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Informa Connect Antitrust West Coast Conference
A Functional Approach to Antitrust Enforcement and Compliance

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Thank you. I want to begin by thanking Informa and the organizers for bringing this conference together, and for the invitation to open it. It's a privilege to be here.

Before I go further, the standard disclaimer: the views I'm about to share are my own. They do not represent the views of the Federal Trade Commission, Commissioner Meador, or anyone else at the Commission.

I want to use this time to suggest a way of thinking about antitrust from an enforcement perspective—one that I hope will be useful as you listen to the panels that follow.

Conversations in antitrust often move quickly among case law, economic theory, and doctrine. Those conversations are important, and you will hear a lot about each over the next two days. But before diving into those details, I want to step back and start with foundations: how to think about what antitrust law is about, and how that question connects to the work that compliance teams and enforcers are each doing in their own way.

At its core, antitrust is concerned with how firms compete.¹ It distinguishes between conduct that creates value for trading partners, like better products and services, and conduct that systematically interferes with their ability to pursue alternatives and make informed choices.²

That distinction sounds simple enough; and at a high level, it is. Everyone in this room can tell the difference between winning a customer by offering a better product and winning a customer because you've firebombed your rivals' factories. Most cases, however, fall somewhere in between.

¹ *Standard Oil Co. of N.J. v. United States (Standard Oil)*, 221 U.S. 1, 58 (1911) (explaining that the common law tradition underlying the antitrust laws focused on contracts and conduct that restrict "competitive conditions" and the flow of commerce).

² *Id.* at 75 (distinguishing lawful competitive growth through "normal methods of industrial development" from conduct reflecting an intent to exclude rivals and centralize "control" over markets).

When determining whether a particular competitive method raises antitrust concerns, enforcers often ask many of the same questions a company asks when devising a business strategy. What is the firm trying to achieve? How will customers and counterparties respond, given the firm's position in the market? How does the strategy shape the terms on which market participants interact?

In practice, that means enforcement decisions, to be effective, must be driven by a careful evaluation of the facts. As the Supreme Court has put it, "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."³

Yet much of the disagreement in antitrust traces back to how we talk about competition itself. There is a tendency to define it in static terms: as an end state in which a court is asked to declare whether efficiency is maximized.⁴ A related view reduces competition to market structure, focusing on the number of firms that comprise the market at a given point in time.⁵ But a more accurate account is functional.⁶ Competition is not a fixed condition;⁷ it is a process through which firms and individuals exchange value.⁸ When parties can freely select from among alternatives on an informed basis, competitive outcomes follow.⁹ For that reason, the inquiry is not about starting with an abstract definition of "competition," but about understanding the conditions upon which market participants are actually transacting.¹⁰

From that perspective, the goal is not to evaluate economic effects and concentration levels in isolation. Rather, the aim is to assess how business strategy works from the perspective of actual market participants—that is, how customers and counterparties experience it, and what choices

³ *Verizon Commc'ns., Inc. v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 411 (2004).

⁴ *See, e.g.,* ROBERT H. BORK, *THE ANTITRUST PARADOX* 51 (The Free Press 1993) (1978) ("'Competition,' for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree").

⁵ *See* *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting) ("Industrial power should be decentralized.").

⁶ *See* *Bd. of Trade of Chi. v. United States (Chicago Board of Trade)*, 246 U.S. 231, 237–41 (1918).

⁷ *See* *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923) (defining competition as a "conflict for advantage" and "the play of the contending forces ordinarily engendered by an honest desire for gain."); *see also* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (identifying the "unrestrained interaction of competitive forces" as the means by which the Sherman Act pursues its broader economic and social goals).

⁸ *Cf.* James M. Buchanan, *What Should Economists Do?*, 30 S. ECON. J. 213, 219 (1964) ("the 'market' or market organization is not a *means* toward the accomplishment of anything. It is, instead, the institutional embodiment of the voluntary exchange processes that are entered into by individuals in their several capacities.").

⁹ *See* *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect."); *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (explaining "all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers.").

¹⁰ *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466–67 (1992) (explaining antitrust analysis should focus on analyzing "actual market realities"); *Standard Oil Co. (Ind.) v. United States*, 283 U.S. 163, 175 (1931) (explaining the need for courts to examine record evidence to "ascertain the operation and effect" of challenged conduct).

are meaningfully available to them. Economic analysis, in turn, provides objective benchmarks that can be used to assess how exchange dynamics operate in practice.¹¹

Taken together, these considerations are best framed as inquiries into the conditions upon which firms compete for customers: what options are available, how they are presented, and whether they can be pursued in practice.¹²

Sound antitrust analysis should therefore focus on institutional context.¹³ Firms operate in complex environments shaped by regulatory regimes, industry initiatives, contractual commitments, and supply chain requirements. These arrangements can only function effectively when market participants adhere to baseline expectations that support voluntary exchange: accurate representations, procedural integrity, good-faith dealing, and candor about matters that affect how customers are able to evaluate alternatives.¹⁴ When those expectations are exploited or significantly disrupted, transaction costs can rise, and commercial activity can decline.¹⁵

It is also important to recognize that business strategy rarely consists of a single act undertaken on a standalone basis; instead, it is often one component of an overall course of conduct that can be characterized in multiple ways. For example, a representation about a third-party competitor in regulatory communications or in connection with a contract dispute may appear unremarkable on its own. Likewise, a discount structure or conditional dealing provision with a key customer may seem like ordinary commercial terms. But a pattern of conduct by a dominant firm that combines these elements in ways intended to disrupt a rival's operations can produce effects that an analysis of any single component would miss.¹⁶

Put differently, a customer receiving a discount offer in this situation might appear, at least on paper, to retain multiple options. But if the offer forms part of an integrated strategy to prevent informed decision making—through mechanisms such as the threatened loss of critical

¹¹ *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 53 n.21 (1977) (“[A]n antitrust policy divorced from market considerations would lack any objective benchmarks.”).

¹² *Cf.* Buchanan, *supra* note 8, at 218 (“A market is not competitive by assumption or by construction. A market *becomes* competitive, and competitive rules *come to be* established as institutions emerge to place limits on individual behavior patterns. It is this *becoming* process, brought about by the continuous pressure of human behavior in exchange, that is the central part of our discipline, if we have one, not the dry-rot of postulated perfection.”).

¹³ *Cf.* R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 718 (1992) (“It makes little sense for economists to discuss the process of exchange without specifying the institutional setting within which the trading takes place since this affects the incentives to produce and the costs of transacting.”).

¹⁴ *Cf.* James M. Buchanan, *Game Theory, Mathematics, and Economics*, 8 J. ECON. METHODOLOGY 27, 29 (2001) (“The mutuality of advantage from voluntary exchange is, of course, the most fundamental of all understandings in economics.”).

¹⁵ *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 & 604 n.31 (1985) (discussing predation that involved a disruption of established distribution patterns); *Eastman Kodak*, 504 U.S. at 474 (focusing on whether market power could be leveraged to the extent consumers would not have the “necessary information” to make informed purchasing decisions).

¹⁶ *See, e.g.*, *Duke Energy Carolinas, LLC v. NTE Carolinas II LLC*, 111 F.4th 337, 366 (4th Cir. 2024) (“[W]e recognize NTE’s claim that this conduct was but part of a larger scheme.”), *cert. denied*, 145 S. Ct. 2748 (2026).

discounts, operational disruptions, and abuses of regulatory processes—the existence of nominal alternatives on paper does not reflect the practical constraints shaping the customer’s selection decision. In such circumstances, the discount may not represent genuine value but rather a means of interfering with the customer’s ability to choose freely among its available options.

This need for contextual judgment and factual development is where the work of compliance teams and enforcement officials begins to look more similar than might appear at first glance. Both are fundamentally concerned with understanding the intent motivating business strategy. Both rely on a holistic approach that examines how conduct operates in context. And both ground the analysis in trying to identify evidence that speaks to the ways in which a business interacts with other market participants in real time.

A well-designed compliance program is not a reactive exercise that evaluates the legal risk of individual business decisions as they arise. It begins with a forward-looking, enterprise-wide assessment of antitrust risk that accounts for the company’s lines of business and the way in which it engages with competitors and trading partners.¹⁷ It also requires evaluating proposed courses of action in light of the company’s broader activities.

When assessing the antitrust implications of proposed conduct, whether a merger or a new distribution model, the relevant questions are practical and ones that business teams routinely ask when making commercial decisions. How does this impact the firm’s position in the market? How does the proposal fit within the company’s broader strategy? How will customers react, and will alternatives remain available? What is the underlying business rationale? How are personnel describing the initiative, both internally and externally?

Enforcement officials conducting an investigation follow a similar line of analysis. The goal is to understand what the conduct means for the marketplace and, ultimately, for trading partners. Does the proposed action create value and facilitate trade, or does it disrupt settled reliance interests and control trading partners’ ability to pursue alternatives?

One potential concern that could be raised with a contextual approach is predictability, which is particularly important given that adherence to the rule of law is enforcement’s first and primary obligation.¹⁸ In practice, however, that concern is not borne out by how antitrust compliance, enforcement, and adjudication actually function.

¹⁷ See U.S. DEP’T OF JUST., ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS 3 (2024), <https://www.justice.gov/atr/media/1376686/dl> (noting that federal guidance on evaluation of corporate compliance programs “allows companies to craft a coherent, holistic compliance program taking into account the company’s lines of business and risk profile.”); Organisation for Economic Co-operation and Development [OECD], Working Party No. 3 on Co-operation and Enforcement, *Potential Pro-competitive and Anticompetitive Aspects of Trade/Business Associations—Note by the United States*, at 3, DAF/COMP/WP3/WD(2007)62 (Oct. 16, 2007), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/ustradeass.pdf>.

¹⁸ See Mark Meador, *Antitrust and the Rule of Law*, 9 AM. AFFS. 3, 8 (2025) (“antitrust enforcement calls for case-by-case judgments, on the basis of the evaluative standards spelled out in the law”).

Predictability is not the same as simplicity. Simple rules can be overinclusive or underinclusive, or applied in ways that impede business action without advancing the policy goals animating the antitrust laws. Predictability instead derives from the consistency and stability of the legal framework, and from the disciplined application of law to facts. It also depends on grounding the analysis in information that is tractable and that courts and businesses can reliably evaluate.

For that reason, a contextual approach prioritizes the types of information that already exist within the firm and reflect how decisions were actually made: board materials, communications with trading partners, competitive intelligence, feasibility and deal analyses, business planning documents, contracting records, and internal correspondence. Because these documents are generated in the ordinary course as strategies are developed, debated, and executed, they capture the rationale, assumptions, and trade-offs underlying business conduct in a way that post-hoc reconstructions cannot. For that same reason, they are often the same materials on which compliance teams, enforcers, and courts rely to characterize conduct and perform economic analysis.

Reasonable disagreements will, of course, persist—about the facts, about how to interpret the evidence, and about how to assess competitive effects. But the core inquiry should remain the same: understanding how the challenged conduct impacts trading partners and their ability to transact on free and informed terms. That inquiry is difficult not because the framework is indeterminate, but because the underlying conduct can be characterized in multiple ways, the institutional settings are complex, and the effects are often hard to measure. No approach can eliminate those difficulties—they are inherent to antitrust as a body of law, which is concerned with how business conduct shapes economic interactions and market outcomes. But what a contextual approach does ensure is that the analysis remains anchored in the business realities the law is meant to govern, creating a more direct connection between legal standards and conduct on the ground.

Let me close with four thoughts on what this means in practice.

First, how to think about antitrust risk. Risk is not evenly distributed across a firm’s activities. It tends to concentrate where a firm’s market position, its relationships, and its strategic objectives intersect in ways that create opportunities to limit the options available to others. Identifying those areas requires the same kind of contextual analysis that effective enforcement demands. Firms that do this well are able to explain their strategies in terms of the value they offer to trading partners, and to do so consistently in the ordinary course of business.

Second, how to evaluate conduct. Antitrust does not proceed by isolating individual elements of a strategy and assessing each in a vacuum. It looks to substance over form.¹⁹ Courts are rightly

¹⁹ See, e.g., *FTC v. Deere & Co.*, No. 25-cv-50017, 2025 LX 172398, at *16 (N.D. Ill. June 9, 2025) (emphasizing “antitrust law’s focus on substance over form.”).

skeptical of approaches that either force firms into artificial “second-best” alternatives²⁰ or encourage them to use contractual formalities to cloak unlawful commercial objectives.²¹ The relevant question is how the pieces fit together—whether, taken as a whole, the strategy creates or appropriates material value.

Third, that evaluation does not necessarily remain confined to a single transaction or practice.²² A merger filing is read alongside the firm’s contractual arrangements; a response to an investigation is considered in light of its broader course of dealing with customers and competitors. Conduct that may appear unproblematic in isolation can take on greater significance when viewed as part of an interrelated pattern, or when it sheds light on the company’s business rationale. In that sense, an investigation targets the same thing a well-designed compliance program seeks to identify: where antitrust risk arises within the firm’s activities and how those risks relate to its overall strategy.

Fourth, a functional, holistic approach is focused on business realities and information produced in the ordinary course. It directs attention to the same considerations firms already manage day to day: how they understand and serve their customers, what constraints they place on counterparties, and whether their conduct reflects ordinary competition or opportunistic behavior. For that reason, a contextual approach is more effective from both a compliance and enforcement perspective. From the compliance side, it integrates antitrust into a firm’s broader risk-management processes and rewards firms that focus on the substance over form. From an enforcement perspective, it provides a stable analytical framework that asks consistent questions for analyzing how business conduct creates value, how it affects trading partners’ options, and whether it reflects ordinary competition or the use of market power to distort or prevent consideration of alternatives.

Ultimately, enforcement and compliance converge on the same task: a rigorous and fact-driven assessment into how business strategy functions in the marketplace. The legal inquiry remains constant; what changes from case to case is how the evidence answers it.

With that, I look forward to continuing the discussion and the opportunity to be a part of the conference. Thank you.

²⁰ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007) (“[A] flawed antitrust doctrine . . . serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.”).

²¹ *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181 (1911) (The “generic designation” of the Sherman Act “embraced every conceivable which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed” and that “there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form.”)

²² Statement of Commissioner Mark R. Meador, *In re Providence Equity Partners L.L.C. and Cantaloupe, Inc.* (May 1, 2026) (underscoring “the importance of evaluating a company’s overall course of conduct, including its prior acquisition history and any risks related to foreclosed access, when assessing the competitive implications of a transaction.”).