

Why US Antitrust Law Should Not Emulate European Competition Policy

Statement of

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I. Introduction

An increasing number of scholars and advocates have argued recently that US antitrust law should be “reformed” in order to invigorate antitrust enforcement and sidestep the judicially-imposed constraints that have developed over antitrust’s 100 year history. Explicitly or not, these efforts seek to bring about a shift in US antitrust that would make it more closely resemble competition law in Europe. While these scholars and advocates assert that their proposals would improve economic conditions in the US, economic logic and the apparent reality from Europe suggest otherwise.

Indeed, there is much we can learn about the implications of these efforts by understanding the differences between US and EU antitrust.

Although the differences between US and EU antitrust law can appear minor or superficial at a glance, even small differences can have important consequences, and the cumulative effect of the differences is significant. Although the Commission is often quite careful to couch its decision-making in economic language, in practice, analytical economic administration of antitrust is far from the norm.

The proposals that would make US antitrust law resemble that of the EU are varied – from calling for tougher structural presumptions¹ and making predatory pricing claims easier to bring,² to weakening the consumer welfare standard,³ punishing dominant firms simply for being dominant,⁴ and severely curtailing vertical restraints.⁵

The movement to undermine the hard-won foundations of modern US antitrust law is not restricted to a small group of academics. Writing in *Vox* recently, for example, Matthew Iglesias ventured that “[o]ne idea [for remedying perceived problems with US antitrust] would be for the US to actually move to something more like the European system and abandon the consumer welfare

¹ See K. Sabeel Rahman and Lina Khan, *Restoring Competition in the U.S. Economy*, in UNTAMED HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER (Roosevelt Institute 2016).

² Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2016).

³ See, e.g., Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard, A New Standard for Antitrust*, Roosevelt Institute, 29 (2018), available at <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf>.

⁴ See Daniel Kishi, *Against Bigness? Begin By Breaking Up Big Tech*, THE AMERICAN CONSERVATIVE (Nov. 28, 2018), available at <https://www.theamericanconservative.com/articles/against-bigness-begin-by-breaking-up-big-tech/>.

⁵ See generally Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y R. 235 (2017)

standard.”⁶ In a similar vein, Bloomberg featured a recent article by economics writer Noah Smith heaping praise on the growing populist antitrust wave and its potential to roll back the consumer welfare standard.⁷ And, at least according to Commissioner Vestager, the US executive branch agencies have expressed a “renewed deeper interest and curiosity as to what we are doing in Europe[.]”⁸

While compared with some other foreign jurisdictions the EU’s approach to competition policy appears close to that of the US, it is fundamentally at odds with the sound economics that underpins much of US antitrust law in several crucial ways. In particular, these divergences between EU and US law point to four key areas where the EU approach threatens to undermine consumers and constrain the region’s economic growth:⁹

1. Precautionary principle vs. error cost framework

The US Supreme Court has repeatedly recognized the limitations the courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases, particularly the risk of false positives in monopolization cases.¹⁰

The Court has also expressed concerns, originally laid out in Judge Frank Easterbrook’s seminal article, *The Limits of Antitrust*, that the cost to consumers arising from type I errors might be greater than those attributable to type II errors because “the economic system corrects monopoly more readily than it corrects judicial errors.”¹¹

⁶ Matthew Yglesias, *Amazon’s looming challenge: Europe’s antitrust laws*, VOX (Sep. 21, 2018), available at <https://www.vox.com/policy-and-politics/2018/9/21/17887008/amazon-europe-antitrust-laws>

⁷ Noah Smith, *The Battle Over Monopoly Power Is Just Beginning*, BLOOMBERG (Dec. 10, 2018), available at <https://www.bloomberg.com/opinion/articles/2018-12-10/the-battle-over-monopoly-power-is-just-beginning>.

⁸ Elizabeth Schulze, *The US under Trump has a ‘renewed interest’ in Europe’s rules on tech, the EU’s antitrust chief says*, CNBC, (Nov. 7, 2018), available at <https://www.cnbc.com/2018/11/07/the-us-under-trump-has-a-renewed-interest-in-europes-rules-on-tech-the-eus-antitrust-chief-says.html>

⁹ A fifth, and important, area of concern, is the relative lack of what we in the US would consider due process in EU competition cases. In this testimony I focus on the economic aspects of EU competition policy, and so discuss these procedural problems only in passing. But they are indeed significant and problematic:

[T]he European Commission’s procedures for enforcing competition law are inadequate and do not match the importance and prestige of the institution as a world leader in antitrust enforcement. The topic is especially urgent due to the heavy consequences of being found to have infringed competition rules, the punitive and adjudicatory nature of the process, and the increasingly important case-law of the European Court of Human Rights. Th[is] article identifies three weaknesses in the current system: the adoption of a decision finding guilt by 27 political appointees who have not heard or studied the evidence; the lack of any hearing before a decision-maker; and the fact that the same case team in the Commission handles both the investigation of the case and the reaching of a decision.

Ian S. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 EUR. L. REV. 817 (2009). See also *infra* notes 167 to 169, and accompanying text.

¹⁰ See especially *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438 (2009); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 265 (2007); *Verizon Comm. v. Law Offices of Trinko*, 540 U.S. 398 (2004).

¹¹ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 7 (1984).

The EU’s “precautionary principle” approach is the antithesis of this. It is rooted in a belief that markets do not – or, more charitably, are unlikely – to function well in general, and certainly not sufficiently to self-correct in the face of monopolization.

Of course, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is the marginal, comparative one: *Given the realities of politics, economics, the limits of knowledge, and the errors they can lead to, which imperfect response is preferable at the margin?* That is: Should we give antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation in careful, economically grounded ways, aimed squarely at *optimizing* – not minimizing – the amount of antitrust enforcement?

This may be a question about changes at the margin, but it is far from marginal. It goes to the heart of the role of the market in the modern economy. While there are plenty of views on this, the arguments that the market has failed us *in ways that more antitrust would correct* are unsupported. We should certainly continue to look for conditions where market failures of one kind or another justify intervention, but we should not make policy on the basis of mere speculation, and we should certainly not do so without taking into account the likelihood and costs of *regulatory* failure, as well. In order to reliably adopt sound antitrust policy that might improve upon the status quo (which has evolved over 100 years of judicial decisions, generally along with the field’s copious advances in economic understanding), we need far, far better information about the functioning of markets and the consequences of regulatory changes than is currently available. Unfortunately, there is little indication that this concern resonates at the European Commission.

2. Presumptions vs effects-based analysis

While US antitrust law generally requires a full-blown, effects-based analysis of challenged behavior – particularly in the context of unilateral conduct (monopolization or abuse of dominance) and vertical restraints – the EU continues to rely heavily upon presumptions of harm or woefully truncated analysis. Even the EU’s highest court has, finally, recognized the paucity of the Commission’s analysis in this area in its recent *Intel* decision, which offers some small encouragement that we will see some movement toward better analysis by the Commission, as well.¹²

This difference between the US and the EU with respect to the reliance on presumptions in antitrust cases is, at root, a manifestation of the relative adherence of the US regime to economic principles, and their relative disregard in the EU. The US approach is consistent with the learnings from modern economics, which near-universally counsel against presuming competitive harm on the basis of industry structure (e.g., the extent of concentration in a market), particularly in the case of unilateral, vertical restraints.

As discussed below, there is no reliable empirical support for claims that concentration is increasing, or that it necessarily leads to, or has led to, increased market power and the economic harm

¹² See *infra* notes 170-178 and accompanying text.

associated with it.¹³ There is even *less* support for claims that concentration leads to the range of social ills ascribed to it by advocates of “populist” antitrust. By the same token, there is little evidence that the application of antitrust or related regulation to more vigorously prohibit, shrink, or break up large companies will correct these asserted problems.

Meanwhile, economic theory, empirical evidence, and experience teach that vertical restraints rarely harm competition and often benefit consumers by reducing costs, better distributing risk, better informing and optimizing R&D activities and innovation, aligning manufacturer and distributor incentives, lowering price, increasing demand by inducing greater supply of promotional services, and/or creating more efficient distribution channels.

As the FTC’s former Director of the Bureau of Economics explained in summarizing the body of economic evidence analyzing vertical restraints: “it appears that when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.”¹⁴ A host of other studies corroborate this assessment.¹⁵ As one of these notes, “some studies find evidence consistent with both pro- and anticompetitive effects... virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”¹⁶ Similarly, “in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects.”¹⁷

At the very *outside*, we must consider ourselves to be profoundly uncertain of the effects of vertical conduct (particularly in the context of modern, high-tech and platform industries), with the

¹³ See, e.g., Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (April 5, 2018) (forthcoming, ANTITRUST MAGAZINE) at 10-11, available at <https://ssrn.com/abstract=3156912>, and papers cited therein. As Werden & Froeb conclude:

No evidence we have uncovered substantiates a broad upward trend in the market concentration in the United States, but market concentration undoubtedly has increased significantly in some sectors, such as wireless telephony. Such increases in concentration, however, do not warrant alarm or imply a failure of antitrust.

Increases in market concentration are not a concern of competition policy when concentration remains low, yet low levels of concentration are being cited by those alarmed about increasing concentration....

See also Joshua D. Wright, et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, (George Mason Law & Economics Research Paper No. 18-29), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524

¹⁴ Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008).

¹⁵ See, e.g., Daniel P. O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-76 (Swedish Competition Authority, 2008) (“[Vertical restraints] are unlikely to be anticompetitive in most cases.”); James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639 (2005) (surveying the empirical literature, concluding that although “some studies find evidence consistent with both pro- and anticompetitive effects... virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition”); Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, 76 ANTITRUST L.J. 431 (2009); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMP. L. & ECON. 707 (2005).

¹⁶ James Cooper, Luke Froeb, Daniel O’Brien & Michael Vita, *Vertical Restrictions and Antitrust Policy: What About the Evidence?*, COMPETITION POL’Y INT’L (Autumn 2005) at 45.

¹⁷ *Id.*

proviso that, so far, most of what we do know suggests that this conduct is good for consumers. But even that worst-case version of the state of our knowledge is inconsistent with the presumptions-based approach taken by the EU. And by adopting presumptions against conduct for which there is no economic basis to do so, the EU's stance is far more hostile to novel business conduct, especially in these innovative contexts. As a result, the EU necessarily errs on the side of their condemnation, deterring beneficial business activities where authorities should, rather, try to better understand them first.

3. Extraction of rents vs. extension of monopoly

While US monopolization law prohibits only predatory or exclusionary conduct that results in both the unlawful acquisition or maintenance of monopoly power and in the creation of net harm to consumers, the EU also punishes the mere exercise of monopoly power – that is, the charging of allegedly “excessive” prices by dominant firms (or the use of “exploitative” business terms). Thus, the EU is willing to punish the mere *extraction* of rents by a lawfully obtained dominant firm, while the US punishes only the unlawful *extension* of market power.

There may be multiple reasons for this difference, including the EU's particular history with state-sponsored monopolies and its unique efforts to bring about the integration of its internal market. But, whatever the reason, the US approach, unlike the EU's, is grounded in a concern for minimizing error costs – not in order to protect monopolists or large companies, but to protect the consumers who benefit from more dynamic markets, more investment, and more innovation. At the same time, the US approach mitigates the serious risk of simply getting it wrong – which is incredibly likely where, for example, “excessive” prices are in the eye of the beholder and are extremely difficult to ascertain econometrically.

4. Non-economic factors and the politicization of antitrust vs. an economically grounded consumer welfare standard

American and European antitrust regimes also differ substantially with regard to the objectives they pursue, and the extent for which these are – or are not – grounded in mainstream economics. Whereas, the US is guided by the consumer welfare standard, the goals of European competition enforcers are both diverse, and often untethered from economic thinking. A quick glance at Europe's main competition provisions is highly revealing. Take article 102 TFEU – Europe's equivalent to Section 2 of the Sherman act:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b) limiting production, markets or technical development to the prejudice of consumers;

- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹⁸

It is striking that firms can infringe Article 102 with practices that are either “unfair,” prejudice consumers, place trading partners at a disadvantage, or impose obligations that depend on the behavior of other, non-contracting parties. Not only are these broad categories sometimes mutually exclusive (a firm could very well prejudice consumers by *not* disadvantaging some of its trading partners) but, more importantly, many of these concepts are almost impossible to translate into economic thinking.

Although the tersely worded Sherman Act, with its prohibitions on any contract “in restraint of trade”¹⁹ or attempts to “monopolize”,²⁰ is notoriously ambiguous, over the course of more than a century the Supreme Court has developed jurisprudence to limit these provisions to certain practices that restrict consumer welfare. It thereby grounded American antitrust enforcement in a requirement of rigorous economic analysis.

This is not all merely an academic question: there are real and damaging consequences that can follow from the antitrust prescriptions based on the EU model. As I discuss below, by endorsing open-ended enforcement, the EU courts have ultimately exposed EU competition law to increased politicization. Because EU regulators can call upon a large list of justifications for their enforcement decisions, they are free to pursue cases that best fit within a political agenda, rather than focusing on the limited practices that are most injurious to consumers. In other words, there is largely no definable set of metrics to distinguish strong cases from weak ones under the EU model; what stands in its place is political discretion.

In the US we have been there before. US antitrust struggled to incorporate a wide variety of often conflicting values throughout the early and mid-twentieth century – what Robert Pitofsky dubbed “the political content of antitrust”²¹ – and it was anything but a resounding success. As Robert Bork wrote at the time:

The thesis of this book has been that modern antitrust has so decayed that the policy is no longer intellectually respectable. Some of it is not respectable as law, more of it is not respectable as economics; and now I wish to suggest that because it pretends to one objective while frequently accomplishing its opposite, and because it too often forwards

¹⁸ Treaty on the Functioning of the European Union, Art. 102.

¹⁹ 15 U.S.C. § 1.

²⁰ 15 U.S.C. § 2.

²¹ See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1052 (1978).

trends dangerous to our form of government and society, a great deal of antitrust is not even respectable as politics.²²

We have thus learned over time, through hard-won experience, that antitrust works best when it focuses on economically sound, empirically rooted analysis that frames its inquiry with a clear and singular goal: the welfare of consumers.

American and European antitrust regimes also differ significantly when it comes to establishing anticompetitive effects. European competition law's overarching goal is to protect a system of "undistorted competition."²³ Accordingly, European authorities generally operate under the assumption that "competitive" market structures ultimately lead to better outcomes for consumers. This contrasts with American antitrust enforcement which, by pursuing a strict consumer welfare goal, systematically looks at the actual impact of a practice on economic parameters, such as prices and output. In other words, European competition enforcement assumes that concentrated market structures *likely* lead to poor outcomes and thus sanctions them, whereas US antitrust law almost systematically looks into the *actual* effects of a practice. The main consequence of this distinction is that, compared to the US, European competition law has established a wider set of *per se* prohibitions and sets a lower bar for plaintiffs to establish the existence of anticompetitive effects. Because of this lower evidentiary threshold, EU competition decisions are also subjected to a less stringent judicial review.

Despite asserting that EU competition law is "better" than that of the US, and that emulating the EU will improve economic conditions in the US, references to the likely *outcome* – positive or negative – of the expanded antitrust experiment in the EU are not provided. Moreover, as noted below, to the extent the European experience is assessed at all, these assessments are manifestly unreliable.

Unfortunately for proponents of this expanded approach to antitrust, the European experience is anything but an unmitigated success. The European Union has not outperformed the United States since the turn of the century. Quite the opposite. Between the years 2000 and 2017, GDP per capita grew from \$34,916 to \$40,088 in the Euro area (14.81%), and from \$45,055 to \$53,128 in the United States (17.92%).²⁴ Although economic growth is a multivariate phenomenon in which antitrust policy plays only a part, these numbers should at the very least dispel the myth that

²² See R.H. BORK, ANTITRUST PARADOX 418 (Simon & Schuster. 1993).

²³ Treaty on European Union, Protocol (No27) on the internal market and competition, Official Journal 115 (emphasis added).

²⁴ *World Development Indicators*, THE WORLD BANK (last visited Dec. 5, 2018), <http://databank.worldbank.org/data/reports.aspx?source=2&series=NY.GDP.MKTP.KD&country=EUU> (Showing EU GDP from 1990 to 2017).

reforming antitrust law would somehow alleviate all of the ills that allegedly dog the American economy.²⁵

II. The specious lure of excessively discretionary antitrust

Antitrust is an attractive regulatory tool for a number of reasons. As noted above, the vague, terse language of the Sherman Act readily lends itself to “interpretation” imbuing it with virtually limitless scope. Indeed, the urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of the tech industry are framed in antitrust terms, even though they are mostly rooted in nothing recognizable as modern, economically informed antitrust legal claims or analysis.

But that attraction is precisely why we should care about the scope, process, and economics of antitrust and the extent of its politicization. Antitrust in the US has largely resisted the relentless effort to politicize it. Despite being rooted in vague and potentially expansive statutory language, US antitrust is economically grounded, evolutionary, and limited to a set of achievable social welfare goals. In the EU, by contrast, these sorts of constraints are far weaker. Whether or not that is suitable for the particular political and historical circumstances of the EU is a separate question. But, undoubtedly, applying a controversial legal regime to the United States – a markedly different jurisdiction with a unique governance structure – and upsetting more than a century of legal, technological, and social development, is deeply problematic.

This conclusion is in no way altered by the fact that US antitrust law has become the outlier of global antitrust enforcement, compared to the EU’s more “consensual” approach.²⁶ What matters is a policy’s actual results, not whether it is widely adopted; the world is full of debunked beliefs that were once widely shared. And it is far from certain that the widespread adoption of the EU model is in any way indicative of superior results. It is equally (or even more) plausible that this model has proliferated because it naturally accommodates politically useful populist narratives – such as “big is bad,” robin hood fallacies and robber baron myths – that are constrained by the US’s more evidence-based and rational antitrust decision-making.²⁷ America’s isolation might thus be a testament to its success rather than an emblem of its failure. But even if by some chance the European approach proved to be optimal for many other countries in the world, it is still dubious that its adoption would lead to improved economic performance in the United States. As has

²⁵ See, e.g., David Leonhardt, *The Monopolization of America*, NEW YORK TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html>. See also *Like America, Britain suffers from a lack of competition*, THE ECONOMIST (Jul. 26, 2018), <https://www.economist.com/leaders/2018/07/26/like-america-britain-suffers-from-a-lack-of-competition>; Emily Stewart, *America’s monopoly problem, in one chart*, VOX (Nov. 26, 2018), <https://www.vox.com/2018/11/26/18112651/monopoly-open-markets-institute-report-concentration>.

²⁶ See Spencer Weber Waller, *The Omega Man or The Isolation of U.S. Antitrust Law* 1 (Dec. 4, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988

²⁷ The idea that bad policies often spread more easily than rational ones is a central theme of Bryan Caplan’s “The Myth of the Rational Voter”. See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 1 (Princeton University Press. 2011).

already been alluded to, the unique features of the US legal regime make it unlikely that the best policy for the EU would also happen to be the best one for America.

The EU's more aggressive pursuit of technology platforms under its antitrust laws demonstrates many of the problems with its approach in general. I urge this subcommittee to consider not just whether the EU approach seems to permit the government to reach a preconceived outcome – i.e., placing large tech platforms under increased antitrust scrutiny – but whether it is truly desirable at all to emulate the EU's approach and to try to reach the goals of EU competition policy under US antitrust law. Endorsing the European approach to antitrust, in a naïve attempt to bring high-profile cases against large Internet platforms, would prioritize political expediency over the rule of law. It would open the floodgates of antitrust litigation and facilitate deleterious tendencies, such as non-economic decision-making, rent-seeking, regulatory capture, and politically motivated enforcement.

Bringing US antitrust enforcement in line with that of the EU would thus unlock a veritable Pandora's box of concerns that are currently kept in check. Chief among them is the use of antitrust laws to evade democratically and judicially established rules and legal precedent. When considering this question, it is important to see beyond any particular set of firms that enforcement officials and politicians may currently be targeting. An antitrust law expanded to consider the full scope of soft concerns that the EU aims at will not be employed against only politically disfavored companies, companies in other jurisdictions, or in order to expediently “solve” otherwise political problems. Once antitrust is expanded beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints.

A. The European approach to Facebook and Google as cautionary tale

The question of whether technology platforms should be regulated (and why) is a contentious one. But whatever the political, economic, or social rationale impelling regulation, it remains a crucial question whether *antitrust* – or competition policy implemented through other laws – is the proper regulatory lever. Despite many claims that European authorities, through their competition laws, have adopted a “better” approach toward regulating technology platforms, these claims are generally based on an *a priori* preference for the *outcome* – not on a careful assessment of the underlying legal interpretation and its broader implications.

Indeed, Europe's recent (and ongoing) experience with applying antitrust to both Facebook and Google presents a *cautionary tale*, not a model. As these examples show, moving towards a more open-ended enforcement of antitrust law (potentially converging with EU competition law) entails significant risks.

I. Facebook

The German Bundeskartellamt’s (Federal Cartel Office, or “FCO”) ongoing Facebook investigation, for which an infringement decision is said to be in the pipeline,²⁸ is a stark case of the unprincipled extension of antitrust to attempt to reach a politically favored result. Indeed, in contrast to the European Commission – which at least often *mentions* economic analysis in its decisions – the FCO did not include any economic analysis or an attempt to gauge the actual effects of the complained-of conduct on users in its preliminary assessment. The FCO’s investigation thus bears all the traits of consumer protection enforcement (which, in Europe at least, tends to rely upon bright-line rules and little analysis of effects) rather than competition scrutiny (which nominally entails at least some inquiry into to the economic effect of firms’ conduct).

The crux of the case concerns Facebook’s collection of users’ personal data outside its site – data that is then merged with Facebook’s user profiles.²⁹ The German competition agency asserts in its preliminary assessment that Facebook (which it “assumes... is dominant”) is “abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user’s Facebook account.”³⁰

Note that the allegation on its face is not that Facebook forecloses other sites from amassing this external data, nor that its data collection amounts to anticompetitive harm (e.g., supracompetitive prices) to consumers. Rather, its allegation is that Facebook’s terms of service authorizing this data collection are simply not good for consumers, regardless of their acceptance of the terms, and thus constitute an abuse of dominance. “In the authority’s assessment, consumers must be given more control... and Facebook needs to provide [consumers] with suitable options to effectively limit this collection of data.”³¹

The German competition authority is thus attempting to use its antitrust authority to impose on consumers (and Facebook) its idiosyncratic political preferences, in this case with regard to privacy. But turning voluntary contract terms that are not, in and of themselves, anticompetitive into an antitrust violation requires a remarkable and unprecedented sleight of hand.

To begin with, the FCO asserts that this data – data collected from *outside* of Facebook – is “essential” for other social networks to compete with Facebook. But, despite asserting that its assessment is not based on how Facebook uses internal data collected from users’ interactions with Facebook

²⁸ See, e.g., Foo Yun Chee, *German cartel agency sees final decision on Facebook in early 2019*, REUTERS (Nov. 22, 2018), <https://in.reuters.com/article/us-facebook-privacy-eu/german-cartel-agency-sees-final-decision-on-facebook-in-early-2019-idINKCN1NR1JT>.

²⁹ See Bundeskartellamt, “Preliminary assessment in Facebook proceeding: Facebook’s collection and use of data from third-party sources is abusive,” (Dec. 19, 2017), *available at* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html.

³⁰ *Id.*

³¹ *Id.*

directly, the FCO appears to convert this *external* data into an essentiality by condemning Facebook's superior ability to combine it with its own internal data:

Facebook has superior access to the personal data of its users and other competition-relevant data. Because social networks are data-driven products, access to such data is an essential factor for competition in the market. The data are relevant for both[] the product design and the possibility to monetise the service. If other companies lack access to comparable data resources, this can be an additional barrier to market entry.³²

The effect of this is to condemn Facebook's success – and even, perhaps, to end up demanding that Facebook share its internal data – without saying so outright. The reference to “comparable data resources” is an unmistakable nod to the essential facilities doctrine, which can require access to a firm's competition-relevant inputs where comparable inputs cannot be obtained elsewhere. Here the FCO appears to be asserting that competitors' effective use of *external* data is thwarted if they do not have comparable internal data with which to combine it. But, of course, Facebook has this data only as a result of its success in bringing users to its platform. And it would be the height of unmoored antitrust enforcement to demand that other social networks, which do not operate *through* Facebook (in contrast, say, to advertisers, who do reach consumers via Facebook), must have access to Facebook's internal data simply to give them a leg up in competing with a more successful rival. And yet, that is precisely what the authority seems to be suggesting – just indirectly by purporting to rest its claim on access to external data (which, like Facebook, competing social networks certainly *do* try to use).

Of course, lack of access to a successful company's resources is a form of barrier to entry in *every* case where a challenger wishes to enter a market where existing firms are long established. The same argument that the FCO makes with respect to Facebook and data could be applied to any firm that has a strong reputation, significant brand value, substantial customer loyalty, or even large real estate holdings or an established line of credit with a bank. For antitrust to require competitor access to these resources would be to undermine completely the competitive market forces that antitrust is supposed to support. And yet the FCO does not – and cannot – distinguish these valuable types of capital from that of access to a large pool of self-generated consumer data.

The FCO also alleges that Facebook's “exploitative business terms”³³ constitute an antitrust violation because “[t]he damage for the users lies in a loss of control: they are no longer able to control how their personal data are used.”³⁴ But the allegedly exploitative nature of this loss of control is a function of European data protection laws, not antitrust law. The FCO appears to convert the alleged data protection law violation into an antitrust offence because,

³² Bundeskartellamt, *Background information on the Facebook proceeding* 3 (Dec. 19, 2017), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html?nn=3600108.

³³ *Id.* at 4.

³⁴ *Id.*

[a]ccording to the authority's preliminary assessment, when operating this business model Facebook, as a dominant company, must consider that its users cannot switch to other social networks. Participation in Facebook's network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the "whole package" or doing without the service.³⁵

But because of the essentiality of Facebook's *internal* data, this choice is alleged to be a false one. And thus consumers "have no option to avoid the merging of their data"³⁶ – a violation, the FCO asserts, of data protection law. In this way the FCO uses data protection law as a foothold to build a convoluted antitrust case that really amounts to nothing more than the condemnation of Facebook's size and success.

This is exactly the sort of uneasy merging of general social policy and the tools of competition policy that is so corrosive to the rule of law. Using the language of antitrust, the FCO is basically making a case that Facebook should be subject to competition law penalties for possessing more data than the FCO thinks is appropriate. Perhaps there are violations under other laws – data security or privacy laws, e.g. – but nothing in the FCO's discussion of its preliminary assessment suggests anything recognizable in the economic literature as an abuse of dominance.

The FCO's approach would dramatically expand the scope of German (and possibly European) competition law. As some commentators have observed, any dominant company that infringes any legal obligation aimed at protecting consumers – regardless of whether the violation actually results from the absence of competition, results in cognizable anticompetitive effects, or extends the company's dominance – could be found to infringe competition law.³⁷

Although particularly egregious here, the FCO's efforts to reach beyond the limited constraints of competition law are not new. Starting in 2017, the FCO has been progressively urging for expansion of its powers into a broader consumer protection set of tools.³⁸ Thus, even if it is unsuccessful in building its case under the current state of the law, the FCO is laying the foundations for convincing the German legislature why it needs vast new powers to combine consumer protection and competition into a single regulatory authority. Notably, even the US Federal Trade Commission (FTC) – which has both consumer protection and competition mandates – treats these missions separately, and regards competition cases to arise only under competition law, and not from the violation of specific consumer protection rules.

³⁵ Bundeskartellamt, "Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive," *supra* note 29.

³⁶ Bundeskartellamt, *Background information on the Facebook proceeding*, *supra* note 32, at 4.

³⁷ See, e.g., Silke Heinz, *Bundeskartellamt sends preliminary assessment to Facebook*, KLUWER COMPETITION LAW BLOG (Jan. 9, 2018), <http://competitionlawblog.kluwercompetitionlaw.com/2018/01/09/bundeskartellamt-sends-preliminary-assessment-facebook/>.

³⁸ See, e.g., Bryan Cave, *German Federal Cartel Office Gains New Role in Consumer Protection*, LEXOLOGY (June 8, 2017), <https://www.lexology.com/library/detail.aspx?g=fab42974-ddfa-4aa2-8bc4-bcce9cd7166b> (the Bundeskartellamt successfully convinced the German legislature to give it a form of sectoral overview when consumer protection laws are violated).

The implications of this approach are obvious. If competition law is unconstrained on its own terms — that is, it unmoored from a set of subject-specific constraints imposed by courts and legislatures — it threatens to become a large, sprawling, economy-wide set of regulations that resembles more closely a national industrial policy. The merits or demerits of actually having an economy-wide industrial policy aside, it is unquestionably a bastardization of *antitrust* law to facilitate the imposition of policies from law and regulation outside of competition policy, in ways that of necessity will promote other policies at the very *expense* of competition.

And, although this is a German case, its antecedents in the prevailing orthodoxy of EU law are not hard to recognize. Though the Commission frequently makes noises about conducting an economic analysis, as I discuss below, the EU's competition process is, at root, a political one. As such, a tremendous amount of leeway is afforded to EU competition regulators. This makes sense, on its own terms: the Commission is, after all, a policy-making body directly responsive to the policy preferences of the President of the European Commission.³⁹ While the Commission may sometimes cite to economics in its decisions, it fundamentally structures its activities in a way that affords it a large degree of policy-making discretion.

The Bundeskartellamt's action, although specific to Germany, makes (unfortunate) sense against this backdrop. Where, unlike in the US, antitrust enforcement is viewed as a political function of the state, regulators administering competition policy can surely be relied upon to turn it into a general regulatory apparatus, as much as possible. While this is precisely what some advocates seem to want for US antitrust, doing so entails enormous risk and the potential agglomeration of massive political power outside of our democratically elected branch of government.

2. *Google*

The European Commission's *Google Shopping* case likewise illustrates the fundamental problems and deep-seated inappropriateness of the EU's approach to antitrust for the US.⁴⁰ In its decision, the Commission, in the name of protecting small competitors, substituted its own judgment for the judgment of Google in administering its search algorithms.

The basic claim is that Google unfairly manipulated its search engine algorithms to benefit itself and to harm competition. In the *Google Shopping* decision, the European Commission concluded that "Google does not position and display in the same way results from Google's comparison

³⁹ "[T]he European Commission (executive arm of the EU)... has a monopoly on initiating all EU legislation and is responsible for ensuring its enforcement. The President is responsible for allocating portfolios to members of the Commission and can reshuffle or dismiss them if needed. He determines the Commission's policy agenda and all the legislative proposals it produces (the Commission is the only body that can propose EU laws)." "Executive Branches," EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON (last visited Dec. 5, 2018), <http://www.europarl.europa.eu/unitedstates/en/eu-us-relations/executive-branches>.

⁴⁰ Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

shopping service and from competing comparison shopping services.”⁴¹ Over the course of more than a hundred pages, the decision adduces copious evidence to prove that this preferential treatment of Google’s services over those its competitors coincided with a drop off in traffic to these sites, and a relative increase in traffic to Google’s comparison shopping results. It also asserts — with far less robust evidence — that this traffic pattern impaired or even destroyed these sites.⁴² On this basis, the Commission concluded that Google “excluded” these rivals, that this interfered with the “competitive process,” and thus that Google prevented its rivals from “competing on the merits.”⁴³

The glaring defect in the decision is that, while it devotes nearly all of its 216 pages to describing the *fact* of Google’s non-neutrality and its relative effect on traffic to other comparison shopping sites, it offers only conclusory statements asserting that this diversion of traffic had, or will have, anticompetitive effect. Rather, the decision asserts that Google’s conduct makes competition more difficult for its rivals and generates more revenue for Google than would “impartial” conduct, and asserts that this is sufficient to demonstrate anticompetitive harm. What the decision *never* assesses, however, is whether this self-preferencing treatment actually results in harm to consumers. “The commission said Google abused its dominance of online search to promote its own comparison-shopping service and relegate those of rivals. Yet it did not show, for instance, that consumers were denied a superior service as a consequence.”⁴⁴

Even if it is true that competing comparison shopping sites received more visitors when they were ranked higher in Google’s search results, and that their traffic plummeted when Google updated its algorithm to promote its own comparison shopping results at the top of its search results pages, the *fact* of that drop in traffic, simply because it resulted from “non-neutral” treatment, does not amount to evidence of anticompetitive effect.

Google’s allegedly anticompetitive conduct, in other words, was to favor its own results over those of its competitors. But without evidence (or even analysis) of the effect on consumers, the conclusion simply does not follow from the premise. A scheme of “impartial results that do[es] not benefit [Google] financially”⁴⁵ — as the founders of Foundem.com, among Google’s most vocal comparison shopping critics, prefer — is, in fact, inherently no better (or worse) for consumers than one that benefits Google at Foundem’s expense.

⁴¹ *Id.* ¶ 662.

⁴² *Id.* ¶ 589-95.

⁴³ *Id.* ¶¶ 596, 600-07.

⁴⁴ *Is Margarethe Vestager championing consumers or her political career?*, THE ECONOMIST (Sep. 14, 2017), <https://www.economist.com/news/business/21728979-she-rich-worlds-most-powerful-trustbuster-margarethe-vestager-championing-consumers-or>.

⁴⁵ Rowland Manthorpe, *Google’s nemesis: meet the British couple who took on a giant, won... and cost it £2.1 billion*, WIRED UK (Feb. 14, 2018), available at <http://www.wired.co.uk/article/fine-google-competition-eu-shivaun-adam-raff>.

Without evidence of actual consumer harm, the Commission simply presumed its existence from the structure of the market, discounting the possibility that that structure was derived from consumer-welfare-enhancing innovations and product improvements. EU competition law is thus interpreted to grant Foundem – and every other site that can claim it competes with Google and happened to make it to the top of Google’s search results at some arbitrarily determined point in history – a virtual entitlement to a previous, idiosyncratic state of affairs, and to penalize developments impelled by new technology and changing consumer preferences.⁴⁶ Such an entitlement will not only deter the continued improvement of Google’s search engine and decimate innovation by competitors hoping to unseat the incumbent, *it is an unprecedented legal anomaly*.⁴⁷

Competitors like Foundem (one of the chief instigators of the EU complaint against Google) found themselves in an asset specificity trap: they engineered their services to be entirely dependent upon Google’s algorithms as they were written at a particular time. Google, as it has since its inception, continued to develop its services. Part of that development obviously benefits users, and part of that benefit undoubtedly has some negative effect on competitors that benefit from the status quo ante. But the Commission simply discounted all of the many ways that Google’s algorithmic changes benefit users and instead opted to focus on the harm that small competitors faced when Google changed its services. The competitors in question were still free, of course, to compete on the merits, and many still do. What the *Google Shopping* decision truly is, however, is the Commission using antitrust law to preference companies that may have made overly risky business decisions, locking in the Commission’s unsubstantiated preference for a particular market structure.

In short, absent injury to consumers, there is no coherent antitrust principle that would properly endorse a company’s decisions when they happen to benefit a particular competitor, but condemn the same decisions when they happen to harm it. Conduct that leads to a decrease in traffic for, say, Foundem but improves Google for consumers is not necessarily anticompetitive or otherwise problematic – any more than was Google’s conduct that *benefitted* Foundem in the first place.⁴⁸ And yet nowhere in the Commission’s 200-plus page *Google Shopping* decision does it establish that Google’s conduct actually harmed consumers – only that it harmed competitors like Foundem.

It must be said that the *trappings* of economic analysis and the preservation of competition to the benefit of consumers are present – rhetorically – in the decision. But they are just that: trappings. The reality is that the Commission’s *Google Search* decision offers a defense only of a structuralist approach aimed at protecting competitors, not consumers. To be sure, the theory under which the decision purports to operate is theoretically consistent with modern economic theories of possible consumer harm (as unlikely as they are to arise). But the elements that the Commission thinks

⁴⁶ See James Grimmelman, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE 435, 439 (Berin Szoka & Adam Marcus, eds., 2010), available at http://nextdigitaldecade.com/ndd_book.pdf#page=436.

⁴⁷ See *id.* at 440-41, 448.

⁴⁸ See Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What’s the Question?*, 2012 COLUM. BUS. L. REV. 151.

sufficient to prove its case, and the proof offered by the decision, are manifestly at odds with an actual consumer-focused case.

B. Competition law as a tool for censorship

The Australian Competition and Consumer Protection Commission (ACCC) has recently made recommendations in a new report that demonstrate exactly the potential harms that come with a competition authority vested with broad discretion and a political mandate disconnected from rigorous economics.

The ACCC report starts with a discussion of basic competition principles, including when a firm may be considered to be dangerously exercising its market power:

Australian law does not prohibit a business from possessing significant market power or using its efficiencies or skills to “out compete” its rivals. But when their dominant position is at risk of creating competitive or consumer harm, governments should stay ahead of the game and act to protect consumers and businesses through regulation.⁴⁹

Thus, the ACCC claims both that it is not illegal to obtain market power, and that it will punish the possession of market power – without an actual harm – as long as the dominant firm is “at risk of creating competitive or consumer harm.” This is, in other words, a purely discretionary model.

Starting with the assertion that both Facebook and Google have substantial market power,⁵⁰ the Commission then opines that “the ubiquity of digital platforms mean many consumers feel they have to join or use these platforms, and agree to their non-negotiable terms of use, in order to receive communications and remain involved in community life.”⁵¹ Noting a lack of “transparency” in how the feed, advertising, and search algorithms work on Facebook and Google (which is a

⁴⁹ Australian Competition & Consumer Commission, ‘ACCC releases preliminary report into Google, Facebook and Australian news and advertising’ (Press Release, 256/18, 10 Dec. 2018), available at <https://www.accc.gov.au/media-release/accc-releases-preliminary-report-into-google-facebook-and-australian-news-and-advertising>.

⁵⁰ ‘Digital Platforms Inquiry’, (Preliminary Report, Australian Competition & Consumer Commission, Dec. 10, 2018) at 4, available at <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>. It is also instructive of the ACCC’s view of its own discretion (and the constraints of economics) that it is willing to contort the market definition and market power exercises that undergird any assessment of anticompetitive abuse in an economically incoherent fashion. The ACCC asserts that Google and Facebook each have “substantial” market power, *Id.* at 4, based on its assessment that

[a]pproximately 50 per cent of traffic to Australian news media websites comes from Google or Facebook. The significance of the referral traffic from Google and Facebook to Australian news media businesses has provided these digital platforms with a substantial degree of market power in the market for news media referral services.

Id. at 6. Whether any firm is able to exercise market power is emphatically a function of competitive constraints from other firms. Asserting that Facebook and Google *together* have market power because of their *combined* market share thus rejects the most important determinant of market power, and incoherently elevates the firms’ *combined* market share as outcome determinative.

⁵¹ *Id.* at 7.

strange assertion given that these are ostensibly valuable trade secrets), the ACCC outlines a parade of horrors that therefore obtain: a risk that the firms will favor their own content,⁵² a risk that advertisers ads aren't being served,⁵³ risks of constraints on consumer choice,⁵⁴ and a risk of filter bubbles developing.⁵⁵

The ACCC proposes a number of “remedies” for these problems, but one proposed solution well highlights the problems that arise when using the façade of competition policy to effect political ends. In particular, it recommends the creation of a new regulatory authority tasked with overseeing the algorithmically driven feeds of Google and Facebook. More specifically, the authority would be “tasked with monitoring, investigating and reporting on the criteria, commercial arrangements or other factors used by relevant digital platform... to impact ...the ranking and display of news and journalistic content with the aim of identifying the effects of algorithms or other policies on the production of news and journalistic content or competition in media markets.”⁵⁶

Further,

The ACCC considers that such a regulatory approach would provide assurances to both businesses and consumers that algorithms are not... operating in such a way as to cause significant detriment to the production of news and journalistic content or media markets.⁵⁷

The implications are both clear and troubling: The ACCC wants to use competition law as a hook to set up what amounts to a national censorship board to ensure that the “right” kind of news is being promoted through Google and Facebook. Most concerning of all, given the existing ability of users to select the news they see in their Facebook feeds, in particular, it is not clear how (or whether) such an authority would preserve user-driven content within the context of Facebook’s algorithm. And whether or not censorship is the stated goal of such an authority, the risks with this approach to competition law should be immediately apparent to anyone passingly familiar with the history of national censorship boards. Moreover, this freewheeling approach to competition law is precisely the danger we want to avoid in the US, and a danger that becomes all the more possible were we to import the sort of vast discretion we see in Germany, Australia, and the EU.

III. Should we be concerned about concentration, and should we look to EU competition policy to combat it?

We have, of course, been debating these matters throughout the course of antitrust and consumer protection history. As judicial doctrine and regulatory policy have evolved over the past century to

⁵² *Id.* at 5.

⁵³ *Id.* at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 10-11.

⁵⁷ *Id.* at 11.

incorporate our better (but still far from perfect) understanding of industrial organization and the consequences of antitrust enforcement, they have moved generally toward, rather than away from economically grounded policies aimed at the protection and promotion of consumer welfare. And yet, throughout that time, presumptions at odds with economic learning and empirical evidence, and preferences to defend politically favored stakeholders (or to “defend” antitrust from the asserted political power of large corporations) have repeatedly crept back into the discussion.

Nowhere is this more consistently the case than with respect to the efforts to condemn market concentration and firm size independently of any evidence of actual anticompetitive effects. Today this effort proceeds apace, despite the copious economic learning to the contrary.

In 1973, Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act (IRA),⁵⁸ in order to address perceived problems arising from industrial concentration. Among other things – and most remarkably, given Hart’s assertion that the bill was offered as “an alternative to government regulation and control”⁵⁹ – the bill would have required the creation of an “Industrial Reorganization Commission” to “study the structure, performance, and control” of seven “priority” industries,⁶⁰ and, for each, to “develop a plan of reorganization... whether or not any corporation [was determined to possess monopoly power].”⁶¹

The bill was grounded in the belief that industry concentration led inexorably to monopoly power; that monopoly power, *however obtained*, posed an inexorable threat to freedom and prosperity; and that the antitrust laws were insufficient to address the purported problems. Thus the preamble to the Industrial Reorganization Act asserts that:

[C]ompetition... preserves a democratic society, and provides an opportunity for a more equitable distribution of wealth while avoiding the undue concentration of economic, social, and political power; [and] the decline of competition in industries with oligopoly or monopoly power has contributed to unemployment, inflation, inefficiency, an underutilization of economic capacity, and the decline of exports....⁶²

That sentiment – rooted in the reflexive application of the (largely-discredited⁶³) structure-conduct-performance (SCP) paradigm⁶⁴ – has resurfaced today as the asserted justification for similar

⁵⁸ Industrial Reorganization Act, S. 1167, 93rd Cong., 1st Sess. (1973).

⁵⁹ Philip A. Hart, *Restructuring the Oligopoly Sector: The Case for a New ‘Industrial Reorganization Act’*, 5 ANTITRUST L. & ECON. REV. 35, 37 (1972) (which reprints Sen. Hart’s statement, along with the text of the bill and an analysis of the bill prepared by the Senate Antitrust and Monopoly Subcommittee staff).

⁶⁰ *Id.* at Title I, § 203(a)(1).

⁶¹ *Id.* at Title I, § 203(a)(2).

⁶² *Id.* at preamble.

⁶³ See generally INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds., 1974), and see especially Harold Demsetz, *Two Systems of Belief About Monopoly*, in *id.* at 164-184. See also Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. & ECON. 229 (1977); Yale Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L. J. 826 (1978).

⁶⁴ See JOE BAIN, INDUSTRIAL ORGANIZATION 372-468 (1968).

(although less onerous) antitrust reform legislation⁶⁵ and the general approach to antitrust analysis often referred to as “hipster antitrust.”⁶⁶ Sen. Klobuchar’s Consolidation Prevention and Competition Promotion Act of 2017, for example, asserts that:

[C]oncentration that leads to market power and anticompetitive conduct makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality;

undue market concentration also contributes to the consolidation of political power, undermining the health of democracy in the United States; [and]

the anticompetitive effects of market power created by concentration include higher prices, lower quality, significantly less choice, reduced innovation, foreclosure of competitors, increased entry barriers, and monopsony power.⁶⁷

Despite repeated attempts the IRA was never enacted into law. But the conversation around the proposal is instructive, as efforts to invigorate antitrust enforcement today have adopted many of the same underpinnings as those of the IRA.

A. What’s at stake: The politicization of antitrust

Much of the pressure behind the IRA was the allegation that economic power leads to political power. We see this same charge today, and, in fact, it is perhaps the most consistently leveled: that economic concentration and the presence of large firms lead inexorably to the subversion of democracy. But this purported causal relationship has no basis in reality. As my father, Henry G. Manne, noted in testimony on the IRA before this very subcommittee in 1974:

There is, however, a “political” argument that should also be considered. It is that some corporations are so large that they are able to “control” the Government, presumably as it were, to “buy” the protection, the subsidy, the transportation system, the war, or whatever they want from the Government.

The argument that companies like Standard Oil, du Pont, and General Motors run our Federal, State and local governments like dictators is no longer simply a Marxist myth about the American system. It has become common fare for television commentators, journalists, self-styled consumer spokesmen, and certain academics, all of whom speak with one voice and a forked tongue. Unfortunately, the energy utilized in making these assertions is about the only force behind them, and again it does not require complicated empirical studies to show the error, or perhaps the mendacity, for example, behind these assertions.

Has the automobile industry, for example, been more successful in Washington than the environmentalists? Have the petroleum companies spent as much money lobbying for

⁶⁵ See, e.g., Consolidation Prevention and Competition Promotion Act, S. 1812, 115th Cong., 1st Sess. (2017).

⁶⁶ See, for example, the essays collected in the April 2018 volume of the CPI ANTITRUST CHRONICLE, “Hipster Antitrust” (Konstantin Medvedovsky, ed.), available at <https://www.competitionpolicyinternational.com/antitrust-chronicle-hipster-antitrust/>.

⁶⁷ Consolidation Prevention and Competition Promotion Act, *supra* note 65, at § 2(a)(4) - (6).

protective legislation as has the National Education Association? Has the steel industry received as much bounty from our seemingly universal Federal welfare system as have the elderly, the uneducated, or those stricken with a strange desire to engage in farming? One could go on like this almost endlessly. But to ask these rhetorical questions is sufficient to make the point.

There is simply no correlation between the concentration ratio in an industry, or the size of its firms, and the effectiveness of the industry in the halls of Government. This scare argument about the political power of large corporations is a sham. We all know that the institutions that influence policies in Washington are those that can deliver the votes or utilize their finances to secure votes. And these are the very practices that large corporations are relatively weakest in performing, especially as compared to unions, farmers, consumer organizations, environmentalists, and other large voting blocks. There is even less substance to this political argument about corporate concentration than there is to the economic ones.⁶⁸

Many things other than dollars influence political decision-making, and it can hardly be said that any large company succeeds in all its efforts to influence politics – just as it must be acknowledged that relatively small companies, labor unions, activist organizations, and even well-connected individuals often succeed in theirs.⁶⁹

Indeed, not only is the risk of political influence arising from concentrated industry overstated, the risk and cost of politicized enforcement arising from the efforts to expand the scope of, and relax the constraints on, antitrust enforcement is significantly *understated*.

When antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions, as Herbert Hovenkamp highlighted in a recent paper:

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement

⁶⁸ Henry G. Manne, Testimony on the Industrial Reorganization Act before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly (Apr. 1974), *reprinted in* Henry G. Manne & Geoffrey A. Manne, *Henry G. Manne: Testimony on the Proposed Industrial Reorganization Act of 1973 – What’s Hip (in Antitrust) Today Should Stay Passé*, ICLE Antitrust and Consumer Protection Research Program White Paper 2018-2, at 19-20 (emphasis added), available at https://laweconcenter.org/wp-content/uploads/2018/05/hgm-testimony_on_indust_reorg_act_1974-2018-05-03.pdf.

⁶⁹ No doubt, at the margin, “small or medium size companies can rarely match the resources of a corporate leviathan in seeking government bestowed advantages.” Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PENN. L. REV. 1191, 1198 (1977). But there are a lot of “corporate leviathans.” Moreover, it must be “said that some small companies also have been adroit in securing favors from the state. The exemption which hog cholera serum producers have received from the antitrust laws is only one example. 7 U.S.C. § 852 (1970).” *Id.* There are, of course, countless other examples.

antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete.⁷⁰

Even Robert Pitofsky, in his 1979 paper advocating in *favor* of incorporating political concerns into antitrust, noted that not all non-economic concerns were appropriate for consideration by antitrust enforcers:

There are a number of non-economic concerns that can play no useful role in antitrust enforcement. These include (1) protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier's products or services regardless of the efficiency of their distribution operation and the will of the supplier (a kind of civil rights statute for distributors), and (3) income redistribution to achieve social goals.⁷¹

Remarkably, at least two of these (protection for small businesses and income redistribution) are now offered as core, constituent parts of the “Neo-Brandeisian,” populist antitrust resurgence.⁷²

The Neo-Brandeisian movement shares much in common with those who pushed for the Industrial Reorganization Act (and with Brandeis himself). And it suffers from many of the same failings. Most fundamentally: The failure to grapple with the reality that constraining firm size in an effort to promote the political and economic power of consumers or favored businesses may actually have the *opposite* of its intended effect.

One of the key concerns with a more overtly politicized competition policy is precisely that: its politicization. By imbuing antitrust with an ill-defined set of vague political objectives, antitrust becomes a sort of “meta-legislation.”⁷³ As a result, the return on influencing a handful of government appointments with authority over antitrust becomes huge increasing the ability and the incentive to do so. As Baumol and Ordover observe, antitrust law is inherently prone to rent-seeking, especially protectionism.⁷⁴ This leads to numerous harms, including the misallocation of resources, less efficient firms, and a diversion of firms’ energies towards less productive ends (rent-seeking).⁷⁵

⁷⁰ Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, U. of Penn, Inst. for Law & Econ. Research Paper No. 18-7 (Feb. 2018) at 3 (forthcoming, Notre Dame Law Review), available at <https://ssrn.com/abstract=3097452>.

⁷¹ Robert Pitofsky, *The Political Content of Antitrust*, 127 PENN. L. REV. 1051, 1058 (1979).

⁷² See, e.g., Senate Democrats, “A Better Deal: Cracking Down on Corporate Monopolies” (Jul. 2017), available at <https://democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf>. The “Better Deal” claims that “[t]he extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.” *Id.* at 1. Its proscriptions are aimed at, among other things, using competition policy to address alleged “higher prices, lower pay, the squeezing out of competition, and increasing inequality.” *Id.* at 3.

⁷³ Geoffrey Manne, *The Antitrust Laws Are Not Some Meta-Legislation Authorizing Whatever Regulation Activists Want: Labor Market Edition*, TRUTH ON THE MARKET (Sep. 22, 2017), available at <https://truthonthemarket.com/2017/09/22/the-antitrust-laws-are-not-some-meta-legislation-authorizing-whatever-regulation-activists-want-labor-market-edition/>.

⁷⁴ See William J Baumol & Janusz A Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 252 (1985).

⁷⁵ *Id.* 250-51.

Adding a political dimension to antitrust law exacerbates these inherent flaws. A political antitrust regime is inherently prone to be captured by rivals who seek to ride populist waves of protectionism.

And finally, if the underlying basis for antitrust enforcement is extended beyond economic welfare effects, how long can we expect to resist calls to *restrain* enforcement precisely to further those goals? All of a sudden the effort and ability to get exemptions will be massively increased as the persuasiveness of the claimed justifications for those exemptions, which already encompass non-economic goals,⁷⁶ will be greatly enhanced. We might even find that we end up with even more concentration because the exceptions could subsume the rules.

All of which of course highlights the fundamental, underlying problem: *If antitrust becomes more political, the outcome will be less democratic, more politically determined results* — precisely the opposite of what proponents claim to want.

B. The Lack of Convincing Empirical Support for Claims that Concentration Is Harmful

Despite numerous assertions to the contrary, there is, in fact, no rigorous economic support for claims that high concentration levels are a strong indicator of harm to competition or that they should trigger a presumption of such harm in antitrust analysis.⁷⁷

As it stands, there is no empirical foundation on which to conclude that monopoly power is rising. To the extent that markups are increasing, other studies show that output has increased and that quality-adjusted prices have remained stable. Claims that concentration has increased at least find somewhat consistent empirical support, although the extent of those changes are up for debate. There is no reliable empirical basis, however, to support the inference that the United States economy has experienced a systematic increase in market power.⁷⁸

By the same token, there is little evidence that the application of law or regulation to more vigorously prohibit, shrink, or break up large companies will correct these asserted problems.⁷⁹ This is not surprising. As Henry Manne noted in his testimony on the IRA:

⁷⁶ See generally ANTITRUST MODERNIZATION COMM'N REPORT AND RECOMMENDATIONS, Chap. IV.B 333342 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁷⁷ In that regard, it should be noted that recent studies cast doubt on the idea that industry concentration has increased in the United States. See, e.g., Rossi-Hansberg, Esteban, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration* 1-15 (NBER Working Paper No. w25066, 2018) (The authors show that while concentration may have increased at a national level, it has decreased at a local level).

⁷⁸ Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, Note submitted as background material for OECD Hearing on Market Concentration, DAF/COMP/WD(2018)69 (Jun. 2018), at 9-16, available at <http://www.oecd.org/daf/competition/market-concentration.htm>.

⁷⁹ See Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (April 5, 2018) (forthcoming, ANTITRUST MAGAZINE) at 11, available at <https://ssrn.com/abstract=3156912>, and papers cited therein:

[T]he studies done to date strongly indicate that there is little or no significant correlation between industrial concentration and corporate profits. To be sure, if one selects a particular year with peculiar characteristics, the figures can be made to appear otherwise, but in general, over a significant period of time, this lack of correlation seems well substantiated....

The studies referred to [] indicate that there is no causal relationship between concentration on the one hand and monopoly profit on the other. We are, it appears, as apt to find companies earning a higher than market rate of return in nonconcentrated industries as in concentrated ones.

Indeed, one thing on which there is unequivocal agreement among economists... is that monopoly rates of return are realized regularly in some of the least-concentrated industries imaginable: those for personal services.... In the industrial sector on the other hand, where remedies for unproved problems abound, monopoly rates of return, when they do occur, seem unlikely to persist for a significant period of time.⁸⁰

The evidence proffered today is no more convincing. Further, there is also no reason to think that the EU's more aggressive stance toward dominant firms leads to better economic outcomes.

Instead, such assertions are based on a simple inference of competitive effects from market structures, and the unsupported assumption that an increase in concentration can mean *only* a reduction in competition. The problem is that no such inference can be made: “[I]t is presumptuous to conclude... that markets populated by fewer firms perform less well or offer competition that is less intense.”⁸¹ As Yale Brozen so aptly put it back in 1978:

Industries have become concentrated where that was the road to lower costs. It is these lower costs that have created temporary, above-average profitability in concentrated industries when it has occurred. Where concentration was not the road to lower costs, industries have remained unconcentrated. The market has worked surprisingly well, where it has been permitted, to conserve our resources and maximize our output. The

Moreover..., [p]rohibiting mergers does not alter the natural evolution of industry structure in which some firms thrive and grow while others languish or fail. An old literature in industrial organization economics explains that, when success and failure are random events, markets become concentrated over time.

More importantly, market concentration naturally results from the growth of firms that are more innovative and efficient than their peers. A group of academics reporting increased industry concentration cite the rise of “superstar firms” as the cause of increasing concentration and as a major force reshaping the economy. But if superior skill and industry account for the spectacular success of these firms, both the competitive process and antitrust law are working as intended.

See also Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361, 386 (2018) (“Kwoka has drawn inferences and reached conclusions about contemporary federal merger enforcement policy that are unjustified by his data and his methods.... His conclusions about the growing permissiveness of enforcement policies lack substantiation. Overall, we are unpersuaded that his evidence can support such broad and general policy conclusions.”).

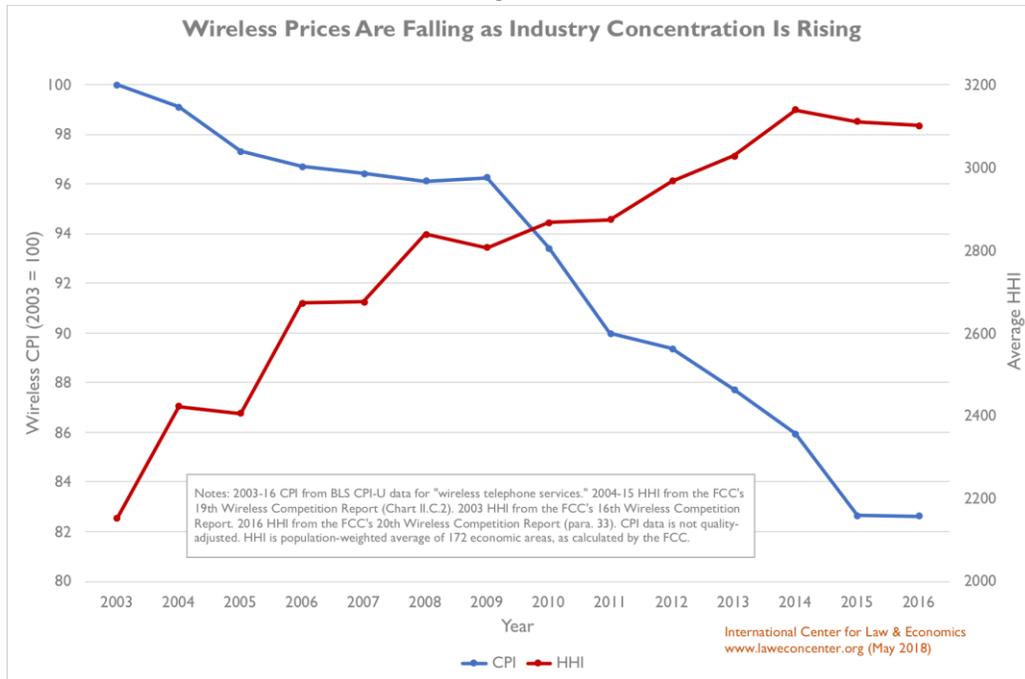
⁸⁰ Henry G. Manne, Testimony on the Industrial Reorganization Act before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, *supra* note 68, at 14-15.

⁸¹ Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140-41 (1995).

antitrust agencies' concentration on concentration in recent years is misdirected and should cease.⁸²

For example, a quick empirical analysis of the US wireless sector shows that concentration is not a reliable predictor of either the health of competition or of consumer welfare. As shown in the graph below, as concentration in the industry increased, wireless communications prices to consumers *decreased* – precisely the opposite of what a concentration-based approach would predict.

Figure 1



The same trend is seen in the price of smartphone mobile data, which has fallen dramatically from \$49.00 per gigabit in 2010 to just over \$6.00 per gigabit in 2017, despite increasing concentration in the industry.⁸³

Properly considered, a superficial increase in concentration is just as consistent with an *increase* in competition as with a decrease; the contrary claim – that there is a clear causal link between increased concentration and reduced competition – simply disregards the weight of economic

⁸² Brozen, *The Concentration-Collusion Doctrine*, *supra* note 63, at 856.

⁸³ See Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations (2018) (FCC WT Docket No. 18-197, Appendix G: Declaration of David S. Evans, at 41 (Table 8)).

evidence.⁸⁴ Put simply: market share and industry concentration are poor predictors of competitive effects.⁸⁵

The fact is that economists know very little about the relationships among market structure, firm size, competition, profits, prices, entrepreneurship, and innovation.⁸⁶ Market shares and structural presumptions are not capable of predicting competitive effects and, thus, of specifying optimal policy choices.

In particular, in markets in which competition occurs significantly through innovation, the effect of increased concentration on competitiveness is ambivalent, at best.⁸⁷ And where effective competition requires significant up-front investment and where economies of scale predominate (because of these high fixed costs),⁸⁸ the assumption that concentration leads to reduced competition is especially misguided.

Excessive reliance on obsolete, market-share-based analysis to evaluate antitrust practices is tantamount to a rejection of modern antitrust principles and the economic learning that undergirds them. Moreover, such an analysis is likely to lead to decisions that *reduce* rather than *promote* consumer welfare and the public interest.

⁸⁴ See *infra* III.1. See also Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L. J. 2, 205 (2015) (noting that, during revision of the Horizontal Merger Guidelines in 2010, the FTC and DOJ were pressed by economists to abandon structural presumptions as they were poor indicators of market power).

⁸⁵ See, e.g., Luke M. Froeb (Former Director, Fed. Trade Comm'n Bureau of Econ.), *From Theory to Praxis: Quantitative Methods in Merger Control*, at 6 (Oct. 30, 2014), available at https://www.ftc.gov/sites/default/files/documents/public_statements/theory-praxis-quantitative-methods-merger-control/041030como.pdf.

⁸⁶ See, e.g., Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951 (Richard Schmalensee & Robert Willig eds., 1989); Tim Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert Willig eds., 1989).

⁸⁷ See, e.g., Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in INNOVATION POLICY AND THE ECONOMY (VOL. 6) 159, 206 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2006) ("There is little evidence that there is an optimal degree of competition to promote R&D. Empirical studies that use market concentration as a proxy for competition fail to reach a robust conclusion about the relationship between market concentration and R&D when differences in industry characteristics, technological opportunities, and appropriability are taken into account."); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007) ("[T]he literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role."); J. Gregory Sidak & David F. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 588 (2009) ("[D]espite 50 years of research, economists do not appear to have found much evidence that market concentration has a statistically significant impact on innovation."); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 4 (2012) ("To this day, however, the complex relationship between static product market competition and the incentive to innovate is not well understood... [E]conomic theory does not support a confident conclusion as to which antitrust policies will elicit a higher rate of innovation.").

⁸⁸ See generally Joseph P. Kendrick, Comment, *Does Sound Travel in Cyber Space*, 8 J. SMALL & EMERGING BUS. L. 39, 46-47 (2004); see also Mark A. Lemley and David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479, 595 (1998).

I. Problems with the alleged empirical evidence proffered

It is also important to address recent empirical research which claims to show that increased concentration does lead to higher prices or other competitive harm. On such example is the recent merger retrospective study by Professor John Kwoka.⁸⁹

Unfortunately, Professor Kwoka's study – and the econometric literature of which it is a part – cannot bear the weight placed upon it.

To begin with, it must be noted that economists have been studying the relationship between concentration and various potential indicia of anticompetitive effects – price, markup, profits, rate of return, etc. – for decades. There are, in fact, hundreds of empirical studies addressing this topic. Contrary to the claims of some, however, even taken as a whole this literature is singularly unhelpful in resolving our fundamental ignorance about the functional relationship between structure and performance: “Inter-industry research has taught us much about how markets *look*... even if it has not shown us exactly how markets *work*.”⁹⁰

Individually, these empirical studies point in multiple directions simultaneously, and variously assign a wide range of causes to the same observed correlations between concentration and price or firm profits.

On methodological grounds alone, it is clear that essentially no confidence can be placed in any of the... studies done in this area.... [L]awyers, judges, and economists should accord the studies no more importance than they deserve. On a scale of one to ten, the studies merit only ‘two-and-a-half cheers.’”⁹¹

Although that assessment was made in 1986, it remains the dominant view among industrial organization economists⁹² – and Professor Kwoka's study is no more reliable as a guide to policy in any particular case than are previous studies. Kwoka's study is, in fact, a meta-analysis of some 60

⁸⁹ John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review*, 81 ANTITRUST L. J. 837 (2017).

⁹⁰ Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 1000 (Richard Schmalensee & Robert Willig eds., 1989). See also Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1053-54 (Richard Schmalensee & Robert Willig eds., 1989) (“[A]lthough the [most advanced empirical literature] has had a great deal to say about measuring market power, it has had very little, as yet, to say about the causes of market power.”); Richard Schmalensee, *Horizontal Merger Policy: Problems and Changes*, 1 J. ECON. PERSP. 41, 49 (1987) (“After all, the link between concentration and the exercise of market power, which once seemed the bedrock of industrial organization, is now widely recognized to be weak. About all that remains of the ‘old learning’... is the belief that high concentration is a necessary condition for the effective exercise of market power.”); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986) (“Today it is hard to find an economist who believes the old structure-conduct-performance paradigm.”).

⁹¹ Almarin Phillips, *Market Concentration and Performance: A Survey of the Evidence*, 61 NOTRE DAME L. REV. 1099, 1107 (1986).

⁹² See, e.g., Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* 24 (John M. Olin Program in L. & Econ., Stanford Law Sch. Working Paper Sep. 2006) (“The Chicago identification argument has carried the day, and structure-conduct-performance empirical methods have largely been discarded in economics.”).

merger retrospectives, and not itself an empirical assessment of the relationship between concentration and price in any particular case or industry. While this may save it from some of the more damning critiques of the typical concentration-price study, it creates additional problems for its relevance to any particular case.⁹³

One problem with a meta-analysis (or a rather casual study derived from it, as is Kwoka's Antitrust Law Journal article) is that it does not readily allow for consideration of industry-or firm-specific characteristics that might undercut the applicability in certain cases of broad claims based on the larger study (unless, of course, that were part of the meta-analysis, which is not the case here). Kwoka's study does not distinguish between (or even identify at all) the industries at issue in each case. Thus, there is no way to tell from the article, for example, whether the cases in which the underlying study found price increases following a merger involved an industry with economies of scale, high rates of advertising, high fixed costs, significant transportation costs, etc.

As it happens, we do know that the prior meta-study from which Kwoka's sample was derived (with the exclusion of nine transactions from that study) was heavily concentrated in a few industries:

The concentration of Kwoka's sample in a small number of industries renders it remarkably unrepresentative of recent merger activity. The three industry groups discussed above (transportation, energy, and journal publishing) represent 32 of his 49 transactions, i.e., two-thirds of his sample.⁹⁴

This is a problem because,

[a]n alternative explanation for price increases or decreases instead may be that the merger led to changes in the quality of the merged firms' products. Thus, rather than market power, price increases may reflect quality improvements; and rather than cost reductions, price decreases may reflect quality degradation.⁹⁵

Obviously, this is particularly true in rapidly innovating, high-fixed-cost industries in which the very purpose of a merger is to facilitate the production of higher quality products. Indeed, several studies that have looked beyond the simplistic concentration-price relationship have found that apparent price increases following mergers in several industries were offset by efficiency gains that ultimately led to *lower* prices.⁹⁶

⁹³ It must also be noted that the larger meta-analysis on which Kwoka's Antitrust Law Journal article was based has been devastatingly critiqued. See Michael Vita & David F. Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, *supra* note 79; Michael Vita, *Kwoka's Mergers, Merger Control, and Remedies: Rejoinder to Kwoka*, 28 RESEARCH IN L. & ECON. 433 (2018).

⁹⁴ Vita & Osinski, *id.*, at 368.

⁹⁵ Michael D. Whinston, *Antitrust Policy Toward Horizontal Mergers*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2369, 2432 (Mark Armstrong & Robert H. Porter eds., 2007).

⁹⁶ See Orley Ashenfelter, et al., *Efficiencies Brewed: Pricing and Consolidation in the US Beer Industry*, 46 RAND JOURNAL OF ECONOMICS 328 (2015) (finding that "[a]ll else equal, the average predicted increase in concentration [from the 3-to-2 merger of brewers Miller and Coors] led to price increases of 2%, but at the mean this was offset by a nearly equal and opposite efficiency effect"); Dario Focarelli & Fabio Panetta, *Are Mergers Beneficial to Consumers? Evidence from the Market for Bank*

For example, a recent econometric study of consolidation in the mobile industry across OECD countries suggests that that may indeed be what tends to happen following mobile operator mergers.⁹⁷ The study's authors — including the current chief economist of the European Commission's competition authority, Tommaso Valletti — find that:

[A]n increase in market concentration in the mobile industry can potentially generate an important trade-off. While a merger will increase prices, investment per operator will also go up. Based on our estimates, a hypothetical 4-to-3 symmetric merger would increase the bill of end users by 16.3% on average. At the same time investment per operator significantly increases by 19.3%, while total industry investment does not change significantly.⁹⁸

As the authors point out, this finding suggests several possible interpretations that add an important gloss to the purported implications of previous studies:

[O]ur finding that concentration has no effect on industry investment suggests that efficiencies from coordinating investment among fewer firms are present. An obvious possibility is that there are fixed cost savings, because fewer firms avoid duplicating the same fixed costs. Such savings can be welfare improving, but do not benefit consumers. A second possibility is that there are economies of scope or spill-overs that generate marginal cost savings or quality improvements to the benefit of consumers.⁹⁹

No study can actually convey fully the competitive implications of a particular merger. The study cited above, for example, deals with a particular group of telecom companies; operating under more than 30 widely varying regulatory regimes; merging over a span of 12 years; and facing disparate market conditions, demand, and usage patterns — among other things. These unique characteristics wouldn't matter if concentration were indeed the sole, or even the most significant, determinant of an industry's competitiveness. But it is not. As the authors of the study conclude:

[T]he main pay-off from an understanding of the expected efficiencies arising from a horizontal merger is likely to be the insights this gives about the nature of competitive rivalry in an industry, which in turn will assist in gathering evidence on market dynamics and likely supply-side responses. Such evidence should not be an after-thought. It deserves a central role in a unilateral effects assessment that justifies a departure from the constraints imposed by simple theoretical static models.¹⁰⁰

Deposits, 93 AM. ECON. REV. 1152 (2003) (finding “strong evidence that, although [banking industry] consolidation does generate adverse price changes, these are temporary. In the long run, efficiency gains dominate over the market power effect, leading to more favorable prices for consumers”).

⁹⁷ See Christos Genakos, Tommaso Valletti & Frank Verboven, *Evaluating Market Consolidation in Mobile Communications*, 33 ECON. POL'Y 45 (2018).

⁹⁸ *Id.* (quotations taken from working paper version of the article: Christos Genakos, Tommaso Valletti & Frank Verboven, *Evaluating Market Consolidation in Mobile Communications* 3-4 (CESifo Working Paper 6509 (May 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992480).

⁹⁹ *Id.* at 38-39.

¹⁰⁰ *Id.* at 39.

Even to the extent that some studies have plausibly shown that an increase in concentration in a particular case led to higher prices, assuming the same result from an increase in concentration in other industries or other contexts is simply not justified by the state of the literature: “The most plausible competitive or efficiency theory of any particular industry’s structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power.”¹⁰¹ Similarly, even where post-Chicago economists have identified theoretical conditions under which certain business conduct (including some mergers) “could be understood as competitive under some conditions but as reflecting the exercise or creation of market power under others,”¹⁰² these are merely “possibility theorems,” the application of which to any particular circumstance requires far more empirical evidence than casually constructed concentration ratios.

As it happens, at least one recent theory paper formalizes the sensible intuition that, in any given market, there is likely some optimal number of firms that maximizes social welfare—and that optimum is never “the maximum” and sometimes it is equal to one.¹⁰³ As that paper discusses, the optimal number of firms varies with the strength of scale economies, such that consumers may benefit from an increase in concentration, even up to monopoly (i.e., where there is a “natural monopoly”), if economies of scale are strong enough. Thus, as the paper notes, “[t]his conclusion clearly suggests that the HHI should be augmented by some measure of economies of scale in the industry that would allow appropriate balancing between the legitimate fears of market power and the desire for production efficiency.”¹⁰⁴

One can appreciate the desire to reduce incomprehensibly complex systems like the market to the predictable effects of a very few, readily quantified variables — or a single variable, as proponents of concentration as the contemporary economy’s *bête noir* seem to prefer. But just because such oversimplification is easier to comprehend doesn’t mean it is correct. As one recent, comprehensive canvas of the literature concludes: “In summary, the literature documenting price effects of mergers has shown that mergers can lead to either price increases or decreases, in keeping with the central market power versus efficiency trade-off.”¹⁰⁵ This is a far cry from the resolute conclusions some scholars and advocates would like to draw. Perhaps more apt is the conclusion of one critic of the concentration-price literature: “All of these studies illustrate once again that the identification of concentration with monopoly power is indeed a fragile ‘mental construct.’”¹⁰⁶

¹⁰¹ Baker & Bresnahan, *Economic Evidence in Antitrust*, *supra* note 92, at 26

¹⁰² *Id.*

¹⁰³ Rabah Amir, *Market Structure, Scale Economies and Industry Performance*, (Indiana Univ. Dep’t of Econ. Working Paper, 2010), available at http://www.indiana.edu/~econdept/workshops/Spring_2011_Papers/AmirMarketStructure.pdf.

¹⁰⁴ *Id.* at 26.

¹⁰⁵ Whinston, *Antitrust Policy Toward Horizontal Mergers*, *supra* note 95, at 2433.

¹⁰⁶ Phillips, *Market Concentration and Performance*, *supra* note 91, at 1105.

2. *The purported evidence that less concentration has led to better economic conditions in Europe is weak*

A recent NBER working paper by Gutiérrez & Philippon attempts to link differences in US and EU antitrust enforcement and product market regulation to differences in market concentration and corporate profits.¹⁰⁷ The paper's abstract begins with a bold assertion: "Until the 1990s, US markets were more competitive than European markets. Today, European markets have lower concentration, lower excess profits, and lower regulatory barriers to entry."¹⁰⁸

The authors are not clear what they mean by *lower*, however it seems they mean lower today relative to the 1990s. At the risk of being pedantic, Gutiérrez & Philippon's measures of market concentration for which both US and EU data are reported cover the period from 1999 to 2012. Thus, "the 1990s" refers to 1999, and "today" refers to 2012, or six years ago.

Based on Gutiérrez & Philippon's data, there actually appears to be no meaningful difference in overall market concentration between the US and EU in 2012, using either the 8-firm concentration ratio or HHI: The numbers are 26% (CR8) and 640 (HHI) for the US, and 27% (CR8) and 600 (HHI) for the EU.¹⁰⁹ Based on this information, it cannot be concluded broadly that EU sectors have lower concentration than the US.

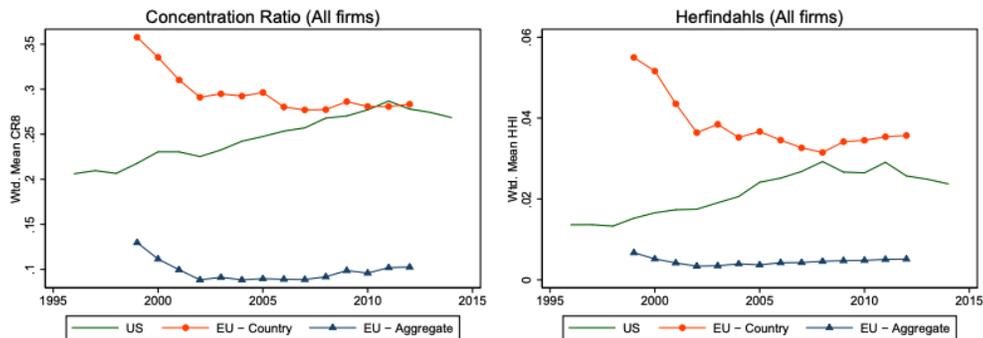
¹⁰⁷ Germán Gutiérrez & Thomas Philippon, *How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift* (NBER Working Paper No. 24700, June 2018), available at <https://www.nber.org/papers/w24700>. The discussion of this paper is based on the analysis by ICLE's chief economist, Eric Fruits, *EU markets are more competitive than U.S. markets? Not so fast*, TRUTH ON THE MARKET (Nov. 19, 2018), <https://truthonthemarket.com/2018/11/19/eu-markets-are-more-competitive-than-u-s-markets-not-so-fast/> and Eric Fruits, *Drifting toward nonsense on EU vs. US competitiveness: The profits puzzle*, TRUTH ON THE MARKET (Dec. 4, 2018), <https://truthonthemarket.com/2018/12/04/drifting-toward-nonsense-on-eu-vs-us-competitiveness-the-profits-puzzle/>.

¹⁰⁸ *Id.* at 1.

¹⁰⁹ The authors, of course, point to the "EU – Aggregate" number, which is considerably lower, as the proper point of comparison. But the "EU – Country" data in their table presents the weighted average of data from eight of Europe's most advanced economies, while the "EU – Aggregate" data treats the entire EU as a single market. The problem, of course, is that this data includes Eastern Bloc countries, with much younger, much-more-recently state-controlled economies. These countries also have significantly less antitrust enforcement. It should be treated as quite revealing that, by including them in the analysis, the extent of industry concentration appears to go down, rather than up. It is certainly true that the EU has become more integrated as a single market over the relevant timeframe, and thus it is possible that the country-specific numbers are misleading. But the integration is by no means perfect, and the simple, undifferentiated combining of countries into a single whole is also extremely unlikely to reflect reality.

Figure 2

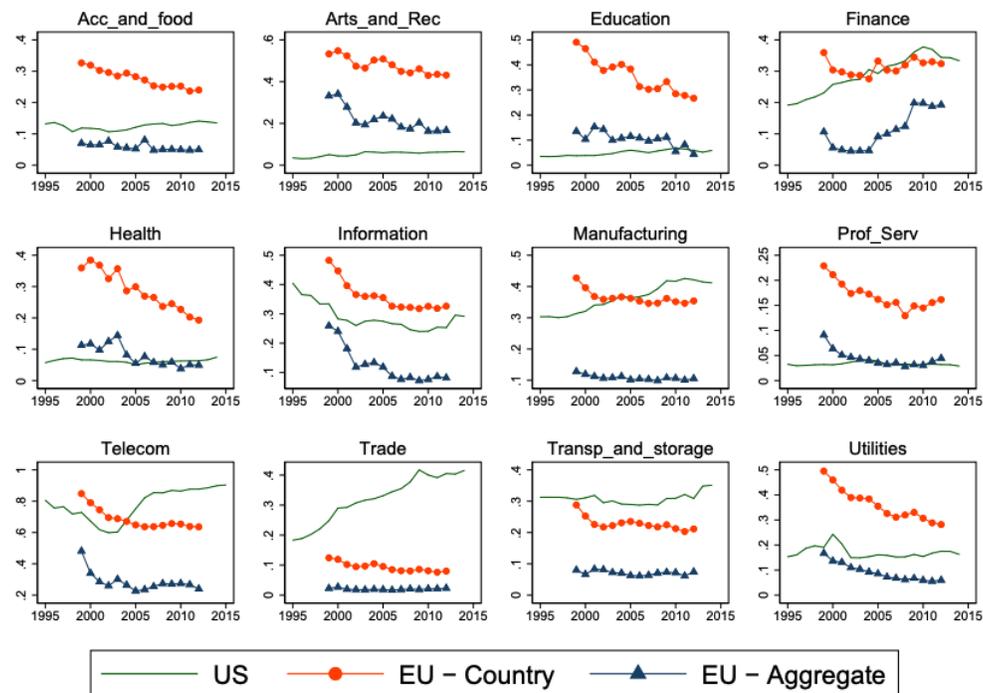
Figure 26: Alternate Concentration Measures: US vs. EU



Gutiérrez & Philippon focus on the *change* in market concentration to draw their conclusions. However, the levels of market concentration measures are strikingly low. In all but one of the industries (telecommunications) in Figure 27 of their paper (Figure 3 below), the 8-firm concentration ratios for the US and the EU are below 40 percent. Similarly, the HHI measures reported in the paper are at levels that most observers would presume to be competitive. In addition, in 7 of the 12 sectors surveyed, the 8-firm concentration ratio is *lower* than in the EU.

Figure 3

Figure 27: Mean 8-firm CR by Sector: EU vs US

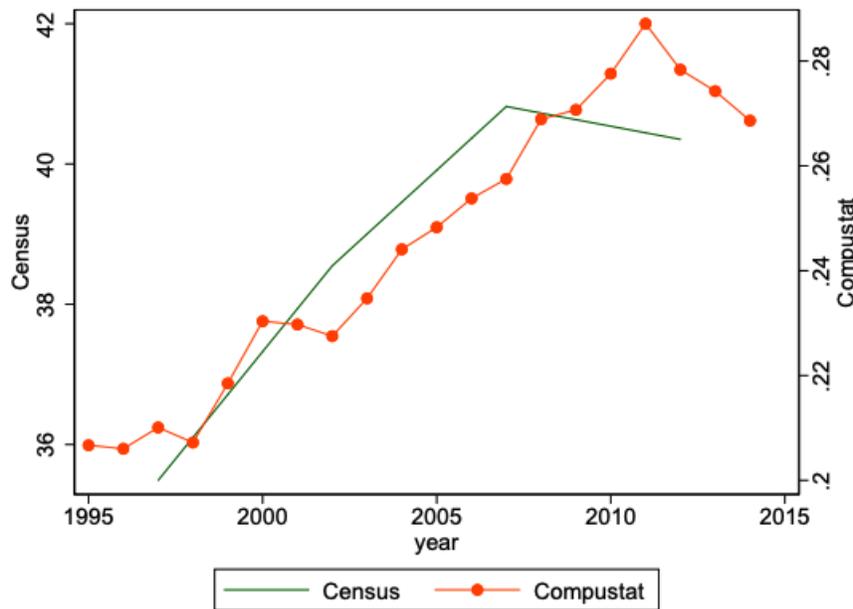


The numbers in parentheses in the table above show the change in the measures of concentration since 1999. The changes suggest that markets have become more concentrated and EU markets have become less concentrated. But, how significant are the changes in concentration?

A simple regression of the relationship between CR8 and a time trend finds that in the EU, CR8 has decreased an average of 0.5 percentage point a year, while the CR8 increased by less than 0.4 percentage point a year from 1999 to 2012. Tucked in an appendix to Gutiérrez & Philippon, Figure 30 (Figure 4 below) shows that CR8 in the had decreased by about 2.5 percentage points from 2012 to 2014.

Figure 4

Figure 30: Weighted Average 8-firm CR for the US: Compustat vs. US Census



A closer examination of Gutiérrez & Philippon’s 8-firm concentration ratio for the EU shows that much of the decline in EU market concentration occurred over the 1999-2002 period. After that, the change in CR8 for the EU is not statistically significantly different from zero.

A regression of the relationship between HHI and a time trend finds that in the EU, HHI has decreased an average of 12.5 points a year, while the HHI increased by less than 16.4 points a year from 1999 to 2012.

As with CR8, a closer examination of Gutiérrez & Philippon’s HHI for the EU shows that much of the decline in EU market concentration occurred over the 1999-2002 period. After that, the change in HHI for the EU is not statistically significantly different from zero.

It is necessary to be cautious when relying on Gutiérrez & Philippon’s data to conclude that the is “drifting” toward greater market concentration while the EU is “drifting” toward lower market

concentration. Indeed, the limited data presented in the paper point toward a convergence in market concentration between the two regions.

Gutiérrez & Philippon also claim that EU markets have lower “excess profits.” However, aside from a passing mention of someone else’s work in a footnote, the only mention of “excess profits” is in the paper’s headline-grabbing abstract. Indeed, the authors do not define or describe what they mean by excess profits.

Gutiérrez & Philippon define “profit” to be gross operating surplus and mixed income as reported in the OECD’s STAN Industrial Analysis dataset as “GOPS.” GOPS is not the same thing as gross margin or gross profit as used in business and finance (for example GOPS subtracts wages, but gross margin does not). The EU defines GOPS as:

Operating surplus is the surplus (or deficit) on production activities before account has been taken of the interest, rents or charges paid or received for the use of assets. Mixed income is the remuneration for the work carried out by the owner (or by members of his family) of an unincorporated enterprise. This is referred to as ‘mixed income’ since it cannot be distinguished from the entrepreneurial profit of the owner.¹¹⁰

Figure 5 is from Gutiérrez & Philippon plotting GOPS as a share of gross output. Over 23 years, from 1992 to 2015, the gross operating surplus rate for firms grew by 2.5 percentage points. In the EU, the rate increased by about one percentage point.

¹¹⁰ Gross operating surplus and mixed income (2018). EU Open Data Portal (emphasis added).

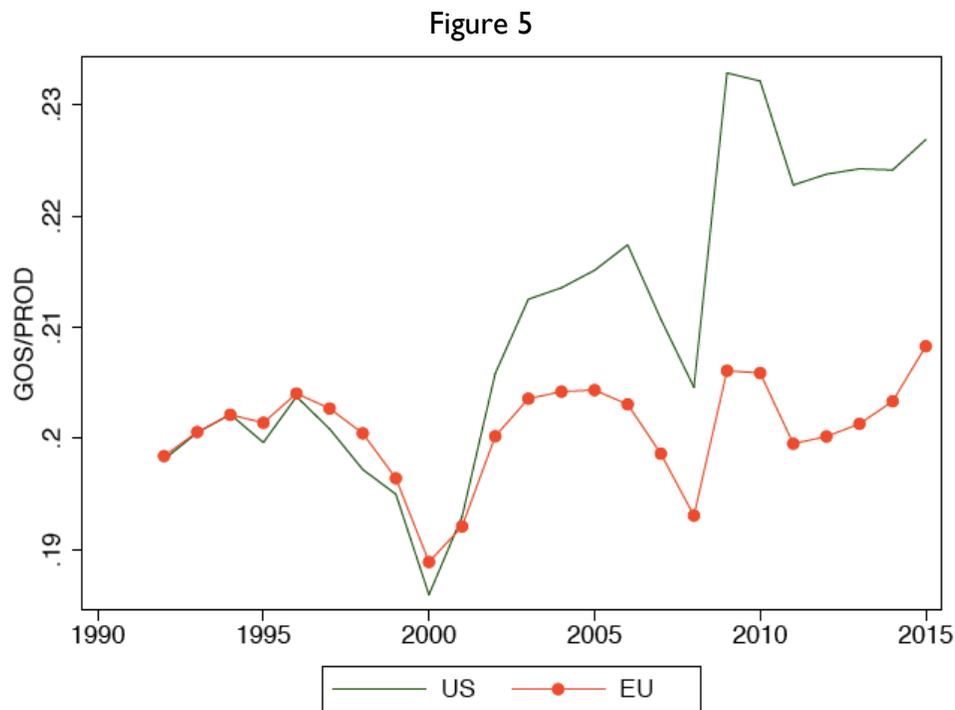
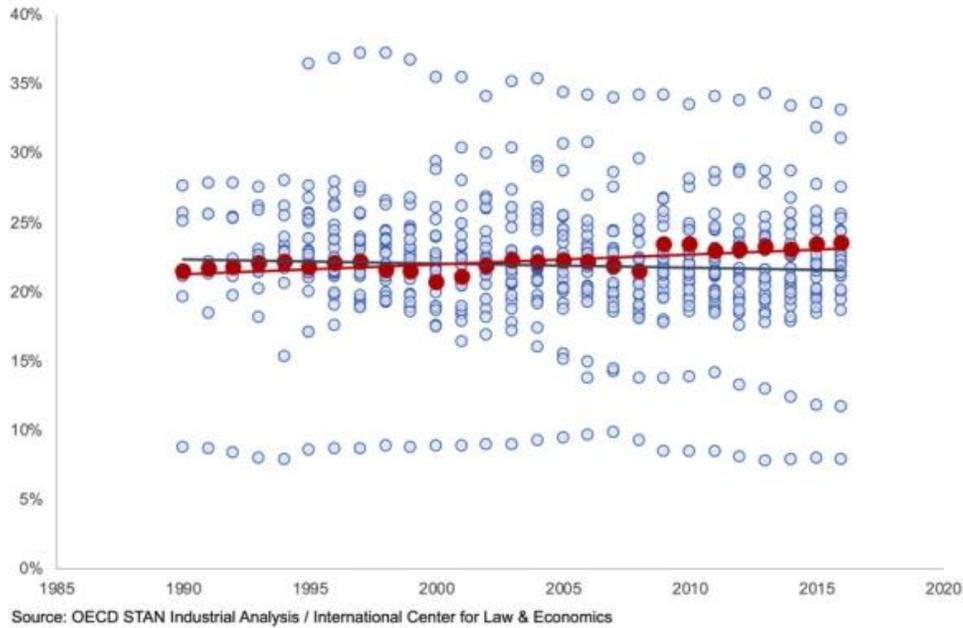


Figure 6 is an alternative presentation of the data from the STAN dataset. It plots the gross operating surplus rate for each EU country (blue dots) and the US (red dots), along with a time trend. There are three takeaways from this plot:

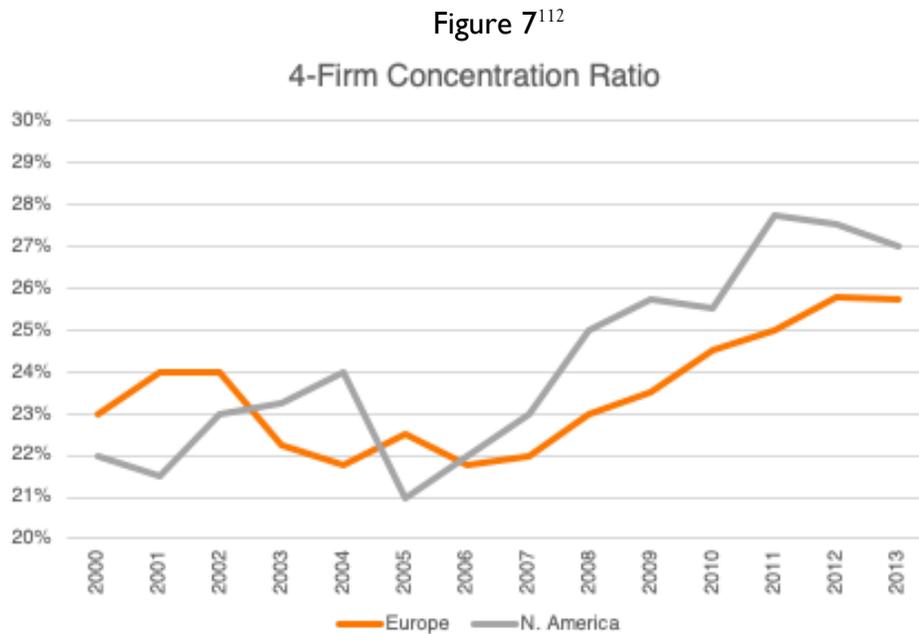
1. There is not much of a difference between the and the EU average—they both hover around a gross operating surplus rate of about 19.5 percent;
2. There is a substantial variation in gross operating surplus rate across EU countries; and
3. The slopes of the trendlines are not statistically significantly different from zero and are not statistically significantly different from each other. Thus, there is no statistically significant growth in US profit rates, nor is there a statistically significant decline in EU profit rates, nor is there a statistically significant difference between the US and the EU.

Figure 6
Gross operating surplus as share of gross output
US and EU, 1990-2016



The Economist also reports a forthcoming study by Matej Bajgar and colleagues at the OECD purporting to show that the average market share of the top four firms in each industry has risen approximately twice as fast in the US and Canada as in Europe.¹¹¹ Figure 7 recreates a key figure reported by the study.

¹¹¹ The Economist, *Special Report: Across the West powerful firms are becoming even more powerful*, THE ECONOMIST (Nov. 15, 2018), available at <https://www.economist.com/special-report/2018/11/15/across-the-west-powerful-firms-are-becoming-even-more-powerful>. The report is cited in the Special Report's "Sources and acknowledgements," at <https://www.economist.com/special-report/2018/11/15/sources-and-acknowledgments>.



A t-test indicates that there is no significant difference in the two series. On average, over the time period surveyed, the average CR4 for the North America was approximately 24.1 percent and the average for Europe was 23.4 percent. And in four of the fourteen years of the survey, CR4 in Europe was *higher* than in North America.

In addition, a t-test of year-over-year changes in CR4 indicates no statistically significant difference between North America and Europe in the change in CR4 over the relatively short time period surveyed.

As with the work of Gutiérrez & Philippon, it is necessary to exercise caution and avoid reading too much into Bajgar, et al.'s reporting of market concentration in North America and Europe. The time series is too short and the apparent differences are not statistically significant.

Another measure of the relative lack of economic success in Europe is the valuation and rate of venture financing of EU tech firms:

¹¹² This chart is based on data taken from Chiara Criscuolo, *A Digital Paradox? Productivity, Business Dynamics and Policy in an Era of Digital Transformation*, A Presentation to Narodowy Bank Polski Warsaw (Oct. 26, 2018), available at https://www.nbp.pl/badania/konferencje/2018/cofee/presentations/Criscuolo_Chiaara.pptx. The paper cited by the Economist is not available, but this presentation by one of its co-authors appears to present the relevant data.

Figure 8¹¹³

Among tech firms founded since 2000, European companies lag far behind in valuation terms:

Region	Cumulative valuation	Global %
Europe	\$240 billion	17
Asia	\$675 billion	35
US	\$1,370 billion	48

Source: GP Bullhound

As the brief analysis accompanying the above table notes, “[the disparity is notable given that the EU’s \$17 trillion economy is comparable in size with the US’s and bigger than China’s.”¹¹⁴ Meanwhile, “the cumulative value of all European unicorns created since 2000 is around \$120bn. By comparison, Facebook currently has a market capitalization of \$275bn.”¹¹⁵

Similarly, the rate of venture fund investment in EU firms, while increasing, lags far behind the US:

According to figures from Dow Jones VentureSource, an investment database, funding for the continent’s digital groups almost doubled from \$4bn a year to \$7.75bn between 2010 and 2014. In the first three months of 2015, companies in the sector raised just over \$2.5bn, the highest for any quarter since the start of the decade.

* * *

While growing, European tech investment is well behind that in the US. Over the past five years, US venture capital funds have raised \$96bn, according to the National Venture Capital Association, and have drawn on existing cash to invest a total of \$160bn — \$70bn of it in Silicon Valley alone.¹¹⁶

Of course, there are certainly multiple and complex reasons for the disparity. Among (many) other things, surely, it must be relevant that: labor regulations in Europe make it extremely difficult to fire (and thus to hire) workers; European member states’ tax regimes tend toward the Byzantine; corporate rules, particularly bankruptcy rules, are more straightforward in the US, allowing for a

¹¹³ John Detrixhe, *Why can’t Europe create tech giants like the US and China?*, QUARTZ (Jul. 5, 2018), available at <https://qz.com/1320983/why-arent-europes-technology-companies-as-big-as-in-the-us-and-china/>.

¹¹⁴ *Id.*

¹¹⁵ Murad Ahmed, *Billion-dollar tech start-ups on the increase in Europe*, FINANCIAL TIMES (June 14, 2015), available at <https://www.ft.com/content/bf7b3dd4-127d-11e5-8cd7-00144feabdc0>.

¹¹⁶ Murad Ahmed, *European tech: In Silicon Valley’s shadow*, FINANCIAL TIMES (Jul. 21, 2015), available at <https://www.ft.com/content/d1507b96-1b24-11e5-8201-cbdb03d71480>.

more fluid transfer of capital; and, on the other hand, US tech firms have generally been around longer, and are at more mature investment stages.

These factors make the comparison unreliable, but the general trends are still telling. In short, the state of the EU's tech industry does not, on its face, lead to an inference that EU competition law caused or even contributed to the relative lack of success of EU tech firms and the relative size and rate of tech firm investment in Europe.

Yet it is notable that EU regulatory policy is, much more explicitly than the US's, often aimed at propping up European companies:

Some European regulators believe they should offer the region's tech groups a leg up and protect them from being swallowed up by US rivals. Among them is Florence Raynal, an executive at France's privacy watchdog CNIL, who argues that Europe's tough data protection rules should be seen as a positive – offering a competitive advantage to local groups....

“If anybody believes Europeans will create a better business environment than Americans, they're completely dreaming,” says [Mark Tluszcz, chief executive of Mangrove, the Luxembourg-based venture capital firm that was an early investor in Skype]. “We don't have this in our culture.”¹¹⁷

Moreover, while still new, the EU's privacy rules (the GDPR) are certainly *not* turning out to be an advantage to smaller companies, whether native to the EU or not.¹¹⁸

EU competition policy is similarly charged with such policy aims. As the Current European Commission President noted in his charge to Margrethe Vestager, the EU Competition Commissioner: “Competition policy is one of the areas where the Commission has exclusive competence and action in this field will be key to the success of our jobs and growth agenda. It should contribute to steering innovation....”¹¹⁹ Of course, we don't know what the European economy or tech sector would look like in the absence of the implementation of these objectives. But the available evidence offers little to suggest the approach has been a successful one, and still less to suggest it has any likelihood of being successful in the US.

IV. Summary of American Antitrust Law

Antitrust law in the United States has been marked by an evolutionary course that progressively adapts to new business and technological developments. Originating with the Sherman Act in 1890 (and with some common law antecedents), courts and Congress have continually shaped

¹¹⁷ Murad Ahmed, *European tech: In Silicon Valley's shadow*, *supra* note 116.

¹¹⁸ See Jian Jia, Ginger Zhe Jin, and Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment* (Nov. 5, 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3278912.

¹¹⁹ Jean-Claude Juncker, President of the European Commission, *Mission Letter to Margrethe Vestager, Commissioner for Competition* (Nov. 1, 2014), available at http://ec.europa.eu/archives/juncker-commission/docs/vestager_en.pdf.

various antitrust doctrines to comport with the norms and expectations unique to the US. In particular, from its earliest days courts worked to introduce economic analysis into antitrust law in recognition that the tersely worded Sherman Act “directly implicated economic concepts”¹²⁰ and yet, owing to its terseness, left the details of appropriate analysis for a common-law-like process. Notably, the courts in the early era of US antitrust struggled to develop coherent principles for antitrust.¹²¹

Following its formative phases, the early twentieth century was marked as a period in which the antitrust laws were interpreted as existing to prevent “bigness.”¹²² By failing to adapt a more rigorous framework that was capable of evaluating harmful conduct (as opposed to relying on a harmful appearance, i.e. size), the courts allowed antitrust to serve a variety of often-conflicting social and political goals, often “regardless of their economic results.”¹²³ But an approach that framed “big” corporations as bad necessarily worked to benefit “small” firms – even when such benefits were not earned by providing superior goods and services to consumers, or even where maintenance of inefficient firms would lead to higher prices.¹²⁴

The end result of this rudderless analysis meant that sometimes the antitrust laws were used to condemn anticompetitive practices, but sometimes they were used to condemn procompetitive practices. By pegging the distinction based on an arbitrary size of firm, there was no meaningful way to distinguish procompetitive conduct from anticompetitive conduct.

The unprincipled approach to US antitrust adjudication that dominated through the 1960s eventually gave rise to serious criticism of the entire body of law.¹²⁵ A rigorous debate grew as scholars and lawyers sought to develop a proper foundation for antitrust laws that would lead to an analytically useful framework.¹²⁶ These scholars observed that, under conventional antitrust wisdom of

¹²⁰ See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

¹²¹ For example, the Sherman Act literally forbids “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” Sherman Act July 2, 1890, ch. 647, §§ 1, 26 Stat. 209 (1890) (codified as amended 15 U.S.C. § 1). Courts quickly recognized that this provision could not be literally enforced. See, e.g., *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *affd as modified*, 175 U.S. 211 (1899) (drawing a distinction between “naked” restraints and “ancillary” restraints necessary to effect the purpose of an otherwise lawful contract).

¹²² LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (1934); See also, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 421 (2d Cir. 1945) (Intentionally obtaining a monopoly was unlawful, even when obtained through superior competitive methods).

¹²³ *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945) (Hand, J.) (emphasis added).

¹²⁴ See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699 (1967) (“A competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.”); *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962) (Anti-“big” administration of antitrust laws means “occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”).

¹²⁵ *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under § 7, the Government always wins.”).

¹²⁶ RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS* xvi (2d ed. 1981) (“Much of the economic analysis expounded in these notes is based on ideas first proposed by Director. A number of these ideas were later developed and published by other economists whose work we cite, but these citations conceal

the middle-Twentieth Century, as a firm developed into a monopoly, it was automatically assumed that the firm obtained and maintained its power through impermissible means.¹²⁷

The reformers revealed that antitrust was marred by a history of internal contradictions where, with little appreciable rationale, courts would vacillate between preserving competition itself on the one hand, and protecting firms from more efficient rivals on the other.¹²⁸ Moreover, the reformers recognized that economic efficiency as a measure of antitrust efficacy was not a good in itself, but as a signifier of the revealed preferences of society. Therefore, an economic efficiency standard was also pro-social (as opposed to a politically-managed antitrust standard which was merely allegedly pro-social).¹²⁹

While significant debate over appropriate rules and standards remained among antitrust reformers, some unifying themes emerged. First, antitrust should be focused on fostering consumer welfare.¹³⁰ Legal scholars were forced to consider the basic principles that guided antitrust and answer why, in the first instance, competition is valuable. The consensus that emerged was that competition leads to lower prices, expanded output, better quality, and more innovation — that is to say it produces outcomes that benefit consumers.¹³¹ The precise number of competitors was only indirectly relevant in discovering whether the desirable result obtained from the competitive process.

The second major contribution of the antitrust reformers was introducing the concept that economic theory, empirical evidence, and the error-cost framework should guide antitrust enforcement decisions.¹³² By aligning legal theories of harm with economic theories, rigor and

Director's seminal role in the development of the economics of competition and monopoly presented in this book.”); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 150 (2012) (“The historical accounts of the Chicago School of Antitrust uniformly agree on the central influence of Aaron Director and the Antitrust Law course he taught with Edward Levi at the University of Chicago.”); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1229–30 (1989); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282–84 (1956).

¹²⁷ Aaron Director and Edward H. Levi, *id.* at 285.

¹²⁸ See Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, FORTUNE at 138 (Dec. 1963), reprinted in 65 COLUM. L. REV. 363, 363–64 (1965).

¹²⁹ See, e.g., *Id.* at 368.

¹³⁰ There is a debate — and confusion — over whether the exact welfare standard used in antitrust should be focused on “consumer welfare” or “total welfare.” See, e.g., Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOYOLA CONSUMER L. REV. 336 (2010). The relevant point for our purposes here is that antitrust law came to incorporate a standard based solely on economic welfare while rejecting an ambiguous socio-political standard that shifted based on enforcement preferences.

¹³¹ See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978); accord *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (“The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers”).

¹³² See Frank H. Easterbrook, *The Limits of Antitrust*, *supra* note 116.

predictability were introduced into the antitrust enforcement process.¹³³ Importantly, it is both theory and evidence that governs the US enforcement process. If economic theory indicates that anti-competitive outcomes are possible, but empirical evidence shows that they are rarely observed in practice, the analysis is correspondingly adjusted.¹³⁴

These insights provided a coherent framework for analyzing allegedly anticompetitive conduct – and specifically for distinguishing between procompetitive and anticompetitive conduct. Today, there is widespread, bipartisan support for the modern consumer welfare standard. That standard has been repeatedly embraced by majorities in Supreme Court decisions that recognize and embrace the economic foundation that the standard provides. In *Reiter v. Sonotone*, for example, the Court recognized that the Sherman Act is a “consumer welfare prescription.” Later, in *U.S. v. Baker Hughes*, then Judge Clarence Thomas—joined by then-Judge Ruth Bader Ginsburg—wrote that “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.” And, more recently, in her confirmation hearings, Justice Kagan stated “it’s clear that antitrust law needs to take account of economic theory and economic understandings.”¹³⁵

The end result of the evolutionary growth of US antitrust law is the development of an economically rigorous antitrust analysis that puts the welfare of consumers at the forefront. Modern US jurisprudence has long recognized that structural analyses of markets are necessarily insufficient for finding competitive harms, because it is the benefits of competition that matter most, and not merely the form of some idealized market structure.

V. High-level differences between EU / US

EU and US antitrust policies differ in a number of important respects, and these differences, even where they *seem* minor, entail significantly different antitrust environments. Some of those differences originate from the divergent historical, legal, political, and institutional characteristics of the two jurisdictions. But some of the differences are decidedly more philosophical and/or economic. Unlike the more ingrained, institutional differences, these are malleable characteristics that reflect the two jurisdictions’ decidedly different approaches to business and its relationship to the state. Most fundamentally, perhaps – and although it is doubtful that the Commission would itself frame it thusly – the overall structure of and approach to antitrust law in the EU vests the Commission with much greater discretion to deviate from established economic principles and procedural best practices in its antitrust enforcement and decision-making. Antitrust enforcement at the

¹³³ *Id.* at 14. (Erring on the side of permitting questionable firm conduct “would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution”).

¹³⁴ *Id.* at 17-18. Easterbrook posited a set of filters for determining whether courts should proceed with an antitrust case that included plaintiffs first demonstrating that market power exists and a harm theoretically could occur, and then, subsequently whether the evidence of industry practice and actual firm behavior results in lowered output.

¹³⁵ *On Antitrust Law, Kagan Calls for Balance*, THE BLOG OF LEGALTIMES (June 29, 2010), available at <https://legaltimes.typepad.com/blt/2010/06/on-antitrust-law-kagan-calls-for-balance.html>.

EU level is driven almost entirely by the European Commission — a political body — and largely unreviewed and unchecked by EU courts. As a result, EU antitrust is, put simply, decidedly less economically grounded, and inevitably more politicized, than in the US.

C. A difference of goals

A first key difference between European and American antitrust law lies in the goals each jurisdiction seeks to pursue with its antitrust laws. While the US focuses on protecting competition for the benefit of consumers,¹³⁶ the EU has built and maintains its competition laws to effect a wider range of political/economic/social objectives. Indeed, the Commission has routinely stated that European competition law pursues multiple goals.¹³⁷

The non-economic ambitions of European competition law are largely down to institutional and historic differences. The EU's main competition provisions are enshrined in the Treaty on the Functioning of the European Union ("TFEU"), which has a quasi-constitutional value in the European legal order. One of the key concerns of the framers of the EU treaties was that the EU's policies should not contradict themselves, with one potentially undermining the other. With these various objectives in mind, the European Commission has sometimes incorporated non-economic considerations into its competition decisions. This is, for example, the case for employment and environmental issues.¹³⁸

More fundamentally, these attempts to ensure that the EU's various activities remain coherent, along with the supra-national nature of the Union, have highly politicized the position of the EU Commissioner for competition. This is best evidenced by the Mission Letter that the current president of the European Commission sent to Margrethe Vestager, the current Commissioner for competition.¹³⁹ The letter highlights that European competition enforcement is constantly accountable to political forces that notably seek to preserve the overall legitimacy of the European Union:

¹³⁶ Much recent discussion has centered on the less consumer-welfare-focused intentions behind the US antitrust laws at the time of their enactment. See, e.g., Lina Khan and Sandeep Vaheesan, *supra* note 5. But see Geoffrey A. Manne and Justin (Gus) Hurwitz, *Big Tech's Big-Time, Big-Scale Problem*, CATO POLICY REPORT (June 2018) available at <https://www.cato.org/policy-report/mayjune-2018/big-techs-big-time-big-scale-problem>. But regardless, and unlike the EU, US antitrust law has evolved significantly from its ambiguous origins, and, whatever it was intended to do 100 years ago, today it is aimed squarely at consumer welfare. See *supra*, notes 121 - 135 and accompanying text.

¹³⁷ Johannes Laitenberger, Director-General for Competition, European Comm'n, Enforcing EU competition law: Principles, strategy, and objectives at Fordham University, 44th Annual Conference on International Antitrust Law and Policy (Sept. 15, 2017), available at http://ec.europa.eu/competition/speeches/text/sp2017_11_en.pdf.

¹³⁸ Commission Communication Guidelines on the Applicability of Article 101 on the Functioning of the European Union to Horizontal Co-Operation Agreements, SEC (2010) 528/2 (draft) ¶ 319, available at http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf.

¹³⁹ Jean-Claude Juncker, *Mission Letter to Margrethe Vestager*, *supra* note 119.

The Commission's relationship with the European Parliament is the source of our democratic legitimacy. This must, therefore, be a political and not a technocratic partnership.¹⁴⁰

* * *

Competition policy is one of the areas where the Commission has exclusive competence and action in this field will be key to the success of our jobs and growth agenda. It should contribute to steering innovation and making markets deliver clear benefits to consumers, businesses and society as a whole. Every effort should be made to maximise the positive contribution of our competition policy in support of our overall priorities and to explain and demonstrate its benefits to citizens and stakeholders at all levels.¹⁴¹

* * *

I want the new Commission to be a strong and political team. And I want you, with your political skills and experience, to fully play your part in this team.¹⁴²

Thus, the guiding ethos for EU competition enforcement is markedly distinct from that of US enforcement. The US structure, although shaped by the political process through the election of Congress and the President, is nonetheless largely insulated from direct political concerns. The roles of the Department of Justice and the FTC are to fairly administer the laws written by Congress, as interpreted over time and a great number of cases by the courts. Undoubtedly there is policy decision-making occurring by US enforcement officials, but it is constrained in the first instance by the structure of the US system, including, most notably, the judiciary's strong check on flights of political fancy. The EU enforcement agencies are significantly less constrained, not least because of its explicitly political function, as President Juncker noted in his letter.

With respect even to competition itself, the EU pursues objectives that are far more ambiguous than that pursued under US antitrust law. While it is relatively uncontroversial that antitrust law in the US currently pursues a single goal – the maximization of consumer welfare¹⁴³ – the question is less settled in the EU.¹⁴⁴ Throughout recent decisions and policy statements, the European Union has been reluctant to commit to a well-defined competition objective for its antitrust law.

Among other things, Protocol No. 27, which is annexed to the EU treaties, states that “the internal market as set out in Article 3 of the Treaty on the European Union includes a system **ensuring**

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 1.

¹⁴³ See, e.g., Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 *FORDHAM L. REV.* 2471 (2012). What this means, precisely, in practice, is a more controversial matter, of course. But that it is the singular objective of US antitrust (despite recent efforts to change that) is not particularly in doubt.

¹⁴⁴ See, e.g., Nicolas Petit, *Intel, leveraging rebates and the goals of Article 102 TFEU*, 11 *EUR. COMPETITION J.* 26 (2015). See also, Wouter PJ Wils, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, 37 *WORLD COMPETITION: L. & ECON. REV.* 405 (2014); Paul Nihoul, *The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?*, 5 *J. EUR. COMPETITION L. & PRACTICE* 521 (2014).

that competition is not distorted.¹⁴⁵ This goal is sometimes also referred to as “the protection of the competitive process.”¹⁴⁶

Unlike the consumer welfare standard – which, for all the internecine and arcane debates it has engendered, refers to a series of generally cognizable principles¹⁴⁷ – the notion of “undistorted” competition has no clear normative implications.

Competition authorities and courts in the EU have seized upon the open-ended nature of the EU treaties to include a variety of different, and often contradictory, objectives within the purview of European competition law. These include, as mentioned above, European integrationist objectives and social policies, but also various conceptions of competition including the promotion of consumer welfare, the preservation of competitive market structures, the protection of consumer choice, fairness – the list goes on.¹⁴⁸

The open-ended nature of European competition law has two important consequences. First, the European Commission faces much lighter requirements to show the existence of anticompetitive harm than if its cases were assessed under a true consumer welfare standard similar to that found in US law; and second, the Commission benefits from a highly deferential review of its decisions by the European Court of justice.¹⁴⁹

D. Different approaches to the analysis of anticompetitive effects

A second important difference concerns the quantification of anticompetitive harm, where European competition law imposes a much less strenuous burden on authorities than does the US. This makes European competition law much more prone to false positives that condemn efficiency-generating or innovative firm behavior. The main cause of these false positives is the failure of the EU’s “competitive process” standard to separate competitive from anticompetitive exclusionary conduct in accordance with established economic principles and learning.

The EU’s competitive process standard is similar to the structuralist analysis that was popular in the US through the middle of the twentieth century. As discussed above, this view of antitrust led

¹⁴⁵ Treaty on European Union, Protocol (No27) on the internal market and competition, Official Journal 115 (emphasis added).

¹⁴⁶ See Wils, *supra* note 144, at 16.

¹⁴⁷ See Hovenkamp, *supra* note 143, at 2471.

¹⁴⁸ See e.g., Ariel Ezrachi, *The Goals of EU Competition Law and the Digital Economy* (BEUC Discussion paper, Aug. 2018) available at https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf.

¹⁴⁹ In what follows, the discussion is largely related to an analysis of how the EU evaluates unilateral conduct cases. In many respects, EU merger law is fairly similar to US merger law, being guided by something that approaches a consumer welfare model. Of course, like US law, there is still a great deal of discretion in enforcement, and even within sensible constraints the EU tends to be relatively more suspicious of large mergers. As noted above, the political aims of competition enforcement tend to include concerns for unifying the single market, including the effects that markets have on labor broadly speaking. This is an important distinction from US competition law which, even within the bounds of discretion, still hews more closely to a dependence on rigorous economic analysis.

US enforcers to frequently condemn firms for merely growing larger than some arbitrary threshold – even when those firms engaged in conduct that, on net, benefited consumers. While EU enforcers often claims to be pursuing a consumer welfare standard, and to adhere to rigorous economic analysis in its antitrust cases,¹⁵⁰ their actual practice tends to engage in little more than a window-dressed version of the outmoded structuralist analysis that US scholars, courts, and enforcers roundly rejected in the latter half of the twentieth century.

To take one important example, a fairly uncontroversial requirement for antitrust intervention is that a condemned practice should actually, or be substantially likely to, foster anticompetitive harm. Even in Europe, whatever other goals competition law is to further, it is nominally aimed at protecting *competition* rather than *competitors*.¹⁵¹ Accordingly, the mere exit of competitors from the market is meant to be insufficient to draw competition liability under European competition law in the absence of certain accompanying factors.¹⁵²

And yet, by pursuing a competitive process goal, European competition authorities regularly conflate desirable and undesirable forms of exclusion precisely on the basis of their effect on competitors. For instance, the Commission routinely sanctions exclusion that stems from an incumbent's superior efficiency rather than welfare-reducing strategic behavior.¹⁵³ European law thus routinely protects inefficient competitors that would otherwise rightly be excluded from a market. As Pablo Ibanez Colomo puts it:

It is arguably more convincing to question whether the principle whereby dominant firms are under a general duty not to discriminate is in line with the logic and purpose of competition rules. The corollary to the idea that it is *prima facie* abusive to place rivals at a disadvantage is that competition must take place, as a rule, on a level playing field. It cannot be disputed that remedial action under EU competition law will in some instances lead to such an outcome.¹⁵⁴

¹⁵⁰ See, e.g., Joaquín Almunia, “Competition and consumers: the future of EU competition policy,” Speech at European Competition Day, Madrid (May 12, 2010), available at http://europa.eu/rapid/press-release_SPEECH-10-233_en.pdf (“All of us here today know very well what our ultimate objective is: Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions.”). Even then, however, it must be noted that Almunia elaborated that “[o]ur objective is to ensure that consumers enjoy the benefits of competition, a **wider choice of goods**, of better quality and at lower prices.” *Id.* (emphasis added). In fact, expanded consumer choice is not necessarily the same thing as consumer welfare and may at times be at odds with it. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405 (2013).

¹⁵¹ See European Commission, Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Official Journal EU, C 45/7 (2009), at n. 5, §6 (“[T]he Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors.”).

¹⁵² See Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, §22 (“Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers...”).

¹⁵³ See Pablo Ibañez Colomo, *Exclusionary Discrimination Under Article 102 TFEU*, 51 *COMMON MARKET LAW REVIEW* 153 (2014).

¹⁵⁴ *Id.*

This tendency to sanction super efficiency is nowhere clearer than the Commission's recent *Google Shopping* case.¹⁵⁵ The unfortunate consequence of the conception of competition policy embodied in the EU *Google Shopping* decision is that, by failing to sort harmful from beneficial exclusion, the outcome threatens to harm innovation, consumer welfare, and the economy writ large. Where US antitrust law has developed a position of relative restraint in the face of uncertainty, the EU tends to read uncertainty as the outward expression of what must be a lurking threat; it is a position that, at root, hearkens back to the "inhospitality" tradition of earlier eras of US antitrust law.¹⁵⁶ The risk, of course, is that this approach will end up thwarting technological evolution and enshrining mediocrity out of a sort of over-active "precautionary principle" – in the process giving up far more than it gains. And this risk of false positives, stemming from a naïve analysis of exclusion, is particularly acute in the digital economy, where practices such as leveraging,¹⁵⁷ lock-in,¹⁵⁸ and network effects¹⁵⁹ have highly ambiguous welfare effects, despite often leading to the exclusion of inefficient firms.

E. Judicial deference towards enforcement authorities

A third important difference concerns the deficient and limited judicial review of the European Commission's decisions by the General Court and the European Court of Justice (ECJ). This acquiescence has numerous causes, two of which are particularly noteworthy. The first is that the European Court of Justice has proved highly reluctant to require the lower court (or itself) to undertake complex economic assessments, instead preferring to defer to the Commission on these points (although the ECJ's recent *Intel* ruling may mark a turning point in this respect).¹⁶⁰ The second is that, as discussed above, the European Commission can call upon an open-ended series of

¹⁵⁵ See *supra* Section II.2.

¹⁵⁶ See Frank H. Easterbrook, *The Limits of Antitrust*, *supra* note 116, at 4 ("Donald Turner once described the "inhospitality tradition of antitrust." The tradition is that judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.").

¹⁵⁷ In the presence of complementary goods, output is higher and prices are lower under a single monopolist rather than two "duopolists." See, e.g., Nicholas Economides & Steven C. Salop, *Competition and Integration Among Complements, and Network Market Structure*, 40 J. INDUS. ECON. 1,105, 106 (1992). See also Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. R. 837, 839 (1990) (concluding that tying has ambiguous welfare effects, even in those cases where it leads to the foreclosure of competitors).

¹⁵⁸ See CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 133 (Harvard Business Review Press, 1998) (The authors stress that lock-in must always be addressed by looking at the entire "lock-in cycle."). See also, PAUL BELLEFLAMME & MARTIN PEITZ, *INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGIES* 167 (2010). Moreover, the lure of *ex post* profits may induce firms to compete aggressively in order to acquire valuable consumers. See, e.g., Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L. J. 433 (2008).

¹⁵⁹ Not all markets with network effects will eventually tip towards a single winning firm. See, e.g., Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 106 (1994). Even if tipping does occur, one cannot assume that society will be worse-off as a result. Fragmentation may be just as harmful as monopoly when markets present network effects. See E. Glen Weyl & Alexander White, *Let the Best "One" Win: Policy Lessons from the New Economics of Platforms*, 10 COMPETITION POL'Y INT'L, 28 (2014).

¹⁶⁰ See *infra* notes 170 to 173 and accompanying text.

objectives to support its decisions. As a result of this discretion, there are few bases on which the Court may challenge the Commission's decisions.

I. Deficient judicial review

The European Court of Justice has self-imposed limits on the courts' review of "complex economic appraisals" made by the Commission.¹⁶¹ As stated in its *Holcim* ruling:

[W]here it reviews complex economic appraisals made by the Commission . . . the [EU] judicature confines itself to verifying whether the rules on procedure and on statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any **manifest error of appraisal or a misuse of powers**.¹⁶²

In practice this "manifest error" standard means that defendants must meet an exceedingly high burden of proof before a court will evaluate and overturn economic assessments made by the Commission. Notably, this deferential judicial review loomed large in the lower court's *Microsoft* ruling, which pointedly remarked at the outset that "review of complex economic appraisals made by the Commission is necessarily limited...."¹⁶³ Indeed, the ECJ itself has acknowledged the deferential consequence of this standard, albeit with characteristic understatement: "In this respect, however, the basic provisions of the Regulation... confer on the Commission a certain discretion, especially with respect to assessments of an economic nature."¹⁶⁴

The consequence of this deference is that, particularly in abuse of dominance cases, the Commission enjoys remarkable – even implausible – success in defending its decisions, and especially its economic approach, in court. Indeed, prior to the ECJ's 2017 *Intel* decision, "the Commission's track record [in abuse of dominance cases] is unblemished, with only a few investigations having been abandoned and no decision having been overturned by the European Courts on the basis of either substantive or procedural grounds."¹⁶⁵ This perfect track record is unlikely (to say the least) to reflect perfect knowledge and judgment on the Commission's part (or the complete absence of these on the courts' part). As such, it has troubling implications for the welfare effects of the Commission's decisions:

Overall, the trivial rate of annulment judgments under Article 102 TFEU is disturbing. It casts doubt on the effectiveness of the GC's judicial review in eliminating type I errors. Of course, the Commission may well have been right in all cases appealed to the GC.

¹⁶¹ See Firat Cengiz, *Judicial review and the rule of law in the EU competition law regime after Alrosa*, 7 EUR. COMPETITION J. 140 (2011).

¹⁶² C-28/03 *Holcim (Deutschland) v Commission* [2005] ECR II-1357, para 95, citing C-42/84 *Remia and Others v Commission* [1985] ECR 2545 para 34; C-7/95 *John Deere v Commission* [1988] ECR I-3111, para 34 (emphasis added).

¹⁶³ Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para 87.

¹⁶⁴ Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* ("Kali und Salz") [1998] ECR I-1375, para 223.

¹⁶⁵ Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38 EUR. COMPETITION L. REV. 147, 164 (2017)

Yet, in our opinion, this “success story” hypothesis does not withstand scrutiny. It is indeed contradicted by the existence of several harsh annulment judgments in all other areas of competition law (and, in particular in areas where (i) negative decisions are less frequent; and (ii) the Court grants to the Commission a large margin of discretion/error tolerance).¹⁶⁶

A further troubling consequence of this deference in the antitrust context (especially combined with the inherently political nature of the Commission given its place within the European government, and the Commission’s “star chamber”-like processes¹⁶⁷) is not simply that the Commission gets to choose which economic standards it applies; rather, because antitrust law is inherently given content by the economic assessment it entails, the Commission is given effective legislative discretion over the law itself. Indeed, this troubling consequence has not gone unremarked upon by the European legal community:

[I]t is arbitrary, dangerous and unfair to apply the same “judicial deference” to the Commission’s discretion in the context of the current EU competition law enforcement regime, characterized by increasingly large fines having inevitable economic and financial impact on companies, shareholders and employees, and leading to de facto “criminalization” of competition law. EU competition rules are directly applicable provisions which leave no room for policy-based discretion in their interpretation and application, so that there is scope for only a very limited degree of deference by the Courts when reviewing their application by the Commission in a specific case.¹⁶⁸

And in that same case the ECJ itself addressed the problem and, although it ultimately upheld its review standard, pointedly admonished that “the Courts cannot use the Commission’s margin of discretion... as a basis for dispensing with the conduct of an in-depth review of the law and the facts.”¹⁶⁹

¹⁶⁶ Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment* 31 (TILEC Discussion Paper No. 2011-008, Oct. 26, 2010), available at <https://ssrn.com/abstract=1698342> or <http://dx.doi.org/10.2139/ssrn.1698342>.

¹⁶⁷ See, e.g., Frederic M. Scherer, *Abuse of Dominance by High Technology Enterprises: A Comparison of US and EC Approaches*, 38 *ECONOMIA E POLITICA INDUSTRIALE - J. INDUS. & BUS. ECON.* 39, 60 (2011) (“[T]he adjudication process underlying a European Commission decision to issue statements of violation and remedy tends to be a star chamber proceeding.”). See also *Prosecutor, Judge and Jury*, *THE ECONOMIST* (Feb. 20, 2010), available at <https://www.economist.com/leaders/2010/02/18/prosecutor-judge-and-jury> (discussing the Commission’s enforcement procedures following its 2009 *Intel* decision and concluding that “[e]nforcement of competition law in Europe is unjust and must change”). See generally Ian Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 *EUROPEAN L. REV.* 817 (2009).

¹⁶⁸ Opinion of Advocate General Sharpstone of 8 December 2011 in Case C-272/09 P *KME Germany and Others v Commission*, para 44. It must be noted that this comment was made in the context of a cartel case, where the “criminalization” of competition law” is certainly more significant than in abuse of dominance or merger cases. But, particularly with the substantial size of recent Commission fines, the concern arises in those cases, as well. See Heike Schweitzer, *The European Competition Law Enforcement System and the Evolution of Judicial Review* in *EUROPEAN COMPETITION LAW ANNUAL 2009: THE EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES* 79 (Claus-Dieter Ehlermann & Mel Marquis, eds. 2011).

¹⁶⁹ Case C-272/09 P *KME Germany and Others v Commission*, para 102.

Most importantly, and more recently, the ECJ has – as if finally exasperated by the extent to which its excessively deferential review has permitted the Commission to engage in woefully insufficient economic analysis – expressed in clear terms the need for more thoroughgoing judicial review of the Commission’s decisions. Although it is far from certain how or whether the General Court and the Commission will respond to its holding,¹⁷⁰ the ECJ’s recent *Intel* decision offers a clear statement of concern by the ECJ.¹⁷¹ In a case centered on rebates offered by Intel to OEMs, the Court overruled the General Court’s initial judgment in favor of the Commission. Crucially, the ECJ rejected the court’s deference to the Commission’s insufficient economic analysis, which simply ignored arguments put forward by Intel that could serve to undermine the rationale for a finding of abuse:

Article 102 TFEU [case-law that] prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself... must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice...; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.

The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates... may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.

If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant’s arguments seeking to call into question the validity of the Commission’s findings concerning the foreclosure capability of the rebate concerned.¹⁷²

* * *

¹⁷⁰ As noted above, arguably the Commission’s recent *Google Shopping* decision suggests that it continues to find its discretion to engage in incomplete economic analysis secure.

¹⁷¹ Case C-413/14 P *Intel Corp. v Commission*, Judgment of 6 September 2017. The ECJ also expressed concern with the lack of a proper, effects-based review in Commission decisions under Article 101 TFEU in its *Cartes Bancaires* decision. Case C-67/13 P, *Groupement des Cartes Bancaires v Commission*, Judgment of 11 September 2014.

¹⁷² *Id.* ¶¶ 138-41.

Consequently..., the judgment of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission....¹⁷³

As laudable as the decision is, it is not a full-throated rejection of the Commission's approach to abuse of dominance cases, and it is not clear that the judgment will actually have much effect on the General Court or the Commission. Notably, the ECJ based its decision on the General Court's procedural failings, rather than the substantive divergence of the Commission's approach from rigorous, economically informed antitrust analysis. Thus, while the Court did cast doubt upon the integrity of the Commission's conclusion, it continued to refrain from undertaking its own evaluation of complex economic evidence, and instead directed the General Court (and, indirectly, for future cases at least, the Commission) to do so. In the absence of that analysis at the Commission level, however, it is unclear how well the General Court will be able to undertake its own such analysis on appeal. The real power of the case, if it is to have any, is far more likely to be found in the Commission's own response.

Yet therein lies the problem in future cases, as it is the Commission, exercising the still-broad discretion noted above, that will conduct the examination on its own terms – presumably favorable to its own complaints. At stake, however, is the legitimacy of the Commission's antitrust decision-making. As Intel itself puts it (not incorrectly, despite its obvious bias in the case, of course):

Intel has reluctantly concluded that the Commission initiated the investigation with a predisposed view to alter the results of competition, and consequently tended to assess the evidence with a prosecutorial bent to confirm its point of view. In doing so, it ignored or minimized – and indeed at times even refused to obtain – important evidence that contradicted its view of the world. The result was a consistently one-sided and result-oriented selection and interpretation of the evidence.¹⁷⁴

Moreover, it must be noted that, to the extent that EU courts *have* sometimes undertaken a more thorough review of the Commission's economic decision-making, the opinions demonstrate a remarkable deviation from fundamental, standard economic concepts that would be found routinely – and necessarily – in US antitrust caselaw. As Damien Geradin and Nicolas Petit have shown:

The [General Court] is reluctant to accommodate mainstream economic concepts within the realm of the Article 102 TFEU [abuse of dominance] case-law. For instance, the concept of “consumer welfare”, which has been elevated as the alpha and omega of competition policy in Europe and in the US, is not even cited once in the Article 102 TFEU case-law of the [General Court]. The same holds true of the SSNIP test, or to a lesser

¹⁷³ *Id.* ¶ 147.

¹⁷⁴ Intel, *Why the European Commission's Intel Decision is Wrong* (Sep. 21, 2009), available at https://www.intel.com/pressroom/legal/docs/EC_response092109.pdf.

extent of the HHI Index, which however constitute conventional instruments for the assessment of a dominant position.

Those two indicators tend to corroborate empirically the hypothesis that the [General Court] is reluctant to embrace an economic approach in the area of abuse of dominance (and that it intends to stick to old, legalistic solutions). In so doing, the [General Court] arguably maintains a misplaced approach of abuse of dominance law, which insulates Commission decisions from judicial scrutiny.¹⁷⁵

This history does not bode well for the quality of the courts' judicial review – even subject to the *Intel* admonition.

Finally, under long-standing judicial precedent (again, perhaps, until *Intel*), in order to make a finding of exclusion by a dominant firm the Commission need not actually demonstrate concrete anti-competitive effects – despite its adoption of a Guidance Paper and frequent lip service to the contrary.¹⁷⁶ “Arguably, the [Commission’s] adoption of a more effects-based approach may be more about semantics or presentation than substance.”¹⁷⁷ And even the Commission’s findings of dominance are always upheld by the courts, despite being based on economically deficient reasoning from which “it is difficult to distinguish genuinely dominant companies that have substantial market power from successful companies that are subject to effective competition.”¹⁷⁸ Whether these crucial analytical problems will be rectified following *Intel* is, at best, uncertain.

2. *European competition law’s dangerous discretion*

EU competition law demonstrates well (by its absence) the advisability of a coherent analytical framework like that found in the US’s consumer welfare standard. As noted above, the EU process is driven by a number of laterally equivalent, and sometimes mutually exclusive, goals.¹⁷⁹ Aside from the general problem of such a wide array of conflicting aims leading to a lack of clarity for firms conducting their business, a large problem exists in the discretion that this fluid arrangement of goals yields.

The *Microsoft* case illustrates this problem well. In *Microsoft*, the Commission could have chosen to base its decision on a number of potential objectives. It notably chose to base its findings on the fact that Microsoft’s behavior reduced “consumer choice.”¹⁸⁰ The Commission, in fact, discounted arguments that economic efficiency may lead to consumer welfare gains because “consumer choice” among a variety of media players was more important:

¹⁷⁵ Geradin & Petit, *supra* note 166, at 34.

¹⁷⁶ European Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, [2009] OJ C45/1.

¹⁷⁷ Dethmers & Blondeel, *supra* note 165, at 153.

¹⁷⁸ *Id.* para 154.

¹⁷⁹ See notes 136-148 and accompanying text.

¹⁸⁰ See Commission Decision No. COMP. 37792 (*Microsoft*), C(2014) 900 final, slip. op., para 958 (March 24, 2004).

Another argument relating to reduced transaction costs consists in saying that the economies made by a tied sale of two products saves resources otherwise spent for maintaining a separate distribution system for the second product. These economies would then be passed on to customers who could save costs related to a second purchasing act, including selection and installation of the product. Irrespective of the accuracy of the assumption that distributive efficiency gains are necessarily passed on to consumers, such savings cannot possibly outweigh the distortion of competition in this case. This is because distribution costs in software licensing are insignificant; a copy of a software programme can be duplicated and distributed at no substantial effort. In contrast, the importance of consumer choice and innovation regarding applications such as media players is high.¹⁸¹

It may be true that tying the products in question was unnecessary, but merely dismissing this decision because distribution costs are near-zero is hardly an analytically satisfactory answer. There are many more costs involved in creating and distributing complementary software than merely the costs associated with hosting and downloading. And by the same token, the Commission simply asserts that consumer choice among some arbitrary number of competing products is necessarily a benefit. This, too, is not necessarily true, and the decision's implication that any marginal increase in choice is more valuable than any gains from product design or innovation is similarly analytically incoherent.

The Court of First Instance was only too happy to give the Commission a pass in its breezy analysis; it saw no objection to these findings. With little substantive reasoning to support its findings, the Court fully endorsed the Commission's assessment:

As the Commission correctly observes (see paragraph 1130 above), by such an argument Microsoft is in fact claiming that the integration of Windows Media Player in Windows and the marketing of Windows in that form alone lead to the de facto standardisation of the Windows Media Player platform, which has beneficial effects on the market. Although, generally, standardisation may effectively present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

The Court further notes that it cannot be ruled out that third parties will not want the de facto standardisation advocated by Microsoft but will prefer it if different platforms continue to compete, on the ground that that will stimulate innovation between the various platforms.¹⁸²

Simply pointing to these conflicting effects of Microsoft's bundling decision without actually weighing them is a weak basis for upholding the Commission's decision that consumer choice outweighs the benefits of standardization – not least because actions undertaken by other firms to enhance consumer choice at the expense of standardization are, on these terms, potentially just as problematic. The dividing line becomes solely which theory the Commission prefers to pursue.

¹⁸¹ *Id.*

¹⁸² Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, ¶¶ 1152-1153.

What such a practice at the Commission, aided by friendly courts, does is vest the Commission with a great degree of discretionary power. Any given Commission case sets up a “heads I win, tails you lose” situation in which defendants are easily outflanked by a Commission that can change the rules of its analysis as it sees fit. Defendants, on the other hand, can play only the cards that they are dealt. Accordingly, Microsoft could not successfully challenge a conclusion that its behavior harmed consumers’ *choice* by arguing that, for example, that on net it improved consumer *welfare*.

By being able to, in this instance, select “consumer choice” as the standard by which the case was judged, the Commission was able to evade the constraints that might have been imposed by a more robust welfare standard. Thus, the Commission can essentially pick and choose the objectives that best serve its interests in each case. This vastly enlarges the scope of potential antitrust liability (while also substantially decreasing the ability of firms to predict when their behavior may be viewed as problematic), leading to what, in US courts, would be regarded as untenable false positives that chill innovative behavior and create nearly unwinnable battles for targeted firms.

VI. Concrete divergences

In addition to the high-level differences discussed above, European and US antitrust authorities also diverge on numerous specific issues. These dissimilarities often result from the different policy goals that animate these two bodies of law. Where US case law is guided by an overarching goal of maximizing consumer welfare (notably a practice’s effect on output), European competition law tends to favor structural presumptions and places a much heavier emphasis on distributional considerations. In addition, where the US approach to many of these specific issues is deeply influenced by its overweening concern with the potentially chilling effects of intervention, this apprehension is very much foreign to European competition law. The result is often widely divergent approaches to complex economic matters in which the US hews far more closely than does the EU to the humility and restraint suggested by economic learning.

A. Exploitative abuses

With the potential exception of SEPs and FRAND pledges, US antitrust is by and large unconcerned with companies that charge what some might consider exorbitant prices. Justice Scalia, writing for the majority in *Trinko*, observed that:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.¹⁸³

¹⁸³ *Verizon Communications v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 407 (2004).

This stands in stark contrast to European competition law cases, where firms have been found to infringe competition law because they charged “excessive” prices:

In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.¹⁸⁴

Although *United Brands* was decided in 1978, the European Commission reiterated that these allegedly exploitative abuses were a possibility when it published its guidance paper on abuse of dominance cases in 2009.¹⁸⁵ Despite the absence of economic merit to support nearly all excessive pricing cases – and, indeed, the Commission’s apparent disinterest in bringing such cases in some time – recently both the European Commission as well as some national authorities have shown a renewed interest in them, most notably in the pharmaceutical sector.¹⁸⁶

Moreover, European competition law also sanctions so-called “margin squeeze” abuses, where a dominant upstream supplier charges a price to distributors that is too high for them to effectively compete with the dominant firm downstream:

[I]t is for the referring court to examine, in essence, whether the pricing practice introduced by TeliaSonera is unfair in so far as it squeezes the margins of its competitors on the retail market for broadband connection services to end users.¹⁸⁷

The EU’s case law has potentially severe welfare ramifications. Just as Justice Scalia observed in *Trinko*, forcing firms to charge prices that are below a market’s natural equilibrium has a knock-on effect on firms’ incentives to enter markets, notably with innovative products and more efficient means of production. But the problem is not just one of market entry and innovation, but also of the competence of competition authorities to effectively determine the “right” prices or margins for competitors. As Friedrich Hayek, winner of the 1974 Nobel Prize in economics, demonstrated in his influential essay, *The Use of Knowledge in Society*,¹⁸⁸ economic agents use prices as information upon which to base their business decisions. In doing so, the collected activity of these agents is greater than the sum of its parts. The distributed activity of thousands or millions of economic actors enables markets to put resources to their most valuable use, thereby leading to more efficient societies. By comparison, the necessarily constrained attempts of central regulators to set prices and margins is also necessarily *inferior*: There is simply no reasonable way for competition regulators to properly make these judgments in any consistent and reliable manner.

Although investigations into purportedly excessive prices should thus properly be significantly circumscribed given the substantial risk of deterrence of *ex ante* entry because of a myopic focus on *ex post* prices, the Court’s precedents here do not necessarily impose such a constraint on the

¹⁸⁴ Case C-27/76, *United Brands v Commission*, ECR 207, February 17, 1978, ¶ 250.

¹⁸⁵ See European Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, *supra* note 176, ¶ 7.

¹⁸⁶ See, e.g., European Commission, *Press Release: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines* (May 15, 2017), available at http://europa.eu/rapid/press-release_IP-17-1323_en.htm.

¹⁸⁷ Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, ¶ 30.

¹⁸⁸ See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 526 (1945).

Commission. It thus remains a serious risk that the lure of “correcting” high prices – especially in the politically contentious pharmaceutical industry – may well induce economically unjustified and ultimately deleterious intervention.

F. Predatory pricing cases

A second important area of divergence concerns predatory pricing cases. US antitrust law subjects allegations of predatory pricing to two strict conditions: (i) Monopolists must charge prices that are below some measure of their incremental costs; and (ii) there must be a realistic prospect that they will be able to recoup these first-period losses.¹⁸⁹ In laying out its approach to predatory pricing, the Supreme Court identified the risk of false positives and the clear cost of such errors to consumers. It thus particularly stressed the importance of the recoupment requirement because, without recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”¹⁹⁰

Accordingly, in the US, authorities must prove that there are constraints that prevent rival firms from entering the market after the predation scheme, or that the scheme itself would effectively foreclose rivals from entering in the first place.¹⁹¹ Otherwise, the predator would be undercut by competitors as soon as it attempts to charge supracompetitive prices in order to recoup its losses. In such a situation – without, that is, the strong likelihood of recouping the lost revenue from underpricing – the overwhelming weight of economic learning (to say nothing of simple logic) makes clear that predatory pricing is not a rational business strategy.¹⁹² Thus, apparent cases of predatory pricing in the absence of the likelihood of recoupment are most likely not, in fact, predatory, and deterring or punishing them would likely actually *harm* consumers.

In contrast, the legal standard applied to predatory pricing in the EU is much laxer, and almost certain, as a result, to risk injuring consumers. Authorities must prove only that a company has charged a price below its average variable costs, in which case its behavior is *presumed* to be

¹⁸⁹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-27 (1993).

¹⁹⁰ *Id.* at 224.

¹⁹¹ On entry deterrence, see Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979).

¹⁹² See generally John S. McGee, *Predatory Pricing Revisited*, 23 J. L. ECON. 289 (1980); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. ECON. 137 (1958). Some economists have more recently posed a “strategic” theory of predatory pricing that purports to expand substantially (and redirect) the scope of circumstances in which predatory pricing could be rational. See, e.g., Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L. J. 2239 (2000). While this and related theories have likely, indeed, expanded the theoretical scope of the circumstances conducive to possible predatory pricing, they have not established that these conditions are remotely *likely* to occur. See, e.g., Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981) (“[It] is conceivable that predation could be profitable. Short-run sacrifice for later reward often is a rational way to maximize profits.... The question, though, is whether profitable predation is probable.”). From a legal perspective, particularly given the risk of error in discerning the difference between predatory pricing and legitimate price cutting, it is far more important to limit cases to situations *likely* to cause consumer harm, rather than those in which harm is but a remote possibility. The cost of error, of course, is the legal imposition of artificially inflated prices for consumers.

predatory.¹⁹³ Even when a firm imposes prices that are between average variable and average total costs, it can be found guilty of predatory pricing if authorities show that its behavior was part of “a plan to eliminate competition.”¹⁹⁴ Most significantly, in neither case is it necessary for authorities to show that the scheme would allow the monopolist to recoup its losses.¹⁹⁵

[I]t does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive.¹⁹⁶

This aspect of the legal standard has no basis in economic theory or evidence – not even in the “strategic” economic theory that arguably challenges the dominant, “Chicago School” understanding of predatory pricing. Indeed, strategic predatory pricing still requires proof of below cost pricing, recoupment, and the refutation of any convincing business justification offered in response.¹⁹⁷

The case of predatory pricing illustrates a crucial distinction between European and American competition law. The recoupment requirement embodied in American antitrust law essentially serves to differentiate aggressive pricing behavior that improves consumer welfare because it leads to overall price decreases from predatory pricing that reduces welfare due to ultimately higher overall price increases. It is, in other words, entirely focused on the welfare of consumers. The European approach, by contrast, reflects structuralist considerations that are far removed from a concern for consumer welfare. Its underlying fear is that dominant companies could, through aggressive pricing – even to the benefit of consumers – by their very success engender more concentrated market structures. It is simply presumed that these less atomistic markets are invariably detrimental to consumers. Both the *Tetra Pak* and *France Télécom* cases offer clear illustrations of the ECJ’s reasoning on this point:

[I]t would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated... The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.¹⁹⁸

Similarly:

¹⁹³ Case C-62/86, *AKZO v Commission*, EU:C:1991:286, ¶¶ 71-72.

¹⁹⁴ *Id.* para 72. (“[P]rices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.”).

¹⁹⁵ Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, ¶ 44. See also, Case C-202/07 P, *France Télécom v Commission*, EU:C:2009:214, ¶ 110.

¹⁹⁶ *France Télécom*, ¶ 107.

¹⁹⁷ See Bolton, Brodley & Riordan, *supra* note 192, at 2264. See also, Salop, *supra* note 191.

¹⁹⁸ See Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, ¶ 44.

[The lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them..¹⁹⁹

In short, the European approach leaves much less room for the analysis of a pricing scheme's concrete effects, making it much more prone to false positives than the *Brooke Group* standard in the US. To make matters worse, the European approach ignores not only the benefits that consumers may derive from lower prices, but also the chilling effect that broad predatory pricing standards may exert on firms that are attempting to attract consumers with aggressive pricing schemes.

G. Refusals to deal

US and EU antitrust laws are also very different when it comes to refusals to deal. While the US has imposed strenuous limits on authorities or rivals that seek to bring such cases, EU competition law sets a far lower threshold for liability.

As Justice Scalia wrote in the *Trinko* majority opinion:

Aspen Skiing is at or near the outer boundary of §2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.²⁰⁰

This highlights two key features of American antitrust law with regard to refusals to deal. For a start, US antitrust law generally does not apply the “essential facilities” doctrine.²⁰¹ Accordingly, in the absence of exceptional facts, upstream monopolists are rarely required to supply their product to downstream rivals, even if that supply is “essential” for there to be effective competition in the downstream market. Moreover, as Justice Scalia observed in *Trinko*, the *Aspen Skiing* case appears to concern only those limited instances where a firm's refusal to deal stems from the termination of a preexisting and profitable business relationship.²⁰² While even this is not likely the economically appropriate limitation on liability,²⁰³ its impetus – ensuring that liability is found only in situations where procompetitive explanations for the challenged conduct are unlikely – is exactly appropriate for a regime concerned with minimizing the cost to consumers of erroneous enforcement decisions.

¹⁹⁹ Case C-202/07 P, *France Télécom v Commission*, EU:C:2009:214, ¶ 112.

²⁰⁰ *Trinko*, 540 U.S. at 407-08.

²⁰¹ *Id.*

²⁰² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985).

²⁰³ See Alan J. Meese, *Property, Aspen, and Refusals to Deal*, 73 ANTITRUST L. J. 81, 112-13 (2005).

As in most areas of antitrust policy, EU competition law is much more interventionist. Refusals to deal are a central theme of EU enforcement efforts, and there is a relatively low threshold for liability.²⁰⁴ In theory, there are four conditions for a refusal to deal to infringe EU competition law: the input must be indispensable, the refusal must eliminate all competition in the downstream market, and there must not be objective reasons that justify the refusal.²⁰⁵ Moreover, if the refusal to deal involves intellectual property, it must also prevent the appearance of a new good.²⁰⁶ In practice, however, all of these conditions have been severely relaxed by EU courts and the Commission's decisional practice. This is best evidenced by the lower court's *Microsoft* ruling where, as John Vickers notes:

[T]he Court found easily in favor of the Commission on the IMS Health criteria, which it interpreted surprisingly elastically, and without relying on the special factors emphasized by the Commission. For example, to meet the “new product” condition it was unnecessary to identify a particular new product... thwarted by the refusal to supply but sufficient merely to show limitation of technical development in terms of less incentive for competitors to innovate.²⁰⁷

EU competition law shows far less concern for its potential chilling effect on firms' investments than does US antitrust law.

H. Other areas

While at a glance US and EU competition law are often superficially similar, the preceding discussion should make clear that, in practice, small differences have a significant cumulative effect on outcomes. Three more such differences deserve to be touched upon briefly. The first concerns vertical restrictions & resale price maintenance (RPM), the second involves rebates, and the third relates to damages claims.

I. Vertical restraints

There are vast differences between US and EU competition law relating to vertical restraints. On the one hand, since the Supreme Court's *Leegin* ruling, even price-related vertical restraints (such as RPM) are assessed under the rule of reason in the US.²⁰⁸ Some commentators have gone so far as to say that, in practice, the US case law almost amounts to *per se* legality.²⁰⁹ Conversely, EU

²⁰⁴ See *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, Joined Cases 6/73 & 7/73, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.

²⁰⁵ See Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs*, EU:C:1998:569, §41.

²⁰⁶ See Case C-241/91 P, *RTE and ITP v Commission*, EU:C:1995:98, §54. See also, Case C-418/01, *IMS Health*, EU:C:2004:257, §37.

²⁰⁷ John Vickers, *Competition policy and property rights*, 120 *ECON. J.* 390 (2010).

²⁰⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

²⁰⁹ See, e.g., D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 *ANTITRUST L.J.* 1003, 1004 (2014) (“[T]he shift in the antitrust rules applied to [vertical restraints] has not been from per se

competition law treats RPM as severely as it treats cartels. Both RPM and cartels are considered to be restrictions of competition “by object” – the EU’s equivalent of a *per se* prohibition.²¹⁰ This particularly strict treatment of vertical restrictions flies in the face of the longstanding, mainstream economics that deal with the subject. As Patrick Rey and Jean Tirole (hardly the most pro-free-market economists) saw it as long ago as 1986:

Another major contribution of the earlier literature on vertical restraints is to have shown that **per se illegality of such restraints has no economic foundations.**²¹¹

Unlike in the EU, the US Supreme Court in *Leegin* took account of the weight of the economic literature, and changed its approach to RPM to ensure that the law no longer simply precluded its arguable consumer benefits: “Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.” Further, “[the prior approach to resale price maintenance restraints] hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.”²¹²

By contrast, the EU’s continued *per se* treatment of RPM strongly reflects its “precautionary principle” approach to antitrust, under which European regulators and courts readily condemn conduct that could *conceivably* injure consumers, even where such injury is, according to the best economic understanding, unlikely (at best). The US approach to *per se* illegality, which rests on *likelihood* rather than mere *possibility*,²¹³ is far less likely to erroneously condemn beneficial conduct.

2. Rebates

US and EU antitrust laws are also divided when it comes to the assessment of rebates (although, as noted above, EU law on rebates is very much up in the air after the ECJ’s recent *Intel* ruling²¹⁴). The assessment of rebates is one of the more complicated areas of modern competition law.²¹⁵

illegality to the rule of reason, but has been a more dramatic shift from *per se* illegality to presumptive legality under the rule of reason.”).

²¹⁰ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 O.J.L. 102, art.4 (a).

²¹¹ Patrick Rey & Jean Tirole, *The Logic of Vertical Restraints*, 76 AM. ECON. REV. 921, 937 (1986) (emphasis added).

²¹² *Id.* at 22.

²¹³ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007) (holding that the *per se* rule should be applied “only after courts have had considerable experience with the type of restraint at issue” and “only if courts can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason” because it “lack[s]... any redeeming virtue”) (citation omitted).

²¹⁴ See *supra* Section I.E, “Judicial deference towards enforcement authorities

²¹⁵ For an overview of European competition law concerning rebates, see Damien Geradin, *Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche*, 11 JOURNAL OF COMPETITION LAW & ECONOMICS 579-615 (2015). For an overview of US antitrust law, see Bruce Kobayashi, *The Economics of Loyalty Rebates and Antitrust Law in the United States*, 1 CPI JOURNAL 115-148 (2005).

Nevertheless, there are significant divergences between the US and the EU's stance on these issues that reflect not the complexity of the issue, but rather the EU's relative willingness to disregard complex economics in favor of non-economic, formalist presumptions. Whereas US antitrust has predominantly moved to an effects-based assessment of rebates,²¹⁶ this is only (at best) starting to happen in the EU. Prior to the ECJ's *Intel* ruling, the EU implemented an overly simplistic approach to the assessment of rebates by dominant firms, where so-called "fidelity" rebates were almost *per se* illegal.²¹⁷ It is unclear how the *Intel* ruling will affect this approach. At the very least, it seems to have moved European competition towards a slightly more evidence-based approach.²¹⁸

3. Damages Claims

Damages claims are also treated differently on both sides of the Atlantic. Whereas the US has a long tradition of private enforcement relating to antitrust matters, this is much less the case in the European Union and its member states. For this reason, the EU recently adopted a competition law damages directive, aimed at facilitating private antitrust suits by injured parties.²¹⁹

Two parts of this piece of legislation are particularly striking and are in stark contrast to US antitrust law. First, the EU damages directive explicitly mandates that indirect purchasers should have standing to claim damages.²²⁰ This differs from the US approach, where the Supreme Court concluded in *Illinois Brick* that indirect purchasers could not bring antitrust damages claims.²²¹ Second, the US bars both defensive and offensive passing-on claims,²²² whereas the EU mandates that courts should consider both of these claims if they are raised by parties.²²³

The US bar on passing-on claims is rooted largely in administrative concerns:

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might

²¹⁶ See Kobayashi, *id.* at 147.

²¹⁷ Case C-85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, ¶ 7.

²¹⁸ *Intel*, ¶ 138.

²¹⁹ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, O.J.L. 349.

²²⁰ *Id.* at Art. 12.

²²¹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

²²² See *Id.*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

²²³ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union at Art. 12

seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.²²⁴

There is something to be said for this reticence to open up the floodgates to private antitrust litigation. Of course, in theory, we want every wronged party to be able to seek redress, but if the system is untenable, it is entirely possible that less justice will be served because of the cost and expense entailed in apportioning damages (and locating relevant parties) in matters involving thousands or millions of individuals. The EU's bold experiment is worth watching, but it is likely better to take the measured approach adopted by the US, and seek marginal improvements as new cases arise.

Recently, the Supreme Court took up just such a potential modification in *Apple v. Pepper*.²²⁵ *Apple v. Pepper* emerged from a claim that Apple's pricing model for its App Store violates US antitrust laws. The central dispute of the case is whether the *Illinois Brick* indirect purchaser doctrine²²⁶ — which limits standing in price fixing cases only to those parties directly injured, and prevents private actions by subsequent purchasers — can be used to prevent App Store users from suing Apple for its alleged anticompetitive pricing structure imposed on app developers. Those in favor of applying *Illinois Brick* to prevent the standing of users assert that — following *Campos v. Ticketmaster* in the 8th Circuit²²⁷ — it is the app developers themselves who are injured by the restrictive pricing (while users receive only a pass-through injury). Therefore, so the argument goes, end users do not have sufficient standing to bring an antitrust suit.

The real opportunity presented to the Court in this case, however, is to consider how antitrust standing doctrine should apply to certain kinds of digital platforms. In truth, Apple's position in the center of the transaction between developers and end users is unique in the context of the indirect purchaser doctrine. The relationship is better framed as a two-sided market, rather than a traditional vertical chain of purchases, and so it may be the case that end users *are* appropriate parties to bring antitrust complaints against a platform operator — not because *Illinois Brick* should be overturned, but because *Illinois Brick* should be amended to reflect the particular circumstances of this and similar cases.

Importantly, this doctrinal evolution also occurs in a larger context in which courts are grappling with the law and economics of two-sided platforms. The Court's recent *American Express* decision actually sets the stage for considering the standing doctrine in *Apple v. Pepper* and how the law ought to develop. In *American Express*, the Court held that plaintiffs need to incorporate facts about both sides of a two-sided "transaction" platform when alleging anticompetitive harm.²²⁸ The full ramifications of this decision are not yet known, but the general consensus is that this means

²²⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. at 737.

²²⁵ *In Re Apple iPhone Antitrust Litigation, Apple Inc. v. Robert Pepper, Et Al.*, No. 17-204 (2018).

²²⁶ *Illinois Brick Co. v. Illinois*, 431 U.S. at 720.

²²⁷ *Campos v. Ticketmaster Corporation*, 140 F.3d 1166 (8th Cir. 1998).

²²⁸ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

that litigants need to conduct a full cost-benefit analysis that examines the net harms and benefits of the platform as a whole, and cannot merely restrict alleged harms to one side.

If *Apple v. Pepper* does increase the number of potential litigants by relaxing the indirect purchaser doctrine for two-sided platforms like the App Store, it is likely that *American Express* will temper the feared excesses this could bring by imposing a higher burden on plaintiffs. The end result may be a system that is capable of addressing more claims, while also being calibrated to limit the risk of wrong-headed or abusive litigation and other administrative problems.

In contrast to this (possible) evolution of doctrine, the EU's approach looks much more like setting off a litigation time bomb. It appears calibrated not to achieve optimal results, but to achieve maximal litigation and redress. Given the incentives of plaintiffs and the likelihood of error, this is almost certain to exacerbate type I errors. The US's approach of developing doctrine that both fits better to the sorts of claims that arise, and also is tempered by incrementalism, is far more likely to yield outcomes that avoid excess while also facilitating just results.