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The Need to Establish Absent Class Member Standing in Antitrust Class Actions

Theane Evangelis and Cynthia E. Richman

This term, in *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court is expected to resolve two related issues concerning the injury required to establish Article III standing that have sharply divided the courts of appeals: (1) can a class containing uninjured members be certified?; and (2) can differences among individual class members be ignored, and a class certified, when plaintiffs use statistical techniques that presume that all class members are identical?

*Tyson Foods* presents these questions in the context of a wage-and-hour class action certified under the Fair Labor Standards Act and as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3), but the answers are likely to have important implications for antitrust class actions too. The questions raised by *Tyson Foods* have taken on increasing urgency in class actions over the past several years, particularly in the area of antitrust, where plaintiffs routinely seek to rely on econometric models that cannot or do not establish classwide injury and tend to obscure individual differences among class members. That includes differences between the named plaintiffs and the unnamed individuals, or “absent class members,” also participating in the action.

Recurring litigation around these issues in antitrust matters has deepened the circuit split. In fact, in the year leading up to the Supreme Court's decision to grant the petition in *Tyson*, the Supreme Court was asked to address almost identical questions in at least two antitrust cases (*In re Polyurethane Foam* and *In re Urethane Antitrust Litigation*)—one petition has been denied, and the other is still pending.

In our view, the “irreducible constitutional minimum” of Article III standing, coupled with the Supreme Court's repeated directives not to use Rule 23 to enlarge “substantive right[s],” including basic Article III precepts, in violation of the Rules Enabling Act, should lead the Court to conclude that absent class members, like all federal litigants, must have Article III standing. Put differently, the Federal Rules cannot confer standing, or excuse standing, where it is lacking under Article III. Further, class members must demonstrate that standing can be established on a classwide basis at the time the class is certified. Any other result would conflict with the Supreme Court's decisions in such cases as *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v.*

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Behrend, elevate the class action device to take precedence over the constitutional imperative of a “case or controversy” between the parties, and unduly expand the jurisdiction of the federal courts.

Different Approaches to the Question of Absent Class Member Standing

The “irreducible constitutional minimum of standing” under Article III is essential to maintain the “judiciary’s proper role in our system of government” and to ensure that the judicial process is not “used to usurp the powers of the political branches.” Beyond its role in preserving the separation of powers, the constitutional standing requirement guarantees that legal questions are resolved in “a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Therefore, to properly invoke the jurisdiction of the federal courts, a litigant must first allege and then eventually prove at trial the three elements essential to Article III standing: (1) an “injury in fact,” meaning “an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted], and (b) actual or imminent, not conjectural or hypothetical”; (2) “a causal connection between the injury and the conduct complained of” that is “fairly traceable” to the actions of the defendant; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable [court] decision.”

The Expansive Approach. In Tyson Foods, the plaintiffs alleged that they were not paid overtime under the Fair Labor Standards Act for changing in and out of uniforms and other pre- and post-shift activities. The defendant sought decertification of the class on the ground that the plaintiffs’ evidence showed that some class members did not work overtime and were thus not injured. The Eighth Circuit upheld the denial of the decertification motion, relying on pre-Dukes authority stating the existence of “claims of differing strengths” did not require decertification, particularly because the defendant “invited error” by requesting that the jury be instructed to “treat plaintiffs with no damages as class members.” The court then rejected the defendant’s argument that the plaintiffs improperly relied on statistical averages to prove liability where none may have existed. The court found it significant that the defendant had no records documenting the specific amount of time class members spent engaging in certain tasks and found it permissible to use “inference[s]” based on representative testimony to establish classwide liability.

The Eighth Circuit’s reasoning in Tyson Foods, while contrary to some earlier Eighth Circuit authority, aligns with several other circuits taking an expansive approach to the issue of absent class member standing. The leading case for this approach is Kohen v. Pacific Investment Management Co. In Kohen, a class action involving futures contracts, the defendants argued that the class definition potentially included persons who would not have lost money on their futures contracts and thus suffered no Article III injury. The Seventh Circuit rejected this argument,
explaining that as long as one member of a certified class has a plausible claim to damages, the requirement of Article III standing is satisfied.\(^{14}\) But the primary authority the court cited for this “one member” standing rule—the Supreme Court’s decision in *United States Parole Commission v. Geraghty*\(^{15}\)—had to do with mootness, not Article III standing in the class action context.

Notwithstanding its flawed premise, *Kohen’s* reasoning spread to other circuits: the Tenth Circuit, for example, followed *Kohen* and subsequently stated in *DG ex rel. Stricklin v. Devaughn* that “Rule 23’s certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm.”\(^{16}\) According to the Tenth Circuit, “That a class possibly or even likely includes persons unharmed by a defendant’s conduct should not preclude certification.”\(^{17}\) But like the Seventh Circuit in *Kohen*, the court in *Stricklin* did not elaborate on its conclusion that plaintiffs who have not suffered any injury should be allowed to remain in federal court.

The Third Circuit in *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*,\(^ {18}\) and more recently in *Neale v. Volvo Cars of North America LLC*,\(^ {19}\) also adopted the view that absent class members need not establish Article III standing. In *Prudential*, the Third Circuit ruled that Article III standing need not be established on a classwide basis, as the question “whether an action presents a ‘case or controversy’ under Article III is determined vis-à-vis the named parties.”\(^ {20}\) The court further explained that once the class representative has established constitutional standing, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense.

The court in *Neale* took a somewhat different approach, concluding that “‘absentee class members are not required to make a . . . showing [of standing] because once the named parties have demonstrated they are properly before the court, the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing.’”\(^ {21}\) That followed, in *Neale’s* view, from a longstanding history of “treat[ing] individuals falling within a class definition as members of a group rather than as legally distinct persons.”\(^ {22}\) *Neale* reasoned that any concerns about compensating uninjured class members could be addressed using Rule 23’s requirements (rather than constitutional standing principles), observing that “a properly formulated Rule 23 class should not raise standing issues” because the “interests” and “injuries” of the class should be “tested by the requirements of Rule 23.”\(^ {23}\) *Neale* did not explain, though, how this approach would be consistent with the Rules Enabling Act’s directive forbidding litigants from using Rule 23 to find standing where none exists.

**The Stringent Approach.** Not all Circuits prioritize Rule 23 over Article III though. The leading decision for the more stringent approach, *Denney v. Deutsche Bank AG*, involved a challenge to

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\(^{14}\) Id. at 676 (citing U.S. Parole Comm’r v. Geraghty, 445 U.S. 388, 404 (1980)).

\(^{15}\) See *Geraghty*, 445 U.S. at 404–05.

\(^{16}\) 594 F.3d 1188, 1198 (10th Cir. 2010).

\(^{17}\) Id. at 1201 (citing *Kohen*, 571 F.3d at 677).

\(^{18}\) 148 F.3d 283 (3d Cir. 1998).

\(^{19}\) 794 F.3d 353 (3d Cir. 2015).

\(^{20}\) 148 F.3d at 306 (citation omitted).

\(^{21}\) 794 F.3d at 361 (quoting *Prudential*, 148 F.3d at 307).

\(^{22}\) Id. at 364 (citing Sosna v. Iowa, 419 U.S. 393, 399 (1975)).

\(^{23}\) Id. at 368.
the certification of a settlement class relating to claims of improper and fraudulent tax counseling.24 The objecting class members asserted that the settlement class had been improperly certified because it contained members for whom tax penalties had not yet been assessed and therefore lacked Article III standing. The Second Circuit held that although absent class members need not “submit evidence of personal standing,” “[t]he class must . . . be defined in such a way that anyone within it would have standing” under Article III.25

The Eighth Circuit in Avritt v. Reliastar Life Insurance Co. subsequently adopted, without much analysis, the Second Circuit’s views, stating that “a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.”26 Likewise, the Ninth Circuit also followed Denney in Mazza v. American Honda Motor Co., holding that “[n]o class may be certified that contains members lacking Article III standing.”27 though in previous decisions, the Ninth Circuit had suggested that only named plaintiffs must have Article III standing.28

Absent Class Member Standing in the Antitrust Context

Although these broad questions of class member standing arise in all kinds of class actions, they are particularly salient in high-stakes antitrust matters with hundreds or thousands of plaintiffs and where liability is often measured in multiples of millions. The leading decisions on absent class member standing that illustrate the circuit split in the antitrust context are the D.C. Circuit’s opinion in In re Rail Freight Fuel Surcharge Antitrust Litigation29 and the First Circuit’s opinion in In re Nexium Antitrust Litigation.30 Although the cases diverge on whether absent class member standing must be proved on a classwide basis (and the point in the litigation during which the issue of standing should be considered), their analytical approaches—examining the issue of Article III standing through the lens of predominance—are similar.

Rule 23(b)(3)’s predominance requirement is concerned with the question whether elements of the plaintiffs’ claims are “susceptible of measurement across the entire class.”31 Two critical elements in antitrust class actions that rightly receive a disproportionate amount of attention in the predominance analysis are the requirements of (1) antitrust impact and (2) resulting damages. Both elements are tied to the concept of Article III standing insofar as they require a plaintiff to show a direct connection to the alleged wrongdoing and require her to show that she was injured in some non-speculative, ascertainable way, often by demonstrating damages.

24 443 F.3d 253, 259 (2d Cir. 2006).
25 Id. at 263–64.
26 615 F.3d 1023, 1034 (8th Cir. 2010). The Eighth Circuit appeared to take a different approach in Tyson Foods, however.
27 666 F.3d 581, 594 (9th Cir. 2012).
28 Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011), abrogated on other grounds by Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (claiming that, with respect to “standing under Article III,” Ninth Circuit “law keys on the representative party, not all of the class members, and has done so for many years”); see also Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (“[W]e consider only whether at least one named plaintiff satisfies the standing requirements . . .”). As one district court put it, while “[i]n the wake of Mazza, many courts have acknowledged and ostensibly followed its directive that absent class members must have Article III standing,” others have “recognized the apparent Stearns-Mazza split—and sided with the reasoning of Stearns,” or else have seen the conflict and “taken no position.” Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 478 (S.D. Cal. 2013).
29 725 F.3d 244 (D.C. Cir. 2013).
30 777 F.3d 9 (1st Cir. 2015).
31 Comcast, 133 S. Ct. at 1433.
These two elements were front and center in the Supreme Court’s decision two terms ago, in *Comcast Corp. v. Behrend*, which reversed the grant of class certification to a class of antitrust plaintiffs alleging violations of the Sherman Act. Central to the Court’s holding was the fact that the expert model proposed to measure antitrust damages could not adequately estimate the damages attributable to the plaintiffs’ particular theory of injury and, by implication, provided a misleading picture as to which class members were injured by the allegedly anticompetitive conduct and which ones were not. Without a means of establishing that damages were capable of relatively accurate measurement on a classwide basis, the Court said “[q]uestions of individual damage calculations” would “inevitably overwhelm questions common to the class.”

**Rail Freight: Toward a More “Rigorous Analysis” of Models of Injury.** In *Rail Freight*, a group of shipping companies brought suit against the four major freight railroads alleging that they were engaged in a price-fixing conspiracy with respect to the rates they set for certain fuel surcharges. The district court granted class certification, largely based on its belief that the plaintiffs’ damages model, which “sought to quantify, in percentage terms, the overcharge due to conspiratorial conduct” at various times during the class period, was “plausible” and “workable.” The D.C. Circuit reversed. It first observed that “[m]eeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates.” Rather, “The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.” In so holding, the court described the level of specificity the plaintiffs had to approach to meet their burden: while they need not “be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member,” the court did “expect the common evidence to show all class members suffered some injury” under Article III.

The court’s scrutiny of the plaintiffs’ damages model played a significant role in the analysis: after taking a hard look at the model, the court agreed it was “defective” because it “purport[ed] to quantify the injury in fact to all class members attributable to the defendants’ collusive conduct,” but it in fact “detect[ed] injury where none could exist.” False positives, the court observed, were of particular importance in *Comcast*, and detecting such false positives or other modeling errors was “now indisputably the role of the district court . . . before granting certification.” The D.C. Circuit summed up its analysis by observing that “[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact.”

The Eighth Circuit took a similar approach in *In re Wholesale Grocery Products Antitrust Litigation*. The district court had denied certification to a class alleging various non-competition claims on the basis that the plaintiffs could not “articulate a method for showing with the same evidence that [certain] fees were inflated for all putative class members,” and therefore could not show that the plaintiffs had “suffered injury from the wholesaler’s alleged antitrust violation.”

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32 Id.
33 *Rail Freight*, 725 F.3d at 250.
34 Id. at 252.
35 Id.
36 Id. at 253 (emphasis added).
37 Id. at 252–53.
38 752 F.3d 728 (8th Cir. 2014).
39 Id. at 732 (internal quotation marks and internal emphasis omitted).
Eighth Circuit affirmed, holding that the district court did not abuse its discretion in refusing to certify the class in the absence of any evidence of classwide injury and damages.\textsuperscript{40}

The Third Circuit, following \textit{Comcast}, also adopted a more rigorous analysis of the plaintiffs’ damages model in \textit{In re Blood Reagents Antitrust Litigation}, although its reasoning is in some tension with the Third Circuit’s treatment of the issue in \textit{Prudential} and \textit{Neale}. In \textit{Blood Reagents}, a price-fixing case, the district court rejected the defendants’ challenges to the plaintiffs’ antitrust impact and damages models, noting that the models were “irrelevant to class certification” and were better analyzed at the merits stage.\textsuperscript{41} The Third Circuit vacated the district court’s order granting class certification, noting that the district court’s observation that the model “could evolve” into classwide proof of antitrust injury—but had not yet crossed that threshold at the class certification stage—“did not survive \textit{Comcast}.”\textsuperscript{42}

\textbf{Nexium: Kicking the Can Down the Road.} Not all courts have interpreted \textit{Comcast} to require heightened scrutiny of antitrust impact and damages models—and consequently, Article III standing—at the class certification stage. The First Circuit’s decision in \textit{In re Nexium Antitrust Litigation}, a case involving alleged non-compete agreements, illustrates this approach. The district court granted class certification in \textit{Nexium} despite the “possibility or indeed inevitability” that some class members were not injured by the defendants’ conduct.\textsuperscript{43} That holding rested on the court’s belief that the plaintiffs had shown “that all class members [had] been exposed to purchasing or paying for [Nexium] at a supracompetitive price.”\textsuperscript{44} In the district court’s view, no further showing was necessary.

The First Circuit affirmed, noting, in essence, that uninjured class members could be filtered out later during the individual claims process. At the class certification stage, however, the First Circuit stated that courts simply must be “satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members.”\textsuperscript{45} Although acknowledging that “a proper mechanism for exclusion of brand-loyalist consumers has not yet been proposed,” the court credited the fact that the “plaintiffs’ expert made no concession that such a mechanism could not be developed, nor did defendants’ expert say that it could not be developed.”\textsuperscript{46}

The Tenth Circuit, in \textit{In re Urethane Antitrust Litigation}, also took the view that \textit{Comcast} requires proof that the plaintiffs “could” establish Article III injury on a classwide basis, but does not demand that the plaintiffs actually produce that proof at the class certification stage. As the Tenth Circuit put it, \textit{Comcast} “did not rest on the ability to measure damages on a class-wide basis” but rather on the “majority’s conclusion that without a way to measure” such damages, individualized questions would “inevitably overwhelm questions common to the class.”\textsuperscript{47} Because the plaintiffs in \textit{Urethane} had provided “a way to measure” damages on a classwide basis, the Tenth Circuit concluded the district court had not abused its discretion in certifying the class. Importantly, it

\begin{thebibliography}{99}
\bibitem{Id.} Id. at 736.
\bibitem{783 F.3d 183, 186 (3d Cir. 2015).} 783 F.3d 183, 186 (3d Cir. 2015).
\bibitem{Id. (emphasis added).} Id. (emphasis added).
\bibitem{In re Nexium Antitrust Litig., 777 F.3d 9, 25 (1st Cir. 2015).} \textit{In re Nexium Antitrust Litig.}, 777 F.3d 9, 25 (1st Cir. 2015).
\bibitem{Id. at 17.} Id. at 17.
\bibitem{Id. at 19 (emphasis added).} Id. at 19 (emphasis added).
\bibitem{Id. at 20.} Id. at 20.
\bibitem{In re Urethane Antitrust Litig., 768 F.3d 1245, 1257–58 (10th Cir. 2014).} \textit{In re Urethane Antitrust Litig.}, 768 F.3d 1245, 1257–58 (10th Cir. 2014).
\end{thebibliography}
reached this result even though it agreed, for the sake of argument, that the plaintiffs’ damages model had failed “to distinguish between the impact and damages attributable to the liability theory pursued at trial and another liability theory” that had not been.48

Whether Absent Class Member Standing—and the Models Used to Prove It—Should Be Decided at the Class Certification Stage

Postponing the analysis of difficult questions of Article III injury as Nexium and other cases do by analyzing whether a damages model “could” theoretically establish injury for at least some class members at some point in the future is problematic because it invites the use of sampling and averaging to disguise individualized issues that should preclude certification. The Supreme Court addressed this concern many years ago in Illinois Brick Co. v. Illinois,49 in which it rejected the use of abstract economic theory to permit indirect purchasers of a product to establish impact at the end of a chain of distribution. In rejecting the use of such theories, it urged courts to closely examine the “serious problem” of measuring complex and uncertain market variables, and to address issues of standing and antitrust impact “in the real economic world” rather than in the world of academia and economic theory.50

Nevertheless, courts have continued to endorse the use of aggregate damages models that oversimplify market realities and the variety of injuries those realities can produce. In In re Scrap Metal Antitrust Litigation,51 for example, the Sixth Circuit held that “[d]amages in an antitrust class action may be determined on a classwide, or aggregate, basis” and approved the use of damages models that assumed (unrealistically) that each plaintiff had incurred an identical “undercharge.”52 The Tenth Circuit said as much in Urethane, where it held that a class action defendant has “no interest in the method of distributing the aggregate damages award among the class members”53 and thus could not challenge a jury’s award to purchasers of polyurethane in an alleged price-fixing conspiracy on the basis that the model considered by the jury may have awarded damages to members with greater bargaining power who suffered no injury.

Such “shortcuts” to achieving class certification are highly problematic: they mask the existence of individualized injuries and defeat the right of defendants to challenge the allegations of individual plaintiffs, forcing them to challenge the bases for an expert’s economic model instead. These shortcuts, which assume a “fictional class” of individuals, also harm absent class members who would have standing to the extent they systematically underestimate the value of their claims.54

In essence, the approach taken by courts like Nexium and Urethane hinges on those courts’ belief that there is no need to burden plaintiffs with the requirement of offering some method of establishing accurate classwide injury during the class certification phase as long as the court is

48 Id. at 1257.
50 Id. at 742 (internal quotation marks omitted).
51 527 F.3d 517 (6th Cir. 2008).
52 Id. at 534 (internal quotation marks omitted).
53 768 F.3d at 1269.
54 See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) (“Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view . . . .”); see also id. at 620 (noting that the Rules are “designed to protect absentees by blocking unwarranted or overbroad class definitions”).
assured that such a method may exist and that uninjured class members can be dealt with at a later time. But neither Article III nor Rule 23 permits this. The Federal Rules have eliminated courts’ ability to engage in “conditional” certification—i.e., certifying a class while reserving the right to decertify it later if it turns out that Rule 23’s requirements are not met. And Article III has never permitted such a wait-and-see approach in the context of individual actions. Individual plaintiffs must establish their Article III injury-in-fact at the time the operative complaint is filed and must maintain standing at all stages of the litigation. Absent class members get more lead time insofar as they do not become parties to the action (for at least some purposes) until class certification is granted, but there is no reason the same justification for determining standing as early as possible should not apply to them.

Adhering to those principles is necessary not only to ensure that the class action device does not destroy bedrock constitutional principles, including Article III’s case or controversy requirement, but also to take into account the dispositive role that the class certification stage often plays in today’s litigation. Not all defendants have the resources to litigate their cases through trial or on appeal. As Justice Ginsberg recognized in Shady Grove, a decision granting class certification will often “place[] pressure on the defendant to settle even unmeritorious claims.” Thus, for constitutional, jurisprudential, and policy reasons, it is important to get the standing question right, and it is important to get it right at the earliest possible time in the litigation. That may involve an in-depth examination of the class definition or it may require plaintiffs to provide “some evidence” at class certification, showing how each element of standing can be proved on a classwide basis, even if the actual proof is reserved for trial. Dukes requires plaintiffs to “affirmatively demonstrate [their] compliance” with Rule 23’s elements, including demonstrating that they “have suffered the same injury,” and there is no reason that directive should not also require plaintiffs to demonstrate that Article III standing can be established on a classwide basis. In the context of antitrust class actions specifically and their dependence on expert models of economic injury, courts should apply the kind of heightened scrutiny that the D.C. Circuit applied in Rail Freight—“common evidence to show all class members suffered some injury,” that appropriately accounts, at the class certification stage, for those class members that may have suffered no injury at all.

**Conclusion**

It is difficult to overstate the importance of the coming resolution of the circuit split in Tyson Foods on the question whether absent class members must provide some evidence of Article III injury at the class certification stage. Correct resolution of this issue would ensure that litigants in Rule 23 class actions continue to be governed by constitutional principles, just as individual litigants are. It would further guarantee that the class action remains a productive means of resolving meritorious claims, rather than becoming a tool to bludgeon defendants into settlements with individuals who were never harmed.

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57 Such a rule would be consistent with the trial plan requirement under Rule 23(c) recognized in both the Third and Ninth Circuits. See, e.g., Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 186 (3d Cir. 2006); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001).
59 In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013).
Unfair Methods of Competition After the 2015 Commission Statement

On August 13, 2015, the Federal Trade Commission issued long-awaited guidance for enforcement of its “standalone” unfair methods of competition authority (“unfairness authority”) pursuant to Section 5 of the Federal Trade Commission Act. This historic development implements limiting principles in FTC competition enforcement, aligns it with the economic approach to antitrust analysis embedded within the modern rule of reason, and promises greater certainty to the business community. It also creates the potential to reinvigorate the agency’s ability to use its unfairness authority to further develop competition law and policy.

The Commission’s Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act sets forth three basic principles to limit and guide future applications of the Commission’s authority. The primary thrust of the Statement is to link the Commission’s standalone Section 5 authority to the rule of reason as applied under the traditional antitrust laws. This article serves as a guide to interpreting three key provisions of the Statement—the use of consumer welfare as a guiding principle; the importance of pro- and anticompetitive effects; and the abstention from enforcing Section 5 on a standalone basis when traditional antitrust laws are sufficient.

Introduction

Section 5 declares “unfair methods of competition” (UMC) unlawful and vests enforcement authority in the FTC. Section 5 enables the agency to enforce—without controversy—the Sherman and Clayton Acts. However, in using language that differs from the Sherman and Clayton Acts, it is well understood that Congress also intended Section 5 to reach beyond the traditional antitrust laws.

This latter portion of Section 5’s scope is commonly referred to as the FTC’s “standalone” Section 5 enforcement authority, and its boundaries, content, and applications have been the subject of considerable controversy throughout the FTC’s 101-year history. Congress left the development of the standard to the FTC, with its unique institutional capabilities. That the FTC neither articulated a coherent framework for UMC enforcement nor offered a workable definition was one of the agency’s most significant failures. The FTC’s development of a stable and reliable stand-

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alone UMC standard has thus far been minimal. This failure has been universally recognized not only by antitrust scholars, but practitioners and, importantly, Congress.

In the absence of guidance from the Commission as to the contours of its UMC authority, business firms and their counsel were left with little ability to predict what conduct would constitute a Section 5 violation. Prevailing case law provides little assistance. In R.F. Keppel & Bro., the Supreme Court upheld the Commission’s condemnation under Section 5 of the practice of inducing the purchase of candy with games of chance involving pennies and prizes because it “casts upon one’s competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt,” namely, the encouragement of gambling in children. The lower court concluded the practice did not violate Section 5 because it was not anticompetitive. The Supreme Court rejected this conclusion, reasoning: “It would not have been a difficult feat of draftsmanship to have restricted the operation of the [FTC] Act to those methods of competition . . . which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of” Section 5. In Sperry & Hutchinson, the Court confirmed its prior reasoning, holding Section 5 “empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws.”

Thus, as a practical matter, until issuance of the Statement, a Section 5 violation was anything three Commissioners imagined it was. Even a cursory review of the FTC’s history—including its recent history—reveals a number of interpretations of the agency’s authority, some remarkably far-

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3 William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L.J. 929, 933, 944 (2010) (“In practice, the FTC’s application of Section 5 has played a comparatively insignificant role in shaping U.S. competition policy.”); see Joshua D. Wright, Comm’r, Fed. Trade Comm’n, What’s Your Agenda?, Remarks at the ABA Antitrust Section Spring Meeting (Apr. 11, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/whats-your-agenda/130411abaspringmtp.pdf (“What does a frank assessment of the 100 year record of Section 5 tell us about its contribution to the competition mission? Or as I might put it, has Section 5 lived up to its promise of nudging the FTC toward evidence-based antitrust? I believe the answer to that question is a resounding ‘no.’”).


7 Id. at 313.

8 Id. at 310.


10 Id. at 239.
Some antitrust scholars have also called for the FTC to adopt even more expansive interpretations of its UMC authority, including applications that would deviate substantially from the traditional antitrust goal of protecting consumer welfare. 12

It is therefore not surprising that only a single form of business conduct—invitations to collude—has been generally accepted as a relatively uncontroversial UMC violation. 13 Those who defend the FTC's historical lack of guidance have argued that Section 5 consent decrees are an adequate substitute for, and maybe even preferred to, an agency statement. 14 But consent decrees do not serve the same function. They are negotiated without the benefit of the adversarial process, have no precedential legal value, and generate no predictive value with respect to how the FTC will view the boundaries of Section 5 in any given case. 15 Further, consents negotiated in the shadow of the FTC's considerable procedural advantages are unlikely to generate valuable guidance because they are likely to implicate conduct that would not violate Section 5 were a court to adjudicate the matter. 16 In light of the uncertainty surrounding the boundaries and meaning of the FTC’s UMC authority, and the general dissatisfaction with the Commission’s lack of guidance, it should be no surprise that there has been substantial demand for Section 5 guidance from all corners of the


13 But see Sims, supra note 4, at 2.


15 See Rybnieck & Wright, supra note 4.

16 The Commission has ruled for itself—that is, has found liability under the FTC Act—in an astounding 100 percent of the cases it has adjudicated over the past 20 years, a record some argue is better interpreted as convincing evidence of the Commission’s procedural advantage in action than of the agency’s superior case selection. See Joshua D. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission, 1 J. ANTITRUST ENFORCEMENT 82 (2013); see also David A. Balto, The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?, LE G A L B A C K G R O U N D E R (W ash. Legal Found.), Apr. 23, 2013, at 1; Melamed, supra note 4 at 18, 19.
antitrust community: Congress,\textsuperscript{17} businesses,\textsuperscript{18} the antitrust bar,\textsuperscript{19} academics,\textsuperscript{20} and even commissioners themselves.\textsuperscript{21}

The Commission has recognized the widespread need and demand for guidance and has—in a historic effort—issued the Section 5 Statement, which aligns and reconciles Section 5 with the traditional antitrust laws.\textsuperscript{22} The Statement is short at only one page in length, but by incorporating terms of art and concepts developed under the Sherman and Clayton Acts, their prima facie simplicity provides antitrust practitioners with 125 years’ worth of antitrust jurisprudence upon which to assess the competitive effects, and therefore the lawfulness, of challenged business conduct. Moreover, the Statement incorporates the modern economic underpinnings of the antitrust laws, explicitly naming consumer welfare as the guiding force behind Section 5 enforcement. The Statement thus provides the FTC and practitioners the ability to counsel parties, clients, and courts on the scope of Section 5—something that could not be said of Section 5 throughout its last 101 years of existence.

It is an important, but not frequently discussed, benefit of the Section 5 Statement that a clear articulation of its limits will spur Section 5 enforcement activity. It will simultaneously encourage the FTC to attack conduct within the Statement’s boundaries and encourage the parties it investigates

Section 5 enforcement

\begin{itemize}
  \item The Commission thus implicitly accepts the view that Section 5 enforcement is properly limited more narrowly than the potentially boundless scope the Supreme Court has contemplated. Compare Section 5 Statement, supra note 1 (beyond the Sherman and Clayton Acts, Section 5 encompasses acts or practices “that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act”) with FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1971) (explaining Section 5 can reach acts or practices that “do not infringe either the letter or the spirit of the antitrust laws”).
\end{itemize}
to challenge the agency when it overreaches. As many have recognized, the credible threat to hold up the Statement to lower courts in litigation when the FTC goes beyond their boundaries will influence consent negotiations as well. The Statement will also guide lower federal courts—who have interpreted the traditional antitrust laws for 125 years—with their interpretation of Section 5 on a standalone basis.

The Commission’s UMC Authority Will Be Guided by Consumer Welfare

“[T]he Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare.”

Non-competition goals have historically been well within the reach of Section 5 both as a matter of theory and in practice. For example, former Chairman Michael Pertschuk contemplated Section 5 enforcement that would address social and environmental harms, opining that “no responsive competition policy can neglect the social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands.”

Some commentators have mistakenly asserted that the days of the FTC interpreting its Section 5 authority to reach public policy goals other than consumer welfare are ancient and irrelevant history. However, former Chairman Jon Leibowitz recently suggested a broad definition for Section 5 that would cover “collusive, coercive, predatory, restrictive, or deceitful,” or otherwise oppressive conduct. The words “otherwise oppressive” could be viewed as encompassing an even wider range of potential non-competition goals than those enumerated by Chairman Pertschuk.

Even more recently, Professors Jonathan Baker and Steve Salop suggested the FTC use Section 5 to address income inequality in that the “FTC could conclude that monopoly pricing or price discrimination targeted at less advantaged consumers can be an unfair practice in violation of Section 5 . . . even if the market power was legitimately obtained.” Former FTC staff lawyer Neil Averitt has suggested Section 5 would properly be used to reach forms of competition that are less “desirable to purchasers,” to fill gaps in Robinson-Patman Act enforcement, and to enforce violations of “external standards of business conduct,” including violations of state contract and tort law.

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24 The Statement also provides the ancillary benefit of guiding interpretation of state consumer protection statutes—or “little FTC acts”—and UMC-like mandates for other federal agencies, such as the Department of Justice. State courts and federal agencies often look to the FTC’s interpretation of Section 5 to guide their enforcement priorities and decision-making.
25 Section 5 Statement, supra note 1.
26 See Pertschuk, supra note 11, at page 10.
27 See Concurring Opinion of Commissioner Jon Leibowitz, supra note 11, at 15 (internal quotation marks omitted).
28 See Baker & Salop, supra note 14, at 23.
The Section 5 Statement specifies, consistent with the traditional antitrust laws, that consumer welfare—and no other public policy goal—will guide the Commission in enforcing Section 5. The Statement wisely excludes from the analysis the consideration of non-competition goals, focusing the FTC’s Section 5 enforcement and taking advantage of its economic and legal expertise. In light of the historical context of Section 5 as well as modern calls to expand its interpretation, the Statement’s exclusion of non-competition goals from the FTC’s Section 5 analysis is not only necessary but also plays a critical role in modernizing Section 5 enforcement by making it consistent with the Sherman and Clayton Acts, under which economically coherent and administrable rules have developed.

**Liability Requires a Showing that Anticompetitive Effects Are Greater than Cognizable Efficiencies and Business Justifications**

“[T]he challenged act or practice will be evaluated under a framework similar to the rule of reason, that is, the act or practice must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.”

The second key feature of the FTC’s standalone Section 5 framework is the application of the rule of reason, a familiar analytical concept to any antitrust practitioner and one upon which they can readily counsel. Much like the first prong of the Section 5 Statement, the rule of reason prong brings the FTC’s standalone Section 5 analysis in line with the traditional antitrust laws. The Statement borrows explicitly from traditional antitrust enforcement principles and contemplates competitive harm and efficiencies or business justifications that are cognizable under the traditional antitrust laws. The Commission Statement accompanying the Section 5 Statement is

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30 Although there is some debate about the precise meaning of consumer welfare under the antitrust laws, see, e.g., Steven C. Salop, Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard, 22 Loy. Consumer L. Rev. 336 (2010) (describing the “long-standing antitrust controversy regarding the economic welfare standard for antitrust”); William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 Colum. Bus. L. Rev. 1, 35 (“Chicago School and Harvard School scholars do not define efficiency identically.”), there is a general understanding of what does and does not fall within its confines. See 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 110 (3d ed. 2006) (“[P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms.”); Kovacic, supra, at 35 (“Both [the Chicago School and Harvard School] generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules. Although Chicago School and Harvard School scholars do not define efficiency identically, the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.”); Donald F. Turner, The Durability, Relevance, and Future of American Antitrust Policy, 75 Calif. L. Rev. 797, 798 (1987) (“Antitrust law is a procompetition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. . . . [T]here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation.”); Joshua D. Wright & Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 Fordham L. Rev. 2405, 2406 (2013) (describing economic welfare as “the lodestar of antitrust laws—to the exclusion of social, political, and protectionist goals”).

31 Section 5 Statement, supra note 2.

32 Although the rule of reason under the traditional antitrust laws is occasionally open to differing applications, its methodology is settled. No rule of law settles all disputes. In fact, one of the many benefits of the rule of law is to push disputes to margins and boundaries of legal authority. Indeed, the optimal level of legal and economic dispute under any standard is positive. See Steven Shavell, The Level of Litigation: Private Versus Social Optimality of Suit and Settlement, 19 Int’l Rev. L. & Econ. 99 (1999). No doubt the various applications of Section 5’s rule of reason under the Statement will also remain the subject of interpretation and occasional debate.

33 Commission Statement, supra note 3, at 1.
unequivocally in this regard, making clear that “the Commission will rely on the accumulated knowledge and experience embedded within the ‘rule of reason’ framework developed under the antitrust laws over the past 125 years.”33 Indeed, to underscore the point, the Commission goes so far as to refer readers to the relevant portion of Professors Areeda and Hovenkamp’s well-known treatise on antitrust law. 34

The explicit incorporation by reference of the rule of reason into UMC jurisprudence means that antitrust practitioners who could counsel their clients with respect to rule of reason violations under the traditional antitrust laws can now confidently counsel their clients as to what conduct the Commission is likely to conclude runs afoul of Section 5. We now turn to some individual elements of the Commission’s second enforcement principle.

The Section 5 Rule of Reason. The Statement explicitly endorses the rule of reason standard that has been developed and applied over the past 125 years. 35 This standard is no different from the standard applied under the Sherman and Clayton Acts when it comes to defining, identifying, and evaluating antitrust harms and benefits. The Section 5 Statement makes clear that application of Section 5 will be bounded by the policy goal of consumer welfare, as informed by economic analysis. The formula of combining expressly economic objectives—promoting consumer welfare—with the modern rule of reason framework informed by economic analysis has been a recipe for success in the development of the traditional antitrust laws. 36

It is critical to understand that, to the extent there is disagreement about the application of the rule of reason under Section 5, the FTC and respondents now have the Statement to rely upon in litigating their cases in court and the threat of that litigation outcome to shape consent negotiations. The entirely unbounded scope of the FTC’s Section 5 authority prior to the Statement created an environment in which the FTC was empowered to seek remedies for conduct that did not pose a harm to competition and in which respondents, with no standard to rely upon in a judicial challenge to the agency’s enforcement action, had little choice but to succumb to the pressure to settle the matter by consent decree. Coupled with the fact that the Commission has a recent perfect record of ruling in favor of itself in administrative adjudication, 37 Section 5 enforcement action at least appears to be biased strongly in favor of the Commission. 38

Obscure readers may notice the second prong refers to a framework “similar to” the rule of reason, before defining the relevant standard as giving rise to Section 5 liability only when “the act or practice must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.” While the definition of the standard in the second clause plainly lays out a standard all antitrust lawyers are familiar with, there is a simple reason for the language of the first clause. There has been some debate as to whether the traditional rule of reason could reach invitations to collude under Section 1 of the Sherman Act, because invitations lack the requisite agreement, or under Section 2 as

34 Id. at 1 n.3.
35 Id. at 1 (“Our statement makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the ‘rule of reason’ framework developed under the antitrust laws over the past 125 years—a framework well understood by courts, competition agencies, the business community, and practitioners.”).
37 See Wright & Diveley, supra note 18, at 14–15; Balto, supra note 18, at 18–19.
38 See Ryb尼克 & Wright, supra note 6, at 1307.
attempts to monopolize.\textsuperscript{39} The Statement’s “similar to” is intended to preserve the Commission’s ability to reach invitations to collude and, importantly, to provide an analytical framework that includes consideration of this type of expected harm to competition.\textsuperscript{40}

\textbf{Harm or Likely Harm to Competition or the Competitive Process.} In aligning Section 5 with the other antitrust laws, the Statement relies upon prior judicial experience in determining which harms are cognizable under the antitrust laws and which are not. Antitrust law makes clear that not all consumer injury is cognizable under the Sherman and Clayton Acts. While the rule of reason framework specifies how the Commission and courts should weigh benefits and harms, the Statement also relates Section 5 to the traditional antitrust laws in a manner that limits its application to the harms identified as cognizable. For instance, the Supreme Court has explained that excessive pricing is not an antitrust law violation:

\begin{quote}
The mere possession of monopoly power, and the concomitant charging of monopoly prices . . . 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.\textsuperscript{41}
\end{quote}

Pursuant to this principle, it is clear Section 5 also must not be interpreted to reach “excessive pricing” precisely because the traditional antitrust laws recognize that conduct as outside their scope.

It is clear the traditional antitrust laws require much more than supracompetitive prices to articulate a cognizable harm. For example, with respect to monopolization under Section 2 of the Sherman Act, the Court has specifically distinguished unlawful from lawful conduct, explaining that Section 2 liability requires “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”\textsuperscript{42} In the context of Section 1 of the Sherman Act, it is the agreement to circumvent legitimate competition that can lead to cognizable antitrust harms.\textsuperscript{43}

\textsuperscript{39} 6 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1407b at 29 (1986).
\textsuperscript{40} To the extent there are concerns about the Commission expanding or even inventing new approaches to addressing “incipient” conduct, they should be assuaged by the fact that the Statement limits the inquiry to conduct giving rise to cognizable antitrust harms that outweigh countervailing procompetitive benefits and that are not justified by a legitimate business rationale. The Commission has explained that it will “rely upon the accumulated knowledge and experience embedded within the ‘rule of reason’ framework” to address the types of harm traditionally recognized under the antitrust laws. Commission Statement, \textit{supra} note 3, at 1. The traditional framework is sufficient, without an expanded view of incipiency, to condemn the types of invitations to collude the FTC has prosecuted to date. Many invitations to collude generate a significant risk of competitive harm. \textit{See} Wright, Section 5 Recast, \textit{supra} note 21, at 20. In the Commission’s Section 5 invitation to collude cases, the invitations would, if accepted, constitute a per se violation of Section 1 of the Sherman Act, a category of analysis reserved for conduct that judicial experience and empirical evidence inform us is highly likely to be anticompetitive. Given the significant net competitive harm associated with collusion, it is reasonable to expect an invitation to collude to generate a significant risk of competitive harm and thus fail a rule of reason analysis.
\textsuperscript{42} Id. (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).
\textsuperscript{43} \textit{See} NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99 (1984) (“By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.”); Arizona v. Maricopa County Med. Society, 457 U.S. 332, 356 (1982) (“Their combination has . . . permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.”); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 7–8 (1979) (“In construing and applying the Sherman Act’s ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so ‘plainly anticompetitive,’ and so often ‘lack . . . any redeeming virtue, that they are conclusively presumed illegal.’” (alteration in original)).
The concept that not all forms of consumer harm result in cognizable antitrust injury is recognized in many areas of antitrust laws. For example, courts have explained that antitrust liability can be incurred for deception by a patent holder that causes a standard-setting organization (SSO) to include the patent holder’s patent-protected technology as part of a standard, where the patent holder later breaches a commitment to the SSO to license its patents on fair, reasonable, and nondiscriminatory (FRAND) terms. The key factor upon which the courts based liability in these cases is the act of deception as the cause of the inclusion of the technology in the standard and the subsequent acquisition of monopoly power. Deception—the action involved in acquiring monopoly power—is not an act of competition on the merits. And where, but for the deception, the SSO would not have included the technology in the standard, the acquisition and exercise of monopoly power warrants an antitrust sanction.

However, where an SSO may have chosen the patent holder’s technology despite the deception, the antitrust laws do not recognize the breach of a FRAND commitment, and subsequent charging of supracompetitive, non-FRAND prices, as a cognizable antitrust harm. To do so would be to impose antitrust liability for a lawful monopolist’s charging of supracompetitive prices, in contravention of established precedent and the economic logic of the antitrust laws, which have determined the consumer welfare benefits associated with enhanced incentives to innovate attributable to the ability to charge the monopoly price outweigh the static efficiency losses resulting from temporary monopoly pricing. As every federal court to address the issue has recognized, a patent holder’s acquisition of monopoly power after competing in the standard-setting process and having its technology chosen—be it due even to “historic accident”—is legally distinguishable from a deceptive act causing the acquisition of monopoly power.

**Cognizable Efficiencies and Business Justifications.** The Section 5 Statement adopts under its rule of reason prong a requirement that the act or practice must generate harm to competition or the competitive process after “taking into account any associated cognizable efficiencies and business justifications.” “Cognizable efficiencies” and “business justifications” are each terms of art in traditional antitrust jurisprudence and analysis. Specifically, “cognizable efficiencies” is a concept borrowed from the 2010 Horizontal Merger Guidelines, and “business justifications” comprise a concept articulated in the rule of reason jurisprudence under Section 2 of the Sherman Act.

The Horizontal Merger Guidelines explain that “[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.” Similarly, the Section 5 Statement establishes that the FTC will consider efficiencies in

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44 E.g., Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) (“We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder’s intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with [a standard-setting organization’s] reliance on that promise when including the technology in a standard, and (4) the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct.”); see also Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

45 See Broadcom, 501 F.3d at 315; Rambus, 522 F.3d at 459.

46 See Broadcom, 501 F.3d at 315; Rambus, 522 F.3d at 459.


48 See Broadcom, 501 F.3d at 315; Rambus, 522 F.3d at 459.

49 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 10 (2010) [hereinafter Merger Guidelines]; see also Wright, Section 5 Recast, supra note 21, at 21.

50 Merger Guidelines § 10.
its rule of reason analysis where those efficiencies are specific to the act or practice being investigated; where the agency can verify the efficiencies, taking into account various relevant factors including the efficiencies’ likelihood, magnitude, method of achievement, timing of achievement, and effect on ability and incentive to compete; and where the efficiencies do not arise from anti-competitive output or service reductions.\textsuperscript{51}

The Statement makes clear that the Commission and courts, when interpreting Section 5, should take into account not just “cognizable efficiencies,” but also “business justifications.” This distinction raises the question of whether there is any important difference between these two concepts. Cognizable efficiencies are well understood in the context of merger analysis under the Merger Guidelines; more generally, analysis of the cognizability of efficiencies is most often associated with judicial scrutiny of justifications raised in the context of Section 1 of the Sherman Act and horizontal restraints of trade.\textsuperscript{52}

In Section 2 cases, and more generally cases involving unilateral conduct, courts often discuss “business justifications” without Section 1’s more searching review of the cognizability of those justifications. Because the Commission has linked its Section 5 authority to the traditional antitrust laws and the rule of reason, the Commission and courts should consider efficiencies and business justifications in a manner consistent with the development of the traditional antitrust laws. To the extent the defendant’s burden to establish cognizable efficiencies or business justifications sufficient to rebut the Commission’s prima facie burden vary across Sections 1 and 2, it is clear that Section 5 analysis should be faithful to those differences.

**UMC Less Likely Where Existing Antitrust Laws Already Address Act or Practice**

”[A]s a matter of discretion, the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice”\textsuperscript{53}

Courts, practitioners, and scholars have recognized that exercising the FTC’s Section 5 UMC authority is less appropriate and more likely to chill procompetitive conduct when it is applied where the traditional antitrust laws have clearly set forth a legal standard governing the conduct at issue. This third, “anti-circumvention” prong of the Section 5 Statement expressly communicates a Commission preference to use the traditional antitrust laws where possible, implicitly acknowledges that using Section 5 to evade the more rigorous standards of proof required by the traditional antitrust laws is inappropriate, and sets forth a limiting principle concerning the scope of Section 5.\textsuperscript{54}

The anti-circumvention prong of the Statement is also consistent with the existing case law regarding the application of Section 5 in this context, namely, *Boise Cascade*,\textsuperscript{55} in which the Ninth

\textsuperscript{51} Id.

\textsuperscript{52} See, e.g., Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35–36 (D.C. Cir. 2005) (explaining that conduct which is likely to harm consumers is condemned “unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint”); United States v. Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. 679, 696 (1978) (“[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.”).

\textsuperscript{53} See Richard Epstein, *When Bureaucrats Do Good*, HOOVER INSTITUTION (Aug. 17, 2015), http://www.hoover.org/research/when-bureaucrats-do-good (“The presumption against using the standalone authority when either the Sherman or Clayton Act “is sufficient to address” some competitive harm is a useful limiting principle.”).

\textsuperscript{54} Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).
There is a plethora of examples of conduct the traditional antitrust laws clearly address and against which applications of Section 5 would run afoul of the Statement’s commitment concern—nation of permissible conduct under the antitrust laws.

The case law in this area uniformly establishes that any consumer harm arising from a patentee’s breach of its FRAND commitment to an SSO, after its lawful acquisition of market power via its contribution of an SEP to a standard, is not cognizable under the antitrust laws. This precedent weighs strongly against the use of Section 5 to address the mere breach of a FRAND commitment without deception.

The third, “anti-circumvention,” prong of the Statement would apply in a number of other settings, including for example, loyalty discounts. A multitude of Sherman Act cases, including Grinnell, Brooke Group, Concord Boat, Virgin Atlantic, Ortho, SmithKline, and LePage’s, establish doctrine sufficient to address the conduct. Yet another example is alleged-

56 Id. at 582.
58 See Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
59 See Trinko, 540 U.S. at 407 (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful.”); Rambus, 522 F.3d 456; see also Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (finding antitrust liability where deception led to acquisition of monopoly power).
60 In our view, the Sherman Act precedent precludes the application of Section 5 under the Statement in cases such as Google/Motorola Mobility Inc. and Bosch for several reasons. See Analysis of Proposed Consent Order to Aid Public Comment, Motorola Mobility LLC, FTC File No. 121-0120, at 4 n.7 (Jan. 3, 2013); Statement of the Federal Trade Commission, Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012). One is that the traditional antitrust laws have clearly held, in precisely this context, that any competitive harm from supracompetitive pricing associated with the lawful exercise of monopoly power is simply not cognizable. Thus these cases would fail any rule of reason analysis. By the same logic, the FTC’s case against N-D ata clearly falls outside the scope of Section 5. See Negotiated Data Solutions LLC, FTC No. 051-0094, 2008 WL 258308 (Jan. 23, 2008). Furthermore, to the extent the Commission finds that these cases otherwise satisfy the first two prongs of the Statement, see, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Remarks at Competition Law Center, George Washington University Law School (Aug. 13, 2015) https://www.ftc.gov/system/files/documents/public_statements/735411/150813 section5speech.pdf, the third prong of the Statement provides another basis upon which to disfavor Section 5 enforcement.
61 Barry Wright v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).
63 Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).
64 Virgin Atl. Airways, Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001).
67 LePage’s, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003); see also Bruce H. Kobayashi, The Economics of Loyalty Discounts and Antitrust Law in the United States, COMPETITION POL’Y INT’L, Autumn 2005, at 115 (examining a long line of case law concerning various loyalty programs addressed under the Sherman Act). Our view is that the third prong would render the application of Section 5 in cases such as Intel undesirable and unlikely under the Statement. Complaint, Intel Corp., FTC File No. 9510028. For reasons discussed elsewhere, it is unlikely Intel would have survived a rule of reason analysis. See Joshua D. Wright, Does Antitrust Enforcement in High Tech Markets Benefit Consumers? Stock Price Evidence from FTC v. Intel, 38 REV. INDUS. ORG. 387 (2011).
ly anticompetitive product design, including so-called product hopping in the pharmaceutical context.

The third prong of the Section 5 Statement establishes the Commission’s commitment to refraining from use of Section 5 to remedy defects in cases under theories already addressed by the traditional antitrust laws, except perhaps in extreme circumstances. This commitment limits the scope of standalone Section 5 to cases involving novel conduct that has not yet been addressed by the Sherman or Clayton Acts—what Susan Creighton and Thomas Krattenmaker have dubbed “frontier cases.” This prong thus creates greater certainty for the business community and their antitrust counsel, who will have a better understanding of the law governing business practices that may run afoul of the law. Finally, the anti-circumvention prong of the Statement provides parties the ability, in litigation, to call attention to the fact that the conduct being litigated is covered by the traditional antitrust laws, and thus a less appropriate target for Commission action according to its own standards. While the Statement does not absolutely preclude the Commission from pursuing such a case, it would do so at substantial risk of losing the litigation at hand, of harming its own reputation by creating a perception that it is seeking to evade the more rigorous burden of proof under the traditional antitrust laws, and of providing an environment ripe for judicial interpretation of Section 5 that would further constrain its authority.

Conclusion
After a century of debate, the Commission has through bipartisan cooperation issued its historic Section 5 Statement. The Statement provides long-awaited guidance regarding the scope and limitations of its standalone Section 5 enforcement authority. We intend this article to provide insight from our perspective, as individuals who were deeply involved in the creation of the Statement, and with the hopes that it will prove useful to those seeking to understand it.

The Statement endorses the consensus view that Section 5 should be aligned with the goals and analysis of the Sherman and Clayton Acts, and it limits the Commission’s Section 5 enforcement authority accordingly. This limit, while not legally binding, is a powerful one: it provides recourse to commissioners, litigants, judges, and even Congress, if the Commission abuses its authority.

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68 E.g., United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).
70 Susan A. Creighton & Thomas G. Krattenmaker, Appropriate Role(s) for Section 5, ANTITRUST SOURCE, Feb. 2009, at 3, 4, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Creighton2_26f.pdf (“The ‘frontier’ rationale argues that there are some cases that meet all of the legal requirements for a Sherman Act claim, but involve new forms of anticompetitive conduct that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis. . . . To guard against [the risks that the Commission will use Section 5 to circumvent the rigorous standards of the other antitrust laws and that its reliance upon Section 5 might weaken its influence as an expert], the Commission in ‘frontier’ cases would need to analyze and litigate the case precisely as it would under the Sherman Act.”).
71 See Epstein, supra note 54; Hurwitz, supra note 23.
72 Hurwitz, supra note 23. (“The value of this policy statement is not that it binds the commission. It doesn’t. Its value is that it gives us something to point to when the commission does go too far. Dissenting commissioners can point to it; litigants can point to it; judges can point to it; Congress can point to it. They can point to this statement and call out the FTC for ruling by whim instead of by law. They can point to this as evidence from the commission itself that reliance on stand-alone UMC claims, untethered from traditional antitrust law, is problematic. They can point to this as evidence that commission decisions merit reduced deference or greater scrutiny—or that Congress needs to rein in the commission’s too-expansive powers.”).
Of course, the Statement will not end the debate about the precise boundaries of Section 5—nor should it. Nevertheless, it provides an overarching framework, grounded in 125 years of antitrust law, upon which the Commission, the business community, and the antitrust bar can rely. 73 For the first time in 101 years, lawyers can counsel their clients regarding Section 5 compliance. As with the rule of reason under the other antitrust laws, there will be disputes on the margin about the legality of conduct under Section 5. Boundary disputes occur wherever there are boundaries; this is not just a practicality of antitrust enforcement, but also a virtuous byproduct of the rule of law. Disputes governed by the rule of reason and guided by consumer welfare were the catalyst for the desirable evolution of the traditional antitrust laws. We are confident that the flexible framework articulated in the Statement, by bounding the previously unbounded, and by adopting the same methodological commitments to an economically informed rule of reason, will lead to an improvement in the development of Section 5 competition law.

73 See also Freshfields Bruckhaus Deringer, FTC’s Section 5 Policy Statement (Aug. 18, 2015), http://www.freshfields.com/en/knowledge/FTC_Section_5_policy_statement/.
Non-Reportable Domestic Megamergers in China’s Red-Hot Internet Industry

Yuni Yan Sobel

China has seen a significant rise in merger-and-acquisition activity in its Internet sector during the past few years. Several recent multi-billion-dollar deals between domestic Chinese competitors proceeded without antitrust notification because they did not exceed the revenue-based notification thresholds under the Anti-Monopoly Law (AML).1 The existence of such thresholds allows the Ministry of Commerce (MOFCOM) to focus its limited resources on a subset of transactions and enables deal-makers to better assess the antitrust risks. However, falling below the notification thresholds does not mean that a merger will not have a significant anticompetitive effect. MOFCOM, which is vested with the authority to review mergers, has the legal authority to investigate and undertake enforcement actions against transactions whether or not their value exceeds notification thresholds.2 Despite having this authority, MOFCOM has not yet pursued enforcement actions against non-reportable transactions.

The rise of mega deals in the Chinese Internet sector has generated significant discussion about antitrust concerns in the Chinese media and among antitrust experts. Such increased media attention, in conjunction with the Chinese antitrust authorities’ expanding appetite for enforcement, may lead MOFCOM to revisit its previously proposed rule-making3 and to review non-reportable transactions. In addition, given the strength of domestic firms in the Chinese Internet sector, a willingness to investigate and challenge such non-reportable transactions could serve as a powerful rebuttal to the persistent critique that MOFCOM unfairly targets foreign merging parties in its merger review.4

China’s Red-Hot Internet Industry

Over the past decade, the Internet industry has emerged as a cultural phenomenon in China, with about 650 million “netizens” and a penetration rate of nearly 50 percent.5 With strong language

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2 Id. art. 4.


and cultural advantages, and a unique ability to navigate governmental censorship and access restrictions as compared to their foreign peers, Chinese entrepreneurs are quick to turn successful foreign business ideas into innovative services catering to domestic needs. In the absence of Chinese state-owned enterprises, which are slow to adapt and are focused on old economy “strategic sectors,” such as aviation, power, and telecommunications, domestic non-state-owned enterprises have been the dominant forces in the industry.

Competition has been particularly fierce in this emerging sector. China’s Internet giants increasingly clash, competing for market share through marketing stunts, public price wars, and court disputes. Many niche segments within China’s mobile Internet space appear ripe for consolidation as the number of competitors dwindles due to intense competition, often leaving only a couple of well-funded rivals, which tend to be backed by China’s Internet titans—Baidu, Alibaba, and Tencent (collectively referred to as BAT). These rivals are often able and willing to spend large amounts of cash—through “money-burning wars”—to try to beat one another, although such wars tend to be unsustainable. As a result, consolidation has become increasingly prevalent among head-to-head rivals, ending costly price wars and raising antitrust debates in the media and among legal experts.

Several recent domestic tech megamergers, such as the tie-up between ride-hailing app giants Didi and Kuaidi, the minority acquisitions of Ganji.com by 58.com in the online classified-advertising marketplace and of Elong by Ctrip in the online travel industry earlier this year, and the combination of video-streaming titans Youku and Tudou a few years ago, all fell below the AML’s mandatory pre-merger notification thresholds, thus obviating the need to notify MOFCOM. This phenomenon disappointed consumers and competitors, and was envied by many strategic merging parties, including foreign firms that have faced or are facing MOFCOM’s frequently prolonged merger review process. Such review often takes many months, and sometimes even more than a year, especially if MOFCOM determines that certain remedies or an outright injunction of the transaction would be appropriate.

The Didi-Kuaidi Merger

Founded in 2012, less than a month apart, Kuaidi Dache (which translates to “Quickly, get a taxi”) and Didi Dache (“Honk honk, get a taxi”), bankrolled by technology giants Alibaba and Tencent, respectively, are by far the largest online ride-hailing companies in China. According to one study, as of December 2014, Kuaidi and Didi made up 56.5 percent and 43.3 percent, respectively, of China’s online ride-hailing industry’s 172 million user accounts. Similarly, a government Internet data center reported that many customers used both apps, as approximately 74.1 percent used Didi and 50.2 percent used Kuaidi, and none of the remaining online ride-hailing companies reached a user penetration rate above 7 percent.

In addition to their high penetration rates and user shares in the online ride-hailing industry, Didi and Kuaidi also engaged in several rounds of aggressive price wars to compete for users and

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6 See Nate Bush, Lining Shan & Ning Qiao, Qihoo versus Tencent: Roadmap or Anomaly?, ANTITRUST, Spring 2015, at 54 (analyzing the first decision of China’s Supreme People’s Court under the AML relating to two homegrown private-sector Internet giants, Tencent and Qihoo).


8 Li Qiaoyi, Battling Taxi Apps Merge in Giant Deal, GLOBAL TIMES (Feb. 15, 2015), http://www.globaltimes.cn/content/907683.shtml.

drivers prior to their merger announcement. For four months before May 17, 2014, when both halted subsidies to passengers on the same day, the duo had engaged in a series of battles for customers and drivers by matching each other’s ever-changing subsidy strategies. Several sources reported that these “money-burning wars” in early 2014 cost Didi approximately RMB 1.4 billion (US $225 million) and Kuaidi approximately RMB 1 billion (US $161 million). 10

A new round of price wars flared up later in 2014 after the apparent truce, as both launched supplemental luxury limo services, Didi Black and Kuaidi One, and aggressively distributed user cash rewards and engaged in public media spats. For example, Kuaidi accused Tencent, a backer of Didi, of selectively restricting users of its widely popular mobile social network, WeChat, from accessing Kuaidi’s cash rewards. 11 The low pricing in 2014 drove more than 20 ride-hailing companies out of business due to their inability to match prices. 12

The heated price wars captured the attention of antitrust authorities in China. During an interview in 2014, Xu Kunlin, the head of the Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), an antitrust authority that monitors price-related offenses including cartels, noted that while ordinary competition in the online ride-hailing industry should be protected, the antitrust authorities would intervene if one company were to use predatory pricing to drive another company out of the market, and then raise prices. In a somewhat prophetic example, he hypothesized that if only one ride-hailing app were to remain in China, as long as it did not raise prices and injure consumers’ welfare, such a situation would “be encouraged as it is beneficial to the people and the market.” 13

Against that backdrop, Kuaidi and Didi shocked the industry with a 2015 Valentine’s Day announcement about their upcoming merger, which would be the largest merger in China’s Internet industry at the time, valued at approximately US $6 billion. No mention of cost-cutting synergies or combining back offices accompanied the announcement of the merger. Instead, the transaction appeared to be about cutting losses from their intense head-to-head competition. In a news article published on MOFCOM’s website, Kuaidi’s CEO stated that the deal was partly influenced by “the sustainability of subsidies,” which were awarded to passengers and drivers. 14

A leaked internal memo revealed more statements from Kuaidi’s CEO: “The fierce competition between Kuaidi and Didi is not sustainable. The merger is the result of strong desires from all the investors of both companies.” 15 Kuaidi’s co-founder said that the transaction would allow the


companies to shift resources away from fighting over market share and into building their platforms to provide more offerings for users.\textsuperscript{16}

Consumer and media objections to the merger became rampant as soon as the merger was announced. Many feared that the subsidies and cash rewards would stop as a result of the merger and called the merging company an “undoubted monopoly.”\textsuperscript{17} Others raised the possibility that the merger potentially would face antitrust roadblocks under the AML—a relatively new concept to most Chinese consumers.\textsuperscript{18} Industry and antitrust experts debated whether the transaction would be reportable and whether it would generate scrutiny at MOFCOM, including discussions of whether the relevant product market definition should be broader than online ride-hailing services and include, for instance, taxis hailed on the street.\textsuperscript{19}

Two days after the merger announcement, on February 16, 2015, reacting to the flurry of antitrust discussions in the media, Kuaidi and Didi issued a joint statement disclosing that the proposed merger was not subject to MOFCOM’s review because neither firm had reached the RMB 400 million (approximately US $65 million) revenue threshold under the AML.\textsuperscript{20} This is somewhat surprising given that the amount of cash subsidies and rewards each company gave out to customers and drivers in the first four months of 2014 alone was more than double this threshold, suggesting that each company was operating at a significant loss and that the parties most likely did not include cash subsidies and rewards as part of their revenue calculations.\textsuperscript{21}

Also on February 16, a domestic competitor, Yidao Yongche, announced that it had complained about the transaction to all three antitrust authorities in China—MOFCOM, the NDRC, and the State Administration for Industry and Commerce (SAIC)—and had requested an antitrust investigation into the merger. During a routine press conference that same day, a MOFCOM spokesperson responded to a reporter’s question regarding whether the merger would create a monopoly by stating that MOFCOM had noticed the relevant reports regarding the merger, but had not received a notification.\textsuperscript{22} He then emphasized that concentrations reaching the notification thresholds should be reported to MOFCOM prior to consummation, but he did not suggest any possibility of an independent investigation if the merger were non-reportable.

While antitrust discussions surrounding the merger continued over the few months after the merger announcement, Didi and Kuaidi quietly closed the transaction in or around May 2015, about three months after the merger agreement was executed.\textsuperscript{23} In contrast, merging parties with local


\textsuperscript{19} See Tan Min, supra note 17.


overlaps triggering the notification thresholds often must wait many months, or even more than a year, for MOFCOM’s approval before they are permitted to close their transaction. By falling under the threshold and thus not notifying MOFCOM of the merger, Didi and Kuaidi were able to avoid a potentially drawn-out MOFCOM review and close their merger without antitrust delays or remedies. This provided transaction certainty for the parties, but essentially allowed a transaction with significant potential antitrust concerns, at least based on the outcry from third parties, to escape antitrust scrutiny in the form of a mandatory MOFCOM review.

Other Recent Non-Reportable Internet Tie-Ups
The Didi-Kuaidi merger was not the first high-profile Internet merger to escape MOFCOM’s antitrust scrutiny. In August 2012, the two largest Chinese online video sites and rivals, Youku Inc. and Tudou Holdings Ltd., closed their US $1 billion merger. Because both companies struggled to generate revenue from free content prior to the merger announcement, they did not meet the notification thresholds, so the merger was not reported to MOFCOM.24 According to Analysys International, Youku led the fragmented Chinese online video market with a 21.8 percent share, while Tudou had a 13.7 percent share. Prior to the merger, the firms competed vigorously for all areas of business, including content purchasing, user engagement, advertising dollars, and mobile apps. In addition, Youku and Tudou were embroiled in a bitter copyright dispute in court.25

Non-reportable mega deals arising from partial-interest acquisitions also appear to be a growing trend in China. Two months after the Didi-Kuaidi merger announcement, the largest domestic online classified advertising listing company, 58.com, announced that it had acquired a strategic stake of 43.2 percent of Ganji.com,26 the number-two player in the online classified advertising industry in China. The combined enterprise is estimated to be valued at approximately US $10 billion.27 The acquisition was not reported to MOFCOM,28 presumably because the merging parties took the position that the minority-stake acquisition would not constitute an acquisition of “control” under the AML.29 The press anticipated an eventual merger of Ganji.com and 58.com, but expected it would involve two separate stages because of antitrust concerns.30 For years leading up to the strategic acquisition, 58.com and Ganji.com had engaged in vigorous competition—in 2014,
58.com spent US $180.1 million on sales and marketing, more than double the US $84.5 million spent in 2013, as the battle with Ganji.com escalated.31

At the end of May 2015, Ctrip, a leading Chinese online travel agency, purchased approximately 36 percent of the stake (and approximately 48 percent of the voting rights) of eLong, one of its main competitors in China, and became eLong’s largest shareholder.32 The transaction also was not reported to MOFCOM presumably because Ctrip did not acquire “control.” In August 2015, the other main competitor of Ctrip, Qunar, announced that it had complained about the transaction to MOFCOM for potential violation of the AML and claimed that the parties have a combined share of over 50 percent in the “online hotel booking industry” in China.33 In response, Ctrip and eLong stated that the “travel market” in China is enormous and the parties have a combined share of less than five percent.34

Will MOFCOM Investigate Non-Reportable Mergers?

Because parties determine whether transactions exceed the AML thresholds using their internal turnover data calculated based on their own financial reporting guidelines, which may introduce ambiguities in how turnovers are calculated, third parties would have difficulty verifying whether the transactions are indeed non-reportable. Moreover, given the low cost of sanctions (i.e., a maximum fine of RMB 500,000, or approximately US $80,000),35 parties may have an incentive not to report a transaction.

Under the AML, MOFCOM has the authority and discretion to review non-reportable transactions—Article 4 of the Provisions of Thresholds states that concentrations that do not reach the notification threshold still can be investigated if the facts and evidence reflect that the concentration has or may have the effect of eliminating or restricting competition.36 MOFCOM has said, on various occasions, that it plans to promulgate a new rule concerning non-reportable transactions.37 Indeed, in early 2009, it issued for public comment two sets of draft rules regarding the substantive and procedural standards for investigating non-reportable transactions.38 However, neither of these draft rules became final. While MOFCOM need not finalize these rules to investigate non-reportable mergers since it is granted such authority under the AML, written guidance

33 Id.
34 Id.
36 Notification Provisions, supra note 1, art. 4.
38 Interim Measures and Interim Rules, supra note 3.
could provide much-needed assistance to merging companies on the form and process of such investigations. And, to date, MOFCOM does not appear to have used its authority to investigate any such transactions, in contrast with its counterparts in the United States.

In the United States, a transaction will not escape antitrust scrutiny simply because it does not trigger a pre-merger Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) filing. Like the transactions noted in this article, significant mergers in the U.S. Internet sector may fall below the notification thresholds under the HSR Act because start-up Internet companies tend to lack substantial sales and assets. For instance, in 2014, the merger between two online ratings and review platforms, Bazaarvoice and PowerReviews, was not reportable because PowerReviews had insufficient assets and revenues to meet the HSR Act's filing thresholds. The Department of Justice successfully challenged the merger in 2014, however. Google's US $1 billion acquisition of map-search company Waze in 2013 was also non-reportable because Waze's revenues and assets were too low to trigger the HSR filing. In the midst of widespread media coverage, the Federal Trade Commission commenced an investigation two days after Google's announcement of the acquisition and closed the investigation about five months later without taking any action.43

Investigating and challenging non-reportable transactions can create significant risks and uncertainties for merging parties, especially to buyers. Over the past few years, the FTC and the DOJ have investigated numerous “below-the-radar” transactions, resulting in several very well-publicized cases. The DOJ alone conducted 73 investigations of non-reportable deals between 2009 and 2013, representing nearly 20 percent of all DOJ merger investigations and 22, or approximately 30 percent, of the 73 investigations resulted in a challenge, including one transaction valued at US $5 million.44 Between March 2009 and March 2012, the FTC challenged nine consummated transactions, representing approximately 20 percent of mergers challenged during that period.45

With the discretion already granted by the AML to MOFCOM, an expanding appetite for enforcement, and a general public increasingly aware of antitrust laws, MOFCOM might decide to follow the lead of the U.S. agencies and investigate or even challenge selected non-reportable transactions. Such a decision would strain MOFCOM's already limited resources and inject more uncertainty into global deal-making. With only about 30 staff members reviewing over 200 merger transactions,

39 In stark contrast to the United States, the European Commission has no specific jurisdiction to investigate a merger that falls below the notification thresholds. It has general jurisdiction to investigate anticompetitive behaviors under articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Art. 101 of TFEU prohibits certain agreements that “have as their object or effect the prevention, restriction or distortion of competition within the internal market.” Art. 102 of TFEU prohibits the “abuse by one or more undertakings of a dominant position within the internal market.”


43 Dan Prochilo, FTC Closes Probe into Google’s $1B Waze Buy, LAW360 (Nov. 6, 2013), http://www.law360.com/articles/486509/ftc-closes-probe-into-google-s-1b-waze-buy.


46 Bell & Nelson, supra note 44, at 12.
filings a year, MOFCOM is extremely short-staffed. Moreover, the burden of obtaining information from the marketplace and parties, the parties’ lack of incentive to cooperate, especially if the transaction already has been consummated, and the difficulty of remedying the anticompetitive effects of a consummated transaction by requiring the parties to “unscramble the eggs,” could add to MOFCOM’s reluctance to investigate such transactions.

Whether MOFCOM would investigate non-reportable transactions, and especially whether it would launch such an investigation against domestic companies, remains to be seen. To date, MOFCOM has never imposed restrictive conditions or blocked a transaction involving only domestic parties. Thus, the appearance of fairness might be one policy-based incentive for MOFCOM to exercise such discretion. Since the AML became effective seven years ago, the Chinese antitrust authorities frequently have been accused of bias against non-Chinese companies for launching many high-profile investigations against foreign companies and for imposing conditions on, or blocking, only transactions involving foreign companies. Through investigation of non-reportable mergers, especially domestic Internet mergers that have generated a significant amount of antitrust attention in the media and among consumers, MOFCOM could demonstrate its persistent claim of equal treatment of all businesses.

Conclusion

The recent mergers and acquisitions boom in China included several megamergers between bitter domestic Internet rivals. A common thread is that, while these transactions generated much debate about antitrust concerns among the Chinese public, they all managed to avoid the lengthy pre-merger antitrust review. These high-profile transactions prompt the question of whether MOFCOM will decide to exercise its existing authority to review non-reportable transactions, as it has not hesitated to flex its muscles in large transactions involving foreign companies. Should it choose to do so, investigating and challenging non-reportable transactions between domestic Internet firms could go a long way toward quieting criticism that MOFCOM unfairly targets foreign firms.


Barak Orbach

In June 2015, the Supreme Court handed down several landmark decisions in controversial areas, such as same-sex marriage rights, the validity of Obamacare, capital punishment, and the use of the Confederate flag. Along with these decisions, the Court also issued an opinion that received less national attention but that was still important, clarifying its approach to stare decisis—Kimble v. Marvel Entertainment. Kimble included a dictum about the relative strength of antitrust precedents. Speaking through Justice Kagan, Kimble declared that the Court is more willing to overrule antitrust precedents than other precedents. The dictum possibly reflects the Justices’ current sentiments but it does not portray correctly the Court’s actual approach to antitrust precedents.

Stare decisis, the idea that the Supreme Court follows its own precedents, has produced specific applications in antitrust law. These applications follow five general patterns. The patterns can be loosely described as the traditional, post-traditional, methodological, anomalous, and neglected antitrust stare decisis:

1. The “traditional pattern” consists of the old per se illegality rules, which the Court was reluctant to overturn on stare decisis grounds.
2. The “post-traditional pattern” emerged in the late 1970s as a judicial policy that intended to update antitrust law by narrowing and even overruling precedents. The Court sometimes presents this pattern as its general antitrust stare decisis jurisprudence. Kimble’s dictum illustrates this tendency.
3. The “methodological pattern” is the practice of relying on judicial statements to structure antitrust analysis.
4. The “anomalous pattern” is comprised of antitrust doctrines, such as the baseball exemption, that were created because of peculiar beliefs and have survived because of stare decisis even though antitrust lawyers and economists generally consider them misguided.
5. The “neglected pattern” refers to the underdevelopment of antitrust stare decisis resulting from the Court’s limited interest in antitrust law.

In this essay, I explain the patterns of antitrust stare decisis and the relationships among them in light of Kimble’s dictum.

1 See Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (a 5–4 decision holding that the Constitution guarantees a right to same-sex marriage); King v. Burwell, 135 S. Ct. 2480 (2015) (a 6–3 decision holding that the Affordable Care Act authorized nationwide healthcare subsidies); Glossip v. Gross, 135 S. Ct. 2726 (2015) (a 5–4 decision holding that a disputed execution drug does not violate the 8th Amendment); Michigan v. EPA, 135 S. Ct. 2699 (2015) (a 5–4 decision holding that the EPA’s regulation of mercury emissions were unreasonable); Walker v. Texas Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (a 5–4 decision holding that Texas was free to reject specialty license plates bearing the Confederate battle flag); Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (a 5–4 decision holding that disparate impact claims are cognizable under the Fair Housing Act of 1968).
Are Antitrust Precedents Weaker than Others?

The Concept of Stare Decisis. Stare decisis is a legal concept the Supreme Court invokes inconsistently and which is not clearly circumscribed. Nevertheless, Justice Cardozo described the concept as “at least the everyday working tool of our law.” Justice Brandeis articulated the general criteria guiding the application of stare decisis:

Stare decisis is not . . . an inexorable command . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.

This classic formulation presents stare decisis as judicial policy and draws a distinction between statutory stare decisis—interpretations of statutes that Congress may amend through legislation—and constitutional precedents that Congress is unlikely to modify.

The Sherman and Clayton Acts created a framework for federal common law that develops through precedents. Accordingly, antitrust precedents are not statutory, and the Court is expected to reconsider them. However, it would be an exaggeration to claim that the Supreme Court consistently treats antitrust only as federal common law, because it does not. As explained below, the Court also gives certain antitrust precedents the protection of statutory stare decisis.

Kimble’s Dictum. In Kimble, in a 6–3 decision, the Supreme Court used a challenge to a half-century old patent law precedent, known as the Brulotte rule, which has generally been accepted as erroneous, to issue a decision about statutory stare decisis. The majority declined an invitation to overturn the precedent, emphasizing that Congress had chosen not to amend it. In such situations, the Court held, a “superspecial justification” is needed to reverse precedents interpreting statutes.

The Brulotte rule built on the old antitrust per se condemnation of leveraging “patent monopoly” through tying. The origins of the rule and the petitioner’s arguments inspired the Kimble Court to make several references to antitrust law. In dictum, the Kimble majority declared that “stare

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7 Brulotte v. Thys Co., 379 U.S. 29 (1964). The Brulotte rule provides that a “royalty agreement that projects beyond the expiration date of the patent is unlawful per se.” Id. at 32. The rule rests on the premises that a patent confers market power and that a licensing agreement that extends after the expiration of the agreement necessarily intends to leverage market power. Both premises are flawed. See generally Herbert Hovenkamp, Brulotte’s Web, 11 J. Competition L. & Econ. 527 (2015) (explaining the flaws of the Brulotte rule).
8 Kimble, 135 S. Ct. at 2410.
**decisis** [has] less-than-usual force in cases involving the Sherman Act,”10 which gives courts “exceptional law-shaping authority.”11 The majority further explained:

> We have . . . felt relatively free to revise our legal analysis as economic understanding evolves and . . . reverse antitrust precedents that misperceived a practice’s competitive consequences. . . . Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court’s rulings necessarily turned on its understanding of economics.12

Together with this dictum about the relative weakness of antitrust stare decisis, the *Kimble* majority recognized that the Court may apply statutory stare decisis even to “judicially created doctrine[s]” designed to implement . . . federal statute[s] . . . [since all] interpretive decisions . . . are balls tossed into Congress’s court.”13 Quite a few antitrust doctrines fit this characterization. *Kimble* was somewhat vague about the relationship between the Court’s willingness to overrule antitrust precedents and its commitment to certain doctrines.

*Kimble* settled concerns regarding potential applications of stare decisis following *Leegin*, where the Court overturned the century-old per se illegality rule against resale price maintenance.14 The *Leegin* dissent criticized the decision, arguing that *Leegin* was “a statutory case,”15 stressing that “the Court applies stare decisis more ‘rigidly’ in statutory than in constitutional cases,”16 and pointing out that the Court had never “overturned so well-established a statutory precedent.”17 *Leegin* was handed down as the polarization in the Court was growing, and the dissent’s discussion of stare decisis cited two cases about campaign financing and abortion rights.18 It appeared that the dissent was concerned with implications of stare decisis outside antitrust law. *Kimble* unambiguously distinguished antitrust precedents from others, especially statutory precedents,19 implying that *Leegin* has no bearing on the Court’s general approach to stare decisis. This clarification, as was the case in *Leegin*, appears related to controversies over other decisions that the Court issued more or less together with *Kimble*.20

*Kimble’s* discussion of stare decisis joined several recent decisions in which the Court articulated its commitment to stare decisis and, specifically, to statutory stare decisis.21 These decisions present stare decisis as the Court’s “preferred course,” declaring that this course “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judi-

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10 *Kimble*, 135 S. Ct. at 2412.
11 Id. at 2413.
12 Id. at 2412–13 (internal quotation marks omitted).
13 Id. at 2409.
15 *Leegin*, 551 U.S. at 924.
16 Id. at 923.
17 Id. at 918.
20 See supra note 1 and accompanying text.
cial decisions, and contributes to the actual and perceived integrity of the judicial process.”

22 They even portray stare decisis as “a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion.”

Kimble’s dictum, therefore, addresses antitrust precedents but its context is the existing polarization in the Court and its effects on the stability of precedents.

Patterns in Antitrust Stare Decisis

The Traditional Antitrust Stare Decisis. Kimble’s recognition that the Court sometimes gives its own doctrines the protection of statutory precedents is consistent with the traditional antitrust per se illegality rules. These rules are irrebuttable presumptions that apply to “certain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue.” Such agreements and practices “are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry [of the rule of reason] as to the precise harm they have caused or the business excuse for their use.”

The Court’s unwillingness to overturn outdated or misguided antitrust precedents considerably undermined the credibility of per se illegality rules. In theory, the Court adopted these per se rules only after acquiring “considerable experience” that a practice has primarily anticompetitive effects. However, until the late 1970s, even when experience showed that a condemned practice was actually procompetitive, the Court was reluctant to overrule per se rules, relying on stare decisis rhetoric. The prime example is the per se rule against resale price maintenance that survived 96 years even though the Court started narrowing the rule shortly after handing it down.

The Court has been moving away from this “traditional antitrust stare decisis”—the reliance on stare decisis to justify per se rules—but has not entirely abandoned the approach. It still influences antitrust law.

At the very least, the per se rule against tying has escaped serious reconsideration because of stare decisis. More than 30 years ago, in Jefferson Parish, the Court declared that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’” The Court has yet to reconsider this position expressly.

Topco offers another example. The Topco Court applied a per se rule to condemn a territorial restraint of a joint venture of small businesses believing that the restraint was “a horizontal one.”


23 Id. (internal quotation marks omitted).

24 Id. (citing N. Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)).

25 Id.

26 Broadcast Music, Inc. v. CBS, 441 U.S. 1, 9 (1979) (“[O]nly after considerable experience with certain business relationships that courts classify them as per se violations” (quoting United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972)); NCAA v. Bd. of Regents, 468 U.S. 85, at 100 n.21 (1984) (”[U]pjudicial inexperience with a particular arrangement counsels against extending the reach of per se rules.”); FTC v. Superior Ct. Trial Lawyers Ass’n, 493 U.S. 411, 433 (1990) (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable” (quoting Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332, 344 (1982))). See also HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 118 (2005) (“The federal courts ordinarily do not apply the per se rule to a practice the first time they encounter it.”).

27 See United States v. Colgate & Co., 250 U.S. 300 (1919) (creating a path to circumvent the per se condemnation of resale price maintenance).


29 Topco, 405 U.S. at 608.
Committed to stare decisis, the Court ruled that “[w]hether or not we would decide this case the same way under the rule of reason . . . is irrelevant.”\(^{30}\) The Topco majority described per se rules as statutory precedents necessary for business certainty and explained that “[s]hould Congress . . . determine that predictability is unimportant . . . it can . . . make per se rules inapplicable in some or all cases.”\(^{31}\) Topco is inconsistent with subsequent decisions of the Court, prominently California Dental Association,\(^{32}\) but inconsistency does not seem to repudiate per se rules in antitrust.

The traditional antitrust stare decisis reflects mechanical formalism, which in antitrust means commitments to interpretations of the antitrust laws that require courts to discount and even disregard relevant competitive effects.\(^{33}\) High degrees of such formalism cannot serve competition well. Still, it is important to recognize that per se rules, such as the prohibition on price fixing, that rest on settled economics rather than stare decisis can be quite useful in antitrust.

**The Post-Traditional Antitrust Stare Decisis.** By depicting antitrust stare decisis as relatively weak, the Kimble majority followed a description that the Court has used many times since the late 1970s. This narrative allows the Court to overturn outdated antitrust precedents, while departing from the traditional antitrust stare decisis. The Court, however, does not feel required to reconsider all outdated precedents, let alone to overturn them.

The “post-traditional antitrust stare decisis” emerged when the Supreme Court started reshaping antitrust in the late 1970s. The Court used two rationales for reversing outdated precedents: (1) antitrust is federal common law,\(^{34}\) and (2) the Court’s evolving understanding of economics may justify reconsideration of antitrust precedents.\(^{35}\) The Court invoked these rationales when overturning per se illegality rules against vertical restraints,\(^{36}\) narrowing the scope of per se horizontal and vertical illegality rules,\(^{37}\) and blurring the distinction between per se rules and the rule of reason analysis.\(^{38}\) In Khan, the Court combined the rationales and presented a general formulation for antitrust stare decisis:

> [T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. . . . [T]he Court . . . recon-

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30 Id. at 609.

31 Id. at 609 n.10.


35 *See, e.g.*, Sylvania, 433 U.S. at 47–49; BMI, 441 U.S. at 23 (internal quotation marks omitted) (“[W]e have some doubt—enough to counsel against application of the per se rule—about the extent to which this practice threatens the central nervous system of the economy.”); Leegin, 551 U.S. at 900.

36 *See, e.g.*, Sylvania, 433 U.S. 36 (overruling the per se rule against territorial restrictions and holding that nonprice vertical restrictions should be reviewed under the rule of reason); Khan, 522 U.S. 3 (overruling the per se rule against maximum resale price maintenance); Leegin, 551 U.S. 877 (overruling the per se rule against resale price maintenance).

37 *See, e.g.*, BMI, 441 U.S. 1 (creating an exemption for the per se condemnation of horizontal price-fixing agreements); Business Electronics, 485 U.S. 717 (narrowing the rule against resale price maintenance by holding that a vertical agreement to terminate discounters is not sufficient for per se condemnation); Illinois Tool, 547 U.S. at 46 (2006) (narrowing the per se rule against tying by holding that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”)

38 *See, e.g.*, NSPE, 435 U.S. 679 (applying the rule of reason to an agreement not to submit competitive bids).
Methodological Stare Decisis utilizes formalism to structure the analysis, supposedly without influencing substance, as it does not define impermissible conduct. Such formalism is needed in law to economize the costs of litigation and administrative processes. The post-traditional pattern, therefore, has been a dominant pattern in antitrust since the late 1970s, expressly used by the Court to reshape the law. Properly understood, however, this pattern is merely a narrative that the Court sometimes utilizes alongside other stare decisis patterns.

The Court has turned to these rationales in several decisions that were pivotal to the trend toward the rule of reason. The *Leegin* majority relied on precedents that used these rationales and went one step further, declaring that “[s]tare decisis is not as significant . . . [when] the issue before us is the scope of the Sherman Act.”

The post-traditional pattern, therefore, has been a dominant pattern in antitrust since the late 1970s, expressly used by the Court to reshape the law. Properly understood, however, this pattern is merely a narrative that the Court sometimes utilizes alongside other stare decisis patterns. Used out of context, the narrative presents the Supreme Court’s antitrust jurisprudence in a favorable light. This was the spirit of *Kimble*’s dictum.

**Methodological Antitrust Stare Decisis.** Methodological stare decisis is “the practice of giving precedential effect to judicial statements about methodology,” namely, “turn[ing] a set of interpretive rules into a controlling interpretive framework.” For example, courts’ interpretations of *Standard Oil,* *Chicago Board of Trade,* and related early antitrust precedents contributed to the development of the rule of reason. Similarly, the construction of Interstate Circuit, *American Tobacco,* and *Theatre Enterprises* established that proof of concerted action requires direct evidence of communication or indirect evidence that goes beyond parallel conduct (“plus factors”).

Methodological stare decisis utilizes formalism to structure the analysis, supposedly without influencing substance, as it does not define impermissible conduct. Such formalism is needed in law to economize the costs of litigation and administrative processes. But the idea has obvious limitations: the methodology is often used to influence substance. The rise of proceduralism in antitrust illustrates both the value and perils of methodological stare decisis.

Three 1977 decisions—*Sylvania,* *Brunswick,* and *Illinois Brick*—shaped the direction of methodological stare decisis. In *Sylvania,* the Supreme Court ruled that “departure from the rule of rea-

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40 *Leegin,* 551 U.S. at 899.

41 See, e.g., *Jefferson Parish,* 466 U.S. at 9; *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977) (analyzing Section 4 of the Clayton Act and stating that “considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29 (1992) (holding that even if economic analysis does not support the ruling regarding market power in aftermarkets, the ruling is supported by stare decisis; analyzing Section 1 of the Sherman Act and stating that “[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done”); *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 769 (1984) (Brennan, J., concurring).


43 *Standard Oil Co. v. United States,* 221 U.S. 1 (1911).

44 Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).


46 See, e.g., *Northern Pacific,* 356 U.S. at 5 (“Th[e] principle of per se unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.”)
son standard must be based upon demonstrable economic effect.”47 In Brunswick, the Court established the antitrust injury standard.48 And, in Illinois Brick, the Court formulated the direct purchaser doctrine.49 These 1977 precedents created standing requirements in antitrust and shaped the evolution of antitrust methodology in recent decades. Examples of subsequent methodological standards developed by the Court include false positives as a principal inference criterion,50 new pleading and summary judgment standards (with specific applications for Section 1),51 and a revised analysis of implied immunity.52 These methodological developments offer considerable advantages, but, as the literature demonstrates, the advantages are not always balanced against their costs. By and large, procedural methodology in antitrust influences—and even appears to be intended to influence—substance by favoring defendants.

Perhaps the most complicated example of methodological antitrust stare decisis is the development of the structured rule of reason. Until the late 1970s, antitrust was governed by “two complementary categories of antitrust analysis”:53 per se rules that established the traditional antitrust stare decisis and the rule of reason analysis that was an unstructured inquiry. Under the traditional rule of reason analysis, as described by the Sylvania Court, “[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”54 A few years earlier, in Topco, Justice Marshall portrayed the rule of reason as “leav[ing] courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”55 The unstructured rule of reason perhaps used the rhetoric of Sylvania but it often had the characteristics described by Justice Marshall.

As explained, post-traditional antitrust stare decisis narrowed the scope of traditional stare decisis. The Court facilitated this transition mostly by overruling vertical per se illegality rules and by making their proof more difficult. Quite notably in this trend, the California Dental Association Court emphasized that categorical analysis is somewhat artificial and that functional analysis without benchmarks can be vague. It announced that “our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”56 Quoting Professor Areeda, the Court also stressed that “[t]here is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for.”57

The erosion in the distinction between per se and rule of reason was accelerated by lower courts and the agencies that tried to promote various approaches of “continuum” (the spectrum

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53 NSPE, 435 U.S. at 692.
54 Sylvania, 433 U.S. at 49.
55 Topco, 405 U.S. at 609 n.10.
56 CDA, 526 U.S. at 779.
57 Id. at 780.
of evidentiary burden spreading between per-se styled limited burden and heavy burden needed in elaborate rule-of-reason inquiries). Courts first applied a structured analysis utilizing a burden-shifting framework in cases arising under Section 1 of the Sherman Act. A similar framework was then applied in Section 2 cases. This contemporary analysis supposedly treats stare decisis as “experience” from which courts may construct a condensed rule of reason and presumptions. Courts and the agencies developed such methodologies while drawing on Supreme Court precedents, or more precisely, on dicta. The Supreme Court appears to endorse these interpretations of dicta, although stare decisis technically does not apply to dicta. A necessary methodological stare decisis formed to eliminate the mechanical formalism of the traditional antitrust stare decisis and the vagueness of the unstructured rule of reason. Professor Areeda’s warning, however, remains valid: the methodology often creates a misleading appearance of precision.

In The Antitrust Enterprise, Professor Hovenkamp criticized traditional antitrust stare decisis and argued that the “proper rule” for antitrust stare decisis is methodological. Such a rule, he argued, would “stabilize a method of analyzing antitrust restraints.” The present methodological antitrust stare decisis is much broader than Professor Hovenkamp’s prescription and has distorting effects on antitrust law. Under present law, antitrust procedure is often used to bar plaintiffs and protect defendants.

**Anomalous Antitrust Stare Decisis.** Anomalous antitrust stare decisis describes a pattern of precedents whose primary justification is the precedent itself. Unlike traditional antitrust stare decisis that rests on certain perceptions of competitive effects, this pattern consists of precedents that were never seriously related to beliefs about competitive evils. They are truly anomalous, yet enjoy

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60 See United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

61 See, e.g., FTC v. Actavis, Inc., 133 S. Ct. 2223, 2237 (2013) (“[A]bandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”) (internal quotation marks omitted).


63 See, e.g., Actavis, 133 S. Ct. at 2236–38 (internal quotation marks omitted) (“An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason. . . . [T]here is always something of a sliding scale in appraising reasonableness, and as such the quality of proof required should vary with the circumstances.”).

64 See, e.g., United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J.) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”).

65 Supra note 57 and accompanying text.

66 HOVENKAMP, supra note 26, at 120.

67 Id. at 120–21.
“a super-strong presumption of correctness.”68 Two key examples are the baseball exemption and the filed-rate doctrine. The baseball exemption shields Major League Baseball from the reach of the antitrust laws.69 The filed-rate doctrine immunizes regulated firms from antitrust challenges to rates filed with regulatory agencies.70 Neither doctrine can be justified other than by the reluctance of the Court to overrule it.

Another anomalous antitrust precedent is footnote 17 in Goldfarb, which gave learned professions a special status in antitrust law.71 The Court has referred to this regrettable dictum as binding precedent.72 In North Carolina State Board of Dental Examiners, the Court expressed skepticism about self-regulation of professional organizations but did not expressly overrule this precedent or withdraw from this position.73

Neglected Antitrust Stare Decisis. The developments in patterns of antitrust stare decisis discussed thus far were shaped by the transformation of antitrust since the late 1970s. Another phenomenon critical to the evolution of antitrust stare decisis is the Court’s limited interest in antitrust law and its unwillingness to review substantive antitrust issues.74 The dramatic decline in the docket of the Supreme Court during the Rehnquist Court era,75 which has continued during the Roberts Court, partially accounts for the phenomenon. But trends in the Court’s approach to its docket do not define its oversight responsibilities of the Court. The Court is still entrusted with overseeing the development of antitrust law by guiding lower courts, resolving conflicts among the circuits, and updating the law. Too often, however, it simply neglects the task.76 For example, in the area of mergers, Philadelphia National Bank’s 1963 presumption established methodological stare decisis.77 The Court has not reviewed any case in this area since the 1970s.

The neglect of antitrust stare decisis has not been an expression of confidence in the state of antitrust or in lower courts. The Court recognized that “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries” and it may “prove difficult for those many different courts to reach consistent results.”78 The Court even went as far as stating that “antitrust courts are likely to make unusual-

68 See Eskridge, supra note 3, at 1376–81 (arguing that statutory precedents sometimes benefit from such presumption and offering the antitrust baseball as an example).
71 Goldfarb v. Va. State Bar, 421 U.S. 773, 788 n.17 (1975) (“The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act . . . .”).
72 NSPE, 435 U.S. at 686 (“[C]ertain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context.”); Indiana Federation of Dentists, 476 U.S. at 458 (“[W]e have been slow to condemn rules adopted by professional associations as unreasonable per se.”).
76 See, e.g., Brent Kendall, Court Takes Pass on Reach of U.S. Antitrust Law, WALL ST. J., June 22, 2015, at B6; Kendall, supra note 69.
78 Credit Suisse, 551 U.S. at 281 (Breyer, J.).
ly serious mistakes.” Yet, in *Actavis*, the Court ruled that reverse settlement agreements should be analyzed under the rule of reason, instructing lower courts to structure their analysis, but without offering guidance:

> As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. . . . We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.

A split among the circuits was inevitable as a consequence of this form of neglected stare decisis. The pattern of neglected antitrust stare decisis, therefore, is well recognized. Yet, despite the impact and persistence of this pattern, it is not one that the Supreme Court writes about. Rather, the Court tends to present its active approach to antitrust precedents—the post-traditional pattern—as its general antitrust stare decisis jurisprudence. *Kimble*’s dictum illustrates the point.

**Conclusion**

The concept of stare decisis presumes that settled law offers advantages that may outweigh the costs of its imprecision. The study of antitrust stare decisis reveals five distinct approaches, which can be loosely described as the traditional, post-traditional, methodological, anomalous, and neglected patterns. The post-traditional and methodological patterns intend to offer practical paths for the development of antitrust law, the traditional and anomalous patterns reflect outdated sentiments, and neglected stare decisis appears to reflect the Court’s general approach to antitrust. The proper interpretation and development of antitrust law require understanding of these patterns.

*Kimble*’s dictum summarized a familiar narrative that the Court occasionally uses to describe antitrust stare decisis. This description is imprecise. It aligns with the theoretical characteristics of antitrust as federal common law that is governed by economic analysis. The law in practice, however, has different characteristics and is considerably more nuanced. The dictum appears to suggest that neglected stare decisis, which troubles many antitrust experts, does not exist.

Ultimately, *Kimble*’s dictum offers a convenient quote for certain purposes and is likely to be used as such. Litigating parties cite the Court’s references to the post-traditional pattern to challenge and defend antitrust precedents. *Kimble*’s dictum will appear in briefs in such contexts. In terms of likely implementation, during the past four decades, the Court has used the post-traditional narrative primarily to narrow the scope of antitrust, but the Court could also do so in the opposite direction. Since law progresses in waves, it may well be that *Kimble*’s dictum will be used to narrow and overrule limiting precedents and instead expand antitrust implementation.

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79 Id. at 282.
80 *Actavis*, 133 S. Ct. at 2238.
So (You Think) You Want to Be a Law Professor: FAQs for Prospective Adjunct Professors in Antitrust

Edward D. Cavanagh

In antitrust, law faculties are increasingly reaching out to experienced practitioners to serve as adjunct faculty to enhance the classroom experience of law students. In part, this trend reflects the fact that practitioners have developed valuable expertise in a field characterized by global markets and breathtaking innovation. This trend also reflects the efforts of law schools to balance instruction in legal theory with instruction in the realities of day-to-day antitrust practice. Moreover, austerity measures triggered by declining enrollments have led law schools to utilize adjuncts to teach antitrust. Is teaching right for you? How can you find an adjunct position? What makes a good adjunct professor? Read on!

How Do I Procure an Adjunct Appointment to Teach Antitrust?

Adjunct teaching has many potential points of entry. One of the most effective ways to land an adjunct position is networking. Network through your law school alumni association; law school classmates; local, state and national bar associations; and full-time law professors with whom you are acquainted. Participate in law school-sponsored CLE events or offer to serve as a guest lecturer in an antitrust class. Simply being part of a professional networking site like LinkedIn is a good first step but not enough. A second point of entry is through writing thoughtful and interesting articles on antitrust law, which shows intellectual depth and commitment to the field. A third avenue: target specific law schools in which you are interested and contact the dean directly.

Do not be discouraged if you learn that the basic antitrust course is already covered. Look for gaps in the curriculum where you can offer expertise: e.g., international antitrust, antitrust law and intellectual property, cartel enforcement, antitrust in health care, or advanced topics. Also consider courses in which antitrust expertise is valuable, such as Sports Law, Regulated Industries, or Consumer Protection. Be prepared to support your pitch for a course with a draft course description, a tentative syllabus, and proposed course materials.

What Is the Time Commitment if Appointed?

The time commitment is substantial. First, consider preparation time. The basic rule of thumb is three hours of preparation for every one-hour class. In a typical 14-week semester, this amounts to at least 126 hours of preparation time. Then add actual classroom hours, travel to and from school, office hours for students and the considerable time needed to prepare and grade exams. In total, this work easily could amount to about 275 hours or more each semester.

Once you have created a good set of class notes, preparation time falls dramatically if you come back for future semesters, but it never really ends. You must stay current with developments in the field by reading advance sheets containing recent court decisions, as well as antitrust-related publications. You’ll encounter law review articles that would be interesting for future classes. And, after teaching for a term, you may want to weave in nuances in cases that
may have escaped you as an advocate. Each time you complete a semester, you will have a firmer grip on the materials and be more adept at anticipating questions from the class and likely problem areas for students.

**What Materials Do I Use?**

Antitrust has an especially rich collection of casebooks from which you may choose for a basic antitrust course. (And once you are appointed, publishers will provide you copies of their casebooks free of charge.) You will normally have considerable latitude in this area. Ask other professors what materials they use. Select materials with which you are comfortable and that will be user-friendly for you and your students. If you are not happy with the available casebooks, you may decide to use your own materials, but a word of caution: preparing your own materials is an extremely labor-intensive enterprise and not recommended for first-time adjuncts. You should be able to find a serviceable casebook. If you teach a related or more advanced course, existing casebooks may be harder to find and then you will have to put together your own materials. The benefit is that you can select materials with which you are most comfortable.

**What Topics Do I Cover?**

You cannot cover all aspects of antitrust in a three-hour introductory course. Basic survey courses usually address Sections 1 and 2 of the Sherman Act; Sections 3, 4, and 7 of the Clayton Act; Section 5 of the FTC Act; and the Hart-Scott Rodino Antitrust Improvements Act. Additional topics may include standing, antitrust injury, remedies, state action, the intersection of intellectual property and antitrust, international enforcement, and the Robinson-Patman Act. You may want to spend time discussing how procedural devices, such as motions to dismiss and motions for summary judgment, shape antitrust outcomes. Be flexible. Do not hesitate to discuss relevant current events, such as a new government enforcement action, a significant appellate decision, or an imploding merger. Other teachers who have taught antitrust law or online syllabi are good places to get ideas for what to include. Above all, avoid sacrificing quality for quantity. Do not worry if you have no time for Robinson-Patman (most of us never get there). Keep in mind that your audience is made up largely of rookies in the field. Whatever you do, do well.

**How Do I Conduct Class?**

The path to success in teaching any law school class is to engage the students and make them part of the enterprise. You may embrace a variety of teaching tools, including the case method, prepared problems, hypotheticals based on assigned cases, and simulations. From time to time, you may want to use a guest lecturer. Audio/visual presentations, such as the DOJ's surveillance tape in the ADM price-fixing case, may capture the attention of the students. Keep the students interested. For example, divide the class in half and have each group give the opposing appellate arguments in a pharmaceutical pay-for-delay case. Also, you may have the class view an oral argument in a significant pending antitrust case.

Avoid a steady diet of straight lecture. If you do all the talking all of the time, you will lose the class quickly—the learning environment is most fertile when students are actively engaged in the class. Bring your practical experience to bear on the materials that you cover. By imparting the lessons learned from day-to-day antitrust practice, you will enrich the classroom experience. Students especially appreciate hearing the back stories of big cases that put outcomes in context. At the same time, avoid having the class descend into a series of war stories, however entertaining those stories may be.
Make the classroom experience rigorous. Remind students that in the practice of law, they will always be part of a dialogue. Senior attorneys, clients, and judges will expect informed and concise answers to their questions. Impress on students the need to be prepared, whether for class or an argument before the Supreme Court. To promote rigor in the classroom and to assure undivided attention from students, some law professors ban the use of laptops and other electronic devices in the classroom; others think these are helpful tools. While there is no one right answer, try to maximize the benefits of technology while avoiding its pitfalls.

**What Do I Do About Free Riders?**

If students come to class unprepared and not ready to participate in the discussion, do not tolerate their behavior. One particularly effective means of assuring that students read their assignments is to announce at the outset that you will lower the course grades for students who are not prepared and then do just that. Create an atmosphere of professionalism in the classroom. Make clear the importance of being prepared as a lawyer, whether before a judge, with clients, or with other attorneys in the office, and the dire consequences that follow from lack of preparation.

**How Much Economics Do I Teach?**

This is a matter of preference. Some professors introduce a healthy dose of economics into the basic course, while others keep discussion of economic theory to a minimum. The level of economic sophistication varies substantially among students, and you may face a mass exodus if you draw too many supply and demand curves. Also, as a practical matter, you simply do not have time to teach your students antitrust and economics. Accordingly, resist any temptation to turn your class into an intermediate microeconomics seminar. Consider assigning the students some readings in basic economics at the start of the course, which they can then refer to throughout the semester. Reassure students that lack of an economics background need not impair their performance in the course or in the practice of law.

**What Are My Obligations to Students Outside of Class?**

Law schools require all professors, including adjuncts, to be available to students outside of class times. Nevertheless, office hours for adjuncts can be tricky because the time on-site is limited and office space for adjuncts is often shared. As a result, the time and space for face-to-face meetings are limited. Encourage students to contact you by email or telephone, and make it a priority to return emails or calls promptly. Although email facilitates communication, it is not a particularly useful tool where the questions posed require detailed and textured responses. Where a face-to-face meeting is needed, set an appointment at a mutually convenient time.

Students may seek you out for a variety of reasons besides questions about the classroom. They may seek career advice, letters of recommendation or your willingness to supervise an independent research project or law review note. Undertake these roles as your schedule permits. Mentoring law students is one of the most satisfying aspects of law teaching.

**How Do I Evaluate Student Performance?**

Most law schools allow leeway in evaluating student performance. You may grade on the basis of a final examination, papers, problem exercises, class participation or some combination of the above. Many professors in the basic course grade on the basis of a final examination, with some discretion to raise or lower a grade based on classroom performance. Semester papers are more appropriate for advanced or specialized courses where students are better equipped to address
What Are the Format and Content of a Final Examination?
The format of the final examination turns on your preferences and the culture of the school—in class or take-home, open or closed book, essays or short answer? A good examination is layered in the sense that it has issues that all students will get, issues that many students will get, and issues that only the best students will get. Preparing the content of the final examination is thus one of the most challenging aspects of teaching. You may get examination ideas from a variety of sources. Check to see if your school keeps past examinations on file. Ask other antitrust professors for sample questions; search the Internet for samples. Avoid “borrowing” the content of prior examinations because students can access the same materials (which sometimes contain model answers). Also, it is unprofessional and lazy—traits that no law professor wants to convey to the law school administration and students. Advance sheets, note cases in the text, and law review articles are good sources for examination questions. Perhaps the best source, however, is your imagination.

How Do I Grade Examinations?
Grading is the WORST part of the job. As a threshold matter, check your ego at the door. Although some students will show that they have mastered the materials, other students will demonstrate that they did not pick up much of what you had conveyed in class. Wading through the morass of an essay answer to distinguish quality from mediocrity often is difficult. Have a model answer against which you read exams. Grade rigorously but fairly. Do not give away the store, and do not be afraid to give low grades. Most schools provide grading guidelines to normalize grades and require substantial compliance with those guidelines. Grade normalization assures that students will be neither unduly benefited nor prejudiced by quirks in an individual professor’s approaches to grading.

Do I Review Examinations with Students?
Policies vary from school to school, but most schools require professors to provide some form of feedback to students where requested. A cover-to-cover review of an exam is time-consuming and probably necessary only in extraordinary situations, such as where the student earned a failing grade. For those seeking review, provide students with copies of their test papers and a model answer against which to read their papers. The model answer can be an answer prepared by the professor, the best paper in class, or an amalgam of the best answers to each question.

Students seeking feedback are often unhappy with their grades and may attempt to re-argue their cases. Resist temptation to engage in that effort. Let the student know up front that the purpose of the exercise is to let them know why the grade is what it is and not to permit the student to argue for more points.

Another vehicle for feedback is to provide a post-mortem session where any student interested in feedback can attend. This is probably the most efficient way to provide feedback but, in my experience, few students attend and many will seek individual reviews anyway. Keep in mind also that after the spring term, few, if any, students will be around to attend a post-mortem.

What Do I Do About Student Evaluations in My Course?
All law schools offer students the opportunity to evaluate their professor. Encourage the students to participate. Take any evaluations with a grain of salt. In all likelihood, you are neither as good
nor as bad as the evaluations say. Things to pay attention to in the evaluations are whether in the view of the students you are (1) punctual; (2) prepared; (3) enthusiastic; (4) organized; (5) clear in your presentation; (6) accessible after class; and (7) whether you have devoted sufficient time to various topics. You typically can discount complaints that the coverage is too broad; that there is too much reading; or that the cases are too long and complicated—that is the very essence of antitrust. Far more important are evaluations by your peers on the faculty. (See discussion below.)

**How Much Supervision Will I Receive?**
The amount of supervision varies from school to school, but you may not receive a lot. If you are assigned a mentor on the full-time faculty, establish regular contact with that person and raise any questions you may have. If no mentor is assigned, seek one out either from the full-time faculty or from another school. Most law schools regularly audit classes taught by part-time faculty and provide adjuncts with meaningful feedback on their classroom performance.

**Is Adjunct Teaching a Foot in the Door to Full-Time Teaching?**
Probably not today, although at one time adjunct teaching was a pathway to full-time status. Today, schools emphasize academic and scholarly credentials, as opposed to practical experience. Nevertheless, a good run in the basic antitrust course may lead to further work in related courses, such as Antitrust and Intellectual Property, International Antitrust, or Antitrust and Healthcare.

**What Are the Major Pitfalls of Adjunct Teaching?**
Perhaps the biggest pitfall is trying to do too much in class and thus not providing sufficient depth for the topics covered. Since your class probably will consist of relatively young and unsophisticated students, you need to lay a foundation for each topic to assure that they understand the material. A second pitfall is grading too leniently. Grading is hard, but that does not mean that all students should get A's. The last thing you need is to develop the reputation of being an easy grader. You will attract unmotivated students to your classes and incur the wrath of your faculty colleagues for not being a team player. Students like easy A's, but they admire the professors who make them earn their grades.

A third pitfall is inability to control the classroom. Set the bar of expectation high from the beginning. Insist that your students come to class, come to class on time, and come to class prepared. Engage the students during class and encourage them to ask questions. Some students may resist but, in the end, most students will respect you for creating an atmosphere of professionalism in the classroom.

**What Is the Pay?**
Not much. If you are looking to supplement your income in a meaningful way, look elsewhere. Adjunct teaching will never make you financially well off. Still, it is fulfilling and a noble calling—and given the pay, a labor of love. As an adjunct, you can help make the profession better by getting another generation excited about antitrust; and since you learn by teaching, you will learn a lot yourself.●
Paper Trail: Working Papers and Recent Scholarship

Editor’s Note: Editor John Woodbury comments on a provocative paper suggesting that shareholding by institutional investors has had a substantial and adverse impact on competition, the recovery from the Great Recession, and income inequality. He also comments on a report recently released by the U.S. antitrust agencies on their FY 2014 enforcement activities.

Send suggestions for papers to review to page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers


Einer Elhauge (Petrie Professor of Law, Harvard Law School) begins this paper in an unusual tenor for a scholarly work:

An economic blockbuster has recently been exposed. A small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other. (p. 1.)

The “blockbuster” refers to a recent paper by Azar, Schmalz, and Tecu (Azar et al.) that suggested that investments by institutional investors in multiple competitors on particular airline routes have raised fares by 3–11 percent.1 Elhauge first describes the theory behind the paper and then draws out its implications across a whole array of issues, which, Elhauge argues, may be resolved through a more aggressive antitrust policy.

Summary of Azar et al.2

Azar et al. observe that institutional investors account for about 70–80 percent of publicly-traded firms. (p. 1.) In the airline industry—the laboratory of Azar et al., seven institutional investors accounted for 60 percent of the stock of United Airlines as well as having significant ownership shares in Delta, Southwest, and JetBlue. (Azar et al., Online Appendix Table A.3) Similarly, the four


2 While I am confident that most would want to read the more technical discussion of the theory and the empirical analysis in the original Azar et al., Elhauge provides a useful non-technical summary of the logic and the empirical analysis. My previous comments (see supra note 1) on Azar et al. chart a middle course.

3 Jose Azar, Martin C. Schmalz & Isabel Tecu, Online Appendix to: Anti-Competitive Effects of Common Ownership (Mar. 3, 2015), https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxtYXJ0aW5jci12NobWFsentxDe6YTM1MDU0NjU0ODY0DQ.
leading shareholders of JP Morgan-Chase have substantial ownership interests in Bank of America and Citigroup. (Azar et al., Table 1.) In brief, the paper concludes that ownership interests by institutional investors in multiple market rivals are prevalent throughout the economy.

At a basic level, the potential anticompetitive implications of these ownership holdings can be illustrated with a simple example. Suppose that a large institutional investor held 70 percent of the shares of two firms that compete in some market. To maximize its profits from its investments, the investor would direct the managers of the rivals (if it had control over the two firms) to be less aggressive in competing with each other, thus resulting in higher prices and reduced output of the two firms. If the firms were independently owned, one rival's gain from competing aggressively would (generally speaking) be reflected in the losses of the other firm. The single aggressive firm that reaps profits from this strategy cares not for the losses of its rival. In contrast, in considering the profitability of aggressive competition, the investor's profitability is its share of the gains to the aggressive firm less its share of the losses of the rival. In other words, the profitability of aggressive competition to the investor is less than that of the aggressor firm.

But Azar et al. note that “it is important to recognize that investors need not explicitly communicate their interests to management” to reduce the rivalry between the two firms. (p. 5.) The managers of both firms will know the identity of the investor—that information is in the public domain—and that the leverage held by the large investor could be used to punish managers who do not act to reduce rivalry between the two firms. In my view, that compliance mechanism in and of itself may not be sufficient given the efforts by institutional investors to directly persuade management to implement their goals. As Azar et al. observe (p. 5), there is “circumstantial evidence that asset managers ‘engage’ with portfolio firms about product market strategy, which suggests that ‘active ownership’ by ‘passive’ investors can indeed be part of the mechanism” by which institutional investors communicate their preferences to management, including preferences to soften competition between the rivals.

Of course, unlike my example, there are multiple institutional investors and Elhauge notes (pp. 1–2) that a relatively small number of institutional investors “share” stock ownership in large rival firms. Multiple investors can complicate the coordination of rivals. But if the interests of these institutional investors are aligned in that they would prefer that the value of their investments be enhanced by reduced competition among the rivals, the rivals’ managers will act in a way that reduces that rivalry, increases prices, and reduces output.

Azar et al. test this proposition empirically for the airline industry. Based on work by O’Brien and Salop,⁴ the metric of interest is a modified HHI (MHHI) that can be used to measure “the likelihood of anticompetitive effects in a way that took into account partial ownership overlaps among horizontal rivals.” (Elhauge, p. 8.) Specifically, Azar et al. decompose the MHHI into the HHI and the Delta MHHI, where the Delta MHHI is simply the difference between the MHHI and the “ordinary” HHI. Thus, Azar et al. can distinguish between the price effects of the “ordinary” HHI and the incremental effect of ownership overlaps by institutional investors. Using the airline industry as its laboratory, Azar et al. find, as reported earlier, that for the typical airline route, prices are elevated by 3–11 percent over and above the price effects of the “ordinary” HHI as a result of the concentration of institutional investment holdings. Elhauge interprets the Azar et al. results as evidence of pervasive anticompetitive harm from the holdings of large institutional investors: “empirical analy-

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sis indicates that having substantial horizontal shareholdings actually does raise prices significantly when the owned firms compete in concentrated markets.” (Elhauge, p. 10.)

**Industry-Based Performance Contracts**

Elhauge applies the results of Azar et al. to three different economic conundrums. First, he considers executive compensation packages that are tied to industry rather than firm performance or reflect a combination of both. Citing other literature, Elhauge’s paper explains that “this method of compensation provides executives with a windfall that is unrelated to executive performance and thus harmful to corporate shareholders.” (Elhauge, p. 11.) Elhauge considered an alternative explanation for the persistence of these seemingly inefficient compensation structures that has been discussed in the literature, namely, managerial power. But Elhauge observes that this alternative explanation ignores the potentially pervasive influence of institutional investors over the firm’s managers. Instead, Elhauge argues that the persistence of these compensation schemes advances the interests of institutional investors in elevating prices across all firms in the industry, an argument he bases on the results of Azar et al. According to Elhauge, “Managers who increase individual corporate performance by competing with rivals and taking away market share decrease institutional investor profits across the industry by decreasing industry profits.” (Elhauge, p. 12.)

Elhauge (p. 13) cites evidence that until the 1980s, managers were ousted for firm-specific reasons but thereafter, those decisions became tied to industry performance. Elhauge notes that this change “coincides with the increasing share of stock held by institutional investors, which has grown from 34% of all stock in 1980 to 67% of all stock in 2010.” (Elhauge, p. 13.)

**The Failure of High Corporate Profits to Increase Investment and Generate High Growth**

Elhauge begins this section by observing that “[a]nother big recent economic puzzle in recent years has been why, at a time when corporate profits have been at record highs, corporations have been so reluctant to invest those profits on expanding output.” (Elhauge, p. 14.) To make this concrete, he cites statistics that indicate corporate investments as a percentage of GDP were 50 percent higher in the late 1990s than today. (Elhauge, p. 14.)

Why might this be happening? For Elhauge, the explanation might be the pervasive reach of institutional shareholders. By effectively cartelizing major (and minor) industries, these investors have discouraged the extent of investments that high returns would normally signal in competitive markets. That competition corrosion seemingly resulting from institutional shareholding could have such a substantial macro-level output effect seems possible to Elhauge, who notes that the Azar et al. paper identified an output reduction of 6 percent “in at least one industry.” (Elhauge, p. 16.)

For those who might remain skeptical, Elhauge takes us back to the Great Depression, contending that the recovery began not with the World War II war effort to build a military, but in 1938: “Military stimulus cannot explain the recovery that began in 1938 because that recovery actually had to overcome military spending cuts.” (Elhauge, p. 17.) Elhauge describes the 1933–1938 period as one in which the National Industrial Recovery Act (NIRA) allowed pervasive cartelization of U.S. industry, resulting in a 60 percent reduction in investment and a 13 percent reduction in output, “causing about 60% of the post-1933 depression in national output.” (Elhauge, p. 18.) By contrast, when this policy was reversed in 1938, “after dropping 32% from 1937 to 1938, industrial production rose by an average of 22% per year” between (presumably) 1938 and 1941. (Elhauge,
p. 20.) Thus, he concludes that “while other factors surely contributed, the evidence indicates that increased antitrust enforcement played a key role in bringing us out of the Great Depression.” (Elhauge, p. 21.) To be sure, he acknowledges that an antitrust taming of institutional shareholders may not have had the same effects in pulling the U.S. out of the Great Recession, but he also concludes that a rigorous antitrust policy towards institutional shareholders holding stakes in market rivals is “likely to be significant for the national economy.” (Elhauge, p. 21.)

The Recent Rise in Economic Inequality
Finally, Elhauge focuses on the now well-documented but still controversial evidence on the increase in income inequality, most notably the evidence in Thomas Piketty’s provocative and widely read book, Capital in the Twenty-First Century. He notes that Piketty found that “income inequality in the U.S. rose from 1900 to 1940, dropped sharply after 1940, and stayed low until 1980 and has since been rising to return to pre-1940 levels.” (Elhauge, p. 22.)

It doesn’t take much effort to predict Elhauge’s explanations. Antitrust was in its infancy from 1900–1940 and was, in Elhauge’s view, a period of relatively lax antitrust enforcement: “Although the Sherman Act was enacted in 1890, antitrust enforcement was rare until 1938 and anticompetitive conduct was common.” (Elhauge, p. 17.) And, as discussed above, Elhauge contends antitrust enforcement became more aggressive in 1938, coinciding with the decline in inequality through the 1980s before once again increasing. In addition to the rise in institutional shareholding beginning in the 1980s, Elhauge argues that the Chicago School critique of antitrust resulted in much less aggressive enforcement of antitrust.

To the extent that one thinks that at least some of that narrowing [of antitrust enforcement] has incorrectly allowed more anticompetitive mergers and conduct, the variations in economic inequality may reflect variations in general antitrust enforcement. . . . In short, although perhaps not a full solution to the problem of economic inequality, antitrust enforcement against horizontal shareholdings certainly seems the remedy that has the least political and economic cost associated with it. (Elhauge, pp. 25–26.)

Closing Observations
My first reaction to Elhauge’s admittedly interesting speculations on the role of antitrust is “Wow.” I certainly would never have thought that appropriate antitrust enforcement could become a key arrow in the quiver of macro tools. In my career as an economist with the government and in the private sector, I felt satisfied considering the much narrower (yet highly significant) antitrust goal of advancing the interests of consumers. Which at least leads me to be a bit skeptical of the broad and deep swath of antitrust in our macro economy as painted by Elhauge.

One place to begin anchoring my skepticism is a response to the already quoted language at the very beginning of the Elhauge paper:

An economic blockbuster has recently been exposed. A small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other. (p. 1.)

One might mistakenly think that there is in fact evidence that these shareholdings have had an anticompetitive effect across the sweep of U.S. markets and industries. In fact, as interesting and

provocative as the Azar et al. paper is, the evidence provided in the paper by Azar et al. is only for the airline industry. In my view—and as I stated in my comments on the Azar et al. paper in an earlier edition of *The Antitrust Source*, given the prevalence of these holdings of institutional investors in market rivals, more research is certainly required before modifying antitrust policy. The idea that one should generalize the results of this single study of a single industry to dramatically change the focus of antitrust policy seems without any empirical justification. This lack of evidence infects all of Elhauge’s policy recommendations.

Further, the analysis in Azar et al., while important and useful, is certainly not bulletproof. As one example (and one noted in my initial review of the paper), an institutional investor may have interests in multiple airline rivals and investments in firms that service those rivals (e.g., meal services, baggage services, travel agencies) that complement airline travel. An increase in airline fares would reduce the investor’s profits from these complements. That does not mean that the institutional shareholdings may not have an anticompetitive effect—the fact that Azar et al. found such an effect for the airline industry is evidence to the contrary. But it does mean that the effects may vary substantially by industry and by the investment strategy of the institutional investor. That the DOJ has begun investigating the effect of institutional shareholdings in the airline industry is welcome news in that the DOJ can probe more deeply (in terms of documents and investigative hearings as well as data requests to various parties) into the web of relationships described by Azar et al.6

With respect to the executive compensation conundrum (and putting aside my concerns about the paucity of evidence on anticompetitive shareholding), Elhauge notes that compensation tied to industry performance occurs even in unconcentrated markets, “where the anticompetitive explanation is likely weak.” (Elhauge, p. 14.) Yet, Elhauge still emphasizes the anticompetitive effect as “perhaps more important in explaining the overall trend [in the growth of these compensation schemes].” (Elhauge, p. 14.)

The issue, of course, is whether firms in unconcentrated markets adopting these schemes do so because they are efficient. And if so, what role the efficiencies should play in evaluating the effects of such practices in more concentrated industries.7 It seems to me that before any aggressive antitrust enforcement against institutional investors is initiated, it would be good to know to what extent the shareholdings of multiple rivals are also driven by efficiency concerns and how those concerns may differ across industries. To do otherwise invites false positives in enforcement, harming consumers, and impeding the growth Elhauge believes will be released by such a policy.

Can aggressive antitrust enforcement encourage additional private-sector investment? Again, there is as yet no evidence that the Azar et al. findings generalize across industries. While he describes how antitrust enforcement may have helped the U.S. to escape the Great Depression, Elhauge’s evidence is highly qualitative and again more of the correlation rather than the causation variety. Elhauge admits that there were other factors at play (Elhauge, p. 21) and that the Great Recession wasn’t nearly as deep as the Great Depression. Certainly, the extent of the explicit (and legal) cartelization under the NIRA was likely far more widespread than is (illegal) cartelization

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7 To be sure, practices that are procompetitive when adopted by firms in a competitive market may nonetheless be harmful to consumers when adopted by firms that have market power or are seeking market power.
today. As a result it is unclear what effect unwinding institutional shareholdings would have had on macro variables in the Great Recession. Still, he argues that the effect is “likely to be significant for the national economy.” (Elhauge, p. 21.) Putting aside the costs of false positives, the issue remains, given the alternative policies available to government, whether devoting resources to this endeavor rather than to the use of other macro tools (e.g., investment tax credits, lower taxes on consumers with a high marginal propensity to consume) generates benefits greater than the costs.

Finally, the evidence for Elhauge’s matching of the extent of antitrust enforcement with growing income inequality is both highly qualitative and (yet again) at best reflects a correlation and not causation. As elsewhere, Elhauge certainly qualifies his conclusions. He notes that “horizontal shareholdings may not be the sole or main cause of that rise. . . . Further research will be necessary.” (Elhauge, p. 25.) Still, he negates that caution with a conclusion that “the evidence so far suggests that increasing horizontal shareholdings probably have played some significant role in increasing economic inequality.” (Elhauge, p. 25.) Not to put too fine a point on this, my understanding has been that in addition to the poor needing money, they also need education, adequate health care, and freedom from discrimination to escape the cycle of poverty and narrow the income gap between the rich and poor. Further, the lower prices coming from (justified) aggressive antitrust benefit the poor (the price of a small car could fall) and the not-so-poor (the price of a luxury car could fall). While one might argue about which income group has a higher marginal utility of income, one cannot help but wonder if antitrust policy should really be an important tool in reversing income inequality.

In short, the Elhauge paper “overclaims” the power of institutional shareholdings to shape not only narrow antitrust policy but broad and substantial macro policy goals as well. In my view, the conclusions are very premature given the absence of evidence on the prevalence of the harm caused by institutional shareholdings. After all, Azar et al. found evidence in only one industry. Further, even putting aside the question of the prevalence of the anticompetitive effects of institutional shareholding, the “connections” that Elhauge finds between institutional shareholdings on the one hand and, on the other hand, the manner of executive compensation, the ability of aggressive enforcement to accelerate the recovery out of the Great Recession, and the role of antitrust in countering economic inequality require much more careful research. We have a long way to go before concluding that antitrust enforcement has a far more important role to play in a macro environment.

Given the creativity of Elhauge in applying the Azar et al. results to a range of other problems—however much I might disagree with the strength that he has ascribed to the still-unproven effects of the pervasiveness of institutional shareholdings, the Elhauge paper is worth the read. In addition, it certainly provides an easy-to-digest explanation of the Azar et al. results. One might hope that the Elhauge paper will encourage researchers to test the pervasiveness of the anticompetitive effects found for one industry by Azar et al., to identify any capital market or managerial-control efficiencies that might accompany institutional shareholding (not acknowledged by Elhauge) and to identify methods for testing Elhauge’s description of the competitive effects of institutional shareholding on economic growth and economic inequality. Such advances will provide a sound basis for considering how antitrust generally should be fine-tuned to account for the effects of institutional shareholdings.

8 I should note in passing that I did not discuss one key section of the Elhauge paper—the legal bases for pursuing institutional shareholders on antitrust grounds, another reason for reading the paper.
The Annual Report provides a variety of high-level statistics on the merger enforcement activities of the two antitrust agencies during Fiscal Year 2014. A summary of the report follows.

First, the number of transactions in which a second request (“second request transactions”) could have been issued totaled 1,618 (Appendix A in the Report), a 26 percent increase over 2013 and more than double those in the 2009, the nadir of such transactions over the past ten years and likely attributable to the Great Recession. This confirms what we probably have known for some time—mergers are back.

Table 1 below is adapted from the Report’s Table I and describes the incidence of second requests during FY2014 by size of the transaction and by agency. Overall, over 30 percent of these transactions were valued at $500 million or more, 14 percent over $1 billion.

While the FTC was more successful in its clearance efforts—11.2 percent overall for the FTC v. 5.7 percent for the DOJ, the incidence of second requests was about the same for both agencies—1.9 percent for the FTC v. 1.3 percent for the DOJ. (Table 1.)

Perhaps a more interesting statistic: Of the 30 second requests issued by the FTC, 17 (or 57 percent) resulted in merger challenges while over 76 percent of the second requests issued by the DOJ (16 of the 21 second requests issued) resulted in merger challenges (which includes simultaneous consents). (Report, p. 2) One could interpret this as the DOJ being a more aggressive enforcer, but that would probably be wrong given all the other factors at play. But regardless, the likelihood of a challenge at either agency seems substantial if a second request is issued.

About 11 percent of the transactions valued at $1 billion or more were issued second requests by both agencies, with the FTC issuing somewhat more than the DOJ (7% v. 4%) (Table 1 below). For transactions valued between $500 million and $1 billion, the FTC’s second requests accounted for 2 percent of all transactions in that asset group while the DOJ’s second requests accounted for about 1.3 percent. So, the raw data suggest that there is little difference between the agencies with respect to the issuance of a second request for larger deals. Attaching any significance to these small differences is fraught with risk. Some of these differences within value categories
are also subject to small numbers issues, may reflect differences in the kinds of matters the agencies considered, and, in any event, these agency differences are not all that great.

Table 2 below is based on Report Table VI and identifies second requests issued by size of the acquirer. About 4.2 percent of the transactions for which the acquirer's assets exceeded $1 billion were issued second requests, with the FTC at 2.3 percent and the DOJ at 1.9 percent. For acquirers with assets in the $500 million to $1 billion range, the FTC-issued second requests accounted for 2 percent for all the transactions in this acquirer-asset range. The DOJ did not issue any second requests in this asset range.

Table 3 below (based on Report Appendix A) provides a time series of different metrics for the period FY 2005–2014. Although again these data are merely raw averages, the trends still may be of interest. As noted above, the number of FY 2014 second-request transactions increased 26 percent over FY 2013, but at a level very close to FY 2005 (1,618 in 2013 v. 1,610 in 2005). The number of these transactions is substantially less than the peak year of FY 2007 (2,108).
The lower part of Table 3 includes the second request percentages (of second-request transactions) for various time periods. Over the entire period 2005–2014, second requests were issued in 3.2 percent of all transactions. The contrast between 2005–2008—the last years of the Bush Administration—and 2009–2014 (the Obama Administration) seems notable but not blindingly different. In 2005–2008, second requests accounted for 2.8 percent of all transactions while accounting for 3.7 percent in the later period. Also of note, perhaps, following the issuance of the 2010 Horizontal Merger Guidelines, the second request percentage fell from 4 percent in the 2009–2010 period to 3.5 percent in the 2011–2014 period.

Drawing inferences from these time series is fraught with unidentified confounding and conflating events, but it is interesting that the second request percentage rose during the early Obama years but fell after the adoption of the 2010 Merger Guidelines. The latter might provide solace to practitioners who may have feared that the new Guidelines would lead to more aggressive antitrust enforcement. Similarly, such practitioners might find solace in that early termination was granted in nearly 80 percent of the second request transactions in the 2011–2014 period following the adoption of the new Guidelines but only 72 percent in the 2009–2010 period. Of course, those who saw the revisions as necessary to correct what might have been thought as a too-lax enforcement regime might be surprised and disappointed. But again, caution is required in attempting to draw inferences from the raw data.

—JRW
Book Review

Global Antitrust Convergence: Words or Reality

Daniel J. Gifford and Robert T. Kudrle

The Atlantic Divide in Antitrust—An Examination of U.S. and EU Competition Policy
University of Chicago Press 2015

Reviewed by Damien Geradin

*The Atlantic Divide in Antitrust* is a short and dense volume seeking to address the following question: “How is it that two broadly similar systems of competition law have reached different results across a number of significant antitrust issues?” This is an important question. Although well over 100 countries have now adopted competition laws and set up enforcement agencies, the U.S. and EU competition law regimes remain the most important ones in the world and they serve as a model for many countries. However, while the output of the U.S. and EU enforcement agencies and the courts are, in theory, based on the same economic principles, there are significant differences in the way they address some fundamental antitrust questions. It is not entirely clear why, for instance, the European Commission (EC) and the EU courts tend to treat single firm conduct more harshly than the U.S. agencies and courts.

*The Atlantic Divide in Antitrust* does not seek to address the above question by analyzing and comparing the whole array of competition law issues. Instead, the book focuses on a limited number of issues that are of particular significance, such as mergers and efficiencies, price discrimination, predatory pricing, exclusive supply contracts, single and bundled product rebates, and the interface between intellectual property and competition law. For each topic, the authors present a discussion of U.S. antitrust law, followed by a discussion of EU competition law, and a comparative analysis. One strength of the book is that it not only describes the law, but also the economic principles underpinning it. The economic discussion is, however, non-technical and thus easy to read for lawyers and policy makers. The limited size of the book (275 pages including end notes) means that it can be absorbed in a couple of days of intense reading, which is a distinct advantage over larger volumes.

Although both authors are American, the discussion of EU competition law is very accurate and up-to-date. There are, however, some limited exceptions. It is, for instance, surprising that the authors do not refer to the *TeliaSonera* judgment of the Court of Justice of the European Union in the section devoted to margin squeeze since it has become the leading case on the subject. Clearly, the authors have an excellent grasp of EU competition law and the comparative parts of the book are very well written. The book will thus be of great relevance not only to EU and U.S. antitrust lawyers and economists, but also to experts from other jurisdictions who will appreciate

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the discussion of both regimes, as well as the inconsistencies that can sometimes be observed between them. The book is insightful and all readers will benefit from it.

One central theme of the book relates to the “economic” or “effects-based” approach that now prevails in both jurisdictions. For the past three or four decades, economic analysis has played an increasingly important role in U.S. antitrust law. Industrial organization (IO) economists are now heavily involved in most antitrust cases. The U.S. enforcement agencies have a large number of Ph.D. economists within their ranks, and the chief economist positions are occupied by leading academic economists. As a result, the antitrust output of these agencies and the courts is generally grounded on economic principles, although the soundness of some of these principles is regularly subject to debate. It took the EU competition law regime longer to absorb the teaching of economics, perhaps because most of IO economic research was conducted in the United States for a long time, although the trend has somewhat recently been reversed with the rise of the Toulouse School of Economics and the recent award of the Nobel Memorial Prize in Economics to its most illustrious member, Jean Tirole.

While the U.S. antitrust revolution can be traced back to the 1970s, it is only at the turn of the 21st century that the EC started to integrate proper economic analysis into its decision-making. The EC’s debacle before the EU courts in certain well-known merger cases, such as Airtours and Tetra Laval Sidel, forced the EC to strengthen the quality of its decision-making. This led inter alia to the creation of the Chief Economist Team, which is comprised of two dozen competition economists. As at the U.S. Department of Justice and Federal Trade Commission, the team is led by a leading academic economist. Many areas of EU competition law have been strongly influenced by economics, such as merger control and vertical restraints.

The increased importance of economic reasoning in EU competition law is well chronicled in the book. The book, however, rightly observes that the effects-based approach that was proposed by the EC in its Guidance Paper on the enforcement of Article 102 TFEU has been met with some skepticism by the EU courts. In this respect, the book mentions the remaining influence of ordoliberalism, a theory that was developed several decades ago by German economists and lawyers, mainly from the Freiburg School. This theory, which emphasizes the importance of rivalry and the maintenance of a competitive market structure, is often in tension with the consumer welfare approach that is supported by most scholars, as well as by DG-Competition, the EC’s antitrust enforcement body. The consumer welfare approach that underpins the Guidance Paper rejects reliance on per se or form-based analysis in favor of an approach that relies on the effects of unilateral conduct. However, the EU courts, in contradiction with that vision, still tend to rely on quasi-per se rule of illegality in areas such as exclusive supply contracts and loyalty rebates. The lack of cohesion between the principles contained in the Guidance Paper and the case law of the EU courts (with the exception of the encouraging Post Danmark I judgment) is well documented in the book.

While there is a growing convergence between the EU and U.S. competition law regimes in the areas of merger control and cartels, it is in the field of single firm conduct that the two regimes diverge most and where the influence of ordoliberalism is the most manifest. While consumer welfare has been the focus of U.S. antitrust policy, competitors’ welfare is still a subject of concern.

for the EU courts, not only because of the emphasis on maintaining rivalry, but also due to a certain distrust of large corporations. The different outlook with respect to unilateral conduct is not only apparent with respect to price discrimination, exclusive dealing, and various forms of abusive pricing, but also in the area of intellectual property. The book discusses at some length the U.S. and EU Microsoft cases, as well as the refusal to license case law of the EU courts. The book outlines the commonalities between the U.S. and EU case law that emerged from the Microsoft investigations, which kept antitrust lawyers on both sides of the Atlantic busy for almost two decades.

The strength of the book is its analysis of substantive law. The authors very carefully analyze the relevant U.S. and EU case law, observe commonalities and differences, and then seek to explain why the two regimes have reached different solutions. However, the book does not ignore the importance of institutions. One of the most important factors when trying to contrast the U.S. and EU competition law regimes relates to their distinct enforcement structures. This structure is radically different in several key respects. For instance, while in the EU, the EC and the national competition authorities are the main and, until the recent adoption of the Directive on damages for competition law infringements and parallel developments in the Member States, the almost unique driving force of the enforcement of EU competition law, the bulk of antitrust enforcement in the U.S. is pursued by private litigants, in many cases through class actions. This probably has had an impact on the case law of the courts. While the EU courts, with some exceptions (such as Airtours or Tetra Laval Sidel judgments noted above), have not so far seen the need to rein in the application of competition law, in the past two decades, U.S. courts have narrowed the scope of antitrust rules, especially with respect to single firm conduct. It also seems quite obvious that in the area of single firm conduct, where the differences between U.S. and EU law are the most obvious, the EU courts have been willing to defer to the EC, which has not lost a single Article 102 TFEU case for the past 20 years. By contrast, U.S. courts have often been suspicious about the theories of harm developed by private litigants.

One aspect that does not figure prominently in the book, although it is an area of concern in the antitrust community, relates to the peculiarities of the EU enforcement process. An important institutional difference between the U.S. and the EU competition law regimes is that the EC is allowed to investigate a case, adopt the decision, and impose the sanction. While this is also to some extent true with respect to the Federal Trade Commission, although greater procedural guarantees are offered by the presence of an independent administrative judge, the Department of Justice must go to court when it decides to challenge practices it considers to be anticompetitive. The perceived lack of due process is a subject of immense frustration for U.S.-based corporations subject to EU competition law investigations, which have major difficulties understanding how the EC can combine investigative, prosecutorial, and adjudicative functions. The shortcomings of the enforcement process have an impact on the substance of the decision as investigated firms often have the impression—rightly or wrongly—that the EC is able to pursue unsustainable theories, which these firms and their counsel would have been better able to challenge in a more adversarial process. Combined with the deference the EU courts have shown in the area of single firm conduct, this may explain some of the controversial decisions adopted by the EC in that area.

Another important institutional feature is that the EC is made up of different constituencies, which may not share the same position in a given case. First, a distinction has to be made between DG Competition, which prosecutes anticompetitive practices, and the Commission Legal Service, which litigates the competition decisions challenged by undertakings before the EU
Courts. Ordoliberalism maintains a greater influence on the Legal Service than on DG Competition. Yet, DG Competition itself is also made of different constituencies, which may not necessarily be aligned in all cases. The Policy Directorate and the Chief Economist Team have been the leading forces in promoting effects-based analysis, whereas case teams may be more amenable to formal reasoning if this allows them to achieve a more favorable outcome in a given case.

Thus, not only substantive, but also institutional and procedural differences may explain differences in the manner in which the U.S. and EU competition law regimes have come out on some important issues. In this respect, the book does much to help the readers to understand the sources of the often misunderstood differences between these two regimes, and outlines the value of looking at both of them.

In sum, *The Atlantic Divide in Antitrust* is a truly well-informed, well-written, and well-reasoned book that I would warmly recommend to antitrust lawyers and economists on both sides of the Atlantic. I tremendously enjoyed reading it and I learned a lot.