Should ASEAN Antitrust Laws Emulate European Competition Policy?

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I. Introduction

Unlike many other trading blocs (most notably the EU), the ASEAN nations are yet to agree upon a common, unified set of competition law provisions. Nevertheless, recent years have seen the ASEAN members embark upon various initiatives that seek to harmonize their competition regimes (though these stop well short of common rules). In 2016, for instance, the member states adopted the ASEAN Competition Action Plan ("ACAP").[1] Among other things, the plan seeks to ensure that all ASEAN states implement competition regimes that meet a set of minimal standards, and eventually to harmonize competition policy across the ASEAN region.[2]

These ongoing efforts to modernize and harmonize ASEAN competition laws do not arise in a vacuum. Rather, they take place amid a longstanding effort by both the European Union and the United States to export their respective competition laws throughout the world:

> The EU and the US . . . want the rest of the world to follow their respective regulatory models. Both jurisdictions have actively promoted their competition laws as "best practices" abroad, urging developed and developing countries alike to adopt domestic competition laws and build institutions to enforce them. They promote their models through a specialized network of competition regulators—the International Competition Network (ICN)—and also more general bodies—notably the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). They also employ bilateral tools in their promotion effort—including offering technical assistance to emerging competition law jurisdictions. In its trade agreements, the EU also explicitly conditions access to its markets on the adoption of a competition law, exporting its own law in the process, while the US relies primarily in its persuasive powers rather than on formal treaties in exporting its laws.[3]

No doubt the EU and US competition regimes are the most developed and dominant exemplars; following the policies of one or both to some extent is virtually inevitable. But this raises a critical question: *should* the ASEAN countries attempt to mimic the competition regimes of other developed nations, notably those that are in force in the EU and the US? And, if so, which one of these regimes should they draw more inspiration from?

While we certainly do not purport to know what type of regime would best fit the idiosyncratic needs of the ASEAN countries, we seek to dispel the myth that the European model of competition

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[1] AN ASEAN COMPETITION ACTION PLAN (2016-2025), https://asean-competition.org/file/post_image/ACAP%20(Website)%2023%20December%202016.pdf

[2] *Id.*

[3] Anu Bradford, Adam Chilton, Katerina Linos, & Alexander Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEG. STUD. 731 (2019). *See also* William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEORGE MASON LAW REVIEW 1157 (2015); Brinkley M. Tappan & Stephen M. Byers, *Exporting US Antitrust Law: The DOJ's Increasing Focus on Asia*, 3 CRIMINAL JUSTICE (2013); Randolph Tritell & Elizabeth Kraus, *The Federal Trade Commission's International Antitrust Program* (2018), *available at* https://www.ftc.gov/system/files/attachments/internationalcompetition/federal_trade_commission_international_antitrust_program__feb_2018_0.pdf; Anu Bradford & Adam Chilton, *Competition Law Around the World from 1889 to 2010: The Competition Law Index*, 14 JOURNAL OF COMPETITION LAW & ECONOMICS 393 (2018); Eleanor M. Fox, *EU and US Competition Law: A Comparison* in GLOBAL COMPETITION POLICY 339 (Graham and David, eds 1997); William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisition in Emerging Economies*, 66 UNIVERSITY OF CINCINNATI LAW REVIEW 1071 (1998).

enforcement would *necessarily* provide a superior blueprint. To the contrary, we show that the evolutionary, common-law-like regime that has emerged in the US has many strengths that are often overlooked by contemporary competition policy scholarship, and which might provide a particularly good fit for the economic and political realities of the ASEAN member states.

Our paper also falls squarely within a much broader debate. Over the past couple of years, there have been renewed calls for policymakers to reform existing competition regimes in order to better address the challenges that are, purportedly, posed by the emergence of the digital economy. This has notably resulted in a series of high-profile reports, papers and draft legislation, concluding that more interventionist tools are required to effectively deal with competition issues in digital markets.[4] The draft European Digital Markets Act[5], the US House Judiciary report on competition in digital markets[6], as well as the draft bill put forward by US Senator Amy Klobuchar[7] all mark the culmination of this antitrust reform movement.

Although the connection is often implicit, these calls for reform ultimately seek to implement (and amplify) features that are currently at the forefront of European competition enforcement. Potential reforms thus include broadening the goals of competition policy[8], as well as relying more heavily on structural[9] and behavioral presumptions (rather than outcome-oriented reasoning).[10]

At times this desire to move closer to the EU model is more explicit. For example, writing in Vox, Matthew Yglesias 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

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[4] *See, e.g.,* JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE, HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA FINAL REPORT (2019). *See also*, DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf. *See also*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY FINAL REPORT (June 2019), https://www.accc.gov.au/focus-areas/inquiries/digital-platformsinquiry/final-report-executive-summary.

[5] *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)*, COM/2020/842 final (Dec. 15, 2020) https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (hereinafter, "Digital Markets Act").

[6] HOUSE COMMITTEE ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Oct. 7, 2020) https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (hereinafter, "HJC DIGITAL COMPETITION REPORT").

[7] *See* The Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), S.225, 117th Cong. 1st Sess. (2021), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/225/text?q=%7B%22search%22%3A%5B%22Competition+and+Antitrust+Law+Enforcement+Reform+Act%22%5D%7D&r=1&s=1.

[8] *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. *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)

[9] *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/. *See also*, 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).

[10] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).

the consumer welfare standard."[11] In a similar vein, Bloomberg featured an article by economics writer Noah Smith heaping praise on the growing populist antitrust wave and its potential to roll back the consumer welfare standard.[12] And, at least according to EU Commissioner Margrethe Vestager, the US executive branch agencies have expressed a "renewed deeper interest and curiosity as to what we are doing in Europe."[13]

In parallel to these calls for reform, scholars have also analyzed the evolution of competition legislation around the world (as well as regulation, more generally).[14] These scholars observe that recent initiatives have tended to mimic the rules of the European Union, rather than the more *laissez faire* approach that is often associated with the US.[15] This trend has been referred to as the "Brussels Effect."[16] Accordingly, these scholars predict a regulatory "race to the top", where more stringent rules and regulations will become the norm. While ostensibly agnostic, this implicitly conveys a sense that "resistance is futile," and that the European approach will inevitably continue to spread more rapidly than its US counterpart.

With these policy debates in mind, our paper argues that ASEAN member states should not be too quick to embrace the European model of competition enforcement – be it by adopting more expansive competition laws or by regulating competition in digital markets. While the above-referenced scholars and advocates tend to assert that a more-expansive, EU-oriented approach would improve economic conditions, economic logic and the apparent reality from Europe strongly suggest otherwise.

Antitrust is an attractive regulatory tool for a number of reasons. The vague, terse language of most antitrust laws (including those in both the US and EU) readily lend themselves to "interpretation" imbuing them 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.

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[11] 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. It is worth noting that adopting EU law does not, in fact, mean abandoning the consumer welfare standard. *See, e.g.*, https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf. As we discuss below, European Commission enforcement policies have moved away from the consumer welfare standard in important ways. But it is important to note that even the EU's competition regime is built on a consumer welfare foundation, which European courts are beginning to reassert in their reviews of European Commission decisions. See *infra*, Section I.D.

[12] 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.

[13] 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), 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.

[14] *See, e.g.,* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012). *See also* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); references cited in note 3, *supra*.

[15] Bradford, *The Brussels Effect*, *id. See also*, *See, e.g.,* Anu Bradford, Adam S. Chilton, & Filippo Maria Lancieri, *The Chicago School's Limited Influence on International Antitrust*, 87 U. CHI. L. REV. 297 (2020); Spencer Weber Waller, *The Omega Man or The Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123 (2020).

[16] *See* Bradford, *The Brussels Effect*, *supra* note 14, at 3.

But that attraction is precisely why everyone—and emerging economies like ASEAN members in particular—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.

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.[17] 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.[18] America's isolation might thus be a testament to its success rather than an emblem of its failure.

The EU's more aggressive pursuit of technology platforms under its antitrust laws demonstrates many of the problems with its approach in general. 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 international antitrust enforcement in line with that of the EU would thus unlock a veritable Pandora's box of concerns that might otherwise be 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.

Our paper proceeds as follows. Section II analyzes the high-level differences between the American and European approaches to competition policy. Notably, this Section shows that these regimes pursue different goals, rely to varying degrees on economic insights to inform their decision-making, afford very different degrees of judicial deference to antitrust authorities, and exhibit different degrees of politization. Section III shows that the US and Europe also differ substantially in terms of the conduct that may constitute an infringement of competition law—the EU system being significantly more restrictive. Section IV turns to question of competition in digital platform markets. It argues that European competition enforcement in the digital industry provides a cautionary tale that cuts against both the adoption of *ex ante* regulation and a relaxation of existing antitrust standards

[17] *See* Waller, *The Omega Man*, *supra* note 15.

[18] 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 (2011).

(such as the "consumer welfare standard"). Section V posits that reducing economic concentration—sometimes cited as a byproduct of European-style competition enforcement—should not be a self-standing goal of antitrust policy. Finally, Section VI argues that many of the economic and political characteristics of the ASEAN economy cut in favor of using the US model of competition enforcement as a blueprint for further development and harmonization of ASEAN competition law.

II. High-level differences between the EU and US approaches to competition policy

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. Ultimately, these characteristics 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 European 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 EU level is driven almost entirely by the European Commission—a political body—and largely unreviewed and unchecked by EU courts.[19] As a result EU antitrust is decidedly less economically grounded, and inevitably more politicized, than in the US.

Unfortunately for proponents of the widespread, global adoption of this expanded approach to antitrust, the European experience is anything but an unmitigated success. The European Union has not significantly outperformed the United States since the turn of the century. For instance, between 2000 and 2019, GDP (in constant 2010 USD), which in 2000 was slightly higher in the EU ($12.69 trillion) than the US ($12.62 trillion) grew to only $16.60 trillion in the EU in 2019, while US GDP in 2019 was $18.32 trillion.[20] Over the same time period cumulative GDP growth per capita has been virtually identical for the two regions.[21] Although economic growth is a multivariate phenomenon in which antitrust policy plays only a small part, of course, these numbers should at the very least dispel the myth that implementing European-inspired antitrust regimes would single-handedly lead to economic success.[22]

As the rest of this sections explains, while the EU's approach to competition policy appears superficially close to that of the US, it is fundamentally at odds with much of the economic reasoning that

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[19] As we discuss at greater length below. *See infra*, Section I.D.

[20] World Bank, *US and EU GDP 2000 to 2019* (last visited Aug. 10, 2020), https://databank.worldbank.org/US-and-EU-GDP-2000-to-2019/id/b244b2db.

[21] *See* World Bank, *Constant GDP per capita for the United States and European Union*, retrieved from FRED, Federal Reserve Bank of St. Louis, August 16, 2020, https://fred.stlouisfed.org/graph/?g=ujdG.

[22] *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.

underpins US antitrust law. In particular, these divergences between EU and US law point to a number of key areas where the EU approach may undermine consumers and constrain the region's economic growth.[23] As we discuss in detail in the final section of this paper, these limitations of the EU approach to antitrust are likely particularly problematic for the growth-oriented ASEAN countries.

A. Broad policy aims vs. narrow competition objectives

The 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 the process of competition for the economic welfare of consumers,[24] 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.[25]

1. The place of competition law in the political structure

The non-economic ambitions of European competition law are largely down to institutional and historic particularities of the European Union. The EU's main competition provisions are enshrined in the Treaty on the Functioning of the European Union ("TFEU"), which has a quasi-constitutional status 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. Thus, in order to effect these various objectives without conflict, the European Commission has sometimes directly incorporated non-economic considerations into its competition decisions. This is, for example, very clearly the case for employment and environmental issues.[26]

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[23] Below we present five key differences. But a sixth, and important, area of concern, is the relative lack of due process in EU competition cases. In this paper we 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 77 to 79, and accompanying text.

[24] 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 & Sandeep Vaheesan, *supra* note 8. *But see* Geoffrey A. Manne & 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 largely unlike the EU, US antitrust law has evolved significantly from its ambiguous origins: Whatever it was intended to do 100 years ago, today it is aimed squarely at consumer welfare.

[25] *See, e.g.*, 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.

[26] Commission Communication Guidelines on the Applicability of Article 101 on the Functioning of the European Union

More fundamentally, these attempts to ensure that the EU's various policies remain consistent, along with the supra-national nature of the Union, have highly politicized the position of the EU Commissioner for competition. This is perhaps best evidenced by the current EU president's decision to entrust her competition commissioner with the additional role of "Commission Executive Vice-President for a Europe Fit for the Digital Age."[27] The Digital Age role is a broadly political one, intended to have "an impact on every aspect of our economy and society."[28] Moreover, industrial policy is the primary aim of the role: "In striving for digital leadership, we must . . . support industry to adapt to globalisation and the twin climate and digital transitions. . . . This will be a key part of strengthening our technological leadership and strategic autonomy."[29] As the letter goes on to note, the Commission's competition portfolio is intended to promote the same ends:

> Competition will have an important role in our **industrial strategy**. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow. EU State aid rules should support this where there are market failures and the need to strengthen value chains. As part of this, you should continue to work with the Member States to make the most of Important Projects of Common European Interest.[30]

And, finally, as the letter makes clear, the Commission's policy will be to use competition enforcement to interfere with free trade in order to "develop tools and policies to better tackle the distortive effects of **foreign state ownership and subsidies** in the internal market."[31]

Nor is this most recent Mission Letter an aberration. As the previous EU president's letter to the competition commissioner in 2014 also makes clear, European competition enforcement is accountable to political forces that seek to preserve the overall political legitimacy of the European Union:

> 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.[32]
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to Horizontal Co-Operation Agreements, SEC (2010) 528/2 (draft) ¶ 319, *available at* http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf.

[27] Ursula von der Leyen, President of the European Commission, *Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age* 4 (Sep. 10, 2019), *available at* https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf ("As Executive Vice-President, you will have a dual function. You will chair the Commissioners' Group on a Europe fit for the Digital Age. In addition, you will be responsible for the competition portfolio.").

[28] *Id.*

[29] *Id.*

[30] *Id.* at 6 (emphasis in original).

[31] *Id.* (emphasis in original).

[32] Jean-Claude Juncker, President of the European Commission, *Mission Letter to Margrethe Vestager, Commissioner for Competition* 4 (Nov. 1, 2014), *available at* http://ec.europa.eu/archives/juncker-commission/docs/vestager_en.pdf.

> 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.[33]

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 who must nominate and confirm the senior-most antitrust enforcement officials, 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-oriented decision-making occurring by US enforcement officials, but when it comes to light it is roundly condemned and thus constrained by reputational concerns. Most recently, for example, the current US administration's apparent politicization of antitrust enforcement was pointedly brought to light by the testimony of a whistleblower in a special congressional hearing entitled, "Oversight of the Department of Justice: **Political Interference and Threats to Prosecutorial Independence**."[34] Most important, politicization of antitrust enforcement in the US 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 their explicitly political function.

2. *The content of competition law*

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 welfare[35]—the question is less settled in the EU.[36] Throughout recent decisions and policy statements, the European Union has been reluctant to commit to a well-defined competition objective for its antitrust law.

On their face, the American and European antitrust regimes differ substantially with regard to the objectives they pursue, and the extent to 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 in the US:

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[33] *Id.* at 1.

[34] *See* House Judiciary Committee Hearing: Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence (Jun. 24, 2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3034 (emphasis added). For the whistleblower's testimony, see John W. Elias, Trial Attorney, Antitrust Division, U.S. Department of Justice, *Written Testimony* (Jun. 24, 2020), *available at* http://docs.house.gov/meetings/JU/JU00/20200624/110836/HHRG-116-JU00-Wstate-EliasJ-20200624-U8.pdf.

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

[36] *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).

> 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.[37]

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"[38] or attempts to "monopolize",[39] is notoriously ambiguous, over the course of more than a century the US 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.

In the relative absence of this legal evolution in the EU, competition law remains much less moored to concrete, underlying economic principles. 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 that competition is not distorted**."[40] This goal is sometimes also referred to as "the protection of the competitive process."[41] Unlike the consumer welfare standard—which, for all the internecine and arcane debates it has engendered, refers to a series of generally cognizable principles[42]—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

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[37] Treaty on the Functioning of the European Union, Art. 102.

[38] 15 U.S.C. § 1.

[39] 15 U.S.C. § 2.

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

[41] *See* Wils, *supra* note 36, at 16.

[42] *See* Hovenkamp, *supra* note 35, at 2471.

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.[43]

3. *The implications of open-ended competition law*

This is not merely an academic or semantic question: there are real and damaging consequences that can follow from the antitrust prescriptions based on the EU model. For instance, 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.

The politicization of antitrust law was also a problem in the US before judicial reform caused it to shift towards the consumer welfare paradigm. In the past, 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"[44]—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 trends dangerous to our form of government and society, a great deal of antitrust is not even respectable as politics.[45]

Over time the US learned, 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.

The open-ended nature of European competition law has at least three related, important consequences for jurisdictions that might adopt the EU's approach. 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. Second, the Commission benefits from a highly deferential review of its decisions by the European Court of Justice, thus imbuing the Commission's competition decisions with considerable discretion to depart from effects-based competition analysis.[46] And third, consistency in broad policy objectives leads to—or, more accurately, effectively demands—*in*consistency in competition policy.

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[43] *See e.g.*, Ariel Ezrachi, *The Goals of EU Competition Law and the Digital Economy*, Oxford Legal Studies Research Paper No. 17/2018 (Jun. 6, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766.

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

[45] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 418 (1993).

[46] In what follows, the discussion is largely related to an analysis of how the EU evaluates unilateral and coordinated conduct

Particularly with regard to this last consequence, mimicking the European model (and thus embracing a more polycentric approach to competition enforcement) would have important ramifications for the ASEAN member states (or other trade blocs seeking to harmonize their competition regimes). Indeed, if the objective is to create a consistent body of competition law across different jurisdictions, then tasking national competition authorities with a single overarching goal, such as the consumer welfare standard, is critical. This is because the existence of multiple conflicting goals increases the prospect of diverging interpretations that might reduce harmonization. While this is somewhat less of an issue for the EU (because the Court of Justice does largely ensure that interpretation of competition law is consistent across *member-state* enforcement decisions), it is much more salient for trade areas that do not have similar overarching institutions to ensure consistency.

B. Precautionary principle vs. error-cost framework

The US Supreme Court has repeatedly recognized the limitations that courts face in distinguishing between pro- and anticompetitive conduct in antitrust cases, and particularly the risk this creates of reaching false positive (Type I) decisions in monopolization cases.[47] 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 is likely greater than those attributable to Type II errors because "the economic system corrects monopoly more readily than it corrects judicial errors."[48]

The EU's more "precautionary" approach to antitrust policy is the antithesis of this.[49] 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. As we explain below (Section V.A), this is an important issue for states—like the ASEAN members—that place a premium on achieving high growth rates. While, in general, the precautionary principle may prevent certain fat-tailed events from occurring,[50] this will almost by definition come at the expense of short-term

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cases. In many respects, EU merger law is fairly similar to US merger law, being guided by something that approaches a consumer welfare model. The EU General Court's recent *CK Telecoms* ruling offers a fitting example. *See* Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020], not yet published, paras 276-277. 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.

[47] *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).

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

[49] *See, e.g.*, Aurelien Portuese, *The Rise of Precautionary Antitrust: An Illustration with the EU Google Android Decision*, CPI EU NEWS NOVEMBER 2019, 4 (2019) ("The absence of demonstrated consumer harm in order to find antitrust injury is not fortuitous, but represents a fundamental alteration of antitrust enforcement, predominantly when it comes to big tech companies. Coupled with the lack of clear knowledge, a shift in the burden of proof, and the lack of a consumer harm requirement in order to find abuse of dominance all reveal the precautionary approach that the European Commission has now embraced.").

[50] Nassim Nicholas Taleb, Rupert Read, Raphael Douady, Joseph Norman & Yaneer Bar-Yam, *The precautionary principle (with application to the genetic modification of organisms)*, ARXIV PREPRINT ARXIV:1410.5787, 2 (2014). ("The purpose of the PP is to avoid a certain class of what, in probability and insurance, is called "ruin" problems. A ruin problem is one where outcomes of risks have a non-zero probability of resulting in unrecoverable losses.").

growth.[51] Adopting a precautionary approach is thus a costly public policy in those instances where it is not clearly warranted by underlying risk and uncertainty.

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 extent 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, and particularly in high-growth, emerging economies like those that largely constitute the ASEAN bloc. 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 a century of judicial decisions, generally along with the field's copious advances in economic understanding), we need much 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.

C. 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 extremely 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 may see some movement toward better analysis by the Commission, as well.[52]

1. Presumptions of harm

The 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

[51] The precautionary principles implies that policymakers should bar certain mutually advantageous transactions on account of the social costs that they might impose further down the line. Moreover, the precautionary principle has historically been associated with anti-growth positions. *See, e.g.*, Jaap C Hanekamp, Guillaume Vera-Navas & SW Verstegen, *The historical roots of precautionary thinking: the cultural ecological critique and 'The Limits to Growth'*, 8 JOURNAL OF RISK RESEARCH, 299 (2005). ("The first inklings of today's precautionary thinking as a means of creating a sustainable society can be traced historically to 'The Limits to Growth'…").

[52] *See infra* notes 80 to 88 and accompanying text.

modern economics, which near-universally counsel against presuming competitive harm on the basis of industry structure—particularly from the extent of concentration in a market.[53]

Concerns about excessive concentration are at the forefront of current efforts to expand competition enforcement, including by the use of presumptions. As discussed below (Section IV.B), however, 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 associated with it.[54] 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."[55] A host of other studies corroborate this assessment.[56] As one of these notes, "some studies find evidence consistent

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[53] *See* Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, NBER Working Paper No. 26007 (Jun. 2019) at 5-6, *available at* http://www.nber.org/papers/w26007 ("In short, there is no well-defined 'causal effect of concentration on price,' but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration."). *See also* Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, John M. Olin Program in L. & Econ., Stanford Law Sch. Working Paper 24 (Sep. 2006), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=931225 ("The Chicago identification argument has carried the day, and structure-conduct-performance empirical methods have largely been discarded in economics.").

[54] *See, e.g.*, Gregory J. Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* 33 ANTITRUST 74 (2018), *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....

Id. at 78. *See also* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019).

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

[56] *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

with both pro- and anticompetitive effects… virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition."[57] Similarly, "in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects."[58]

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 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.

2. *Quantification of anticompetitive harm*

A related problem stems from the quantification of anticompetitive harm, where European competition law imposes a much less strenuous burden on authorities than does US law. 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.

By seeking to protect a system of "undistorted competition", European authorities generally operate under the assumption that "competitive" market structures ultimately lead to better outcomes for consumers.[59] 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 conduct. Because of this lower evidentiary threshold, EU competition decisions are also subjected to a less stringent judicial review.

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. This view of antitrust led 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 claim to be pursuing a consumer welfare standard, and to adhere to rigorous economic analysis in their antitrust

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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).

[57] 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.

[58] *Id.*

[59] Treaty on European Union, Protocol (No27) on the internal market and competition, Official Journal 115.

cases,[60] much of 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*.[61] Accordingly, the mere exit of competitors from the market should be insufficient to draw competition liability under European competition law in the absence of certain accompanying factors.[62]

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. As a result, the Commission routinely sanctions exclusion that stems from an incumbent's superior efficiency rather than welfare-reducing strategic behavior,[63] and routinely protects inefficient competitors that would otherwise rightly be excluded from a market. As Pablo Ibanez Colomo puts is:

> 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.[64]

This tendency to sanction super efficiency is nowhere clearer than the Commission's recent *Google Shopping* case (discussed below[65]). By failing to sort harmful from beneficial exclusion, the conception of competition policy embodied in that decision 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

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[60] *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).

[61] *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.").

[62] *See* Case C-209/10, *Post Danmark A/S v Konkurrenceradet*, 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…").

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

[64] *Id.*

[65] *See infra*, Section I.B.

eras of US antitrust law.[66] The risk, as explained above (Section I.B), 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,[67] lock-in,[68] and network effects[69] have highly ambiguous welfare effects, despite often leading to the exclusion of inefficient firms.

D. Judicial deference vs. judicial review

A fourth important difference concerns the 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, as well as the General Court's *CK Telecoms* ruling, may mark a turning point in this respect).[70] The second is that, as discussed above, the European Commission can call upon an open-ended series of objectives to support its decisions. As a result of this discretion, there are few solid bases on which the Court may challenge the Commission's decisions.

1. Limited judicial review

The European Court of Justice has self-imposed limits on the courts' review of "complex economic appraisals" made by the Commission.[71] 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

[66] *See* Frank H. Easterbrook, *The Limits of Antitrust*, *supra* note 48, 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 re 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.").

[67] 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).

[68] *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 133 (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).

[69] 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).

[70] *See infra* notes 80 to 88, and accompanying text. *See CK Telecoms*, *supra* note 46.

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

> 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**.[72]

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...."[73] 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."[74]

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."[75] This near 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. 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).[76]

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 processes[77]) is not simply that the Commission gets to

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[72] 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).

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

[74] 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.

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

[76] 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* http://dx.doi.org/10.2139/ssrn.1698342.

[77] *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), https://www.economist.com/leaders/2010/02/18/prosecutor-judge-and-jury (discussing the Commission's enforcement

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.[78]

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."[79]

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,[80] the ECJ's recent *Intel* decision offers a clear statement of concern by the ECJ.[81] 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. It is worth quoting the court at length:

> 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

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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 EUR. L. REV. 817 (2009).

[78] 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).

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

[80] 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.

[81] 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.

> 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.[82]
>
> * * *
>
> 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….[83]

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 is thus 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):

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[82] *Id.* ¶¶ 138-41.

[83] *Id.* ¶ 147.

> 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.[84]

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 case law. As Damien Geradin and Nicolas Petit have argued:

> 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 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.[85]

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 anticompetitive effects—despite its adoption of a Guidance Paper and frequent lip service to the contrary.[86] "Arguably, the [Commission's] adoption of a more effects-based approach may be more about semantics or presentation than substance."[87] 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."[88] Whether these crucial analytical problems will be rectified following *Intel* is, at best, uncertain.

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[84] 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.

[85] Geradin & Petit, *supra* note 76, at 34.

[86] 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.

[87] Dethmers & Blondeel, *supra* note 75, at 153.

[88] *Id.* ¶ 154.

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 (Section I.A), the EU process is driven by a number of laterally equivalent, and sometimes mutually exclusive, goals. 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."[89] 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:

> 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.[90]

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

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

[90] *Id.*

> 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.[91]

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.

What such a practice at the Commission, aided by friendly courts, does is vest the Commission with an immense 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, 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 an untenable risk of false positives that chill innovative behavior and create nearly unwinnable battles for targeted firms.

E. Extraction of rents vs. extension of monopoly

Finally, while US monopolization law prohibits only predatory or exclusionary conduct that results in both the unlawful acquisition or maintenance of monopoly power and 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.

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

III. Some concrete divergences between EU and US competition policy

Beyond the high-level differences discussed above, European and US antitrust authorities also diverge significantly on numerous specific issues. These dissimilarities often result from the different policy goals that animate these two bodies of law. As noted, 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 discussion of some of the most important of these divergences follows.

A. Exploitative abuses

US antitrust is by and large unconcerned with companies that charge what some might consider "excessive" prices. Justice Scalia, writing for the Supreme Court 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.[92]

This stands in contrast to European competition law cases, where firms have been found to infringe competition law because they charged "excessive" prices. As the ECJ held in *United Brands*: "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."[93]

Although *United Brands*—the EU's foundational case for excessive pricing—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.[94] 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.[95]

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:

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[92] Verizon Communications v. Law Offices of Curtis Trinko, LLP, 540 U.S. 398, 407 (2004).

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

[94] *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 86, ¶ 7.

[95] *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.

> [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.[96]

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*,[97] 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 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.

B. Predatory pricing

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 able to recoup these first-period losses.[98] 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."[99]

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 form entering in the first place.[100] 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

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

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

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

[99] *Id.* at 224.

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

underpricing—the overwhelming weight of economic learning (to say nothing of simple logic) makes clear that predatory pricing is not a rational business strategy.[101] 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 cost, in which case its behavior is *presumed* to be predatory.[102] Even when a firm imposes prices that are between average variable and average total cost, it can be found guilty of predatory pricing if authorities show that its behavior was part of "a plan to eliminate competition."[103] Most significantly, in neither case is it necessary for authorities to show that the scheme would allow the monopolist to recoup its losses.[104]

> [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.[105]

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 some form of recoupment, and the refutation of any convincing business justification offered in response.[106]

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

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[101] *See generally* John S. McGee, *Predatory Pricing Revisited*, 23 J. L. ECON 289 (1980). 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* Bruce H. Kobayashi, *The law and economics of predatory pricing*, in 4 ENCYCLOPEDIA OF LAW AND ECONOMICS (De Geest, ed. 2017) ("The models showing rational predation can exist and the evidence consistent with episodes of predation do not demonstrate that predation is either ubiquitous or frequent. Moreover, many of these models do not consider the welfare effects of predation, and those that do generally find the welfare effects ambiguous."). 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.

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

[103] *Id.* at ¶ 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.").

[104] 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.

[105] *France Télécom, id.* at ¶ 107.

[106] *See* Bolton, Brodley & Riordan, *supra* note 101, at 2264. *See also* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test,* 81 ANTITRUST L.J. 371 (2017) (explaining the "raising rivals' costs" analysis of predation and noting that recoupment still occurs, just at the same time as predation: "the anticompetitive conditional pricing practice does not involve discrete predatory and recoupment periods, as in the case of classical predatory pricing. Instead, the recoupment occurs *simultaneously* with the conduct. This is because the monopolist is able to maintain its current monopoly power through the exclusionary conduct.").

differentiate aggressive pricing behavior that improves consumer welfare because it leads to overall prices decreases from predatory pricing that reduces welfare due to ultimately higher prices. 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.[107]

Similarly:

> [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.[108]

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.

C. 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 enforcement 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.[109]

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.[110] Accordingly, in the

[107] *See Tetra Pak*, *supra* note 104, at ¶ 44.

[108] *France Télécom*, *supra* note 104, at ¶ 112.

[109] Verizon Communications v. Law Offices of Curtis Trinko, 540 U.S. at 407-08.

[110] *Id.*

absence of exceptional facts, upstream monopolists are rarely required to supply their product to downstream rivals, even if that supply is "essential" for 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.[111] While even this is not likely the economically appropriate limitation on liability,[112] its impetus—ensuring that liability is found only in situations where pro-competitive explanations for the challenged conduct are unlikely—is exactly appropriate for a regime concerned with minimizing the cost to consumers of erroneous enforcement decisions.

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.[113] In theory, for a refusal to deal to infringe EU competition law it must meet a set of fairly stringent conditions: 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.[114] Moreover, if the refusal to deal involves intellectual property, it must also prevent the appearance of a new good.[115] 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.[116]

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

D. 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.[117] Some commentators have gone so far as to say that, in practice, the US case law almost amounts to *per se* legality.[118] Conversely, EU competition

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[111] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11 (1985).

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

[113] *See Instituto 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.

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

[115] *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.

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

[117] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[118] *See, e.g.,* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79

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.[119] This severe treatment also applies to non-price vertical restraints that tend to partition the European internal market.[120] Furthermore, in the *Consten and Grundig* ruling, the ECJ rejected the consequentialist – and economically-grounded – principle that inter-brand competition is the appropriate touchstone for assessing vertical restraints:

> Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85(1) merely because it might increase the former.[121]

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**.[122]

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."[123]

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

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ANTITRUST L.J. 1003, 1004 (2014) ("[T]he shift in the antitrust rules applied to [vertical restraints] has not been from per se 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.").

119 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).

120 Case C-403/08, *Football Association Premier League and Others*, ECLI:EU:C:2011:631, §139. ("[A]greements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU.").

121 Joined Cases-56/64 and 58/64, *Consten SARL & Grundig-Verkaufs-GMBH v. Commission of the European Economic Community*, ECLI:EU:C:1966:41, at 343.

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

123 *Id.* at 22.

understanding, unlikely (at best).[124] The US approach to per se illegality, which rests on *likelihood* rather than mere *possibility*,[125] is far less likely to erroneously condemn beneficial conduct.

E. Rebates

US and EU antitrust laws are also divided when it comes to the assessment of rebates (although, as noted above (Section I.C.2), EU law on rebates is very much up in the air after the ECJ's recent *Intel* ruling). The assessment of rebates is one of the more complicated areas of modern competition law.[126] 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,[127] 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.[128] 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.[129]

F. 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.[130]

Two parts of this piece of legislation are particularly striking and are in contrast to US antitrust law. First, the EU damages directive explicitly mandates that indirect purchases should have standing to claim damages.[131] This differs from the US approach, where the Supreme Court concluded in *Illinois Brick* that indirect purchasers could not bring antitrust damages claims under federal law.[132] Second,

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[124] *See, e.g.*, Lafontaine & Slade, *supra* note 55.

[125] *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).

[126] 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 J. COMP. L. & ECON. 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).

[127] *See* Kobayashi, *id.* at 147.

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

[129] *Intel*, ¶ 138.

[130] 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.

[131] *Id. at* Art. 12.

[132] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). It should be noted, however, that many US states do allow indirect purchaser suits under state antitrust law.

the US bars both defensive and offensive passing-on claims,[133] whereas the EU mandates that courts should consider both of these claims if they are raised by parties.[134]

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

> Permitting the use of pass-on theories… 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 seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.[135]

There is something to be said for this reticence to open up the floodgates to private antitrust litigation, and the approach is squarely in line with the US's error-cost framework, which seeks to minimize not only the cost of erroneous enforcement but also the costs of judicial administration.[136] 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.[137] 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 adjustments as new cases arise.

Although, as we discuss below, even the measured, US approach is imperfect, it is likely to be particularly important in the context of novel, nonstandard business arrangements. The question of the appropriateness of enforcement and adjudication in novel circumstances extends beyond the issues of standing and justiciability, of course. But the preliminary question of whether a case may be brought at all is crucially important.

The US Supreme Court was recently confronted with the question of the application of the *Illinois Brick* standing rule in the modern, digital-platform setting in *Apple v. Pepper*.[138] *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 was whether the *Illinois Brick* indirect purchaser doctrine prevented App Store end-users (i.e., device owners) from suing Apple for its alleged anticompetitive pricing structure imposed on app developers. Those in favor of applying *Illinois Brick* to prohibit suit by end-users asserted that it is the app developers themselves who are directly injured by the allegedly anticompetitive pricing, while end-users purchase apps from developers, not Apple, and receive only a pass-through injury (if any). Although Apple acts as a payment processor in these transactions, it is the app developers who set the price, and it is in the prior, direct relationship between app developers

[133] *See id.*; Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

[134] 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

[135] Illinois Brick Co. v. Illinois, 431 U.S. at 737.

[136] *See* Easterbrook, *supra* note 48, at 12-13.

[137] As then-Judge (now Justice) Breyer admonished, antitrust rules "must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification." Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990).

[138] Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

and Apple that Apple's allegedly anticompetitive pricing is imposed. Therefore, so the argument went, end-users do not have standing to bring an antitrust suit.

The Court, however, adopted a different stance. Instead, the Court essentially viewed Apple as a retailer of developers' apps, with a direct relationship to end-users who purchase apps directly from Apple through the App Store. The Court rejected Apple's argument that what matters is the transaction in which prices are set:

> [W]e fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct.[139]

However, the real—and missed—opportunity presented to the Court in this case was to consider how antitrust standing doctrine should apply to certain kinds of digital platforms, which present novel business arrangements. 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. Rather than a traditional vertical chain of purchases (as was the context in which *Illinois Brick* was decided), the relationship is better framed as a two-sided market in which *both* end-users and app developers stand in a direct relationship to the platform. Thus it could well have been argued that end-users *are* appropriate parties to bring antirust complaints against the App Store—not because *Illinois Brick* should be overturned, but because *Illinois Brick* should be amended to reflect the particular circumstances of this and similar cases.[140]

Importantly, this doctrinal evolution could have occurred 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 could have set the stage for considering the standing doctrine in *Apple v. Pepper* in light of two-sided markets theory. 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.[141] The full ramifications of this decision are not yet known, but the general consensus is that this means 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. But, by the same token, if both sides of a two-sided market are considered to be in the same market, both sides should also have standing to sue for alleged antitrust problems in that market.

In contrast to the Court's actual approach—which expanded standing but did not acknowledge the two-sided market context and the limitations on liability imposed by *American Express* in that context—such an approach would not necessarily lead to excessive administrative costs arising from the expansion of standing doctrine. Instead, while this approach to *Apple v. Pepper* would still 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* would temper the feared excesses this could bring by imposing a higher burden on plaintiffs. The end result might well have been a system that is

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[139] *Id.* at 1523.

[140] *See* Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. Amex *and the* Apple v. Pepper *Decision That Should Have Been*, 98 NEB. L. REV. 425 (2019).

[141] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

capable of addressing more claims, while also being calibrated to limit the risk of wrong-headed or abusive litigation and other administrative problems.

Although this was an important missed opportunity for the evolution of the US's measured, error-cost approach, it remains the case that the approach adopted by the Court—deeply rooted as it is in Illinois Brick's error-cost doctrine—is likely superior to the EU approach. In contrast to the US 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.

IV. Digital markets and the lure of discretionary regulation

As the above discussion demonstrates, modern digital platforms—and high-tech markets more generally—present complicated problems for the development of antitrust doctrine. But their central importance to the modern economy means that institutional mechanisms by which these nonstandard business arrangements are addressed is crucially important.

Policymakers around the globe are contemplating the adoption of regulations that would either complement or completely overhaul antitrust laws as they apply to the digital economy. Among others, legislators in the United States, the European Union, the United Kingdom and Australia have all put forward legislative initiatives to this end.[142] It is hard to imagine that the ASEAN nations will remain completely immune to this regulatory movement (though Singapore, for instance, has so far declined to move forward with digital markets regulation).[143]But the question of whether technology platforms should be regulated (and why) is a contentious one. Indeed, 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.

In that regard, the European approach to competition enforcement can shed important light on the benefits and downsides of digital market regulation. As the previous sections have explained, European competition law is much more reliant on structural presumptions and precautionary reasoning. It is also far more tolerant of Type I errors than US antitrust law. As a result of these features, European competition law is already very similar to the digital markets regulation that several critics have called for. Put differently, digital markets regulation is, in some sense, a natural endpoint of the European competition system.

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[142] *See* Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), *supra* note 7; Digital Markets Act, *supra* note 5; *New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated*, GOV.CO.UK (Nov. 27, 2020), https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated; Australian Competition & Consumer Commission, *Draft news media bargaining code* (Apr. 20, 2020), https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code.

[143] *See, e.g.,* Peter Walters & Rheya Shah, *Singapore on digital platforms: "nothing to see here"*, LEXOLOGY (Oct. 13, 2020), https://www.lexology.com/library/detail.aspx?g=8c5d7125-3bb9-4316-9e3a-b77dbc02cc8d.

However, as we explain below, Europe's recent (and ongoing) experience with applying competition law to digital markets (notably to Facebook and Google) is anything but a resounding success. It thus presents a *cautionary tale* for would-be legislators.

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. Digital markets regulation bringing ASEAN competition enforcement more in line with the European approach is thus unlikely to meaningfully improve competition and outcomes for consumers.

A. Data combination and the German Facebook decision

One of the most salient examples of digital markets regulation mimicking European competition enforcement relates to the combination, by online platforms, of data accrued from different sources. This issue was central to the German Bundeskartellamt's (Federal Cartel Office, or "FCO") Facebook decision[144], and it is now driving several regulatory initiatives. For instance, article 5 (a) of the draft European Digital Markets Act would notably bar so-called gatekeepers from "combining personal data sourced from [...] core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services."[145] Along similar lines, the United States House Judiciary's "Investigation of Competition in Digital Markets" highlights the threat to competition purportedly posed by this phenomenon, notably citing the German Facebook decision.[146]

However, the German Facebook decision is not the paragon of sound enforcement that would-be reformers make it out to be. Instead, it constitutes an 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 decision. The FCO's case 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). This explains why, on appeal, the FCO's case was temporarily suspended by the Higher Regional Court in Düsseldorf[147] (before the decision was reinstated by the German Federal Court of Justice[148]), and

[144] *See* Bundeskartellamt, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Feb. 6, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html (hereinafter, "Bundeskartellamt, 2019 Facebook Decision"). *See also,* 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.

[145] Digital Markets Act, *supra* note 5, at Art. 5 (a).

[146] *See* HJC DIGITAL COMPETITION REPORT, *supra* note 6, at 134, 207 & 210.

[147] OLG Düsseldorf, August 26, 2019, Case VI-Kart 1/19 (V).

[148] German Federal Court of Justice, June 23, 2020, KVR 69/19.

why many commentators responded to this defeat by calling upon the German legislative branch to pass more stringent regulation.[149]

The crux of the FCO's decision concerned Facebook's collection of users' personal data outside its site—data that is then merged with Facebook's user profiles.[150] The German competition agency asserted that Facebook abused its 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 users' Facebook account":

> [T]he Bundeskartellamt prohibited Facebook [...] from making the use of the Facebook social network by private users residing in Germany, who also use its corporate services WhatsApp, Oculus, Masquerade and Instagram, conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without the users' consent.[151]

Note that the allegation on its face was not that Facebook foreclosed other sites from amassing this external data, nor that its data collection led to anticompetitive harm (e.g., supracompetitive prices) for consumers. Rather, its allegation was that Facebook's terms of service authorizing this data collection infringed European consumer protection law, in this case the GDPR, and that this constituted an abuse of dominance because it was enabled by Facebook's market power (the Higher Regional Court in Düsseldorf forcefully rejected the latter part of this assessment).[152]

The German competition authority thus attempted 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 asserted that collecting data from *outside* of Facebook impeded competition from other social networks. In reaching this conclusion, 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:

> In addition to that there is a causality in terms of the outcome as Facebook's conduct linked to its market dominance, which was the subject of the proceedings at hand, impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts. It has thus gained a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook's market power towards end customers.[153]

The effect of this is ultimately to condemn Facebook's success. The FCO essentially asserted that competitors' effective use of *external* data was thwarted by the fact that they did not have comparable

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[149] *See, e.g.*, Natasha Lomas, *Facebook succeeds in blocking German FCO's privacy-minded order against combining user data*, TECHCRUNCH (Aug. 26, 2019), https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/.

[150] *See* Bundeskartellamt, 2019 Facebook Decision, *supra* note 144.

[151] *Id.*

[152] *Id. See also*, OLG Düsseldorf, August 26, 2019, Case VI-Kart 1/19 (V).

[153] Bundeskartellamt, 2019 Facebook Decision, *supra* note 144.

internal data with which to combine it. But, of course, Facebook obtained 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 Facebook put an end to this practice merely because it gave it a leg up over its competitors. And yet, that is precisely what the authority seems to have suggested—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 made 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 prevent firms from developing these unique resources (or to require competitor access to them) would be to undermine completely the competitive market forces that antitrust is supposed to support. And yet the FCO did not—and could not—distinguish these valuable types of capital from that of access to a large pool of self-generated consumer data.

The FCO also alleged that Facebook's "exploitative business terms" constitute an antitrust violation because "Facebook as a dominant company has bargaining power over its users and is in a position to impose far-reaching data processing conditions, which users cannot prevent as they have no additional control mechanisms.."[154] 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. As its preliminary assessment in the case made clear:

> According 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.[155]

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"[156]—a violation, the FCO asserted, of data protection law. In this way the FCO used data protection law as a foothold to build a convoluted antitrust case that ultimately amounted 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 basically made a case that Facebook should be subject to competition law penalties for possessing more data than the FCO thought was appropriate. Perhaps these were violations under other laws—data security or

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[154] *Id.* at 1.

[155] 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.

[156] *Id.* at 4.

privacy laws, e.g.—but nothing in the FCO's decision suggested anything recognizable in the economic literature as an abuse of dominance.

Widely adopting the type of approach that the FCO employed in its Facebook decision – be it through regulation or actual competition law – would dramatically expand the scope of competition enforcement. 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.[157]

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 polices at the very *expense* of competition.

And, although this was 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 discussed above (see Section I.D) 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.[158] 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 commentators seem to want for antitrust, doing so entails enormous risk and the likely subordination of economy-expanding governance to idiosyncratic political preferences. Even in states where such political preferences are paramount, there is surely great value in promoting economic expansion alongside those political preferences. Antitrust need not be itself political for a government to impose its policies through direct regulation or legislation, and insulating it from those policies offers the prospect of maintaining growth-oriented economic decision-making alongside a country's political aims.

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[157] *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/.

[158] *See* "Executive Branches," EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON (last visited Mar. 1, 2021), http://www.europarl.europa.eu/unitedstates/en/eu-us-relations/executive-branches ("[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).").

B. Self-preferencing and the Google Shopping case

Much of the same can be said about self-preferencing and the European Commission's *Google Shopping* decision.[159] The basic claim in the case was that Google unfairly manipulated its search engine algorithms to benefit itself and to harm competition. This wholesale condemnation of self-preferencing is echoed by both the draft Digital Markets Act[160], in the EU, and the House Judiciary's "Investigation of Competition in Digital Markets", in the US.[161]

However, the European Commission's *Google Shopping* case neatly illustrates the fundamental problems of this hostile approach to self-preferencing.[162] In its decision, the European Commission concluded that "Google does not position and display in the same way results from Google's comparison shopping service and from competing comparison shopping services."[163] 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 of 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 asserted—with far less robust evidence—that this traffic pattern impaired or even destroyed these sites.[164] 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."[165]

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 *anticompetitive effects*. 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."[166]

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

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[159] 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.

[160] Digital Markets Act, *supra* note 5.

[161] HJC DIGITAL COMPETITION REPORT, *supra* note 6.

[162] 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.

[163] *Id.* at ¶ 662.

[164] *Id.* at ¶ 589-95.

[165] *Id.* at ¶¶ 596, 600-07.

[166] *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-trustbustermargrethe-vestager-championing-consumers-or.

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"[167]—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.

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.[168] 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*.[169]

Competitors like Foundem (one of the chief instigators of the EU complaint against Google) put 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.

> The problem with the superficial analysis that assumes harm from the diminution of traffic to independent competitors is this: Protecting complementors from the inherent risk in a business model in which they are entirely dependent upon another company with which they have no contractual relationship is at least as likely to encourage excessive risk taking and inefficient overinvestment as it is to ensure that investment and innovation are not too low.[170]

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

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[167] 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.

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

[169] *See id*. at 440-41, 448.

[170] Geoffrey A. Manne, *Against the vertical discrimination presumption*, CONCURRENCES N° 2-2020, Art. N° 94267 (May 2020) at 3.

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

The upshot is that efforts to entirely prohibit self-preferencing by online platforms are unmoored from mainstream economic reasoning. Such a prohibition would also greatly expand the scope for politically motivated intervention throughout the economy, as every decision by a vertically integrated platform will almost inevitably prove detrimental to *some* of its downstream rivals. In short, the *Google Shopping* decision shows that European competition law is not the poster child that proponents of digital regulation and heightened competition enforcement make it out to be. Instead, the decision provides further evidence that removing existing barriers to competition enforcement in the digital economy – which for many competition regimes will mean moving closer towards the European model – is liable to harm consumers.

V. 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 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.[172] 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.

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[171] *See* Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151 (2012).

[172] *See especially* Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 21 (2005); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77; Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143 (1997).

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

One of the key arguments of those who point to the excessive concentration of markets is that economic power leads to political power.[173] But this purported causal relationship has no basis in reality. As Henry G. Manne noted as early as 1974:

> 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.[174]

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.[175]

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:

> 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 antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher

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[173] *See, e.g.*, Matt Stoller, *How Democrats Killed Their Populist Soul*, THE ATLANTIC (Oct. 24, 2016), https://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/504710/ ("Restoring political stability means structuring society's public and corporate institutions so they can be governed by human beings and communities. . . . And it means understanding that protecting competitive markets and preventing concentrations of power are essential components of democracy.").

[174] 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, *available at* https://laweconcenter.org/wp-content/uploads/2018/05/hgm-testimony_on_indust_reorg_act_1974-2018-05-03.pdf.

[175] 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[, for example,] have received from the antitrust laws is only one example." *Id.* There are, of course, countless other examples in every country with an antitrust law.

> prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete.[176]

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.[177]

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.[178] The Neo-Brandeisian movement shares much in common with those who pushed for the Industrial Reorganization Act in the US, in the early nineteen-seventies. 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."[179] 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 William Baumol and Janusz Ordover observe, antitrust law is inherently prone to rent-seeking, especially protectionism.[180] 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).[181] 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 enforcers and politicians to resist calls to *restrain* enforcement

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[176] Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 585-86 (2019).

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

[178] *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.

[179] 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), https://truthonthemarket.com/2017/09/22/the-antitrust-laws-are-not-some-meta-legislation-authorizingwhatever-regulation-activists-want-labor-market-edition/.

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

[181] *Id.* at 250-51.

precisely to further those goals? A significant and costly consequence of the increased politicization of antitrust is thus the expansion of antitrust exemptions—and thus the expansion of the sphere of economic activity to which antitrust does not apply at all. When political bases for the assessment of antitrust are made more powerful, both the effort and the ability to obtain exemptions will be massively increased as the persuasiveness of the claimed justifications for those exemptions, which already encompass non-economic goals,[182] will be greatly enhanced. Paradoxically, the result may well be an economy with even *more* concentration because the exceptions could subsume the rules.

All of which of course highlights the fundamental, underlying problem: *To the extent that antitrust is more political and less reliant on economic science, the predictable outcome will be less democratic, more politically determined results*—precisely the opposite of what most proponents of European-style antitrust claim to want.

B. The lack of support for claims that concentration is harmful

The popular narrative has it that lax, US-style antitrust has led to substantially increased concentration,[183] strangling the economy,[184] deterring economic dynamism,[185] harming workers,[186] and saddling consumers with greater markups[187] in the process. But the assertion that increased market concentration has been driven by anticompetitive conduct and that it has, in turn, resulted in economic harm is not supported by the evidence or empirical research.

The popular narrative derives from a widely reported literature that has documented increasing *national* product market concentration.[188] There are good reasons to be skeptical of the national concentration and market power data on their face in the first place.[189] But even more important, the

[182] *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.

[183] The narrative has its fullest, and perhaps most influential, discussion in THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (Harvard University Press, 2019).

[184] David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARV. BUS. REV. (Apr. 2018), https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy.

[185] Ryan A. Decker, John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.*, 86 EUR. ECON. R. 4, 5 (2016) *available at* https://www.sciencedirect.com/science/article/pii/S0014292116300125?via%3Dihub.

[186] Adil Abdela & Marshall Steinbaum, *The United States Has a Market Concentration Problem*, ROOSEVELT INSTITUTE 8 (2018), *available at* https://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf#page=8; David Autor, David Dorn, Lawrence F Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020).

[187] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020).

[188] *See, e.g.*, Germán Gutiérrez and Thomas Philippon, *Declining Competition and Investment in the U.S.*, NBER Working Paper No. 23583 (2017), *available at* https://www.nber.org/papers/w23583; Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020).

[189] A number of papers simply do not find that the accepted story regarding the vast size of markups and market power is accurate. Among other things, the claimed markups due to increased concentration are likely not nearly as substantial as commonly assumed. *See, e.g.*, James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements*, Stigler Center Working Paper (Feb. 2018), *available at* https://pdfs.semanticscholar.org/8059/7e4e80edebd66d3eef57e28d324623ad9ee0.pdf; *see also* WORLD ECONOMIC

narrative that purports to find a causal relationship between these data and the depredations mentioned above is almost certainly incorrect.

To begin with, the assumption that "too much" concentration is harmful assumes both that the structure of a market is what determines economic outcomes, and that anyone knows what the "right" amount of concentration is. But, as economists have understood since at least the 1970s (and despite an extremely vigorous, but futile, effort to show otherwise), market structure is *not* outcome determinative.[190]

> Once perfect knowledge of technology and price is abandoned, [competitive intensity] may increase, decrease, or remain unchanged as the number of firms in the market is increased. . . . [I]t is presumptuous to conclude . . . that markets populated by fewer firms perform less well or offer competition that is less intense.[191]

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. Yet 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*."[192]

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

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OUTLOOK, APRIL 2019 GROWTH SLOWDOWN, PRECARIOUS RECOVERY, INTERNATIONAL MONETARY FUND (Apr. 2019), *available at* https://www.imf.org/en/Publications/WEO/Issues/2019/03/28/world-economic-outlook-april-2019. Another study finds that profits have increased but are still within their historical range. *See* Loukas Karabarbounis & Brent Neiman, *Accounting for Factorless Income*, NBER Working Paper No. 24404 (June 2018), *available at* https://www.nber.org/papers/w24404. And still another shows decreased wages in concentrated markets but also that local concentration has been *decreasing* over the relevant time period. *See* Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility,* U.S. Census Bureau Working Paper 2018-10 (Sep. 2018), *available at* https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf.

[190] *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973).

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

[192] 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.").

> 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.'"[193]

This view is not an aberration, nor has it been challenged by subsequent research. Indeed, a recent paper by three prominent, pro-enforcement economists and critics of the current US regime reaches essentially the same conclusion:

> In short, there is no well-defined "causal effect of concentration on price," but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration. . . .
>
> Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates.[194]

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. Nor is there 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—an inference that, as noted, simply cannot be sustained. The fact is that economists know very little about the relationships among market structure, firm size, competition, profits, prices, entrepreneurship, and innovation.[195] Market shares and structural presumptions are not capable of predicting competitive effects and, thus, of specifying optimal policy choices.

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

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

[194] Steven Berry, et al., *supra* note 53, at 5-6, *See also* Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, John M. Olin Program in L. & Econ., Stanford Law Sch. Working Paper 24 (Sep. 2006) ("The Chicago identification argument has carried the day, and structure-conduct-performance empirical methods have largely been discarded in economics.").

[195] *See, e.g.,* Richard Schmalensee, *supra* note 192; Tim Bresnahan, *supra* note 192. On the relationship between market structure and innovation in particular, see 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.")

them. Moreover, such an analysis is likely to lead to decisions that *reduce* rather than *promote* consumer welfare and the public interest.

1. *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. The standard bearer of this literature is the recent merger retrospective study by Professor John Kwoka.[196] Unfortunately, Professor Kwoka's study—and the econometric literature of which it is a part—cannot bear the weight placed upon it.

Professor Kwoka's study is a meta-analysis of some 60 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.[197]

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. 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.[198]

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.[199]

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

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[196] John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review*, 81 ANTITRUST L.J. 837 (2017); *see also* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 158 (2015).

[197] 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*, 82 ANTITRUST L.J.361 (2018). *See also* Michael Vita, *Kwoka's Mergers, Merger Control, and Remedies: Rejoinder to Kwoka*, 28 RESEARCH IN L. & ECON. 433 (2018).

[198] Vita & Osinski, *id.* at 368.

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

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.[200]

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.[201] The study—whose findings were relied upon by the European Court of Justice in its *CK Telecoms* ruling[202]—finds 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.[203]

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.[204]

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:

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[200] *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 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").

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

[202] See *CK Telecoms UK Investments Ltd v European Commission*, *supra* note 46, para 280. ("[I]t is apparent from the evidence submitted during the administrative procedure that, while a positive correlation may be established between concentrations which reduce the number of operators in the mobile telecommunications sector from four to three and result in price increases, a correlation may also be established between those concentrations and an increase in network investments by mobile network operators.").

[203] Genakos, et al., *supra* note 201, at 49.

[204] *Id.* at 84.

> [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.[205]

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."[206] 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,"[207] these are merely "possibility theorems," the application of which to any particular circumstance requires far more empirical evidence than casually constructed concentration ratios.

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 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."[208] 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.'"[209]

VI. Conclusion: Insights for ASEAN policymakers

As we have argued throughout this paper, the question of what constitutes the ideal competition regime is complex. While commentators in academic and policy circles often cite the European model as paragon of efficient competition enforcement, this paper suggests that such an assertion is far from self-evident.

Indeed, the light-touch approach that has iteratively emerged from the US judiciary has numerous strengths that are all too often ignored by scholars. As we have explained, these notably include: a single unifying goal that has led to a more consistent body of law with, arguably, fewer contradictions; an error-cost framework and, largely, effects-based analysis that enable US antitrust law to

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[205] *Id.* at 85.

[206] Baker & Bresnahan, *Economic Evidence in Antitrust*, *supra* note 194, at 26.

[207] *Id.*

[208] Whinston, *Antitrust Policy Toward Horizontal Mergers*, *supra* note 199, at 2433.

[209] Phillips, *Market Concentration and Performance*, *supra* note 193, at 1105.

rapidly adapt to evolving economic findings; and a regime that is less vulnerable to the political whims of antitrust agencies, notably because they are afforded less discretion by courts.

In addition to these high-level strengths, the US system also has two *features* that are often, wrongly, portrayed as weaknesses in policy discussions. For a start, US antitrust law has proved a much weaker tool for policymakers to attack the conduct of large tech companies. However, as we have shown, those "big tech" cases that have been enabled by the European competition rules are anything but models of impartial enforcement. The fact that US antitrust rules have largely prevented plaintiffs from bringing effective cases of this sort might thus be a strength rather than a weakness of the US model of antitrust enforcement. To be more precise, our assertion here is not that the behavior of Big Tech firms is *unquestionably* beneficial to society, but rather that competition enforcement is likely the wrong tool to address the sorts of antitrust-irrelevant issues that were alleged in the European Facebook and Google.[210] In short, the European approach to competition enforcement in digital markets is expedient, buts its costs—notably in the form of excessive regulatory discretion and an untethering from economic analysis—often lead authorities towards pyrrhic victories. Much of the same applies to claims that US antitrust law has been ineffective at preventing the consolidation of industries.

Of course, while these advantages of the US system are certainly worth considering, they are not dispositive. In that respect, it is worth questioning whether the idiosyncrasies of the ASEAN economy are better suited to the EU approach, the US approach, or something else. In that regard, we see at least three important reasons why the US model might indeed serve as a useful blueprint to further develop the burgeoning ASEAN competition regimes.

A. Growth is key

Boosting growth is perhaps the most important argument in favor of implementing a more restrained competition regime—such as that which exists in the US—throughout the ASEAN nations. One of the important objectives of ASEAN integration, as well as the adoption of competition laws more generally, is to promote economic growth and innovation. As the ACAP makes clear:

> These goals are designed to allow ASEAN to **work towards the overarching vision of a competitive, innovative, and dynamic ASEAN** with effective and enforceable competition policies and laws.[211]

Many ASEAN nations may not have the means, or the inclination, to provide their competition authorities with similar resources to those of the European Commission. Given this resource constraint, it is essential that these nations focus their enforcement efforts on those areas that provide the highest return on investment, notably in terms of increased innovation.

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[210] *See* Randal C. Picker, *Prepared Statement of Randal C. Picker James Parker Distinguished Service Professor of Law The University of Chicago Law School Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law Investigation into the State of Competition in the Digital Market Place* (May 11, 2020), *available at* *https://picker.uchicago.edu/PickerHouseStatement.100.pdf*. ("For me, that means that we might want to look outside of traditional antitrust for solutions. And I think that the issues posed with regard to digital advertising and newspapers, in how smartphone operating system ecosystems operate and how Amazon operates its platform are not easily addressed in anything like U.S. antitrust law."). *See also*, Dirk Auer, *The Limits of Australia's Digital Platforms Inquiry,* CPI OCEANIA COLUMN NOV. 2019, 1 (2019).

[211] ACAP, *supra* note 1.

This raises an important point. A recent empirical study by Ross Levine, Chen Lin, Lai Wei and Wensi Xie argues that competition enforcement does indeed promote innovation. However, one of the study's findings is more surprising: unlike other areas of competition enforcement, the strength of each jurisdiction's "abuse of dominance" intervention does *not* correlate with increased innovation.[212] Furthermore, jurisdictions that allow for so-called "efficiency defenses" in unilateral conduct cases also tend to produce more innovation.[213] The authors thus conclude that:

> Dividing Abuse of Dominance into its components highlights a potential explanation for why the overall Abuse of Dominance index is not strongly correlated with innovation: Exploiting the dominant position created by a patent might be one mechanism that firms use to maximize the returns from innovation, so that limiting such "abuse" could reduce investment in innovation and hence future patenting. From the perspective of maximizing patent-based innovation, therefore, a legal system that allows firms to exploit their dominant positions based on efficiency considerations could boost innovation.[214]

If these findings are correct, then policing unliteral conduct infringements should likely be lower on authorities' priority list than other areas of enforcement. This is particularly true for the ASEAN trade bloc, given its stated ambition to strengthen the IP regimes of member states.[215] Indeed, competition enforcement, particularly in unilateral conduct cases, often conflicts with IP protection.[216] This tends to conform with the US model of enforcement where successful (attempted) monopolization cases are much rarer than in the EU.

These findings also cut in favor of another facet of US antitrust enforcement. While US antitrust law is resolutely focused on maximizing consumer welfare (i.e. increased economic output),[217] European enforcers often pay more attention to the distributional aspects of competition policy. This choice appears less than desirable in light of the aforementioned study, which suggests that reducing monopoly rents through competition policy may potentially lead to reduced innovation.

Another important consideration for ASEAN policymakers is that the European model of competition enforcement is closer to precautionary principle-type reasoning than the error-cost framework endorsed by US courts.[218] ASEAN policymakers thus need to decide whether the tail risks that might potentially stem from laxer competition enforcement—notably in digital markets—justify the EU's precautionary approach. If not, then the areas of EU competition enforcement that resort to precautionary reasoning needlessly harm growth with no countervailing benefit to consumers.

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[212] Ross Levine, Chen Lin, Lai Wei and Wensi Xie, *Competition Laws and Corporate Innovation*, NBER Working Paper No. w27253 (May 2020) at 30, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615449.

[213] *Id.* at 31.

[214] *Id.* at 30.

[215] *See, e.g.*, THE ASEAN INTELLECTUAL PROPERTY RIGHTS ACTION PLAN 2016-2025: MEETING THE CHALLENGES OF "ONE VISION, ONE IDENTITY, ONE COMMUNITY" THROUGH INTELLECTUAL PROPERTY, Jan 1, 2016, at 1 ("Strategic Goal 1: A more robust ASEAN IP System is developed by strengthening IP Offices and building IP infrastructures in the region.").

[216] *See, e.g.*, Donna M Gitter, *The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine*, 40 AM. BUS. L.J. 299 (2002) ("The legal action among IMS and its rivals NDC and AzyX illustrates the inherent tension between competition law and intellectual property rights.").

[217] *See supra,* Section I.A.

[218] *See supra,* Section I.B.

In short, the US antitrust law's focus on consumer welfare and relatively limited enforcement in the area of unilateral conduct may be good match for ASEAN nations that want competition regimes which maximize innovation under relatively important resource constraints.

B. Heterogeneous economic and political conditions

A second important observation is that members of the ASEAN trade bloc have incredibly diverse economic and political profiles. These divergences are neatly summarized in a report published by McKinsey & Company:

> ASEAN is a diverse group. Indonesia represents almost 40 percent of the region's economic output and is a member of the G20, while Myanmar, emerging from decades of isolation, is still a frontier market working to build its institutions. GDP per capita in Singapore, for instance, is more than 30 times higher than in Laos and more than 50 times higher than in Cambodia and Myanmar; in fact, it even surpasses that of mature economies such as Canada and the United States. The standard deviation in average incomes among ASEAN countries is more than seven times that of EU member states. That diversity extends to culture, language, and religion. Indonesia, for example, is almost 90 percent Muslim, while the Philippines is more than 80 percent Roman Catholic, and Thailand is more than 95 percent Buddhist. Although ASEAN is becoming more integrated, investors should be aware of local preferences and cultural sensitivities; they cannot rely on a one-size-fits-all strategy across such widely varying markets.[219]

A harmonized ASEAN competition regime would need to function in a variety of economic and political contexts. In turn, these environments affect the respective costs and benefits of the European and US models of competition enforcement.

Take the discretion afforded to antitrust authorities. Giving authorities wide powers with limited judicial oversight might be, relatively, less problematic in countries where government has a track record of self-restraint. However, the consequences of regulatory discretion may be far more dramatic in jurisdictions where authorities routinely overstep the mark and where the threat of corruption is very real.

While this is an assessment that only the ASEAN member states can make, a rapid survey does suggest that some of the ASEAN nations are at higher risk of misapplying the powers that accompany the European model of competition enforcement. For instance, the "ease of doing business" index published by the World Bank suggests that countries like Singapore and Malaysia have particularly strong traditions of letting businesses operate without excessive government interference (ranking n° 2 and 12 in the world, respectively).[220] The human freedom index published by the Cato Institute echoes these findings, with both countries ranking very highly in terms of economic freedom.[221]

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[219] Vinayak HV, Fraser Thompson & Oliver Tonby, *Understanding ASEAN: Seven things you need to know*, MCKINSEY & COMPANY (May 1, 2014), https://www.mckinsey.com/industries/public-sector/our-insights/understanding-asean-seven-things-you-need-to-know.

[220] WORLD BANK GROUP, DOING BUSINESS 2020, *available at* http://documents.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf.

[221] Ian Vásquez and Tanja Porčnik, *The Human Freedom Index 2019: A Global Measurement of Personal, Civil, and Economic*

However, other ASEAN nations, including Laos and Myanmar, for example, rank much less favorably. Further increasing the government's power with wide-reaching competition laws might merely compound existing problems in these cases.

Outright corruption is also a real problem in several ASEAN nations. For instance, a piece recently published in the Financial Times concluded that:

> Much less impressive is Asean's record dealing with corruption, that other "invisible enemy". With the exception of Singapore, Brunei and Malaysia—whose 1MDB scandal has still cast a cloud—member countries languish around the middle (Indonesia, Vietnam, Thailand) or in the bottom half (the Philippines, Laos, Myanmar, Cambodia) of Transparency International's Corruption Perception Index.[222]

At a more granular level, eyebrows were raised in Indonesia when Nadiem Makarim (the CEO and co-founder of Gojek, one of the most successful online platforms in Indonesia) joined the cabinet of Joko Widodo, the country's current president.[223] While there is nothing inherently problematic about corporate leaders entering the political sphere, it is more worrying when it occurs in countries with weak institutions that are not sufficiently shield from outside interference—for instance by strong judicial oversight.

The specter of corruption thus militates in favor of establishing competition regimes with sufficient checks and balances, so as to prevent competition authorities from being captured by industry or political forces. In that regard, the US model, along with the consumer welfare standard, seems far more robust. Indeed, as we have argued throughout this paper, the US model limits competition authorities' discretion by subjecting their decisions to a single unifying standard, rather than allowing them to justify idiosyncratic decisions by choosing from a plethora of competing goals.

Much the same can be said about the resources that antitrust authorities have at their disposal. For example, if one looks at government spending as a percentage of GDP, it is apparent that the ASEAN nations have markedly different profiles.[224] At one end of the spectrum, countries like Vietnam and Brunei have government expenditures that reach roughly 30% of GDP—not that far from some Western nations. However, other countries, like Singapore, Indonesia, and Laos have much lower government spending. These differences are even starker when one accounts for the fact that all of these countries have very different GDP levels to start with: Singapore is one of the richest countries in the world, Laos is one of the poorest.

These disparities have implications for competition policy. The ASEAN nations exhibit extremely diverse policies regarding the role of government in the economy. Put simply, some of the ASEAN nations seem ill-suited to the far-reaching technocracy that almost inevitably flows from adopting the European model of competition enforcement. Others might simply not have sufficient resources to

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Freedom (2019), *available at* https://www.cato.org/sites/cato.org/files/human-freedom-index-files/cato-human-freedom-index-update-3.pdf.

[222] *See* Brook Horowitz, *How Asean countries can turn the tide on corruption*, FINANCIAL TIMES (Apr. 24, 2020), https://www.ft.com/content/ef7426be-7500-11ea-90ce-5fb6c07a27f2.

[223] *See* Stefania Palm, *Gojek co-founder leaves to join Indonesia's new cabinet*, FINANCIAL TIMES (Oct. 21, 2019), https://www.ft.com/content/5620ae50-f3c4-11e9-b018-3ef8794b17c6.

[224] IMF WORLD ECONOMIC OUTLOOK DATABASE (2019).

staff agencies that could, satisfactorily, undertake the type of far-reaching investigations that the European Commission is famous for.

In short, many the ASEAN nations might find it optimal to focus their limited enforcement resources on the most harmful categories of anticompetitive conduct, widely accepted to be cartels and mergers to monopoly. The more permissive and politicized EU model is less likely to lead to this outcome, however.

C. Different legal traditions and competition regimes

The implications of diversity apply as well when it comes to the legal traditions of the ASEAN nations, including their competition regimes. In short, there are stark differences between the laws in place in each ASEAN member country, likely more so than is the case between EU member states or US states. These differences tend to cut in favor of minimal—but achievable—harmonization rather than broad reforms that would be unworkable in many of the ASEAN nations.

The most obvious difference concerns the widely differing traditions of competition enforcement found throughout the ASEAN trade bloc. A quick snapshot of competition enforcement throughout the 2000-10 decade brings these differences to light. According to the Competition Law Index (CLI).[225] some ASEAN countries (Brunei and Cambodia) had no competition enforcement before 2010, while others (notably Singapore) had particularly strong regimes:

	2000	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*
Brunei	0	0	0	0	0	0	0	0	0	0	0
Cambodia	0	0	0	0	0	0	0	0	0	0	0
Indonesia	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.655172
Laos	0	0	0	0	0.390805	0.390805	0.390805	0.390805	0.390805	0.390805	0.390805
Malaysia	0	0	0	0	0	0	0	0	0	0	0.517241
Myanmar	0	0	0	0	0	0	0	0	0	0	0
Philippines	0.54023	0.632184	0.735632	0.735632	0.735632	0.735632	0.701149	0.701149	0.701149	0.701149	0.701149
Singapore	0.839081	0.54023	0.666667	0.793103	0.793103	0.804598	0.781609	0.804598	0.804598	0.804598	0.574713
Thailand	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161	0.678161
Vietnam	0	0	0	0	0	0.586207	0.586207	0.586207	0.586207	0.586207	0.586207

Figure 1: ASEAN nations' CLI score (max score: 1) by year (higher scores indicate stronger competition enforcement).

[225] Anu Bradford & Adam S. Chilton, *Competition law around the world from 1889 to 2010: The competition law index*, 14 J. Competition L. & Econ. 393-432 (2018).

The above numbers can easily be explained. Brunei enacted its first competition law in 2015,[226] as did Myanmar,[227] while Cambodia is still drafting its competition legislation.[228] At the other end of the spectrum, Singapore's competition law reform of 2005, which created the Competition Commission of Singapore, intended to mimic the European model.[229] This might explain its particularly high subsequent CLI ranking.

What do these numbers tell us about efforts to harmonize competition law throughout the ASEAN Economic Community? For one thing, it is illusory to think that there is currently a single competition regime that could perfectly fit the diverse needs of all the ASEAN nations. It will take at least years, and probably decades, for countries that do not yet have competition laws in place to develop the type of sophisticated regimes that prevail in the US, the EU, or Singapore. More to the point, any harmonization should likely start with the most uncontroversial areas of enforcement—which likely also exhibit the highest returns relative to enforcement costs (areas like cartels and horizontal mergers)— rather than more complex efforts to police unilateral conduct cases. These two factors tend to cut in favor of harmonized competition laws that are closer to the US model, where unilateral conduct and vertical agreement cases are much less common.

At a more general level, the ASEAN nations also exhibit very different legal traditions. Indeed, some of the ASEAN legal regimes are firmly anchored in the common law tradition (e.g., Singapore), while others have civil law roots (e.g., Indonesia), and others still exhibit a diverse range of legal influence (the Philippines, for instance, has Spanish legal roots with civil and common law influences).[230]

Although we do not want to overstate the impact of these differences, it seems reasonable to assume that each of the ASEAN nations may have different views about the way in which their competition regimes should evolve, whether through iteration by the judicial branch or by continuing legislative developments. In our opinion, this militates in favor of a minimal, standards-based initial harmonization, leaving it up to each nation to further develop its competition enforcement regime in the manner that it sees fit. Arguably this approach conforms better to the US model—with an overarching and unspecified adherence to a discernible economic principle (the consumer welfare standard)—than to the EU's far more detailed and multi-faceted regime.

The US regime's adherence to the consumer welfare standard—informed by economic theory, empirical evidence, and the error-cost framework—aligns legal theories of harm with economic theories, and introduces rigor and predictability into the antitrust enforcement process. This approach provides a coherent framework for analyzing allegedly anticompetitive conduct—and specifically for distinguishing between procompetitive and anticompetitive conduct—without prejudging specific market structures or mandating particular doctrinal rules. The result is overall coherence of outcomes, but a flexibility in implementation that would likely serve the diverse ASEAN countries well.

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[226] BRUNEI COMPETITION ORDER (2015), *available at* https://asean-competition.org/file/pdf_file/Competition%20Order%202015.pdf.

[227] CPI, "Cambodia To Finalize Antitrust, Competition Draft Law", CPI (Apr. 15, 2020), *available at* https://www.competitionpolicyinternational.com/cambodia-to-finalize-antitrust-competition-draft-law/.

[228] Thou Vireak, *Gov't set to finalise antitrust, competition draft law*, THE PHNOM PENH POST (Apr. 15, 2020), https://www.phnompenhpost.com/business/govt-set-finalise-antitrust-competition-draft-law.

[229] *See* Bradford, *supra* note 14.

[230] Nobuyuki Yasuda,, *Law and Development in ASEAN countries*, ASEAN ECON. BULL. 148 (1993).

D. Summation

To summarize, we conclude that the ASEAN trade bloc has a number of features that cut in favor drawing at least some inspiration from US antitrust law in those areas where it differs from European law. For a start, as we have argued, the US approach to antitrust law would grant enforcement authorities less discretion in antitrust decisions. This, in turn, would limit the extent to which they could subsequently politicize antitrust enforcement. Along similar lines, the more restrained US approach is less demanding on state resources. A second important strength is that the US model might provide a better middle-ground between the very different traditions of competition enforcement that prevail throughout the ASEAN countries. This seems to be less true of European competition enforcement which relies much more heavily on centralized enforcement by a strong competition authority. Finally, tentative empirical evidence suggests that those areas where US antitrust enforcement is weaker than in the EU are also those that appear to offer a lower return on investment. ASEAN policymakers could thus reap many of the benefits that competition policy provides while avoiding some of the unnecessary costs by, at least partly, emulating the US regime.