

Access and Information Remedies in High Tech Antitrust

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As antitrust becomes more complex so does its remedies. Patterns are beginning to emerge in the dizzying array of remedies in recent monopolization and merger cases. Like the cases themselves, the remedies increasingly focus on access to network industries and platform technologies. In an economy increasingly dominated by information and information technology, access is often dependant on seamless interoperability. It is thus not surprising that antitrust remedies increasingly also have focused the disclosure of competitively necessary information as well as the protection of competitively sensitive information obtained from actual or potential competitors. Finally, the more complex the remedy, the greater the need for sophisticated oversight and dispute resolution mechanisms that rely on third-party experts and typically exceed the resources and strengths of the enforcement agencies.

While access and information remedies have been a part of antitrust law since the very earliest days of the Sherman Act,¹ they have become a vital part of litigated cases and settlements in recent times in both the United States and the European Union.² This has been particularly true for cases involving network industries, telecommunications, broadcasting, software platforms, and other high technology industries at the forefront of antitrust enforcement.

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¹ Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).

² Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, 2007 WL 2693858; Case C-418/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co., 2004 E.C.R. I-5039 (2004); Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann & Indep. Publ'ns Television Ltd. v. Comm'n, 1995 E.C.R. I-743 (Magill). There is a separate body of case law under Article 102 which also holds that it can be an abuse of a dominant position to refuse to supply a firm without objective justification. Cases 6 & 7/73 R, Commercial Solvents v. Comm'n, 1974 E.C.R. 223.

When taken together, these recent cases and settlements constitute an informal revival of the essential facilities doctrine³ and an acknowledgement that the essential facilities doctrine, and similar access remedies, remain an important and needed part of the antitrust toolkit.

This essay will examine the growing use of complex behavioral remedies in both merger and monopolization cases that suggest antitrust enforcement has moved far beyond any stated preference for structural remedies. Particularly in settlements, commitments, and consent decrees, the Antitrust Division, Federal Trade Commission, and the European Commission have permitted mergers and unilateral conduct by dominant firms conditioned upon complex commitments regarding future conduct that typically include:

- 1) Continued obligations to supply or license competitors and customers with vital inputs on fair and non-discriminatory terms;
- 2) Continued obligations to allow competitors access to networks on fair and non-discriminatory terms;
- 3) The disclosure of intellectual property, know how, and technical information necessary to make these access obligations meaningful;
- 4) Creation of firewalls and other devices to prevent the dominant or merging firms from misusing competitively sensitive information obtained through their ongoing relationships with their competitors and customers; and
- 5) The use of special masters, technical committees, monitors, regulatory bodies, and the creation of third-party alternative dispute resolution procedures to handle the inevitable disputes

³ The essential facilities doctrine holds that a monopolist may be liable for the denial of the use of its facilities to a competitor where there exists: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI Commc'ns Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1984); *see generally* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008) (defending doctrine as providing necessary access to infrastructure).

that will arise without requiring the agencies or courts to act as long-term regulators of the industries and firms in question.

I use examples such as the Microsoft and Intel litigation in the U.S. and the EU, as well as more recent U.S. merger consent decrees involving Google-ITA, Comcast-Universal, and Live Nation-Ticketmaster to illustrate these important changes in competition law enforcement and what they portend for the future.

I. Access Remedies and the Return of the Essential Facilities Doctrine

Without belaboring the point, the essential facilities doctrine is a shadow of its former self in the United States as a result of the *Trinko* decision.⁴ However, it remains vibrant in the EU, its member states, and numerous other jurisdictions around the world.⁵ Whether you view either of these developments with alarm, delight, or indifference, what is interesting is how an informal version of the doctrine is re-emerging in consent decrees in both merger and monopolization cases. Defendants increasingly are committing to providing fair and non-discriminatory access to the modern infrastructure equivalents of the bottlenecks that generated the essential facilities doctrine in the first place – network industries and software platforms.

These are not new developments. Nor are access obligations limited to the occasional vertical merger challenge, although the rate that access remedies have been imposed or raised in litigation has dramatically increased in the past twenty-plus years. Many of these remedies would not be needed if the U.S. focused on policies of vertical separation or structural remedies in monopolization cases, but this has not been the emphasis of either United States competition or regulatory policy for decades.⁶ While structural separation may well

⁴ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁵ See generally Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76 ANTITRUST L.J. 741 (2010).

⁶ Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11 (2009); Howard Shelanski, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (2001); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1139 (1989).

be preferable, it has rarely been sought or achieved in modern times outside of the AT&T breakup.⁷ Even if such structural issues surface in future monopolization cases, these cases are few and far between and may still require supplemental provisions on access, information, and non-discrimination to facilitate the core remedies. In short, access and information remedies have persisted because they are needed in resolving complex cases under Section 1 and 2 of the Sherman Act,⁸ Section 7 of the Clayton Act,⁹ and Section 5 of the FTC Act.¹⁰

In the 1990s, such issues were part of the FTC's challenge to the Cadence- CCT merger in the integrated circuit design market, in which the spirited debate between the majority and dissent centered around the need and scope of the access issues.¹¹ Similarly, in the Turner-Time Warner merger (a harbinger of the current crop of media and telecom mergers), issues of access to programming and cable transmission were front and center.¹² On the monopolization side, the 1999 Intel consent decree included key provisions requiring Intel to provide customers with meaningful access to its chip architecture and the related necessary technical information, even during disputes and litigation with those same customers over intellectual property issues.¹³

Access issues also were central in the remedies in the Microsoft litigation in both the United States and the EU. In the U.S., a variety of Microsoft's contractual practices were held illegal as constituting

⁷ United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982). *See generally* TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (2010) (generally recommending structural separation in media and communications industries to prevent competitive abuses); Frank Maier-Rigaud, Federica Manca & Ulrich von Koppenfels, *Strategic Underinvestment and Gas Network Foreclosure – the ENI Case*, EC Competition Policy Newsletter (forthcoming 2011/1) (discussing structural remedy involving Italian natural gas market); Boaz Moselle & David Black, *Vertical Separation as an Appropriate Remedy*, J. EUR. COMP. L. & PRAC. (2010) (analyzing pluses and minuses of such remedies using case studies in different EU member states).

⁸ 15 U.S.C. §§ 1-2.

⁹ 15 U.S.C. § 18.

¹⁰ 15 U.S.C. § 45.

¹¹ *In re* Cadence Design Systems, Inc., 124 F.T.C. 131 (1997).

¹² *See generally* Michael W. Klass & Michael A. Salinger, *Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases?*, 40 ANTITRUST BULL. 667 (1995) (surveying various vertical mergers in the 1990s with similar behavioral remedies).

¹³ *In re* Intel Corp., 128 F.T.C. 213 (1999).

unlawful monopoly maintenance of the Windows operating system.¹⁴ In addition, the dissemination of a modified version of Java was held illegal where software application developers using the adulterated version of Java would effectively be denied access to any web browser other than Microsoft's Internet Explorer.¹⁵ In the EU, the litigation focused on tying allegations involving server operating systems and internet browsers and bundling of media players and operating systems.¹⁶

Regardless of the specific violations found, access issues were a prominent part of the decisions and settlements in each jurisdiction. In the U.S., the relief included elimination of certain exclusive and restrictive contractual provisions in upstream and downstream contracts.¹⁷ Equally important, the final consent decrees included provisions requiring the licensing of Microsoft communications protocols, extensive provision of technical documentation, non-discrimination and non-retaliation provisions, and the formation of separate compliance and technical committees to both assist and monitor compliance.¹⁸

In the European Union, the access and information issues played an even more prominent role in the Commission's decision, the Court of First Instance's affirmance of liability, and the eventual settlement between Microsoft and the Commission. First, the forced unbundling of the operating system from the media player was an ill-conceived and ultimately failed attempt to provide greater access to non-integrated application developers.¹⁹ Second, the remedy imposed by the Commission required the disclosure of interface to the operating system in order to provide greater access to competing application developers.²⁰ Most of the further proceedings and subsequent fines by the Commission related to Microsoft's alleged failure to adequately disclose the amount and correct type of information to allow more

¹⁴ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

¹⁵ *Id.* at 59-64, 67-74.

¹⁶ *Id.* at 74-77.

¹⁷ See notes ___-___ *infra* and accompanying text.

¹⁸ Commission Decision No. C(2004)900 of 24 March 2004, Relating to a Proceeding under Article 82 of the EC Treaty, Case COMP/C-3/37.792 Microsoft, *available at*.

¹⁹ *Id.* at Art. 6.

²⁰ *Id.* at Art. 5.

seamless access to the super-dominant Microsoft operating system.²¹ Finally, the company agreed in the final settlement to provide a simple selection of competing web browsers for Windows consumers.²²

These types of access issues have achieved even greater prominence in a slew of recent merger settlements by both the Antitrust Division and the Federal Trade Commission. The first such consent decree in a merger case during the Obama administration was the Ticketmaster/Live Nation merger.²³ This transaction combined the largest primary ticketing service with the largest vertically integrated live entertainment firm with operations in ticketing services but also talent management, concert promotion, and venue ownership and management. The merger thus raised both horizontal and vertical issues, and each firm had itself been subject to antitrust controversies even prior to the merger.²⁴

To the surprise of many in the industry, the Ticketmaster/Live Nation transaction was approved by the Antitrust Division, the seventeen state attorneys general who joined the complaint, and the Canadian Competition Bureau, but was the subject of a consent decree with both structural and behavioral relief. To address the horizontal

²¹ Commission Decision No. C(2008)764 of 27 Feb. 2008, Fixing the Definitive Amount of the Periodic Payment Imposed on Microsoft Corp. by Decision C(2005)4420 Final, Case COMP/C-3/34.792 – Microsoft, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_3997_9.pdf (imposing 899 million euro fine for non-compliance); Commission Decision of 12 July 2006, Fixing the Definitive Amount of the Periodic Penalty Payment Imposed on Microsoft Corp. by Decision C(2005)4420 Final and Amending that Decision as Regards the Amount of the Periodic Penalty Payment, Case COMP/C-3/37.792 – Microsoft, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_2186_8.pdf (fixing payment of EUR 280.5 million for failure to comply with prior decision).

²² Press Release, Antitrust: Commission Accepts Microsoft Commitments to Give Users Browser Choice (Dec. 16, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN>.

²³ United States v. Ticketmaster Entertainment, Inc., No. 1:10-cv-00139, 2010 WL 5699134 (D.D.C. July 30, 2010) (Final Judgment). The judge assigned to the matter was Rosemary Collyer, who also approved and supervised the consent decrees in the Microsoft litigation.

²⁴ *Justice Drops Antitrust Probe of Ticketmaster*, ORLANDO SENTINEL, July 6, 1995, *available at* http://articles.orlandosentinel.com/1995-07-06/news/9507060230_1_ticketmaster-pearl-jam-justice-department. *In re Live Concert Antitrust Litigation*, 247 F.R.D. 98 (C.D. Cal. 2007) (class action litigation alleging monopolization of live concert market).

overlap in the primary ticketing services market, the merged entity had to divest one ticketing company to a specified company or “suitable” alternative²⁵ and license its primary ticketing platform with an option to purchase to AEG, the largest remaining competitor in the primary ticketing industry.²⁶

The reason why the merger and the consent decree were so controversial in the industry were the fears of performers, independent talent managers, concert promoters, venues, and competing ticketing services that they would be shut out from mounting meaningful national tours unless they did business with Ticketmaster/Live Nation.²⁷ To address these concerns, the consent decree contained a number of provisions which may surpass the divestitures in significance down the road. The consent decree contained “anti-bundling” provisions that prevent the merged entity from requiring ticketing clients to use other company services.²⁸ Supplementing this are anti-retaliation provisions which forbid the merged entity from retaliating against any venue owner who chooses to use a competing ticketing or promotional company.²⁹

Behavioral remedies play even more of a crucial role in the approval of the Comcast/Universal joint venture. Comcast, a leading cable operator with some programming assets, acquired a majority stake in Universal’s broadcast, satellite, and radio operations from General Electric. Although this deal also included horizontal issues, the primary concerns arose over whether competing programmers would have adequate continued access to Comcast cable distribution

²⁵ Lauren Hatch, *Comcast-Spectacor Swipes Paciolan Ticket Service In Live Nation Deal*, BUSINESS INSIDER, March 9, 2010, available at <http://www.businessinsider.com/comcast-spectacor-swipes-paciolan-ticket-service-from-live-nation-2010-3>.

²⁶ In February 2011, AEG declined its rights under the consent decree in order to pursue a different business model for primary ticketing services. See Alfred Branch Jr., *AEG teams with Outbox Technology to compete with Ticketmaster on ticketing*, Feb. 3, 2011, available at <http://www.ticketnews.com/news/AEG-teams-with-Outbox-Technology-to-compete-with-Ticketmaster-on-ticketing021103456>.

²⁷ See e.g., *Special Announcement*, JAM MAIL, available at <http://www.jamusa.com/jammail/concertfansbeware.htm> (web site of independent concert promoter urging consumers to complain to Justice Department about Live Nation-Ticketmaster merger, arguing that “the variety and quality of artists coming to local venues would be affected, and your prices could rise further and faster.”).

²⁸ Ticketmaster Final Judgment, *supra* note 23, at IX(A)(2-3).

²⁹ *Id.* at IX(A)(1).

systems and whether competing cable companies would have adequate access to Comcast/Universal programming.

The review by the Federal Communications Commission and the Antitrust Division focused on these issues as did the resulting consent decrees. The core of the antitrust decree requires non-discriminatory access to Comcast programming. Access has to be equivalent for on-line distributors relative to traditional video distribution and relative to “peer” on-line distributors.³⁰ The decree further provides for non-discriminatory access by programming companies to Comcast distribution.³¹ Finally, the consent decree includes non-retaliation provisions.³² The consent decree also imposed a variety of additional provisions, most notably for our purposes so-called net neutrality for the internet operations of the merged firms, which is another form of non-discriminatory access regime.³³

One of the most complex iterations of this issue came in the recent Google-ITA merger. In July 2010, Google entered into a merger agreement to acquire ITA, the provider of the QPX software, which is the leading independent airfare pricing and shopping system. These systems provide pricing, schedule, and seat availability information to Internet travel sites such as Expedia and Travelocity, where consumers make on-line travel reservations, as well as so-called meta-search sites such as Kayak and TripAdvisor, which allow customers to view results from multiple travel sites. While Google is not currently in the on-line travel space, it is the leading general use Internet search engine in the U.S., the leading seller of Internet advertising, and it planned to launch an Internet travel aggregator site using the technology it would acquire from ITA.

The Justice Department’s complaint focuses on access as the likely harm resulting from the transaction. Paragraph five states:

The proposed merger will give Google the means and incentive to use its ownership of QPX to foreclose or disadvantage its

³⁰ United States v. Comcast Corp., No. 1:11-cv-00106, Proposed Final Judgment at IV (D.D.C. Jan. 18, 2011) *available at* <http://www.justice.gov/atr/cases/f266100/266160.pdf>.

³¹ *Id.* at IV.

³² *Id.* at V(A).

³³ *Id.* at V(F). *See generally* UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, NET NEUTRALITY (2010); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 28 (2006).

prospective flight search rivals by degrading their access to QPX, or denying them access to QPX altogether. As a result, the proposed merger is likely to result in reduced quality, variety, and innovation for consumers of comparative flight search service.³⁴

These antitrust concerns were settled through a proposed consent decree that would impose perhaps the most complicated access regime of the cases discussed so far in this essay. Following the merger, the defendants will be required to honor all existing QPX licensing agreements, negotiate extensions of such licenses with commercial terms “substantially similar” to the existing terms at the time of the consent decree, and negotiate other terms of the extension that are “fair, reasonable and non-discriminatory.”³⁵ New licenses have to contain commercial terms that are “fair, reasonable and non-discriminatory” as measured by both the specific terms under negotiation and the terms in effect between the defendants and similarly situated competitors.³⁶ Defendants must provide upgrades at no more than fair, reasonable, and non-discriminatory prices.³⁷ Furthermore, defendants must license a new software product called InstaSearch that was in development by ITA at the time of the merger on fair, reasonable, and non-discriminatory terms to all interested parties.³⁸ Finally, the defendants agree to devote at least as much annual resources as the average of the past two years for the continued research development and maintenance of both QPX and InstaSearch.³⁹

³⁴ United States v. Google Inc., No. 1:11-cv-00688, 2011 WL 1338047, Complaint ¶ 5 (D.D.C. Apr. 8, 2011).

³⁵ United States v. Google Inc., No. 1:11-cv-00688, Proposed Final Judgment at IV(B) (D.D.C. Apr. 8, 2011), *available at* <http://www.justice.gov/atr/cases/f269600/269632.pdf>. Although beyond the scope of this essay, the continued requirements of fair, reasonable, and non-discriminatory price and other commercial terms throughout the consent decree resemble the typical FRAND provisions in standard setting organizations and licensing arrangements. *See generally* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

³⁶ Google Proposed Final Judgment, *supra* note 35, at IV(C).

³⁷ *Id.* at IV(E).

³⁸ *Id.* at IV(H).

³⁹ *Id.* at IV(F). Other parts of the on-line travel industry have generated similarly complex litigation about access issues. At present, both American Airlines and US Airways have sued the leading providers of a different software system used

Access issues also have arisen in connection with the recent district court rejection of the Google book class action settlement.⁴⁰ While copyright law and fair use issues predominate in both the settlement and its 2011 district court decision, antitrust issues akin to the essential facilities doctrine played a supporting role in the rejection of the settlement. The settlement would have allowed Google to display snippets of copyrighted works, display full text of unprotected works, and sell the full text of copyrighted works where the rights owners have not opted out of the settlement or otherwise negotiated agreements with Google.⁴¹

The situation is more complicated for works under copyright where the rights holders are unknown. Google would have the right to proceed with the sale of these so-called orphan works with a specified share of the proceeds segregated in a fund administered by a trustee who would distribute the funds if the rights holders could eventually be located or used in other specified ways if the copyright owners were never identified.⁴² As a result of this arrangement, Google would have de facto exclusivity over the search, display, and sale of orphan works, since no one else could scan, display, or market these works without fear of the same kind of copyright litigation that led to the class action suit and its settlement in the first place. Whether the entire settlement or the orphan works provisions constitute an antitrust violation remains a contested issue.⁴³ Without definitively resolving these issues, the district court cited the access issues raised by the submissions of the Antitrust Division, those of other objectors to the

by travel agents to search and make reservations for corporate customers on the grounds that the defendants have used a monopoly position over this bottleneck to raise fees, degrade access during disputes with airlines, and delay or prevent the deployment of new technology that would allow travel agents to interface directly with airline reservation systems. *Am. Airlines, Inc. v. Travelport Ltd.*, No. 4:11-cv-00244-Y, 2011 WL 1376742 (N.D. Tex. Apr. 12, 2011) (Complaint); Press Release, US Airways Files Antitrust Lawsuit Against Sabre (Apr. 21, 2011), available at <http://shopping.usairways.com/en-US/aboutus/pressroom/distributionpressrelease.html>.

⁴⁰ *Authors Guild v. Google Inc.*, ___ F. Supp. 2d ___, 2011 WL 986049, (S.D.N.Y. Mar. 22, 2011).

⁴¹ See generally Matthew Sag, *The Google Books Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010-11).

⁴² *Authors Guild*, ___ F. Supp. 2d at ___.

⁴³ Compare Einer Elhauge, *Why the Google Books Settlement is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010) and Randal C. Picker, *The Google Book Search Settlement: A New Orphan Works Monopoly?*, 5 J. COMP. L. & ECON. 383 (2009).

settlement, and the continuing debate in the antitrust community as additional reasons to question the fairness and adequacy of the proposed settlement.⁴⁴

II. Disclosure of Information

In order to make these access provisions meaningful and effective, defendants have been required to disclose vast amounts of information, some of which would otherwise have been subject to intellectual property protection or are highly proprietary in nature. While the access provisions, and the accompanying disclosure provisions, can be thought of as an alternative to more traditional divestiture remedies, for many of these defendants, disclosure amounts to divestiture given the industries involved and the value of the information involved.⁴⁵

As discussed above, in the Microsoft litigation in the U.S. and the EU, meaningful access consisted in large measure of unprecedented information disclosures in terms of both scale and scope. From the time of its consent decree in the U.S. until May of 2011, Microsoft has been bound to share vast amounts of interoperability information with software developers and devote enormous resources to satisfying antitrust enforcers, and it has lived up to its obligations to do so.⁴⁶ It is still litigating these same questions in the EU.

Similarly, most of the recent merger consent decrees have included provisions dealing with information disclosure where necessary to guarantee access. For example, in Live Nation, the merged firm must allow any ticketing client that leaves to use a competing ticketing service to take with them a copy of the ticketing data related to that client for use by the competing ticketing platform.⁴⁷

The Google-ITA settlement also requires detailed information disclosures as part of its access regime. The consent decree not only requires the continued disclosure via licensing and upgrades of existing software products, but further requires the disclosure via licensing of new software still under development on fair, reasonable,

⁴⁴ *Authors Guild*, __ F. Supp. 2d at __.

⁴⁵ Waller, *Monopolization Remedies*, *supra* note 6, at 26.

⁴⁶ The consent decree in the U.S. expired after several extensions on May 12, 2011. U.S. Dep't of Justice, Press Release, *Microsoft Antitrust Final Judgment Expires May 12* (May 11, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271042.htm.

⁴⁷ Ticketmaster Final Judgment, *supra* note 23, at IX(C).

and non-discriminatory terms.⁴⁸ It additionally requires Google to establish a web site permitting on-line travel sites to submit qualifying complaints which are periodically forwarded to the Justice Department along with related communications.⁴⁹ Finally, the decree also contains provisions that prohibit the defendants from limiting airlines' rights to share information with other parties, which requires the defendants to incorporate airline information into their software systems.⁵⁰

III. Protection of Information

While the preservation or restoration of competition on occasion requires the disclosure of information on the part of the defendant or merging party, on other occasions it requires the protection of information from disclosure within the corporate structure or family of the dominant or merged company. Such situations are occurring more frequently as vertical acquisitions or vertical integration produce access to the confidential proprietary information and trade secrets of less integrated competing firms. Antitrust enforcers have rarely challenged vertical mergers or integration directly in recent years, but have imposed behavioral remedies to limit the harm and spillover effects of the vertical integration while allowing for whatever efficiencies flow from the vertical integration.⁵¹

One of the key tools in such an approach is the requirement of strict firewalls so that competitively sensitive information acquired by one part of the firm is not disclosed or misused by another part of the firm that deals with the customer as a competitor in a different market segment. Once again, unless antitrust policy is going to insist on structural separation and stricter limits of vertical integration, then such concerns have to be taken seriously and effective controls be created and enforced.

⁴⁸ Google Proposed Final Judgment, *supra* note 35, at IV(H).

⁴⁹ *Id.* at V(N-O).

⁵⁰ *Id.* at V.

⁵¹ Such firewall remedies were routinely used in allowing vertical mergers and joint ventures as the defense industry consolidated in the 1990s. See Prepared Statement of the Federal Trade Commission, Presented by Robert Pitofsky, Chairman, Before the Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, United States Senate (July 24, 1997), available at <http://www.ftc.gov/os/1997/07/defense4.htm>.

The agencies have the greatest leverage while a merger is still under investigation and the parties have not closed the transaction. In this posture, the FTC or the Antitrust Division can seek appropriate firewalls and non-disclosure provisions as part of the negotiation of a consent decree rather than wait until competition is affected post-closing.

The newest merger consent decree to include such provisions is the Google-ITA decree. In addition to the complicated access provisions discussed above, Google is required to establish firewalls protecting information that ITA obtains from its on-line customers and prohibiting ITA from sharing that information with the Google side of the business as it enters the on-line travel space.⁵²

Similarly, in the Live Nation/Ticketmaster merger decree, the merged firm is required to establish internal firewalls between its ticketing operations and its other functions in the live entertainment industry. It is further prohibited from using information from the ticketing side in connection with concert promotion or its other operations where its ticketing clients are competitors in other aspects of the industry.⁵³

One of the more complicated, but necessary, firewall provisions came in an approved vertical merger in the graphite electrodes industry,⁵⁴ an industry with a history of major antitrust problems.⁵⁵ GrafTech, one of the major graphite electrode producers, had a long-term supply arrangement with Conoco for petroleum needle coke, a key input for graphite electrode production. GrafTech eventually acquired Seadrift Coke L.P., a major competitor of Conoco in the production of petroleum needle coke. GrafTech then terminated its prior supply arrangement with Conoco. This termination triggered

⁵² Google Proposed Final Judgment, *supra* note 35, at VI.

⁵³ Ticketmaster Final Judgment, *supra* note 23, at IX(B).

⁵⁴ United States v. GrafTech Int'l Ltd., No. 1:10-cv-02039, 2011 WL 1566781 (D.D.C. Mar. 21, 2011) (Final Judgment).

⁵⁵ See OECD, HARD CORE CARTELS 13 (2000), available at <http://www.oecd.org/dataoecd/39/63/2752129.pdf>. GrafTech's corporate predecessor, UCAR, was a leading member of the cartel. See U.S. Dep't of Justice, Press Release, *U.S. Company Agrees to Pay \$110 Million Fine for International Conspiracy Fine is Largest in Antitrust History* (Apr. 8, 1998), available at http://www.justice.gov/atr/public/press_releases/1998/1628.pdf; see also Graphite Electrodes – Commission Decision of 18 July 2001 (Case E-1/36.490), 2002 OJ (L100) 1 (imposing fines on firms including UCAR for EU portion of international cartel).

contract rights entitling GrafTech to both audit rights and most-favored nation pricing terms from Conoco for a number of years.

This would have provided GrafTech access to a host of competitively sensitive information about transactions between both 1) Conoco and GrafTech's competitors, and 2) the competitors of Seadrift, its newly acquired supplier. The consent decree permitting the merger dealt with this awkward and sensitive situation by requiring: 1) the deletion of the audit and most-favored nation pricing terms from the temporary arrangement with Conoco, 2) the prohibition of similar provisions in future contracts, 3) the provision of key contracting, production, and pricing data to the Department of Justice, and 4) the establishment of internal firewalls to ensure that GrafTech and Seadrift cannot share confidential competitive information with each other or with Conoco.⁵⁶

It may not be possible to address all such concerns before the transaction is consummated. Ex post, rather than ex ante, investigation and enforcement sometimes may be required either because the transaction was not challenged before closing, the agencies were not aware of the competitive concerns because no pre-merger filing was required, or where the agencies challenged the transaction but lost the case.

Such concerns over inappropriate sharing of competitively sensitive information are central to understanding current pressure to prevent or undo vertical integration of benefit managers and pharmacies.⁵⁷ For example, the FTC did not challenge the 2007 merger of Caremark and CVS, which was a vertical transaction combining Caremark, a major pharmacy benefits manager, and CVS, a leading pharmacy chain. However, years after the merger, consumer groups have become increasingly vocal in alleging that Caremark is sharing customer information so that the combined company can steer benefits customers to CVS pharmacies.⁵⁸ These allegations are also part of an on-going investigation of the now four-year-old merger by the Federal Trade Commission and twenty-four state attorneys

⁵⁶ GrafTech Final Judgment, *supra* note 53, at IV and V.

⁵⁷ Reed Abelson & Natasha Singer, *Pressure Grows to Unwind CVS Merger*, N.Y. TIMES, April 15, 2011, available at http://www.nytimes.com/2011/04/15/business/15cvs.html?_r=1&ref=natashasinger.

⁵⁸ *Id.*

general.⁵⁹ In turn, the company maintains that it utilizes appropriate internal firewalls and does not use information on one side of the corporation to affect competition on the other side of its business.⁶⁰

Similar issues arose in the purely horizontal Evanston-Northwestern hospital merger. This merger took place in 2000 in the north shore suburbs of Chicago and was not challenged by the FTC. In 2002, the FTC announced that it was conducting a retrospective review of hospital mergers more generally.⁶¹ As a result of the retrospective review, the FTC in 2004 filed an administrative complaint challenging the Evanston-Northwestern acquisition. In 2005, the FTC prevailed before the Administrative Law Judge (ALJ) on its theory that the merger had produced anticompetitive unilateral effects in the form of higher prices that could not be explained by other factors in the intervening years.⁶² While the ALJ ordered divestiture, the full FTC disagreed with the structural remedy. The Commission cited the substantial integration of the two hospital entities in the years since the merger and significant doubts that the smaller of the two hospitals could survive on a stand-alone basis given the changes since the merger.⁶³ The FTC instead ordered the parties to establish separate and independent contracting teams which would deal with managed care plans and other purchasers of health care services and would be prohibited from sharing pricing and other competitive information in negotiation and contracting with outside parties.⁶⁴

⁵⁹ Ted Nesi, *Two FTC Divisions Probing CVS Merger*, PROVIDENCE BUS. NEWS, Apr. 30, 2010, available at <http://www.pbn.com/Two-FTC-divisions-probing-CVS-merger,49529>.

⁶⁰ Abelson & Singer, *supra* note 56.

⁶¹ FEDERAL TRADE COMMISSION, BUILDING ON A STRONG FOUNDATION: THE FTC YEAR IN REVIEW 9 (Apr. 2002), available at <http://www.ftc.gov/os/2002/04/ftcyearreview.pdf>.

⁶² *In re* Evanston Northwestern Healthcare Corp., Dkt. No. 9315, 2005 WL 2845790 (F.T.C. Oct. 20, 2005) (Initial Decision), available at <http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>.

⁶³ *In re* Evanston Northwestern Healthcare Corp., Dkt. No. 9315, 2008 WL 1991994 (F.T.C. Apr. 24, 2008) (Final Order).

⁶⁴ *Id.* at 4-5. Observers have questioned the significance of the remedy since the separate contracting teams will lack any incentive to price compete against one another. See e.g., Jeff Miles, *Observations and Lessons from the FTC's Evanston Northwestern Healthcare Hospital Merger Decision*, 20 HEALTH LAW. 24 (Oct. 2007).

All of these examples suggest a new business model and a complex compliance issue for the firms involved going forward. The merged firms or dominant enterprises will now have significant operations that either cannot cooperate fully with their sister divisions or subsidiaries, or in some cases must actively compete with them. This will pose operational, human resources, reporting, legal, and compliance issues going forward. In some cases, the companies will have to figure these issues out on their own; in other cases, the government has insisted on a role for third parties to facilitate and enforce compliance as well as resolve disputes about the information and access obligations.

IV. Outsourcing Compliance

Each of the types of behavioral remedies discussed above requires someone to ensure compliance. Fair and non-discriminatory access, adequate and meaningful disclosure of technical information, software code, and other forms of know-how, and the creation and maintenance of firewalls protecting the disclosure and misuse of competitively sensitive information require a high degree of vigilance and some way to resolve the inevitable disputes that will arise.

The key question is who is going to do this? While the FTC and the Antitrust Division take an active role in monitoring and ensuring overall compliance with its many existing court judgments and consent decrees, they are not equipped, nor particularly eager, to take on the day-to-day tasks of monitoring the nitty gritty of compliance. A long-term compliance role can involve resolving fine-grained disputes over terms of access, pricing issues, whether information was or was not adequately disclosed or protected, and the overall significance of the alleged violations, individually or collectively. Probably the closest the Antitrust Division ever came to this role was the continuing enforcement of the Paramount decree in the movie industry⁶⁵ and the aftermath of the AT&T divestiture,⁶⁶ each which took decades and undoubtedly many thousands of attorney hours.

⁶⁵ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *see generally* MICHAEL CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* (1960).

⁶⁶ *Symposium, The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective*, 61 *FED. COMM. L.J.* 1 (2008).

We should be mindful of the Supreme Court's admonition in *Trinko* not to fashion decrees beyond the institutional competence of the courts or antitrust agencies, particularly when the remedy requires regulatory-type relief.⁶⁷ *Trinko*'s concerns, while valid, were overblown under the facts of that case and in most access-type cases.⁶⁸

Nonetheless, the resource limitations and natural tendency of courts and agencies to want to move on and address new matters suggest compliance with complex court judgments and consent decrees remains a real concern. The limitations of the contempt of court process in the *Microsoft* litigation⁶⁹ suggest they have little choice to fashion new processes to ensure compliance.

A. Monitors

The agencies have reacted quite sensibly and creatively by increasingly utilizing third-party compliance monitors and alternative dispute resolution of the type that have been used for decades in constitutional and institutional reform litigation.⁷⁰ As is well known, the disclosure obligations in *Microsoft* were supervised by a technical committee⁷¹ which at its height consisted of several highly credentialed and expensive committee members and a staff of over forty individuals with a fully equipped office in Redmond, Washington, nearby the Microsoft campus, all paid for by the defendant. The technical committee's task was the mind numbing review and resolution of any disputes over the adequacy of the disclosure of millions of lines and pages of software code and technical information made available by Microsoft to application developers.

⁶⁷ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004).

⁶⁸ See Frischmann & Waller, *supra* note 3, at 40-46 (listing many areas where neither courts nor agencies are required to act as price-setting regulator to apply essential facilities doctrine).

⁶⁹ *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

⁷⁰ See generally Robert E. Bucholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826-37 (1978).

⁷¹ There also was an internal Microsoft compliance committee established in the subsequent judgment reached following the objections of the non-settling states. *State of New York v. Microsoft Corp.*, Third Modified Final Judgment, No. 98-1233 (D.D.C. Apr. 22, 2009), available at http://www.microsoft-antitrust.gov/pdf/CG_filed_TMFJ.pdf.

In the EU, the role of the monitoring trustee was equally important, although not as grand in scope.⁷² As part of the original 2004 decision of the European Commission as upheld on appeal by the Court of First Instance, Microsoft was required to provide enhanced access to its server operating system through the disclosure of communication protocols and other interface information to software application developers for Windows.⁷³ Under the Commission's 2004 order, a monitoring trustee was appointed to evaluate and issue reports on Microsoft's compliance with these key provisions of the decree.⁷⁴

The provisions of the Commission's order with respect to the monitoring trustee provided that:

In the first place, the monitoring trustee is to be appointed by the Commission from a list of persons submitted by Microsoft and Microsoft is to devise a procedure which allows the Commission to appoint a monitoring trustee of its choosing if it does not deem any of the persons proposed by Microsoft adequate for the task. In the second place, the monitoring trustee must be independent of Microsoft and 'provisions [must] be established to ensure that [he] is not and will not become exposed to a conflict of interest'. The monitoring trustee must possess the necessary qualifications to carry out his mandate and it should be possible for him to hire experts to carry out certain precisely-defined tasks on his behalf. In the third place, provisions must be established in order to guarantee that the monitoring trustee has 'access to Microsoft's assistance, information, documents, premises and employees to the extent that he may reasonably require such access in carrying out his mandate'. In the fourth place, the monitoring

⁷² The EU has appointed monitoring trustees in over 50 cases from 2006 through 2009. Almost all of these cases other than Microsoft have involved the implementation of structural and behavioral remedies in merger cases. PriceWaterhouseCoopers, *Monitoring Trustee Services in Merger Cases and Antitrust*, available at www.pwc.co.uk/pdf/monitoring_trustee_2009.pdf.

⁷³ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601, 2007 WL 2693858.

⁷⁴ *Id.* ¶ 1230 *et seq.* The rest of the decree dealt with unbundling the Windows operating system with the Media Player and is generally regarded as a failure. Waller, *Monopolization Remedies*, *supra* note 6, at 28; William H. Page & Seldon J. Childers, *Bargaining in the Shadow of the European Microsoft Decision: The Microsoft-Samba Protocol License*, 102 NW. U. L. REV. COLL. 332, 333 (2008).

trustee must have full access to the source code of the relevant Microsoft products. Last, in the fifth place, ‘all costs of establishment of the monitoring trustee, including a fair remuneration for the monitoring trustee’s activities, should be borne by Microsoft’.⁷⁵

In 2005, the Commission appointed Dr. Neil Barrett, a British computer science, security and cybercrime expert, as the monitoring trustee.⁷⁶ Barrett in turn designated two professors as technical advisors. Despite the critical role that the monitoring trustee played in the Microsoft saga in the EU, the trustee’s operations paled in scope to that of the technical committee in the U.S. side of the case.

The trustee’s role was further affected by the 2007 decision of the Court of First Instance (CFI). The CFI ultimately upheld the Commission on liability, but struck down the appointment of a trustee who was independent of both the Commission and the company, as well as voided Microsoft’s obligation to pay for the trustee’s operations.⁷⁷

Dr. Barrett continued to work as a monitoring trustee on a more informal basis on behalf of (and paid for by) the Commission.⁷⁸ In the view of some commentators, Barrett developed an effective relationship with Microsoft’s technical staff and played a key role in brokering the licensing of key software as part of its compliance with the EU decision.⁷⁹ Finally in 2009, the Commission announced that it would utilize ad hoc technical consultants rather than a full-time monitoring trustee to assist with compliance issues.⁸⁰

⁷⁵ *Microsoft Corp. v. Comm’n* ¶ 1237.

⁷⁶ Simon Taylor, *Update: EU appoints academic to monitor Microsoft: British expert in computer security to oversee Microsoft’s compliance with antitrust ruling*, INFO WORLD (Oct. 5, 2005), available at <http://www.infoworld.com/t/platforms/update-eu-appoints-academic-monitor-microsoft-458>.

⁷⁷ *Microsoft Corp. v. Comm’n* ¶ 1278.

⁷⁸ Commission Decision of 4 Mar. 2009 on the Deletion of Article 7 of Decision 2007/53/EC Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corp. and Repealing Decision C(2005)2988 Final, Case COMP/37.792 – Microsoft, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4183_3.pdf.

⁷⁹ Page & Childers, *supra* note 73, at 344.

⁸⁰ Commission Decision of 4 Mar. 2009, *supra* note 77; *EU Exec Amends Microsoft Antitrust Monitoring*, PCMAG.COM (Mar. 4, 2009), available at <http://www.pcmag.com/article2/0,2817,2342395,00.asp>.

Despite the success of the monitoring trustee, disputes over the sufficiency of information disclosures continued to be featured prominently in the remaining disputes between the company and the Commission. The Commission assessed additional fines of over 280 million euros in 2006, and a whopping additional fine in 2008 of 899 million euros⁸¹ based on Microsoft's alleged failure to fully comply with its earlier decision.

While the scale and scope of the Microsoft monitoring trustee in the EU and technical committee's work in the U.S. is likely to be *sui generis*, the basic idea of an outside monitor or trustee to ensure compliance with the provisions of a consent decree is not. The antitrust agencies have used trustees in a number of merger consent decrees to ensure that the parties divest agreed upon assets within the time frame specified in the consent decree.⁸² Nor is the concept of a monitor or trustee particularly new in litigation outside the antitrust realm where monitors, trustees, and special masters have been used in all manners of employment discrimination, civil rights, foreign corrupt practices, and structural reform litigation to ensure that defendants comply with their obligations under court judgments and consent decrees that can last for years, if not decades.⁸³

What is new is the increasing role of an outside monitor to ensure compliance with the information provisions that are part of recent antitrust decrees. For example, the Pepsi and Coca-Cola acquisitions of their leading bottlers left them in charge of bottling operations for not only their own products, but also the soft drinks of certain competitors. The resulting consent decrees allowed these acquisitions to proceed, but included provisions establishing both

⁸¹ *EU Imposes €899 Million Fine on Microsoft for Failure to Comply with 2004 Decision*, 94 ANTITRUST & TRADE REG. REP. (BNA) 223 (2009).

⁸² U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies, at I, available at <http://www.justice.gov/atr/public/guidelines/205108.htm#4i> (Oct. 2004) ("For divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree."); Staff of the Bureau of Competition, FTC, A Study of the Commission's Divestiture Process (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf> (discussing need for auditing and divestiture trustees).

⁸³ See e.g., Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 897; Special Project, *supra* note 69.

firewalls of the type described above as well as an outside monitor to ensure compliance with the firewall provisions of the decree.⁸⁴

Similarly, a federal district court in private antitrust litigation recently appointed a group of special masters to act as an antitrust advisory panel to shape the relief going forward in the newspaper advertising industry where the parties competed.⁸⁵ The advisory panel was tasked with preparing a report regarding the appropriate scope of the court's order regarding future business practices that might constitute unlawful tying or product bundling.

B. Alternative Dispute Resolution

Even these creative monitoring mechanisms are insufficient to resolve the inevitable disputes that will arise when high stakes competitive market positions depend in part on the terms of access and pricing decisions of a rival. The Comcast/Universal and Google-ITA consent decrees utilize the most innovative forms of alternative dispute resolution, while the Justice Department plays quite a limited role.

The Comcast/Universal consent decree allowing the joint venture to proceed contained alternative dispute resolution procedures that build on the existing FCC provisions for the broadcast industry. In Comcast/Universal, disputes over access, retransmission, and fees between the joint venture and a licensee can be resolved by either DOJ enforcement of the consent decree or by commercial arbitration by the licensee, if the DOJ consents.⁸⁶ Arbitration cannot be invoked by the

⁸⁴ Monitor Agreement, *available at* <http://www.ftc.gov/os/caselist/0910133/100928pepsicoagree.pdf> (Apr. 23, 2010) (appointing Eric Croson monitor for Pepsi compliance issues); FTC, News Release, FTC Appoints Monitor to Ensure Compliance with Commission Order Related to Coca-Cola's Acquisition of its Largest North American Bottler (Oct. 13, 2010), *available at* <http://www.ftc.gov/opa/2010/10/coke.shtm>.

In contrast, the GrafTech acquisition of the leading supplier of petroleum needle coke carried with it strict firewall provisions, but required detailed reporting to the Justice Department rather than the use of any third-party monitor. *See United States v. GrafTech Int'l Ltd*, No. 1:10-cv-02039, 2011 WL 1566781 (D.D.C. Mar. 21, 2011) (Final Judgment & Competitive Impact Statement).

⁸⁵ *Valassis Commc'ns, Inc. v. News America Inc.*, No. 2:06-cv-10240, 2011 WL 2420048, (E.D. Mich. Jan. 24, 2011) (Report and Recommendation).

⁸⁶ Comcast Proposed Final Judgment, *supra* note 30, at VII. The parties are also allowed to use the FCC arbitration procedures if applicable. *Id.* at IV(C).

joint venture.⁸⁷ If the licensee pursues arbitration (and the DOJ consents), the proceeding would be heard by the American Arbitration Association pursuant to its commercial arbitration rules and expedited procedures.⁸⁸

These arbitral proceedings involve so-called “final offer” arbitration, where each party makes its final and best offer. The arbitrator then must select one of the two competing offers without compromise or other terms.⁸⁹ In other FCC and unrelated types of arbitration using this final offer method, the tendency is for parties to submit more reasonable offers and work out their differences before the arbitrator actually rules.⁹⁰

In the Google-ITA consent decree, the parties use a similar arbitration procedure when Google and an on-line travel site are unable to resolve any disputes through good-faith negotiation. In such an event, Google is required to submit the matter to binding arbitration for resolution through the AAA Commercial Arbitration Rules and Expedited Procedures.⁹¹ No arbitration shall be commenced unless the on-line travel site has certified to the United States that it has negotiated in good faith and the United States consents to the initiation of arbitration.⁹² The arbitration is limited to the determination of a fair, reasonable, and non-discriminatory fee for queries through the software system.⁹³ Here too, each party submits a final offer where

⁸⁷ *Id.* at VII(A, C).

⁸⁸ *Id.* at VII(D).

⁸⁹ *Id.* at VII(K).

⁹⁰ Ed Edmonds, *Symposium, A Most Interesting Part of Baseball's Monetary Structure - Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 33 (2009). See generally Donald Wittman, *Final Offer Arbitration*, 32 MGMT. SCI. 1551, 1551-52 (1986); Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85 (2010); Eldon L. Ham, *Hardball Free Agency--The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy--and How to Fix it*, 1 HARV J. SPORTS & ENT. L. 63 (2010); Matt Mullarkey, *For the Love of the Game: A Historical Analysis and Defense of Final Offer Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234 (2010). Final offer arbitration also is used extensively outside of professional baseball and other sports contexts, and is used in such disparate areas as labor relations, health care billing disputes, tax treaties, and throughout telecommunications regulation.

⁹¹ *United States v. Google Inc.*, Proposed Final Judgment, *supra* note 35, at IV(K)(3).

⁹² *Id.* at IV(K)(2, 5).

⁹³ *Id.* at IV(K)(10).

the arbitrator must select one of the offers without compromise or alteration.⁹⁴

It may be controversial to describe these trends as the outsourcing of compliance, but that is the net effect of the utilization of innovative monitoring and dispute resolution mechanisms that go far beyond negotiations with the agencies and the actual or threatened court enforcement of the prior consent decree. Third parties can, and must, be used in sensible and creative ways to ensure that the consent decrees and court judgments are enforced, and that competition is restored or at least maintained in the affected markets. It also suggests that *Trinko*'s parade of horrors is vastly overblown, and that access and related disputes can be resolved without having a court or agency reach deep within the inner workings of the defendant.⁹⁵

V. Conclusion

Moving forward, we are likely to see more, not less, of these types of access and information remedies in both litigated and settled cases involving network industries, software platforms, and other bottlenecks to competition. This appears to be an informal revival of the essential facilities doctrine, particularly in consent decrees in unregulated software, high tech, and other industries not subject to the full strictures of the *Trinko* decision.⁹⁶

Whether one calls this the return of the essential facilities doctrine or something else, the agencies, private litigants, the courts, and the affected industries recognize that it is a necessary part of antitrust enforcement for cases involving non-discriminatory access and pricing for the infrastructure of the modern and future high-tech economy. Inextricably woven into questions of access are questions about information, access to the information necessary for access to the network or infrastructure, and protection for what information has to be shared for that access.

To manage these vital aspects of antitrust in the high-tech industry, we have seen the agencies do their best to permit transactions and business practices to proceed with new and often complex

⁹⁴ *Id.* at IV(K)(5).

⁹⁵ 540 U.S. at 410.

⁹⁶ *Id.* at 411 (barring use of essential facilities doctrine where access present through regulatory remedies).

behavioral remedies to safeguard access, mandate the disclosure of necessary information, and protect against misuse of the information shared by competitors with the dominant network and infrastructure operators. The agencies have recognized that compliance is key, but also that they cannot monitor compliance in every case by themselves, except under unusually clear and limited circumstances.

Out of necessity, creative solutions have emerged that go beyond the traditional tools of agency compliance and invocation of the court's supervision and contempt powers. Instead, the agencies properly have insisted on the use of technical committees, outside monitors, cooperation with sectoral regulators, and the innovative use of ADR by third-party arbitrators to allow the parties to get on with their business and at the same time ensure compliance with the carefully negotiated provisions of the consent decrees governing the competitive impact of that business.

The next step is to carefully monitor (no pun intended) these increasingly complicated and innovative solutions. We must determine both if firms can operate with what amounts to split personalities for certain purposes, and if the judgments and decrees fulfill their intended roles as the guardians of competition and the preservers of the resources and traditional enforcement roles of the agencies.

These issues will only increase in importance regardless of what agencies and courts ultimately decide with regard to the pending airline ticketing cases, continuing investigations, and allegations of market power and abuse of that power by such firms as Google, Apple, and the more distant horizon of the competitive significance, if any, of Facebook and the other key players in the social networking space. My best guess is that unless we return to a world of structural separation and structural remedies, these controversies will be the next iteration of how issues of access and information are shaping antitrust enforcement in the twenty-first century.