# Another Take on the Relevant Welfare Standard for Antitrust

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As Robert Bork explained in *The Antitrust Paradox*:[1]

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals. Everything else follows from the answer we give . . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive antitrust rules.[2]

There is widespread agreement today that Judge Bork's assessment was correct. Antitrust policy cannot be coherent unless its goals are understood. The problem, however, is that there remains no consensus on what those goals should be.

In this article, I identify a variety of standards that have been proposed since *The Antitrust Paradox* was published. I analyze some of their various strengths and weaknesses and propose a standard for further study and analysis: that the goal of antitrust is to protect the competitive process, with anticompetitive effects best analyzed through the impact on market output.

## Welfare Standards

The Supreme Court has never articulated a specific welfare standard. But several different ones have been proposed. In most antitrust cases, the choice of welfare standard really does not matter, as the same results will hold regardless of the standard applied. The instances in which the selection matters, however, can be quite important, and the standard chosen invariably says much about the decision maker's basic philosophy of antitrust. The most significant include the following:

***Total Welfare.*** "Total" welfare looks to measure the effect of a practice or transaction on the economic welfare of all participants in a market, including both producers and consumers. Put differently, it "refers to the aggregate value that an economy produces, without regard for ways that gains or losses are distributed."[3] Among the many proponents of the total welfare standard are Professors Roger Blair and Daniel Sokol[4] and senior government economist Kenneth Heyer.[5]

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1 ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

2 *Id.* at 50.

3 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 114a (4th ed. 2014).

4 Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013); *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012).

5 Kenneth Heyer, *Welfare Standards & Merger Analysis: Why Not the Best?* (EAG Discussion Paper 06-8 U.S. Dep't of Justice Mar. 2006); *see also* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 690–98 (2010); Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677 (1988).

Most observers also have understood Judge Bork's references to "consumer welfare" to refer to a total welfare standard,[6] but his approach is better understood somewhat differently as a standard under which the goal is allocative efficiency to the extent it does not interfere significantly with productive efficiency.[7]

***Consumer Welfare.*** The consumer welfare standard equates with consumers' surplus in economic terms—technically, the difference between what consumers actually pay and what they would be willing to pay. To illustrate the principle, consider a merger of rival firms that both reduces their costs and gives them market power.[8] If costs are reduced but prices to consumers still rise, the merger is viewed as benign under a total welfare standard if the cost reduction is greater than the price increase. But the same merger will fail the consumer welfare standard unless the cost decrease is such that prices to consumers remain the same or fall. The gains to the merging producers do not count; only the effect on consumer prices is relevant. This consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies,[9] and is supported by many observers including, most preeminently, Professor Steven Salop.[10]

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***Consumer Choice.*** The relatively new "consumer choice" standard is based on the idea that the "range of options [available to consumers should not] be significantly impaired or distorted by anticompetitive practices."[11] The standard is not based on any specified number of options, and does not forbid all reductions in choice, but focuses instead on "conduct that artificially limits the natural range of choices in the marketplace."[12]

***Multiple Goals.*** For much of the first century of U.S. antitrust enforcement, the courts made clear that at least one purpose of the antitrust laws was the protection of small business—the "small dealers and worthy men" praised in *Trans-Missouri*[13] and the "small, locally owned businesses" of *Brown Shoe*.[14] Following these precedents, many observers concluded that antitrust's goals included preserving a deconcentrated industry structure, dispersing economic power, pro-

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6 *E.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 437–38 (2009).

7 BORK, *supra* note 1, ch. 5. Gregory Werden describes Bork's view as "general equilibrium social welfare": "General equilibrium social welfare relates only to actual consumers; it is the welfare of the people who make up the society. In contrast, partial equilibrium consumer surplus does not directly relate to consumers in most antitrust cases because businesses most often are the sellers and the buyers in the relevant market." Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 723 (2014). Werden provides a cogent explanation of Bork's use of the phrase "consumer welfare," and why it was not misleading. *Id.* at 718–23.

8 For the classic exposition of this example, see Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

9 *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 114b; U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010).

10 *E.g.*, Steven A. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOYOLA CONSUMER L. REV. 336 (2010).

11 Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 503 (2001).

12 *Id.* at 503–04.

13 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

14 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); *accord*, United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945).

moting fairness in economic dealings, and providing competitive market structures to reduce the need for governmental control.[15]

***Competitive Process.*** A fifth option is the competitive process standard articulated by Gregory Werden and others.[16] Under this approach, practices and transactions that interfere with competition as a process would be prohibited, focusing only on economic effect, but *without* focusing on any particular welfare standard. Practices that do not impair the competitive process would not be prohibited, even if there is some negative impact on consumer surplus.

## Assessing the Alternatives

In the years following the passage of the Sherman Act, the protection of small business and related non-economic goals were at the forefront of antitrust enforcement. This was consistent with the original intent of the Sherman and Clayton Acts, later efforts to rewrite that history notwithstanding.[17] But starting with *Sylvania*[18] and *Brunswick*[19] in 1977, only economic goals have mattered, and no one expects that to change.

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The question today is what the standard should be in assessing the *economic* consequences of a practice or transaction. As mentioned, the Supreme Court has never articulated an answer. And Gregory Werden has demonstrated ably that efforts to tease a particular welfare standard out of the Supreme Court's opinions invariably fail.[20] The Court's references to a "consumer welfare prescription" in *Reiter*[21] and *NCAA*[22] represent neither an endorsement of the total welfare approach thought to have been urged by the phrase's creator, Judge Bork, nor a reference to the current understanding of the phrase as consumers' surplus. *Reiter* simply upheld a ruling authorizing consumers to sue to recover overcharges. *NCAA* condemned restrictions on price and out-

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[15] *See, e.g.*, Gordon Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651, 653 (1983); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979). More recently, Professor Hovenkamp demonstrated that a primary purpose of the Sherman Act was the protection of rivals—such as the small oil companies attacked and then acquired by Standard Oil. *See* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24–30 (1989). *Cf.* John S. McGee, P*redatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

[16] *See, e.g.*, Interface Group v. Mass. Port Auth., 816 F.2d 9, 10 (1st Cir. 1987) (Breyer, J.) ("'Anticompetitive' . . . refers . . . to actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods."); Werden, *supra* note 7. Werden identifies the goals of antitrust as those set forth famously in *Northern Pacific Railway*, and argues that the competitive process standard is the best means for achieving those goals. The passage from *Northern Pacific Railway* states: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[17] *See, e.g.*, Gordon Spivack, *Monopolization Under Sherman Act, Section 2*, 50 ANTITRUST L.J. 285, 304–07 (1982); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). These articles, and many others (e.g., the articles cited *supra* note 15), demonstrate the inaccuracy of Judge Bork's argument that Congress's original intent was solely to maximize economic efficiency. BORK, *supra* note 1, ch. 2.

[18] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[19] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[20] Werden, *supra* note 7, at 737–43.

[21] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[22] NCAA v. Bd. of Regents, 468 U.S. 85, 107 (1984).

put that would be prohibited under any standard. The Court has never addressed the standard in a context where it truly mattered; and so, as a matter of general jurisprudence, the welfare standard question must still be viewed as open.

In examining the five potential alternative standards, the analysis must include, not only whether we view a standard as doctrinally correct, but also its adminstrability. A standard that is "right" in the abstract has very little value if it cannot be applied practicably in court, in agency reviews, or, most importantly, in counseling clients.

Of the five alternatives, one of the easier ones to discard is the multiple goals concept. Although consistent with the original congressional intent of the law and prevalent for a long time, the courts abandoned it almost 40 years ago—and there has been no serious effort to reinstate it. That is so, at least in part, because it is often internally inconsistent and unadministrable.[23] For example, suppose a group of small dealers agrees to fix and raise prices. The enhanced profits would help "preserve" these small businesses, but would not disperse economic power or promote fairness in economic dealings. And consumers would certainly be harmed. Decision makers would be at a loss in deciding which of these conflicting goals has priority over others.

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The "consumer choice" standard does not fare much better. Virtually every merger involving competing products will entail the exit or change of one or more products. That reduction in "choice," in fact, is often the very source of the economic efficiencies that render so many mergers beneficial. As Judge Douglas Ginsburg and FTC Commissioner Joshua Wright have explained: "The flaw in this approach is that both economic theory and empirical evidence are replete with examples of business conduct that simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services."[24] Another flaw is that the standard is necessarily arbitrary. Is a reduction in choices from 100 to 99 unreasonable? Or five to four? There is no objective way to tell.

In contrast, the "total" welfare standard has many adherents and much to commend it. Its premise is the prohibition of only those practices that reduce the wealth of society as a whole—which certainly sounds laudable. In terms of competition policy, however, that strength can also be a weakness. Professor Salop has provided an example that demonstrates the point: a merger (or conduct) that reduces the defendant's costs, resulting in lower prices to consumers—but that also drives some rival producers out of business as a result.[25] If the harm to the rivals results in a loss of aggregate producer surplus that exceeds the gain to consumers, the merger would not be allowed. Similarly, the total welfare standard, rigorously applied, would condemn vertical restraints that lower prices to consumers if the loss to rivals is greater. These outcomes, of course, are contrary to longstanding precedent holding that antitrust protects competition, not competitors.[26] And not even the proponents of a total welfare standard defend these results. Analysis of these and similar examples demonstrates that what we are really interested in is the process of competition, not textbook economic welfare as a whole.

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23 This point was ably demonstrated by Judge Bork. BORK, *supra* note 1, chs. 2–3.

24 Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2411 (2012). It is also worth noting that consumer choice is not a "welfare" standard: it does not purport to measure surplus in any respect, producer, consumer, general, or otherwise.

25 *See* Salop, *supra* note 10, at 343.

26 *E.g.*, *Brunswick*, 429 U.S. at 488.

Probably the most widely favored standard today is the consumer welfare standard. It is commonplace to speak of antitrust as focused on consumer welfare, and to require claimants to make a demonstration of consumer harm. The Supreme Court said in *ARCO* that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."[27] Recognizing this point, the lower courts and federal enforcement agencies today consistently apply what they perceive to be a consumer welfare standard.

A consumer welfare focus also has some practical advantages over total welfare. Perhaps the most significant of these is relative ease of measurement. Under a consumer welfare test, if a practice yields lower prices or higher output, then that generally resolves the matter without a need for further inquiry. Under a total welfare test, in contrast, it is necessary to quantify and net out consumer losses against producer gains—a process that can be especially difficult in a litigation context.[28]

The consumer welfare standard loses some of its appeal, however, when it is pointed out that, technically, the sole focus of that standard is on consumer surplus (as economists define the term). There are some practices—although quite few in number and fewer still as actual occurrences—in which competition is harmed even where consumer surplus increases. One example is a consumer-buyers' cartel. If the cartel restricts its purchases—a reduction in market output—such that prices decline, the consequences will typically include a deadweight (or allocative efficiency) loss and a wealth transfer from producers to consumers.[29] In such a case, consumer surplus will increase, but competition is harmed. We do not want buyers going around entering into naked agreements to fix prices even if consumer surplus increases as a result.[30] The Department of Justice, in fact, will prosecute these types of cases criminally.[31]

The consumer surplus standard becomes especially complicated in dealing with certain vertical restraints. If, for example, a seller's resale price maintenance increases market output for the product, but buyers pay more whether they want the resulting dealer services or not, is that an antitrust offense? Focusing only on consumers' surplus may be misleading (and difficult to calculate) in terms of the economic effect on those consumers who pay a higher price in instances where the product itself is unchanged. And what of the consumers who would not buy the product at all but for the services induced by the resale maintenance program?[32] Under a consumer surplus regime, similar issues arise in evaluating price discrimination practices and metering ties.[33]

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[27] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990).

[28] Under a total welfare test, moreover, if a practice actually harms consumers with lower output, then, in the usual case, producer gains cannot come from economies of scale because output will be lower than before. As a result, the most common source of producer gains is not available. *See* Herbert Hovenkamp, *Consumer Welfare in Competition and Intellectual Property Law*, 9 COMPETITION POL'Y INT'L, Autumn 2013, at 53, 56.

[29] *E.g.*, Salop, *supra* note 10, at 342. For a discussion of monopsony generally, see Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, ANTITRUST SOURCE (Dec. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec13_jacobson_12_18f.authcheckdam.pdf.

[30] *See* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000) (injury to buyers sufficient even if lower prices to consumers result); *see also* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007).

[31] *E.g.*, United States v. Seville Indus. Mach. Corp., 696 F. Supp. 986 (D.N.J. 1988).

[32] *See generally* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).

[33] A classic example of a metering tie is *IBM Corp. v. United States*, 298 U.S. 131 (1936).

The one standard that seems to defeat each of these criticisms is the competitive process standard—unadorned by any particular welfare requirement. Under that approach, practices or transactions that impede the competitive process from working effectively fall into the prohibited category. This will include practices that restrict market output or that exclude rivals on bases other than efficiency while enhancing the defendant's market power. As an example of a prohibited practice, consider the *Professional Engineers* case.[34] The defendants implemented a professional code that banned competitive bidding on the grounds that unabated price reductions could reduce building quality and safety. The Court found the conduct illegal and rejected the defense as "nothing less than a frontal assault on the basic policy of the Sherman Act" because it was based on the premise that competition itself was harmful.[35]

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Conversely, consider the *Discon* case.[36] The conduct at issue involved alleged regulatory deception that allowed the defendant to raise prices but with negative impacts on at most a single rival, rather than the competitive process. Because the higher prices were the result of gaming the regulatory system, and not "from a less competitive market," the claim was rejected.[37] Consumers were harmed on those facts, but not by a violation of the antitrust laws. Similarly, tie-in or bundling arrangements that may cause buyers to pay more—like cable television program bundles—are generally not prohibited absent some reduction in competition in the tied product market. Without such an effect, one cannot say that the *competitive process* has been harmed.[38] *Professional Engineers* and *Discon*, taken together, show that conduct that does not implicate the process of competition is not outlawed even if consumers are harmed, while conduct that impairs the competitive process is subject to condemnation absent a justification that, if proven, would demonstrate that the competitive process has actually been enhanced.

Gregory Werden's article[39] makes a convincing argument that the competitive process standard is the one standard that is truly consistent with both the Supreme Court's case law over many years and the economic underpinnings of modern antitrust. This standard, however, does not provide the complete answer we are seeking. Since *Sylvania* in 1977, proof of economic harm has been essential to any antitrust case,[40] but saying that a practice interferes with the competitive process does not tell us what kind of economic harm is required. Something more is needed—an understanding of the *type of anticompetitive effect* the antitrust laws are designed to prevent. Without that understanding, the exercise can be circular.

## Output and the Competitive Process

The multiple goals and consumer choice standards are unworkable. The total welfare standard can be effective, but generates obviously incorrect results in a number of instances. The consumer welfare standard comes very close, but also misses the mark in enough contexts to call its utility into doubt as a universal answer. The one that emerges best is the competitive process stan-

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34 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

35 *Id.* at 695. This and many other examples are discussed in some detail in Gregory Werden's article articulating a competitive process standard. Werden, *supra* note 7.

36 NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

37 *Id.* at 136.

38 Werden, *supra* note 7, at 758 & n.285; *see generally* Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012).

39 Werden, *supra* note 7.

40 *See* Heyer, *supra* note 5, at 2.

dard, but it needs an added factor to make it more effective in defining anticompetitive effects. The added factor recommended here is market output.[41]

A focus on output is consistent with antitrust policy and practice from the beginning. Section 1 of the Sherman Act speaks of "restraint of trade."[42] The Supreme Court's earliest decisions on the merits—*Trans Missouri* and *Joint Traffic*—condemned regimes that increased price and decreased output,[43] while the *Standard Oil* decision announcing the rule of reason specified the "limitation of production" as one of the key evils the law was designed to prevent.[44]

Judge Bork's *Antitrust Paradox* makes the case that an antitrust policy designed to prevent agreements and practices that reduce market output is consistent with the purpose of the law, provides an administrable mechanism to guide enforcement, enhances economic efficiency, and furthers the competitive process.[45] Professor Hovenkamp's newly added subchapter on the subject, similarly, expresses the view that antitrust's "overall goal is markets that maximize output, whether measured by quantity or quality."[46]

A focus on output has many virtues. Decreased output generally means higher prices. An output reduction will also typically lead to a deadweight welfare loss and associated diminution of allocative efficiency—the *bêtes noires* of the total welfare approach. Reduced output is also typically associated with a transfer of wealth from consumers to sellers, and an associated reduction in consumer surplus. So an output measure is largely consistent with both the total and consumer welfare paradigms. And conduct that causes a reduction in market output will often be connected to some interference with the competitive process.

None of this is to suggest that output is a panacea. Output can be very hard to measure precisely, and the measurement must factor in differences in quality. The key is the impact on net output, taking into consideration the many separate facets consumers value. But while measuring all the relevant attributes may be achievable in some cases, it will be difficult or impossible in many others. One of the most important of these facets is innovation, which can be especially difficult to quantify. Yet, innovation effects must be taken into account because innovation is the source of much of the gains accruing to society over time. A further complication is that the analysis must focus on the very-difficult-to-measure output that would have been produced "but for" the restraint in issue, comparing it with the output that was produced with the restraint in place—a particularly challenging task in rapidly growing industries.

In addition, output alone cannot be the test. Much conduct, such as simply going out of business, "reduces output," but not in any way that implicates antitrust policy. And some conduct that increases output, such as predatory pricing, is appropriately prohibited when there is reason to believe that the longer-run effects will be negative. Output must be used in connection with the overall competitive process standard to determine whether competition has been harmed.

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[41] Adding an output gloss to the consumer welfare standard would have a similar effect. The reason for favoring competitive process/output is that it is more consistent with the case law, especially cases like *Discon*, where consumer surplus was diminished but the competitive process (at least in the Court's eyes) was not harmed.

[42] 15 U.S.C. § 1.

[43] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

[44] Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911).

[45] Bork, *supra* note 1, at 35 & passim.

[46] Areeda & Hovenkamp, *supra* note 3, ¶ 114a. Professor Hovenkamp favors a consumer welfare approach, but with some exceptions and with a focus on output. *See id.* ¶¶ 114b, 114e. Overall, his approach seems quite similar to the one suggested here.

*[C]onduct that reduces output should be condemned if the competitive process has been impaired.*

These complications should not deter the use of an output test under a competitive process regime. When litigating per se cases, a negative effect on output is presumed. In rule of reasons cases, proof of an anticompetitive effect is part of the plaintiff's initial burden, and an adverse effect on output should be an implicit part of that burden. Most of the time, there will be no need to measure output. In cases involving purely vertical territorial or customer restraints, the possibility of a reduction in output is so remote that a rule of virtual per se legality would make sense.[47] With mergers, the traditional tools used under the Merger Guidelines serve as a useful proxy for output, although efficiencies yielding non-price benefits may be entitled to greater weight under an output standard than under the Guidelines' focus on price effects.[48] Exclusionary conduct cases, both vertical and unilateral, will remain hard, as they so often are, but it is in those cases that an output focus will be most valuable in distinguishing the harmful from the benign.[49] Conduct that, overall, does not decrease market output should be upheld, and conduct that reduces output should be condemned if the competitive process has been impaired.

If antitrust courts and enforcers can direct their primary focus to conduct that impairs the competitive process, and rely on output effects to determine close calls on whether that process is truly being harmed, we should reach the right result in all but the most exceptional cases. Until something better comes along, this seems to be the best way to go. ●

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[47] *Cf.* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).

[48] Horizontal Merger Guidelines, *supra* note 9, § 10.

[49] *See* Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 Antitrust L.J. 779 (2006).