, and generally

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[71] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 117 (1932) (Macmillan 1933) ("[I]n the largest American corporations, a new condition has developed .... [T]here are no dominant owners, and control is maintained in large measure apart from ownership.").

[72] Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994). *See* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (same).

[73] *See, e.g.,* DEL. CODE ANN. tit. 8, §§ 212, 242(b), 251(c), 271(a).

[74] *See supra* notes 67 & 70; UNIF. LTD. LIAB. CO. ACT § 407 (Unif. L. Comm'n 2006 and amended 2013).

[75] *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (holding that controlling shareholder owes fiduciary duties to minority shareholders).

[76] **[citation]**

are not exposed to liability to internal constituents precisely because they do not control the firm.[77]

Even when shareholders are presumptively passive and lack direct control, they may bear liability if they exercise control. As a controlling shareholder, they may be liable for breaching their fiduciary duties. Moreover, if they exercise control in a way that abuses the corporate form, they may be liable for the debts and obligations of corporation through the doctrine of veil piercing. Indeed, a person does not even have to be a shareholder in form for veil piercing to apply.[78]

Lastly, in the determination of whether a person is a controlling shareholder, corporation law is not doctrinaire. Clearly, de jure control through ownership of more than 50% of shares suffices. However, control ultimately is a point of fact, and a shareholder can be deemed to be a de facto controlling shareholder though she may own less than a majority of shares.[79]

Control and its consequences are at the heart of the laws of business firms. When a person has control, per legal grant or factual circumstance, she incurs duties and liabilities arising from the exercise of managerial authority.

C. Control in Agency Law

The law of agency is grounded on the idea of control. Agency is defined as a fiduciary relationship that arises when a principal manifests assent to an agent that the agent shall on the principal's behalf and subject to the principal's control, and the agent manifests assent to act in this

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[77] **[citation]**

[78] *See, e.g.,* Freeman v. Complex Computing Co., Inc., 119 F.3d 1044, 1051 (2d Cir. 1997) ("New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner', notwithstanding the fact that the individual is not a shareholder of the corporation.").

[79] *See, e.g.,* Kahn v. Lynch Communication Sys., 638 A.2d 1110, 1114-15 (Del. 1994) (holding that 43.3% holding constituted de facto control). *See also* Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989) ("[A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status. For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct.") (quotation marks and citations omitted).

capacity.[80] The role of agency in antitrust law is evident. Suppose a principal firm instructs an agent firm to engage in anticompetitive behavior, and both firms are separate and distinct in the sense that, while they are in a principal–agent relationship, neither has equity ownership of the other. It is clear that both firms would violate antitrust laws.

What happens when facts are muddied by the lack of an explicit agreement, but at the end of the day a court control exists through contractual arrangements and mutual assent? The old chestnut, *A. Gay Jensen Farms Co. v. Cargill, Inc*. illustrates the problem.[81]

Warren Seed & Grain Co., a grain elevator, financially failed, and creditor plaintiffs sued Cargill for Warren's debts owed. Contractual arrangements bound Warren and Cargill. Cargill provided credit to Warren and purchased grain from Warren.[82] Ordinarily, neither a creditor–debtor nor buyer–supplier relationship creates a principal–agent relationship. However, the set of contractual and factual arrangements were unusual. An agreement provided, among other arrangements, that Cargill a right of first refusal to purchase grain sold by Warren, and that Warren could not make capital improvements in excess of $5,000, be liable as guarantor on another's indebtedness, encumber its assets, and declare a dividend without Cargill's approval.[83] At some point in the relationship, Cargill concluded that Warren "needs very strong paternal guidance."[84] Based on this belief, Cargill began to take greater control of Warren's operations. Some plaintiffs were led to believe that they were dealing with Cargill or that Warren was acting on Cargill's behalf. Cargill sought to capture control of Warren because Warren was a supplier of grain.[85] When Warren ceased operations, it owed Cargill $3.6 million and plaintiffs $2 million.[86]

The plaintiff's theory against Cargill was that Warren was Cargill's agent, Warren's contracts with the plaintiffs were for the benefit of Cargill, and thus Cargill as principal was liable for Warren's contractual

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[80] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2007).

[81] A Gay Jensen Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981).

[82] *Id.* at 288.

[83] *Id.*

[84] *Id.* at 289.

[85] *Id.* Warren shipped 90% of its cash grain to Cargill. *Id.*

[86] *Id.* at 289-90.

obligations.[87] Predictably, Cargill contended that there could not have been an agency because it never consented to the agency, Warren did not act on behalf of Cargill, and Cargill did not exercise control over Warren.[88] However, agency does not require an explicit agreement is not necessary. It only requires the satisfaction of the elements of agency: mutual assent for agent to serve the principal's purpose and be subject to the principal's control.[89] Based on the facts, the court reasoned:

> By directing Warren to implement its recommendations, Cargill manifested its consent that Warren would be its agent. Warren acted on Cargill's behalf in procuring grain for Cargill as the part of its normal operations which were totally financed by Cargill. Further, an agency relationship was established by Cargill's interference with the internal affairs of Warren, which constituted de facto control of the elevator.[90]

While *Cargill* is a case on agency, it illustrates a broader point that has implication on antitrust law. Contractual arrangements can be structured so that one firm can capture control of another firm even though the two firms are separate and distinct and are not bound by equity investment. Cargill and Warren did not explicitly agree to a relationship in which one firm relinquishes control, but the facts were such that the court concluded control capture occurred.[91]

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[87] *See* RESTATEMENT (THIRD) OF AGENCY §§ 6.01–6.03 (2007) (providing that a principal is a party to the contract).

[88] Cargill, 309 N.W.2d at 290-91.

[89] *Id.* at 291.

[90] *Id.* The court reasoned further: "A number of factors indicate Cargill's control over Warren, including the following: (1) Cargill's constant recommendations to Warren by telephone; (2) Cargill's right of first refusal on grain; (3) Warren's inability to enter into mortgages, to purchase stock or to pay dividends without Cargill's approval; (4) Cargill's right of entry onto Warren's premises to carry on periodic checks and audits; (5) Cargill's correspondence and criticism regarding Warren's finances, officers salaries and inventory; (6) Cargill's determination that Warren needed "strong paternal guidance"; (7) Provision of drafts and forms to Warren upon which Cargill's name was imprinted; (8) Financing of all Warren's purchases of grain and operating expenses; and (9) Cargill's power to discontinue the financing of Warren's operations." *Id.*

[91] "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the legal consequences of the relation to follow. The existence of the agency may be proved by circumstantial evidence which shows a course of dealing between the two parties." *Id.* at 290.

Control and its consequences are at the heart of agency law. When a person has control, per legal grant or factual circumstance, she may be deemed to be a principal for which she may be liable for the agent's conduct or their joint conduct.

D. Reasons for Contractual Control Capture

The laws of business firms and agency show that control capture does and should engender obligations and liabilities. Equity ownership is not the sine qua non of power, duty, and liability. Directors and officers may not be equityholders. A nonshareholder may have the corporate veil pierced so that he is liable for the debts and obligations of a company in which he holds no equity. Principals and agents are legally distinct persons. Yet the paradigm of antitrust is based on acquisition of equity instead of control capture, resulting in a large gap in legal policy.

The principal–agent analogy is the most useful model for application to antitrust law. Agency is created from three elements: principal's goal, principal's control, and mutual asset. Each of these elements are present in antitrust consideration. A firm wishes to engage in anticompetitive behavior. It may not be able to do so alone because it does not have the necessary market power. It needs another firm or firms. Their combined action can be in the form of collusion, suggesting firms of approximate equal standing that ought to be competitors. Alternatively, a firm may require the acquiescence or cooperation from another, suggesting a power relation based on control capture. In either case, there is mutual assent between the two firms.

One of us has argued that a specific form of contract—debt contracts—may inure control to the creditors and this control has antitrust implications.[92] Other than specific contractual protections,[93] debt normally does not inure internal control rights to creditors.[94] If, however, creditors

[92] D. Daniel Sokol, *Debt, Control, and Collusion*, 71 EMORY L.J. 695 (2022).

[93] *See* COMMENTARIES ON INDENTURES 1-2 (Am. Bar Found. 1971) (stating that the rights of creditors are "largely a matter of contract").

[94] Delaware permits creditors to vote, but other statutes do not permit such participation. *Compare* DEL. CODE ANN. tit. 8, § 221 (permitting creditors "the power to vote in respect to the corporate affairs and management"), *with* MOD. BUS. CORP. ACT § 7.21(a) (2020) ("Only shares are entitled to vote."). *See also* Eliasen v. Itel Corp., 82 F.3d 731, 735 (7th Cir. 1986)

can obtain sufficient control of debtors, they can engage in the types of behavior that are prohibited under competition law.[95] In this Essay, we expand this idea to a general principle: Any contractual arrangement that may result in control capture should trigger antitrust merger review.

A firm may have many reasons for preferring contractual control capture over equity acquisition. It may lack the capital to make a whole acquisition. It may achieve the same benefit without a costly acquisition including integration risk. If it can do this without risking capital, the financial returns on contractual control capture are compelling. In other words, the economic calculus may be that the benefit of anticompetitive conduct is greater than the benefit of investment return on capital for an acquisition. A firm may also wish to experiment with business models before making acquisition.

This approach suggests a model of contractual incubators in which investments in innovative business models are made through contracts rather than through the traditional venture capital equity investment. Such contracts may include option rights on equity upon satisfaction of certain targets or other conditions.

Lastly, given that antitrust law is based on the paradigm of equity acquisition, a firm may wish to exploit the gap in law by capturing control through contract rather than equity precisely because such contractual arrangements will likely avoid antitrust scrutiny.

E. Standard for Control Capture

We establish the legal standard to determine control capture. Of course, all contracts create obligations, liabilities generally speaking, and thus impose a level of legal control in the sense that the obligee firm must comply with the terms or face legal liability. For the purpose of antitrust, if contractual control capture can lead to liability, what level of control is sufficient to trigger review? We believe that the answer is self-evident. It is the level of control necessary for the controlling firm to create anticompetitive results. In other words, has control capture resulted in anticompetitive result?

("A corporate structure in which the bondholders . . . have all the voting rights, and the shareholders . . . have no voting rights, is anomalous.").

[95] Sokol, *supra* note 92, at 707-08. "Those types of control include the ability to (1) set the price, (2) decide whether to acquire companies, (3) reduce capital expenditures, and (4) replace top management." *Id.*

Control capture is not unidirectional in the sense that one firm is stronger than the other firm. Such result may inure from control over the obligee firm or bilateral agreement between the contracting firms. Control capture can be bilateral where two firms contract in mutually symbiotic relationship based on bilateral control arising from unique vulnerabilities and opportunities.

A key consideration is whether a contractual arrangement creates vulnerabilities in the obligee firm or bilateral vulnerabilities. Elements of contractual control capture are: (1) contract constitutes all or substantially all of the obligee firm's business and financial return; (2) contract leaves the obligee firm critically vulnerable to termination or breach; (3) obligee firm substantially depends on the controlling firm for financial, managerial, product development or business model support; (4) contract substantially dictates obligee firm's operational control of firm. When these elements exists and they are used to promote anticompetitive effects, legal policy should consider them problematic.

Lastly, an obvious point must be made explicit. We do not suggest that control alone would be invalid. Liability inures from harm. Contract resulting in control capture are not void, but are voidable. Illegality results when control is exercised improperly to facilitate anticompetitive behavior.

III. APPLICATION TO ANTITRUST LAW

A. Control in Antitrust

Antitrust reaches mergers mostly proactively through the filing of a pre consummated merger notification to the DOJ and FTC under HSR. The Act requires notification of stock and asset deals. When there is a merger that may have potential anticompetitive effects, government enforcers (and sometimes private plaintiffs) may sue to enjoin the proposed merger under Section 7 of the Clayton Act.[96] Antitrust has, under HSR, focused on two tests: the size of persons and the size of transactions. The size of the persons threshold addresses the size of the parties (based on parent entities) to the transaction. The size of the transaction is based upon "voting securities" or

[96] See 15 U.S.C. § 18. Antitrust merger case law relies in part on a structural presumption. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–63 (1963). Antitrust merger law also uses a burden shifting framework. See United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

"assets" beyond the currently set threshold. The HSR rules do not contemplate non-equity transactions as a regular condition for notification for antitrust review. We argue that this formalistic approach to merger control omits actual control that firms might exhibit through non-equity investments. Such a framing is also out of sorts with the spirit of antitrust law generally, including decades of Supreme Court case law.[97]

Antitrust must police against anti-competitive contracts in the merger space. Whereas antitrust for decades has focused on error costs suggesting more concern about possible false positives,[98] modern antitrust thought suggests that this assumption should be revisited.[99] It is not possible to predict how many of the total number of contracts firms enter into in a given year nor how many are problematic. Even if is the case that most contracts are benign or even efficient, some number of such contracts pose a threat. Certainly it cannot be the case that there are no such problematic contracts. A more optimal approach to make society better of cannot be to always wait until the conduct stage before intervening in contracts. Early intervention after all is precisely the rationale for the existence of merger law. Thus, society is better off with a policy that is surgical and nuanced with few administrative costs that would allow for antitrust to reach such conduct. In a different merger context, Professors Bryan and Hovenkamp argue, "society may benefit from a policy that permits limited intervention based on reasonably ascertainable evidence, even if this carries some risk of false positives."[100] This certainly should be true in the context of control contracts as well.

With relatively few but in some ways significant modifications to antitrust law, it would be possible to reach such contracts. Antitrust law requires a change to address the issues that emerge from control contracts.

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[97] Ohio v. American Express Co., 585 U.S. 529, 542-3, 138 S. Ct. 2274, 2285, 201 L.Ed.2d 678 (2018) ("Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law," citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466–467, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992)).

[98] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX L. REV. 1, 21 (1984) ("If judges tolerate inefficient practices, the wrongly-tolerated practices will disappear under the onslaught of competition. The costs of [false positives] are borne by consumers, who lose the efficient practices and get nothing in return.").

[99] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 7–36 (2015).

[100] Kevin Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331, 334 (2020).

At present, the Clayton Act requires that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The problem is that the act does not foresee the possibility that there may control without an acquisition. The Clayton Act would need to be amended to capture control transactions. This could be done with a change in the text of the act which would not require a merger.

In some ways this would make antitrust merger control harder rather than simpler. But efforts at simplification of antitrust in the merger context regarding the use of the structural presumption has made antitrust harder to enforce rather than easier[101] The change in the language is the first step because no enforcement seems suboptimal than some enforcement.

To effectuate a change that addresses control capture, antitrust must have legislative change for both the Clayton Act and HSR Act. Merger law would then apply specifically to such control contracts. This would allow for the application of Section 1 joint venture related case law to the merger context as well as develop new merger case law for purely contractual situations that may be vertical. As this Part will explore, a control capture test would not create additional significant costs because the but for world already exists in both the United Kingdom and European Union with review of such types of contracts. In both jurisdictions, a finding of control is a significant undertaking and is not applied easily. In the US setting, creating a more appropriate framework would aid to better address control contracts and allow for early intervention when antitrust intervention may be warranted.

B. The United States needs to have a reporting regime for certain types of contractual relationships

1. Tying and Bundling

Tying and bundling are among the reasons that antitrust contractual arrangements deserve scrutiny. Though many such antitrust arrangements may be benign or pro-competitive, bundling and tying present potential competitive problems.

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[101] This is not necessarily a problem. See Sean Sullivan, *Against Efforts to Simplify Antitrust*, 49 J. CORP. L. 419, 421 (2024).

The basic economics of tying are relatively straightforward. When a seller of two products (Product A and Product B) requires a consumer to purchase Product B along with Product A, this practice is referred to as tying. In this case, Product B is the "tied product" and Product A is the "tying product."[102] Antitrust law recognizes the potential anti-competitive effects in both traditional[103] and tech[104] settings.

Tying may be used, in certain settings, to preserve or extend monopoly power in markets that are based on rapid technological change. This, for example, is a common feature in digital platform markets.[105] In such settings, tying may be used to drive competitors out of the market and to block potential entrants.[106] As such, tying may be effective in particular in settings where a complementary market has network effects.[107] As such, tying may allow for the transfer of monopoly power to nascent markets.

In the academic setting, the potentially anti-competitive effects of tying focus on leveraging of the market power from the tying market to the tied market.[108] The seminal article that articulated this concern is by Whinston, who through game theory modeling suggests that such tying related leveraging may create market power.[109] Such market power in turn leads to the foreclosure of competitors which in turn reduces consumer welfare. This insight has been extended to tech markets related markets where tying behavior can be used to extend the monopoly position through

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[102] It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 685 (4th Cir. 2016); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying To Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194, 194-96, 198-212 (2002)

[103] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953); Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 234 (2005) ("[I]n tying, the buyer is forced to buy the tied product as a condition of obtaining the tying product."); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 425-26 (2009).

[104] Erik Hovenkamp, *The Antitrust Duty to Deal in the Era of Big Tech*, 131 YALE L.J. 1483, 1488-89 (2022).

[105] Jordan Barry & D. Daniel Sokol, *Data Valuation and Law*, 96 S. CAL. L. REV. 1545, 1549-53 (2024).

[106] Carlton & Waldman, *Strategic Use, supra* n. **[_]**.

[107] Jay Pil Choi, Doh-Shin Jeon & Michael D. Whinston, 2024. "Tying with Network Effects," CEPR Discussion Papers 19076.

[108] There are numerous pro-competitive justifications for tying. See e.g., Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469, 525-26 (2001).

[109] Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (1990).

preserving the monopolistic position in the tying market.[110] In the tech platform setting, the academic literature extends to "platform envelopment." This strategy uses tying to limit competitors to scale up. Similarly, recent work identifies tying as the strategy to create demand side leverage for a "quasi installed base" advantage in markets that exhibit.[111]

As separate from tying, bundling involves selling two or more distinct products together as a package at a single price.[112] Bundles come in various forms. In pure bundling, the products are available only as part of the bundle. In mixed bundling, at least some products in the bundle are available separately.[113] In the tech context, platform bundling may be used as a strategy to overcome entry barriers in markets with strong network effects and high switching costs.[114] For example, a platform in Market A can bundle its offerings with those of an incumbent platform in Market B, to leverage common user relationships and shared components to enhance its market power.

The academic literature on bundling is also longstanding.[115] In the general context, the anti-competitive rationale for bundling can be found in

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[110] Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. Econ. 194, 205, (2002).

[111] Doh-Shin Jeon, Jay Pil Choi & Michael Whinston, "Tying with Network Effects," TSE Working Papers 1524 (2024), available at https://ideas.repec.org/p/tse/wpaper/129287.html.

[112] See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); United Shoe Mach. v. United States, 258 U.S. 451 (1922); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 840, 846 (1990).

[113] Dennis W. Carlton & Michael Waldman, *Safe Harbors for Quantity Discounts and Bundling*, 15 GEO. MASON L. REV. 1231 (2008); Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423 (2006); Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULL. 321 (2005).

[114] Thomas Eisenmann, Geoffrey Parker & Marshall Van Alstyne, *Platform Envelopment*, 32 STRAT. MGMT. J. 1270 (2011). For an application in law, see Dan Awrey & Joshua Macey, *The Promise and Perils of Open Finance*, 40 YALE J. ON REG. 1, 57-58 (2022).

[115] For more pro-competitive justifications see e.g., Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L.J. 423 (2006); Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 Antitrust L.J. 399 (2008).

works such as Nalebuff or Greenlee et al.[116] Nalebuff suggests that bundling products may allow incumbents to deter potential competitors from market entry because of switching costs. Similarly, Greenlee et al. identify that bundling might lead to higher prices or less innovation through exclusion and thereby an inability to match the pricing by the incumbent firm. The anti-competitive concerns of bundling were operationalized in the law review context by Elhauge.[117] In the tech context, bundling might include user-generated content with news from third-party publishers. Depending on the scenario, this might lead to lower publisher profitability or increased publishers' profitability.[118]

2. Exclusive Dealing

Exclusive dealing is a type of contractual arrangement in which a seller requires a buyer to only purchase goods or services from the seller. This means that as a result of the exclusivity, the buyer cannot purchase the same goods or services from competitors. Both theoretical and empirical scholarship examine both the pro-competitive and anti-competitive impact of exclusive dealing. Regarding pro-competitive effects, exclusive dealing may prevent competitors from taking advantage of the seller's work through free riding. Such agreements also may increase the durability of supply chains to disruption or from a marketing perspective protect a brand's image.

There are possible anti-competitive effects to exclusive dealing.[119] This may include blocking rivals from entering the market or making it harder for such rivals to compete.[120] Recent academic work has examined

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[116] Patrick Greenlee, David Reitman & David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 Int'l J. Indus. Org. 1132 (2008) Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. Econ. 159 (2004).

[117] Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397 (2009).

[118] Alexandre de Cornière & Miklos Sarvary, *Social Media and News: Content Bundling and News Quality*, 69 Mgmt. Sci. 162 (2022).

[119] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 331-34 (1961); LePage's Inc. v. 3M, 324 F.3d 141, 157-59 (3d Cir. 2003); Daniel Francis, *Monopolizing by Conditioning*, 124 COLUM. L. REV. 1917, 1961-65 (2024).

[120] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct--Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64 (1998); Chiara Fumagalli & Massimo

digital platform specific exclusive dealing. [121] For example, this may include how exclusive dealing contractual agreements may prevent sellers from using multihoming (using multiple platforms at once) Or where a platform offers various deals to sellers to get the sellers to sign exclusive contracts. This in turn makes it more difficult for competing platforms to find sellers for their platforms. When there are few or no sellers available, buyers will not use the competing platforms. This strategy has the result of effectively blocking competition to the platform that offers exclusivity.

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Motta, *Exclusive Dealing and Entry, When Buyers Compete*, 96 AM. ECON. REV. 785 (2006); John Simpson & Abraham L. Wickelgren, *Naked Exclusion, Efficient Breach, and Downstream Competition*, 97 AM. ECON. REV. 1305 (2007). There also may be pro-competitive rationales for exclusive dealing. See e.g., Jan B. Heide, Shantanu Dutta & Mark Bergen, *Exclusive Dealing and Business Efficiency: Evidence from Industry Practice*, 41 J.L. & ECON. 387 (1998); Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433, 437-65 (2008).

[121] See e.g., Mark Armstrong & Julian Wright, *Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts*, 32 Econ. Theory 353 (2007); Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 Am. Econ. Rev. 2960 (2013); Upender Subramanian, Jagmohan S. Raju, & Z. John Zhang, *Exclusive Handset Arrangements in the Wireless Industry: A Competitive Analysis*, 32 Mktg. Sci. 191 (2013).

[122] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 331-34 (1961); LePage's Inc. v. 3M, 324 F.3d 141, 157-59 (3d Cir. 2003); Daniel Francis, *Monopolizing by Conditioning*, 124 COLUM. L. REV. 1917, 1961-65 (2024).

[123] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct--Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64 (1998); Chiara Fumagalli & Massimo Motta, *Exclusive Dealing and Entry, When Buyers Compete*, 96 AM. ECON. REV. 785 (2006); John Simpson & Abraham L. Wickelgren, *Naked Exclusion, Efficient Breach, and Downstream Competition*, 97 AM. ECON. REV. 1305 (2007). There also may be pro-competitive rationales for exclusive dealing. See e.g., Jan B. Heide, Shantanu Dutta & Mark Bergen, *Exclusive Dealing and Business Efficiency: Evidence from Industry Practice*, 41 J.L. & ECON. 387 (1998); Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433, 437-65 (2008).

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3. Joint ventures

Joint ventures are one form of strategic alliance., a situation in which firms pool resources for joint gain.[125] This gets covered typically under Sherman Act Section 1. The sort of joint ventures in this context have been horizontal such as those addressed in *Dagher*[126] (oil & gas) and *American Needle*[127] (professional sports) or even in the merger context such as *American Airlines/JetBlue* as described earlier.[128] Sometimes joint ventures may be vertical.

C. Other jurisdictions provide some guidance.

In such jurisdictions the cases are quite rare such that they can reach to cases of control capture without creating a significant administrative burden. These experiments are useful to showing how a change in US merger control policy would not overwhelm the merger system but would create opportunities to reach control capture.

The European Commission (EC) approach focuses on what it terms "decisive influence" when there is no ownership change but there is a joint venture agreement in which the two firms act as a single firm regarding the commercial decisions.[129] Similarly, negative covenants are covered as these also serve to limit the control of one of the trading partners.[130] For example,

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[125] Ranjay Gulati, *Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances*, 38 ACAD. MGMT. J. 85 (1995).

[126] See supra at n. [_].

[127] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

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[129] See Commission Consolidated Jurisdictional Notice Under Council Regulation 139/2004, 2008 O.J. (C 95) 1, 8 ("Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where for example long term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.").

[130] Id.

in a recent case, the Commission identified that an entity with less than 50 percent ownership could still exercise control.[131] Therefore, in exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence."[132] This has rarely been used in case law.[133]

Similarly, the United Kingdom's competition law regime recognizes that control rather than ownership is what determines a competition concern. As such, low levels of ownership or even no ownership may raise competition concerns. Competition concerns arise when there is "material influence" that allows one firm to influence the behavior of the other firm in terms of "the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.[134] This is largely a fact-specific inquiry.[135] The system defines control in a way that 'Control' is not dissimilar to US case law in the agency or corporate law contexts that suggest that the test is one based on substance over form arguments.[136]

A decisive influence is not the same as a substantial lessoning of competition, which is not the same standards as used in the US merger guidelines because the focus in the substantial lessoning of competition test is on mergers. However, the same logic applies to contracts, especially

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[131] Case C.1887 — Mediaset — Article 265 Invitation to Act, 23.1, 2023 O.J. (C 23/9).

[132] Commission Notice on the concept of Concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, 1998 O.J. (C 66) 1 at III. 9.

[133] See e.g., Case IV/M.697 — Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

[134] Competition & Markets Authority, Mergers: Guidance on the CMA's Jurisdiction and Procedure, GOV.UK, ¶ 4.17 (Jan. 2, 2025) [hereinafter CMA, Mergers: Guidance], https://assets.publishing.service.gov.uk/media/677664f96c34906cc84c946d/CMA2_Mergers_-_guidance_on_the_CMA_s_jurisdiction_and_procedure.pdf.

[135] Id. at ¶ 4.18.

[136] Id. at ¶ 4.16, noting that merger control may be triggered "falling short of outright voting control. Section 26 of the Act distinguishes three levels of interest (in ascending order): (a) material influence; (b) de facto control; and (c) a controlling interest (also known as 'de jure', or 'legal' control)."

given that in the merger context, contracts may be the basis of the substantial lessoning concerns.

Regarding a substantial lessoning of competition, in *General Dynamics*, the Supreme Court identified that the legal test for purposes of allowing a rebuttal against the structural presumption of the prima facie merger case was based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition'").[137] Similarly, the Merger Guidelines reference a substantial lessening of competition 14 times.

In the case of substantial control, the substantia, lessening of competition framework would look most like unilateral effects in a merger regarding the potential for downstream foreclosure. As the merger guidelines explain relating to foreclosure strategies, "[The merger] could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or information relevant to making efficient use of the product."[138] This sort of approach brings together the framing in Europe and the UK within the US context of SLC.

C. Case Law Development

We suggest mandatory notification that would require that the contractual relations get notified in settings where one party is a monopolist and for the other party the contract is material to its operations enough that there is effectively a change in the control of who governs the firm through control contracts. This type of concern has been addressed in both agency and corporate law and can be used in antitrust for similar purposes.

Antitrust would be well served by drawing some initial presumptions as to the sorts of deals that would need to be notified. These would be the sorts of deals in which the contracts are material for a trading partner enough that the contract must be mentioned in an SEC filing or the equivalent for a private firm. The SEC provides for guidance of what makes a contract material:

> If a reporting company's business is substantially dependent upon a contract, that contract will be considered material and must be reported. This would include any contract pursuant

[137] United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974).

[138] Merger Guidelines at 2.5.A.

> to which the reporting company sells the major part of its products or services or purchases the major part of its requirements of goods, services or raw materials.[139]

The next question would be if the other trading partner has market power.[140] Without market power, there is minimal antitrust concern about the contract.[141]

Our suggestion should not block the majority of contracts. While there are a number of studies that show anticompetitive effects both in terms of modeling and empirically, Francine Lafontaine & Margaret Slade, summarize, "[O]verall a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong."[142]

Addressing the sort of contractual arrangements that may lead to potential concern of antitrust authorities may require the increased use of machine learning textual analysis to better inform the risk assessment of particular contracts.[143] Emerging antitrust issues such as competition in the AI stack via contract is but one application.[144]

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[139] Item 601(b)(10)(ii)(A)-(D) of Regulation S-K.

[140] In the conduct context, see FTC v. Indiana Federation of Dentists, 476 U. S. 447, 459-61 (1986).

[141] Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

[142] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 677 (2007). See also Fernando Luco & Guillermo Marshall, *The Competitive Impact of Vertical Integration by Multiproduct Firms*, 110 Am. Econ. Rev. 2041, 2043 (2020) (measuring separately the effects of vertical integration on integrated and nonintegrated firms, finding unintegrated products increased in price by 1.2 to 1.5 percent, while prices for integrated products decreased by 0.8 to 1.2 percent).

[143] Increasingly such methods are being used to understand business text. See e.g., Maryjane R. Rabier, *Acquisition motives and the distribution of acquisition performance*, 38 STRAT. MGMT. J. 38266 (2017); Gerard Hoberg & Gordon M. Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 REV. FIN. STUD. 3773 (2010).

[144] John Kirkwood, How Big Tech's AI Startup Alliances Could Harm Competition, ProMarket, August 29, 2024, available at https://www.promarket.org/2024/08/29/how-big-techs-ai-startup-alliances-could-harm-competition/.

CONCLUSION

Merger review is antitrust law's best opportunity to combat anticompetitive control in concentrated markets.[145] There are many kinds of behavior in antitrust that we would like to get at but the rules have developed in such a way that we do not effectively get it this behavior and we need a new framing to get at potentially anti-competitive behavior. But to understand that we need to understand what it is that antitrust does relatively well and where we need to make improvements that doesn't upset the balance of increased innovation and higher output from lower prices and higher quality.[146]

Recognizing that control contracts may create anti-competitive effects is the first step to reinvigorating antitrust law in a way that identifies a particular type of control akin to a merger that antitrust has not adequately addressed.

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[145] See Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 47–48 (2018). There has been other work exploring some issues specific to potential anti-competitive activity in the merger space in recent years where conduct remedies seem to be insufficient. See e.g., Miriam Schwartz-Ziv, Anat Alon-Beck, Moran Ofir, & John Livingstone, *Unraveling the Web: How Big Tech Uses SPACs to Skirt Antitrust Laws*, 26 U. PENN. J. BUS. L. 634 (2024); D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265 (2024); Michal S. Gal & Daniel L. Rubinfeld, *Algorithms, AI, and Mergers*, 85 ANTITRUST L.J. 683 (2024)

[146] While the issue of acquihiring and non-competes are also contractual issues in antitrust, we do not focus on such issues in this setting as they typically will not be control contracts. On acquires, see John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 Duke L.J. 281 (2013). On non-competes and antitrust, see Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. Chi. L. Rev. 381 (2020); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143 (2022); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 Antitrust L. J. 165 (2020).