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ANTITRUST DIVERGENCE AND THE LIMITS OF ECONOMICS

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INTRODUCTION

Despite assured and self-congratulatory pronouncements of cooperation, convergence, and harmony,[1] the European and U.S. approaches to anti-

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[1] *See, e.g.*, Makan Delrahim, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property, Remarks to the *George Mason Law Review* Symposium (Oct. 6, 2004), *in* 13 GEO. MASON L. REV. 259 (2005); Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, ANTITRUST, Summer 2005, at 25–26; Charles A. James, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition (Oct. 17, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9330.pdf; Neelie Kroes, European Comm'r for Competition Policy, EU & US Antitrust Policies—Our Shared Belief in Competitive Markets, Opening Remarks at 56th Annual Spring Meeting of the ABA Section of Antitrust Law, (Mar. 28, 2008), *available at* http://ec.europa.eu/competition/speeches/index_theme_22.html (follow "en" hyperlink listed next to speech date and title; then follow "EN" hyperlink for PDF); Deborah

trust policy remain in conflict.[2] Confluence of thought, particularly on the proper treatment of unilateral behavior by dominant firms, has yet to be attained.[3] Consequently, European Union (EU) law continues to condemn conduct that would be deemed innocuous in the United States, most paradigmatically and controversially by requiring successful companies to share the fruits of their investments with rivals.[4] The result is a transatlantic chasm that frustrates efforts to attain international harmonization.[5]

This divergence has spurred vociferous debate over the relative superiority of each jurisdiction's substantive law, with both the United States and the EU touting the predominance of their respective methods.[6] The tone of the discourse has been far from uniformly civil, and at times has been decidedly acerbic.[7] The United States has accused Europe of jettisoning foundational principles of antitrust law and implementing ill-considered, protectionist, overly interventionist, and damaging policies.[8]

Platt Majoras, Chairman, U.S. Fed. Trade Comm'n, Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy, Remarks at the 34th Annual Conference on International Antitrust Law & Policy, (Sept. 27, 2007), *available at* http://www.ftc.gov/speeches/majoras/070927fordham.pdf; Press Release, U.S. Dep't of Justice, International Competition Network Conference Promotes Convergence Among World's Antitrust Enforcers (June 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/209437.pdf.

2 *See, e.g.*, Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423 (2005); Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 453 (2005); Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in* GE/Honeywell*: Causes and Lessons*, ANTITRUST, Fall 2001, at 18; Nathan R. Viavant, Comment, *Agreeing to Disagree?: Continuing Uncertainties in Transatlantic Merger Clearance Post-EC Merger Regulation*, 17 TUL. J. INT'L & COMP. L. 177 (2008); Press Release, Thomas O. Barnett, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Statement on European Microsoft Decision (Sept. 17, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/226070.pdf.

3 *See, e.g.*, Jim Puzzanghera, *Europe Does Antitrust Its Way*, L.A. TIMES, Sept. 24, 2007, at C1.

4 *See* Case T-201/04 R, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, ¶ 36 (holding that Microsoft's refusal to share proprietary information necessary to allow rivals to interoperate with its operating system constituted an abuse of a dominant position); *cf.* Stephen Labaton, *Microsoft Finds Legal Defender in Justice Dept.*, N.Y. TIMES, June 10, 2007, at A1 (describing the Justice Department's defense of Microsoft both at home and abroad).

5 *See* R. Hewitt Pate, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Antitrust in a Transatlantic Context—From the Cicada's Perspective, Remarks at the Antitrust in a Transatlantic Context Conference (June 7, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/203973.pdf (exploring U.S./EC divergence and noting that "unilateral conduct remains the area of greatest separation").

6 *See infra* note 9.

7 *See* Barnett, *supra* note 2 ("We are . . . concerned that the standard applied to unilateral conduct by the [Court of First Instance], rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."); *see also infra* note 115 (providing additional examples).

8 *See* Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME, July 8, 2001, at 5, *available at* http://www.time.com/time/business/article/0,8599,166732-2,00.html (quoting Treasury Secretary Paul O'Neill as criticizing the EC's decision regarding the GE–Honeywell merger as "off the wall"); Barnett, *supra* note 2 (criticizing the EC decision against Microsoft as potentially damaging to consumers).

Europe, in turn, resents what it views to be unwelcome commentary on matters within its exclusive purview and staunchly defends the legitimacy of its approach.[9] Although broad swathes of competition policy find analogous application on both sides of the Atlantic, significant points of departure remain.

Is this divergence inevitable? Although the gulf at times appears unbridgeable—and transatlantic dialogue therefore immaterial—one might nevertheless find hope in the vitality of the debate. Indeed, the underlying precepts to the dispute are surprisingly homogeneous. Both the United States and the European Union couch the relevant policy issues in exclusively economic terms.[10] Both jurisdictions place primacy on consumer welfare and reject the contention that antitrust law should be employed to protect competitors in place of consumers.[11] Enforcement agencies on both sides of the Atlantic employ expert economists to analyze the propriety of challenged business conduct.[12] Utilizing the tools of microeconomics, game theory, and econometrics, antitrust enforcers review mergers and suspect behavior by looking to the likely market effects of the practices under review.[13] Only those actions found to increase price beyond the competitive

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[9] *See, e.g.*, Peter Lattman, *Antitrust Armageddon: Thomas Barnett v. Neelie Kroes*, WALL ST. J. L. BLOG (Sept. 19, 2007, 2:28 PM ET), http://blogs.wsj.com/law/2007/09/19/antitrust-law-armageddon-thomas-barnett-v-neelie-kroes/; David Lawsky, *EU Official Lambasts U.S. Justice Dept on Microsoft*, REUTERS, Sept. 19, 2007, http://www.reuters.com/article/politicsNews/idUSL1926927820070919. EC Commissioner Neelie Kroes reportedly said: "It is totally unacceptable that a representative of the U.S. administration criticized an independent court of law outside its jurisdiction. . . . The European Commission does not pass judgment on rulings by U.S. courts, and we expect the same degree of respect." *Id.*

[10] *See* Neelie Kroes, Member of the European Comm'n in Charge of Competition Policy, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute (Sept. 23, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537 (follow "EN" hyperlink for PDF) ("I think that competition policy evolves as our understanding of economics evolves. In days gone by, 'fairness' played a prominent role in [U.S.] enforcement in a way that is no longer the case. I don't see why a similar development could not take place in Europe."); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107–15 (1978).

[11] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); Neelie Kroes, Editorial, *Why Microsoft Was Wrong*, WALL ST. J. EUROPE, Sept. 26, 2007, at 13 ("U.S. and EU antitrust laws agree on most things, not least the objective of benefiting consumers."); MARGARET BLOOM, SUBSTANTIAL ANTITRUST CONVERGENCE: DEVELOPED COUNTRY ANTITRUST ENFORCEMENT IS CONVERGING ON A CONSUMER WELFARE BASIS (2005), http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-convergence-final.pdf.

[12] *See* Antitrust Division Organization Chart (2002), http://www.usdoj.gov/atr/org.htm; European Comm'n Directorate Gen. for Competition, http://ec.europa.eu/dgs/competition/economist/role_en.html (last visited Feb. 12, 2010); Economic Advisory Group, http://ec.europa.eu/dgs/competition/economist/eagcp.html (last visited Feb. 12, 2010).

[13] *See* Thomas Barnett, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Section 2 Remedies: A Necessary Challenge, Presentation at the Fordham Competition Law Institute (Sept. 28, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/226537.pdf (opining that "there seems to be con-

level—thus creating market distortions in the form of allocative inefficiency—are deemed worthy of concern.[14]

Mutual obeisance to the teachings of economics should be most encouraging. Framing points of divergence in terms of price theory alone would suggest that advances in economic reasoning and statistical analysis will ultimately reveal optimal policies. Once those policies are identified, global harmonization should theoretically be inevitable. Thus, recent debate over asymmetric approaches to issues of competitive concern should be viewed as laudable. Only through mutual engagement in intelligent and pointed discourse will the proper economics of regulatory intervention be revealed.

For this process to work, however, economics must be capable of yielding unequivocal conclusions. This Essay argues that price theory and econometric analysis cannot always generate such conclusions,[15] which leaves pressing questions of competition policy that economic theory is incapable of answering in useful and coherent terms. More specifically, we find that grave epistemological limitations necessarily frustrate any attempts to resolve the tension between short- and long-run competitive effects, particularly when those effects are in seeming opposition to one another.

This intertemporal tension pervades certain aspects of antitrust doctrine and undermines the capacity of economics to yield international harmonization. As a result, one must question the efficacy of transatlantic dialogue that can at times be both accusatory and peremptory. This is especially so when parties to the dispute claim a monopoly of truth on the subject and look to the hegemony of economic analysis to justify their positions. We argue that the indeterminacy underlying the tradeoff between the long and short run is sufficiently severe that economics alone cannot lead to a complete confluence of ideas.

How does the tension between present and future effects translate into such a fundamental weakness underlying competition policy? The answer lies in the tradeoff inherent in many antitrust inquiries, most prototypically with regard to regulation of unilateral conduct. Antitrust regulators often face the quandary of choosing between two opposing goals, namely whether to promote immediate gains against the possibility of future losses, or conversely to forego instant benefits in the hope of spurring even more desirous conduct in the future. Unfortunately, this inquiry requires regulators to weigh an observable variable against an indeterminate one.

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sensus that we should prohibit unilateral conduct only where it is demonstrated through rigorous economic analysis to harm competition and thereby to harm consumer welfare").

[14] *See* BORK, *supra* note 10, at 122.

[15] For sure, many aspects of antitrust law are capable of being accurately analyzed under the lens of economics.

Refusal to supply—perhaps the most contentious area of divergence—constitutes the quintessential example, and thus serves as the focus of this Essay. When a rival seeks access to a competitor's "essential facility," a regulator's decision to grant such access against the owner's protestations unequivocally facilitates a more "competitive" market structure *in the short run*.[16] The problem lies with the consequences of that antitrust intervention for the owner of the essential facility, who may have devoted considerable capital to constructing, acquiring, or improving it. When regulators prevent owners from earning a sufficient ex post reward to compensate for the risk and cost of their prior investment, they will have little incentive to engage in such socially desirable conduct in the future.[17] This tension will be familiar to those acquainted with the policies underlying intellectual-property law.[18] There is no question that Europe places a far greater premium on short-run effects in refusal-to-supply cases. The United States has been highly reluctant to require private parties, even monopolists, to share the fruits of their innovative success.[19]

Other examples further illustrate the tension between immediate, observable consequences and empirically attenuated, though potentially just as important, future effects. Below-cost (predatory) pricing by dominant firms yields exceptional immediate gains for consumers, but threatens to create inefficiencies in the future.[20] Once a predator has eliminated its rivals, it may be able to increase the market price to supracompetitive levels, thus recouping its prior losses at the expense of consumers.[21] In judging the legality of such conduct, one must weigh clear short-run benefits against uncertain, negative future effects in a context of limited information.[22] Here, the United States and Europe reverse their preferences from those seen in the refusal-to-supply context: the United States discounts the future and focuses on the present in below-cost pricing cases, while Europe places

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[16] *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 57–58, 69–73 (4th ed. 2005) (explaining the static efficiency benefits of competition).

[17] *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994–96 (1997).

[18] *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003) (focusing on evaluating the economic efficiency of intellectual property law); SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES (2004) (discussing incentive systems and their ability to encourage technological or scientific advances).

[19] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP (*Trinko*), 540 U.S. 398, 414 (2004) (reasoning that courts should avoid over-interference in the workings of the free market).

[20] *See* CARLTON & PERLOFF, *supra* note 16, at 352–57.

[21] *See id.*

[22] As explored below, there are good reasons to be skeptical of long-run harm in predatory pricing scenarios. *See infra* Part III.B. Nevertheless, for the purposes of the current illustration, we take this potential harm as a given.

conclusive significance on the possibility of future harm and minimizes present benefits accordingly.[23]

Other aspects of antitrust law reflect the same tension, but also suggest that the European bias in favor of the short run seen in refusal-to-supply cases is not consistent. Product tying and exclusive dealing cases, for example, may bring immediate efficiency gains for consumers, but may sometimes frustrate future entry into the market by competitors.[24] Here, unlike with refusals to deal, Europe places determinative weight on what it views as potentially harmful long-run effects caused by efficiency-enhancing, short-run phenomena.[25]

Yet another example is provided by vertical integration. A manufacturer's decision to assume all distribution activities eliminates the problem of double marginalization, thus ensuring greater efficiency.[26] One can safely assume that a firm will vertically integrate only if it can perform the requisite functions with a greater level of skill and at lower cost because, if it were otherwise, the company would contract with external parties à la

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[23] *Compare* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1992) (requiring that a plaintiff alleging predatory pricing demonstrate "that the competitor had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices"), *with* Case C-62/86, AKZO Chemie BV v. Comm'n, 1991 E.C.R. I-3359, 3372–74 (condemning below-cost pricing without consideration to the dominant undertaking's ability to recoup its losses).

[24] *See* BORK, *supra* note 10, at 299–309, 365–81; RICHARD A. POSNER, ANTITRUST LAW 197–207 (2d ed. 2001).

[25] Europe's recent decision to forbid the bundling of Internet Explorer with Windows was based on just this logic. *See* Press Release, European Comm'n, Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows (Jan. 17, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15 (follow "EN" hyperlink for PDF). The bundling of Internet browsing software with Microsoft's operating system carries axiomatic and significant consumer benefits by providing them with goods most of them will consume, thereby allowing them to avoid the transaction and negotiation costs of acquiring them separately. *See* BORK, *supra* note 10, at 365–81. Meanwhile, the economics of complementary effects strongly suggest that the purveyor of such goods will charge a smaller price in combination than it would separately. *See* CARLTON & PERLOFF, *supra* note 16, at 638. The European Commission surely found that these undeniable short-run benefits were outweighed by what it perceived to be the long-run danger to a competitive market structure. In particular, it considered that Microsoft's dominant market share created an impediment to free entry. *See* Press Release, European Comm'n, *supra* (opining that "the tying of Internet Explorer with Windows, which makes Internet Explorer available on 90% of the world's PCs, distorts competition on the merits between competing web browsers insofar as it provides Internet Explorer with an artificial distribution advantage which other web browsers are unable to match"). In short, present efficiency arguments notwithstanding, the possibility that free entry may be frustrated in the future was sufficient to condemn the behavior under review. This decision, which placed long-run considerations ahead of short-run efficiencies, would never have been reached across the Atlantic. *See* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001). This is a particularly acute example of a broader phenomenon. As a general matter, Europe displays a greater predisposition toward regulatory intervention, driven in no small way by its relative skepticism toward the free market's long-run ability to remedy immediate harm. *See* William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533, 550 (2002).

[26] *See* BORK, *supra* note 10, at 225–45.

Coase.[27] Thus, the practice unequivocally enhances short-run efficiency.[28] However, the potentially negative long-run effect is that such integration may eventually raise rivals' costs.[29] If a company's integration and market dominance both become sufficiently pervasive, competitors may struggle to acquire necessary inputs at comparably low prices, or to achieve minimum efficient scale.[30] This creates a potential long-run distortion. Once more, Europe and the United States approach the matter in distinct ways. The EU focuses on the future danger of vertical integration by dominant companies, while the United States places primacy on the unequivocal gains brought about in the short run.[31]

Similarly, conglomerate mergers that bring together complementary operations create positive price effects.[32] Yet, European antitrust enforcers have found long-run dangers from excessive concentration, which they fear may disincentivize future entry by rival firms.[33] Thus, the European Commission has vetoed arrangements that would have had immediate benefits but posed the threat of future harm to competition.[34] In contrast, U.S. agencies have found such long-run inquiries speculative, believing that possible long-term effects—even if they do arise—are usually ameliorated by workings of the market.[35]

A recent episode of potential divergence comes in the merger area and concerns the acquisition of Sun Microsystems by Oracle.[36] In August 2009, the Department of Justice cleared the merger, determining that the transaction was unlikely to be anticompetitive.[37] But in early November, the European Commission issued a Statement of Objections regarding the deal, announcing that it would oppose the merger as presently constituted.[38] This statement, in turn, prompted the Justice Department to take the highly un-

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[27] *See id.* at 241; POSNER, *supra* note 24, at 226.

[28] *See* BORK, *supra* note 10, at 241; POSNER, *supra* note 24, at 226.

[29] *See* POSNER, *supra* note 24, at 225–26.

[30] *See* CARLTON & PERLOFF, *supra* note 16, at 429–30.

[31] *See* Robert Pitofsky, Chairman, U.S. Fed. Trade Comm'n, Vertical Restraints and Vertical Aspects of Mergers—A U.S. Perspective, Remarks Before the Fordham Corporate Law Institute (Oct. 16–17, 1997), *available at* http://www.ftc.gov/speeches/pitofsky/fordham7.shtm.

[32] *See* CARLTON & PERLOFF, *supra* note 16, at 638.

[33] *See, e.g.*, Commission Decision COMP/M.2220, General Electric/Honeywell, 2004 O.J. (L48) 1 (EC), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf (ruling that the proposed General Electric and Honeywell merger would result in excessive concentration).

[34] *See* Deborah Platt Majoras, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, GE-Honeywell: The U.S. Decision, Remarks Before the Antitrust Law Section, State Bar of Georgia (Nov. 29, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9893.pdf ("Crucial to the EU's theories of competitive harm are the predictions—fueled by Honeywell's rivals—that rivals would be forced to exit in the face of a strengthened Honeywell.").

[35] *See id.*

[36] *See Oracle and Sun Microsystems: Merger Interruptus*, ECONOMIST, Nov. 14, 2009, at 98.

[37] *Id.*

[38] *Id.*

usual step of publishing its own statement criticizing the Commission's decision and expressing the hope that "the EC will reach a speedy resolution that benefits consumers in the Commission's jurisdiction."[39] Not to be outdone, the Commission issued a reply to the DOJ's statement, describing it as "unusual," and observing, with regard to the DOJ, that "[w]e have our methods, they have theirs."[40] Fortunately, the Commission ultimately approved the acquisition in early 2010.[41]

Although specific instances of international divergence are legion, the conflict surrounding the uncertainty of the short-run/long-run tradeoff reveals itself most explicitly through a very unlikely phenomenon—namely, internal debate within the United States itself. An unprecedented public rift recently emerged between the two U.S. antitrust agencies.[42] The U.S. Department of Justice under the Bush Administration released its views on the proper application of Section 2 of the Sherman Act in September 2008.[43] The report reflected Chicago-oriented skepticism of the benefits of excessive regulatory intervention, and advocated antitrust action only in cases where anticompetitive effect was clear.[44] In other words, the Justice Department resolved the indeterminate inquiry between the near and distant future by seeking to minimize the risk of false positives—that is, the erroneous prohibition of desirable conduct.[45] As a general matter, this translates into a significant bias in favor of under-enforcement.[46] The Federal Trade Commission was swift in making its thoughts on the report known, criticizing it in almost condemnatory fashion.[47] Under the Obama Administration, the Justice Department wasted no time in withdrawing the Section 2 re-

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[39] *See* Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun (Nov. 9, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/251782.htm.

[40] *See* Aoife White, *EU Says Oracle's Criticisms of Antitrust Probe are "Facile and Superficial*,*"* WASH. EXAMINER, Nov. 10, 2009, http://www.washingtonexaminer.com/economy/ap/eu-says-oracles-criticisms-of-antitrust-probe-are-facile-and-superficial-69651757.html

[41] *See* Press Release, Mergers: Commission Clear Oracle's Proposed Acquisition of Sun Microsystems (Jan. 21, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/40.

[42] *See* Mark D. Whitener, *Domestic Divergence*, ANTITRUST, Fall 2001, at 6.

[43] *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 1 (2008) [hereinafter SINGLE-FIRM CONDUCT], *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf (describing innovation as "the most important source of economic growth").

[44] *Id.*

[45] This conclusion doubtless finds its foundation in Frank Easterbrook's famous 1984 article in the *Texas Law Review*. *See* Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (noting that courts act with imperfect information and their actions can ultimately harm efficiency).

[46] *Id.*

[47] *See* Press Release, FTC Commissioners React to Department of Justice Report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (Sept. 8, 2008), *available at* http://www.ftc.gov/opa/2008/09/section2.shtm.

port.[48] But it would be a serious mistake to suppose that the resulting harmony between the two enforcement agencies diminishes the importance of the debate. Indeed, such a dramatic and swift shift in policy by a single agency, which can be explained only on political grounds, highlights economics' inability to yield determinative answers.

If America's two enforcement agencies—informed, one presumes, by similar political ideals and preconceptions as to the nature of the market—cannot always agree on the proper approach to antitrust problems involving tensions between the short and long run, what chance do foreign jurisdictions possess of achieving international harmonization either with one another or with the United States?

We believe that the tendency for competition enforcers to reach conclusions most in tune with their political predispositions accounts for much of this international divide in antitrust law. It explains the positive paradox of ongoing divergence notwithstanding mutual agreement that competition policy should primarily serve consumer welfare, casts light upon the prospects of future harmonization, and gives normative guidance on the proper terms within which to frame constructive debate.

Yet, it does not follow that our conclusion is, or ought to be, a welcome one. There are serious negative repercussions associated with the present reality. The tendency to solve empirically indeterminate problems by reference to one's political ideology—informed by disparate social experiences, histories, and cultures—creates a host of further issues. In particular, this tendency ensures that departures are likely to proliferate and that harmonization will continue to be elusive.[49] This phenomenon will persist as the number of countries around the world implementing competition regimes continues to grow.[50] Such jurisdictions will doubtless find much to borrow from Europe and the United States, by far the most mature and sophisticated antitrust enforcers, but will also find frustratingly little to draw from in those areas of the law plagued by tensions between the long and short run. Finding serious transatlantic, even internal, divergence on such matters, new competition regimes will be left to reach their own respective conclusions, many of which will surely be in conflict. This is far from desirable, though a better approach remains elusive.

The antitrust laws of these new regimes would also likely be in conflict with those of other countries. Given the global reach of modern business,

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[48] *See* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/May/09-at-459.html.

[49] This is because each jurisdiction is likely to have a distinct sociopolitical view on the merits of short-run gains vis-à-vis facilitating long-run investment.

[50] *See* Platt Majoras, *supra* note 34 (referring to an explosion in the number of countries enacting antitrust statutes). The latest and most prominent example is provided by China, which enacted its "Anti-monopoly Law" in 2007. *See Full Article of Anti-Monopoly Law of the People's Republic of China*, PEOPLE'S DAILY ONLINE, Aug. 5, 2008, http://english.peopledaily.com.cn/90001/90776/90785/6466798.html.

one jurisdiction's decision to prohibit a practice that would be deemed innocuous by others creates powerful negative externalities. An international company may have to play by the rules of the most restrictive regulator—a fact that should be of considerable concern to policymakers.

This Essay explains the preceding issues in detail, and recommends an important, but suitably contained, role for economic analysis as applied to international competition policy. Part II explains that, given the malleability of antitrust law and the politically sensitive nature of the conduct it governs, competition law represents little more than an expression of contemporary public policy. Consistent with this conclusion, and as a historical matter, competition law has been demonstrably molded in furtherance of the political ideology of those who enforce it. Yet, the myriad of often conflicting goals sought to be attained in the past has now given way to ubiquitous modern agreement on a common standard: consumer welfare. Economics has emerged as the sole analytic tool used to give meaning to that concept, and it is employed to inform antitrust inquiries accordingly.

Notwithstanding widespread and unwavering support for economic analysis and consumer welfare, this Introduction has observed the paradox of substantive international divergence. Part I seeks to give meaning to this paradox, explaining the profound weaknesses associated with economic analysis of business practices with long-run implications. More specifically, it explains that price theory has limited ability to yield objectively verifiable conclusions with respect to business practices, the long-term effects of which cannot be predicted with any sort of accuracy. Although many business phenomena evoke tensions between the current and future states of the world, only refusals to deal bring these tensions to their breaking points. Accordingly, this Essay employs this area of antitrust law to illustrate the limitation of economics. Part II explains that the inability of price theory to provide antitrust enforcers with determinate policy conclusions requires those enforcers to make decisions based on their socio-political predilections. As different jurisdictions have distinct cultures, traditions, social experiences, and hence political biases, it ought to be clear that transatlantic harmonization will remain elusive as long as economics and statistics lack the ability to provide clear policy conclusions. However, Part III emphasizes that this explanation, whilst bearing great explanatory power, is troubling. Fortunately, we find that economic analysis provides an optimal solution to most matters of antitrust concern. Nevertheless, those engaged in international debate over the proper approach to phenomena with significant long-run implications should refrain from overemphasizing the normative contribution of the economic literature. A brief conclusion follows.

I. THE INFLUENCE OF PRICE THEORY AND INTERNATIONAL DIVERGENCE

A. Antitrust Policy as an Expression of Contemporary Public Policy

The regulation of industry necessarily implicates a wide variety of political interests. Due to the presence of numerous stakeholders with conflicting priorities, antitrust policy has always threatened to become a vehicle for promoting the sociopolitical predilections of those who would enforce it.[51] Such malleability is made possible by the vague contours of the statutory commands. Indeed, when competition law provides no greater specificity than prohibiting that which is "anticompetitive," an enforcer needs a foundational theory to give substance to that nebulous prohibition.[52] Inevitably, the theory employed will be a manifestation of contemporary public policy.[53]

Yet, a single definition of that policy has proven decidedly elusive. This ought to be expected, given the concept's highly subjective nature and the plethora of competing interests vying to influence the substance of domestic and international antitrust law. As a political matter, incessant pressures exist to temper the harsh operation of a free market. Robust competition not only threatens the viability of sympathetic small businesses that cannot attain the scale efficiencies of corporate rivals, it may also endanger "national champions" exposed to unbridled undercutting from foreign companies and portend mass bankruptcy in economic downturns.[54] Conversely, though, a lack of competition invites social harms that will be of equal or greater distaste to an electorate. In particular, monopolistic practices lead to artificially high prices for consumers and may result in

[51] The history of competition law enforcement is replete with examples of this phenomenon. Illustratively, in the United States the Sherman Act—a notoriously flexible piece of legislation—has been employed to a variety of ends, from trust-busting in the early twentieth century to protectionism by the Warren Court to consumer welfare in modern times. *See generally* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

[52] The Sherman Act, in particular, is a conspicuously vague statute, purporting to condemn contracts, combinations, and conspiracies in restraint of trade, in addition to prohibiting the willful acquisition or maintenance of monopoly power. 15 U.S.C. §§ 1–2 (2006). The Act is a classic "common law statute," and Congress left to the courts the task of giving meaning to its broad commands. 21 Cong. Rec. 2456 (1890) (statement of Sen. John Sherman). Given the malleability of the statutory rules, antitrust law is eminently capable of becoming a conduit for enforcers' political predispositions.

[53] *See* Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 AM. J. COMP. L. 1, 1 (2005) (noting that the basic ambiguity in market rhetoric "enables competition authorities to invoke the spirit of the market no matter what they do").

[54] *See* Frank Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 440 (2008) (noting that "[a]ntitrust law and bankruptcy law go hand in hand"); Deborah Platt Majoras, U.S. Fed. Trade Comm'n Chairman, National Champions: I Don't Even Think It Sounds Good, Remarks Before the International Competition Conference/EU Competition Day (Mar. 26, 2007), *available at* http://www.ftc.gov/speeches/majoras/070326munich.pdf.

what is perceived to be the inequitable exclusion and predation of fringe rivals.[55] Concentrated industries have even been viewed as antithetic to a robust democracy, given their inconsistency with principles of free access to markets and consumers.[56] Yet, increasing concentration will often lead to greater efficiency, which creates something of a quandary for the policymaker who wishes to cater to the wishes of all those affected by the substantive application of competition law.[57]

The foregoing principles sit in apparent and irreconcilable tension, and any attempt to incorporate them into a doctrinal body of law inevitably results in a somewhat tortured outcome. This is most obviously true when weighed against the possibly overriding concerns of efficiency. Historically, both European and U.S. antitrust law have displayed an uneasy balancing of contradictory policies.[58] Both recognized the axiomatic benefits of competition, but both felt that concerns of efficiency must occasionally give way to other sociopolitical concerns.[59] Thus, in the United States, the Supreme Court saw fit for a time to promote the virtues of small business over the efficiency-enhancing benefits of mergers by larger companies.[60] In Europe, size, scale, and vertical integration alone have been judged to be constituent elements of a dominant position, even though such attributes rarely illuminate a company's market power.[61] Even today, both jurisdictions prohibit tying arrangements that, while potentially enhancing efficiency and aggregate welfare, indisputably injure rivals and ostensibly foreclose access to markets.[62] The result was—and, to an extent, still is in Europe—an ad hoc patchwork of discordant principles and rules of the kind characterized by Judge Richard Posner as "an intellectual disgrace."[63]

Yet, it may no longer be accurate to say that there is no agreed-upon public policy that gives substance to the law. From the preceding web of

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[55] *See* CARLTON & PERLOFF, *supra* note 16, at 95–99 (explaining how monopoly leads to artificially high prices caused by restrictions in output).

[56] European antitrust law has been clearly influenced by the Freiburg School of ordoliberalism, which arose in the aftermath of the failed Weimar Republic. This school of thought saw an open competitive process as essential to both a robust economy and effective government. Excessive concentration and monopoly were seen as harbingers of economic ruin and governmental instability. *See generally* RICHARD WHISH, COMPETITION LAW 19–20 (LexisNexis UK 5th ed. 2003) (explaining the ordoliberal influence on the development of EU competition policy).

[57] *See* Harold Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J.L. & ECON. 371, 381–83 (1976).

[58] *See generally* BORK, *supra* note 10, at 15–19 (discussing the historical contradictions in U.S. antitrust law).

[59] *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

[60] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[61] *See* Case 27/76, United Brands Co. v. Comm'n, 1978 E.C.R. 207, 211–21.

[62] See Treaty Establishing the European Community art. 82(d), Nov. 10, 1997, 1997 O.J. (C 340); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

[63] *See* POSNER, *supra* note 24, at viii (deriding the state of antitrust law in the United States in 1976).

confusion, economics has emerged as the definitive metric by which to inform antitrust analysis. Beginning in the 1970s at the University of Chicago, economists demonstrated the inefficiency and logical vacuity of contemporary competition rules and sought to amend the law accordingly.[64] Their efforts proved to be extraordinarily successful. Combined with the game theoretic models of post-Chicago economics, price theory has assumed a role of hegemonic importance.[65] If competition law is simply a doctrinal manifestation of public policy, then the post-Chicago world would have us believe that the law should be couched in exclusively economic terms and applied in favor of allocative efficiency and consumer welfare.[66]

Such is now the case. Influenced by economists' criticism of prior precedent, the U.S. Supreme Court and enforcement agencies have steadily reversed antitrust doctrine that was inconsistent with price theory. The per se rule against product tying has been jettisoned in favor of a qualified rule that requires monopoly power in the tying market and a significant foreclosure effect in the tied market.[67] The prohibition against vertically imposed price and geographic restraints has been rejected, and such business practices are now scrutinized under the rule of reason.[68] Those claiming attempted monopolization must now demonstrate a dangerous probability of success, thus necessitating facts beyond injury to rivals alone.[69] The FTC and Justice Department have recognized the correlation between expanding market share and productive efficiency, and have liberalized their merger enforcement guidelines accordingly.[70] Similarly, the agencies have eliminated the restrictive ban on many efficient licensing arrangements involving intellectual property.[71] Price squeezes by monopolists are legal where the defen-

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[64] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–34 (1979).

[65] *See generally* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257.

[66] *See* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1021 (1987).

[67] *See Jefferson Parish*, 466 U.S. at 12.

[68] *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (overruling the Court's 1911 decision in *Dr. Miles*, which held that vertical minimum price fixing is illegal per se); State Oil Co. v. Khan, 522 U.S. 3, 10–22 (1997) (overruling its 1968 *Albrecht* decision, which held that vertical maximum price fixing was a per se antitrust violation).

[69] *See, e.g.*, Weyerhaeuser Co. v Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 314–20 (2007); Brooke Group Ltd. v Brown & Williamson Tobacco Corp., 509 U.S. 209, 219–27 (1993).

[70] *See, e.g.*, William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003); Oliver E. Williamson, The Merger Guidelines of the U.S. Department of Justice—In Perspective, Remarks at 20th Anniversary of the 1982 Merger Guidelines (June 10, 2002), *available at* http://www.usdoj.gov/atr/hmerger/11257.pdf.

[71] *See* Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITIES: MICROECONOMICS 283, 307–32 (1997).

dant has no antitrust duty to deal with the plaintiff at the wholesale level.[72] Underlying all these developments in the law is an unyielding focus on efficiency.[73] Only those practices that are apt to reduce output in a relevant market, thus increasing the price paid by consumers above competitive levels and causing deadweight loss, are subject to serious scrutiny.[74]

There is no question that the Chicago School approach to antitrust jurisprudence—defined broadly to include post-Chicago advancements in theory[75]—has been more influential in the United States than Europe.[76] The free market focus on price theory perhaps found a more welcome home in America because of its relatively stronger embrace of capitalism, than in Europe, where socialist and ordoliberal thought is much more attractive.[77] Nevertheless, despite some resistance to the U.S. approach, the central tenet of the Chicago School has largely taken hold in Europe. The European Commission—the chief enforcer of EU competition law—now couches its policy guidelines and enforcement actions in exclusively economic terms, propounding the virtues of "consumer welfare" as the sole, relevant criterion in antitrust inquiries.[78] Per the Chicago approach, EU law rejects the contention that trade regulation should be used to protect competitors, in place of competition.[79]

B. International Embrace of the Consumer and the Paradox of Divergence

Since the world's two most important antitrust jurisdictions agree that economic analysis should inform competition enforcement, and that consumer welfare should be the sole standard by which to judge business conduct, one would expect significant levels of convergence on matters of substantive antitrust law.[80] Consistent with this expectation, the U.S. and EU enforcement agencies regularly confer on such issues, exchange infor-

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[72] *See* Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 129 S. Ct. 1109, 1114–15 (2009); J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279, 280–84 (2008).

[73] *See* Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001) ("[I]t needs to be remembered that the goal is efficiency, not competition. The ultimate goal is that there be efficiency.").

[74] *See* BORK, *supra* note 10, at 122.

[75] *See* Hovenkamp, *supra* note 65 (reviewing the development and nature of post-Chicago antitrust doctrine); *see also* Posner, *supra* note 64 (describing the growing consensus of an economic approach to antitrust doctrine).

[76] *See* GIORGIO MONTI, EC COMPETITION LAW 79–80 (2007).

[77] *See* Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295, 319–48 (2008); James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 371–83 (2007).

[78] *See* Kroes, *supra* note 10.

[79] *Id.*

[80] *See, e.g.*, Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 402–03 (2005).

mation and views, and emphasize the extent to which their enforcement intentions merge.[81] Both jurisdictions put a premium on the prosecution of domestic and international cartels and go to great lengths to approach merger sanction decisions in parallel fashion.[82] To a significant degree, convergence has indeed been achieved.[83]

Yet, glaring instances of divergence persist. In numerous cases, a major transatlantic rift has been exposed, as the U.S. and European agencies have reached diametrically opposed outcomes. Particularly dramatic examples include the European Commission's decision to veto the merger between General Electric and Honeywell, which had already been cleared by the U.S. Department of Justice,[84] and Europe's action against Microsoft under Article 82 EC following the company's settlement decree with the U.S. government.[85] Both decisions created a firestorm of controversy.[86] The merger between Boeing and McDonnell Douglas almost resulted in a similar altercation, though the European Commission eventually capitulated in the face of the Justice Department's approval and the threat of an all-out trade war.[87] The European Commission's 2007 decision to fine Microsoft what was then the largest amount in the history of global antitrust enforcement for failing to offer court-ordered interoperability information at a "rea-

[81] *See* Platt Majoras, *supra* note 1.

[82] *See* Donald C. Klawiter & J. Clayton Everett, *Global Cartel Enforcement in 2005:* Empagran, *Executives and Equilibrium*, *in* THE ANTITRUST REVIEW OF THE AMERICAS 11 (2005); William J. Kolasky, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, U.S. and EU Competition Policy: Cartels, Mergers, and Beyond, Address Before the Council for the United States and Italy Bi-Annual Conference (Jan. 25, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/9848.pdf.

[83] *See* Mark R. Patterson, *Revision of the New Technology Transfer Block Exemption Regulation: Convergence or Capitulation?*, *in* THE EVOLUTION OF EUROPEAN COMPETITION LAW: WHOSE REGULATION, WHICH COMPETITION? 53, 53 (Hanns Ullrich ed., 2006) ("It is generally believed that European competition law is becoming both more similar to US antitrust law and more based on economics."); David Scheffman & Mary Coleman, Dialogue and Consultation Facilitates Convergence in the Analyses of Mergers in the US and EU, http://www.ftc.gov/be/convergence.pdf (last visited Feb. 16, 2010).

[84] *See* Kris Dekeyser et al., *Coordination Among National Antitrust Agencies*, 10 SEDONA CONF. J. 43, 58 (2009).

[85] *See* Commission Decision COMP/C-3/37.792, Microsoft, 2007 OJ (L 32) 23 (Mar. 24, 2004), *available at* http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf; WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 80–83 (2007); *see also* David S. Evans et al., United States v. Microsoft*: Did Consumers Win?*, 1 J. COMPETITION L. & ECON. 497 (2005) (discussing the controversial nature of the action taken by the European Commission against Microsoft); Stephen H. Haber, F. Scott Kieff & Troy A. Paredes, Op-Ed. *EU Antitrust Nonsense*, WASH. TIMES, Oct. 5, 2007, at A19, *available at* http://www.washingtontimes.com/news/2007/oct/05/eu-antitrust-nonsense/ (criticizing the EC's decision in the Microsoft case).

[86] *See* Dimitri Giotakos, *GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across the Atlantic*, 23 U. PA. J. INT'L ECON. L. 469, 498–99 (2002).

[87] *See* Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry*, 45 ANTITRUST BULL. 119, 120 (2000).

sonable" price was extraordinary indeed.[88] Perhaps the ultimate indicator of divergence, however, occurred in January 2009, when the Commission ordered Microsoft not to bundle its Internet browsing software with its operating system.[89] This was an astonishing decision, and would appear directly to contradict foundational principles of efficiency. In light of this decision and others, it becomes difficult to resist the urge to declare EU competition policy a vehicle for promoting interests other than those of consumers. This is particularly true in light of Europe's record $1.45 billion fine of Intel for its use of loyalty rebates.[90]

Indeed, the differences are more systemic than the foregoing might suggest. As a general matter, Europe has a greater predisposition to finding violations of competition law in cases of unilateral misconduct, while the United States approaches such situations with a great deal of skepticism.[91] At the micro level, serious distinctions persist in doctrine.

First, the European definition of a dominant position is far broader than the U.S. approach to defining monopoly power.[92] The former places relevance on such factors as size, vertical integration, and scope—characteristics deemed irrelevant by U.S. law—and creates a far lower market share cutoff for a finding of dominance.[93] Indeed, under EU law, market shares below 40% have been found to represent a position of market dominance.[94] In contrast, the definitive U.S. decision on the matter expressed serious doubt

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[88] On February 27, 2008, the European Commission fined Microsoft $1.3 billion—then the largest fine in the history of antitrust enforcement—for charging rivals "unreasonable prices" for gaining access to interface information for work group servers that would facilitate interoperability. *See* Press Release, European Comm'n, Antitrust: Commission Imposes €899 Million Penalty on Microsoft for Noncompliance with March 2004 Decision (Feb. 27, 2008), *available at* http://ec.europa.eu/competition/antitrust/cases/index/by_nr_75.html#i37_792 (follow "Antitrust: Commission imposes . . ." hyperlink; then follow "EN" hyperlink for PDF). The offending prices were initial royalty rates of 3.87% of licensees' product revenues for patented information and 2.98% for confidential interoperability information. *Id.*

[89] *See* Press Release, Microsoft Statement on European Commission Statement of Objections (Jan. 16, 2009), *available at* http://www.microsoft.com/presspass/press/2009/jan09/01-16statement.mspx.

[90] *See* Matthew Newman, *Intel Fined $1.45 Billion in EU Antitrust Case*, BLOOMBERG NEWS, May 13, 2009, http://www.bloomberg.com/apps/news?pid=20601110&sid=a22oQQl0woQI.

[91] *See* William J. Kolasky, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, United States and European Competition Policy: Are There More Differences than We Care to Admit?, Address Before the European Policy Center (Apr. 10, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/10999.pdf ("In the U.S., we believe [calculating negative long-run effects caused by short-run efficiency gains] will generally exceed our limited predictive abilities. We therefore will generally not intervene in these circumstances. We prefer to let markets sort it out.").

[92] *See* BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 221 (2002) ("[T]he definition of market power is much broader under EC law, and dominance is more likely to be found in the European Communities than in the United States.").

[93] *See generally* WHISH, *supra* note 56, at 178–90 (discussing the EC's governing tests for determining dominant positions in antitrust).

[94] *See* Case T-219/99, British Airways PLC v. Comm'n, 2003 E.C.R. II-5917 (finding British Airways to be dominant in the UK air travel agency market with a share of 39.7%).

as to whether a 64% market share would suffice.[95] No Supreme Court decision has found monopoly power where market share is less than 75%.[96] Indeed, U.S. law holds that even a 100% market share will not necessarily amount to monopoly power.[97] By way of contrast, there is at least some reason to believe that European law regards undertakings with market shares in excess of 90% as "super dominant," and therefore subject to even more stringent behavioral constraints.[98] Europe's broader definition of dominance has significant repercussions, as it subjects far more unilateral conduct to its oversight.[99] Behavior that would be deemed incapable of negatively affecting market outcomes in the United States may be prohibited across the Atlantic.

Second, a lesser showing is required to establish a violation of Article 82 EC than is necessary to prove a breach of Section 2 of the Sherman Act. Under EU law, to demonstrate illegal predatory pricing, one need not show that the dominant company has a dangerous probability of recouping its losses—a predicate element of the otherwise analogous cause of action under U.S. law.[100] A monopolist's use of loyalty rebates amounts to a violation of EU law,[101] but would be unlikely to have adverse legal consequences in America.[102] Similarly, a dominant undertaking's imposition of exclusive purchasing requirements on a consumer creates a major danger of violating EU competition law.[103] The European rule against product tying is considerably stricter than its U.S. equivalent.[104]

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[95] *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

[96] *See* Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 481 (1992).

[97] *See* United States v. Syufy Enters., 903 F.2d 659, 665–66 (9th Cir. 1990) (asserting that a firm's market share is a less important consideration than its ability to maintain that market share); *see also* L.A. Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425–29 (9th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994) (explaining that 100% market share does not necessarily demonstrate power to control prices or exclude competition).

[98] *See* Joined Cases C-395/96 P & C-396/96 P, Compagnie Maritime Belge Transps. SA v. Comm'n, 2000 E.C.R. I-1365, ¶¶ 119, 137.

[99] *See* ZANETTIN, *supra* note 92, at 221.

[100] *Compare* Brooke Group Ltd v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (requiring that a plaintiff alleging predatory pricing demonstrate "that the competitor had a reasonable prospect" or "a dangerous probability of recouping its investment in below-cost prices"), *with* Case C-62/86, AKZO Chemie BV v. Comm'n, 1991 E.C.R. I-3359, 3372–74 (condemning below-cost pricing without considering the dominant undertaking's ability to recoup its losses).

[101] *See* Newman, *supra* note 90.

[102] *See generally* Richard A. Duncan & Brian S. McCormac, *Loyalty & Fidelity Discounts & Rebates in the U.S. & EU: Will Divergence Occur over Cost-Based Standards of Liability?*, 9 SEDONA CONF. J. 133, 138–44 (2008) (reviewing applicable case law and concluding that loyalty rebates generally withstand judicial scrutiny in the United States).

[103] *See* Comm'n Notice, Commission Guidelines on Vertical Restraints, 2003 E.C.R. II-5917, ¶ 141.

[104] *Compare* Case T-201/04 R, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (finding Microsoft's tying arrangements as problematic and anticompetitive), *with* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (holding that Microsoft's tying arrangements are not per se illegal but should judged by the rule of reason).

Third, in the realm of concerted conduct, much of the preceding behavior would also be found to infringe Article 81 EC, but would not amount to a violation of Section 1 of the Sherman Act. In addition, a manufacturer's imposition of price and geographic restrictions on its dealers is likely to violate EU law, but, following a flurry of recent decisions by the U.S. Supreme Court, would simply be analyzed under the rule of reason in America.[105]

As a general matter, Europe has greater confidence in its ability to intervene in markets and to facilitate outcomes superior to those that the market would yield alone.[106] In cases of uncertainty, this results in an asymmetric transatlantic approach. The United States, in contrast to Europe, would appear to err on the side of under-enforcement.[107]

Perhaps the most important distinction for modern purposes, however, is the dramatic asymmetry between the legal duties placed on dominant companies to deal with their rivals. Although there has been some judicial divergence on the matter, as a question of U.S. law, a monopolist's duty to deal with rivals is virtually nonexistent.[108] To the extent it exists at all, it would seem limited to the case where a dominant firm ceases to supply a competitor after a prolonged period of cooperation.[109] Yet, the duty to deal imposed on a dominant firm has steadily increased in Europe, as recent cases expand the doctrine ever further.[110]

The European approach would thus seem antithetical to the teachings of Chicago and post-Chicago School economics. These schools define dominance solely through the lens of price theory, so as to consider only those factors indicative of the price elasticity of demand at the competitive price level.[111] Similarly, claims of predatory pricing are approached with skepticism, given the benefits of low prices for consumers.[112] Injecting a requirement that a plaintiff establish a dangerous probability of success ensures that only below-cost pricing that threatens consumer welfare in the future

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[105] *Compare* Joined Cases 56 & 58/64, Établissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299, 339 (finding geographical and price restrictions on car dealerships to violate antitrust law), *with* State Oil Co. v. Khan, 522 U.S. 3, 10–22 (1997) (holding that requiring distributors to sell at certain price restrictions was not anticompetitive) *and* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (overruling the Court's 1911 decision in *Dr. Miles*, which held that vertical minimum price fixing is illegal per se).

[106] *See* Kolasky, *supra* note 91.

[107] *See id.*

[108] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004); *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1327–28 (Fed. Cir. 2000).

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

[110] *See* Case C-418/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co. (*IMS Health*), 2004 E.C.R. I-5039, 5081–88; Case T-201/04 R, Microsoft v. Comm'n, 2007 E.C.R. II-3601; Case C-241/91 P, Radio Telefis Eireann v. Comm'n, 1995 E.C.R. I-743, 815–25.

[111] *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939–43 (1981).

[112] *See* POSNER, *supra* note 24, at 207–23.

should be prohibited. Refusals to supply are generally respected as inviolate, given the danger that long-term innovation might be stymied by the myopic dilution of intellectual property rights.[113] Conglomerate mergers, such as the proposed combination of General Electric and Honeywell, should be approved in the presence of complementary pricing effects that are apt to produce lower prices for consumers.[114] Myriad aspects of EU competition law can be criticized for their attenuated relationship to economic reasoning.

Is it the case, then, that Europe says one thing and does another? Is its proclaimed adherence to consumer welfare, and professed rejection of protecting competitors, disingenuous? There are certainly those who believe so.[115] The U.S. Department of Justice has been particularly cutting in its criticism of European antitrust enforcement, accusing the EU of jettisoning sound economics.[116] Europe has returned fire, denouncing U.S. criticism of its internal affairs as officious, and defending the prudence of its actions.[117] Interestingly, though, the disputes have been largely framed in economic terms. Indeed, a focus on proper economics might be thought of as the definitive trait of the transatlantic debate.

Yet, economics alone cannot yield the myriad benefits of harmonization. Notwithstanding the ubiquitous adoption of consumer welfare—economically defined—as the lodestar of competition enforcement, profound epistemological limitations undercut the normative contribution of price theory. More specifically, the long-run effects of a practice are not subject to determinate analysis. Without an ability to quantify the long-term effects of present conduct, competition enforcers are compelled to weigh current facts against a probabilistic future. As large swathes of business conduct bear the potential to have economic consequences in both the short and long run, the inability to weigh such potentially offsetting effects accurately is especially problematic.

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[113] *See* Thomas Barnett, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Remarks, Interoperability Between Antitrust and Intellectual Property (Sept. 13, 2006), *in* 14 GEO. MASON L. REV. 859, 865–66 (2007).

[114] *See* CARLTON & PERLOFF, *supra* note 16, at 638.

[115] *See, e.g.*, Hal R. Varian, *Economic Scene; in Europe, G.E. and Honeywell Ran Afoul of 19th-Century Thinking*, N.Y. TIMES, June 28, 2001, at C2 ("When evaluating a merger, United States antitrust officials tend to focus on the benefits to consumers, while European regulators give substantial weight to the impact on competitors, especially if they are 'national champions.'"); Editorial, *Europe to GE: Go Home*, WALL ST. J., June 15, 2001, at A14 ("In the Honeywell case, novel antitrust theories have been dreamed up simply because it would be unthinkable to let a large U.S. company go about its business unmolested.").

[116] *See, e.g.*, John R. Wilke, *U.S. Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell*, WALL ST. J., July 5, 2001, at A3 ("Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors' . . . . The EU decision reflects a significant point of divergence." (internal quotation marks omitted)).

[117] *See, e.g.*, Lawsky, *supra* note 9.

We argue that it is this limitation in economic analysis—the inability of the discipline to yield specific answers with respect to the long run—that causes the U.S. and EU competition law regimes to diverge in such important ways. This effect is compounded by Europe's relative lack of faith in the free market to remedy inefficiencies in an expeditious and effective manner.[118] As a result, and unlike the United States, the European Commission and courts have displayed great reluctance to permit short-run gains to be realized if they portend potential future barriers to competition.[119] Similarly, Europe typically discounts nebulous, but socially valuable, long-term investments that may be facilitated by short-run harm. Most paradigmatically, EU competition law displays a tendency to discount the long-term value of intellectual property, believing it to be attenuated in some instances when compared to the immediate restriction of competition.[120]

The following Part explores the limitations of economics revealed by an inquiry into the tension between the long and short run. To illustrate this phenomenon, we use the law governing refusals to supply, which casts the relevant issues into critical relief.

II. THE EPISTEMOLOGICAL LIMITATIONS OF ECONOMICS: THE SHORT-RUN/LONG-RUN DILEMMA

A. *Price Theory's Normative Limitation—Comparing Calculable Short-Run Effects to Indeterminate Future Consequences*

"[T]his long run," wrote John Maynard Keynes, "is a misleading guide to current affairs. In the long run we are all dead."[121] Better to stimulate the economy now, Keynes concluded, than to wait for it to return to equilibrium in the longer term. An institutional preference for resolving difficult economic problems in the short run also underlies much of competition law analysis in the United States and Europe. In both jurisdictions, regulators and courts assess the legality of competitor collaborations—contractual arrangements, joint ventures, and mergers—in part by comparing their past, present or near-term anticompetitive consequences with their immediate or

[118] *See generally* Kolasky, *supra* note 91 (asserting that the United States' deference to market forces diverges from the European approach).

[119] Part of this tendency can be explained by the ordoliberal tradition that pervaded parts of Europe at the incipiency of the then European Economic Community (EEC), and the resulting policies that may be traced to the so-called Freiburg School. *See* Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 OXFORD J. LEGAL STUD. 267, 267–94 (2009).

[120] See Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, ¶¶ 697–98, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04 (under the "Cases" column and in the row with "Judgment," follow the "T-201/04" link) (placing the burden on the defendant to prove with specificity that interoperability would reduce incentives to innovate).

[121] JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) (italics omitted).

near-term benefits.[122] Conduct of dominant firms that might harm competition is usually subject to the same form of analysis.[123]

In the United States, a dominant firm possessing powerful intellectual property can refuse to license that property to its rivals, or would-be rivals, even though access to the property is arguably necessary to foster or preserve competition in the short term.[124] If it has previously licensed that property, the dominant firm can refuse to continue licensing it, as long as its refusal arises plausibly from the everyday desire to appropriate for itself the full value of its invention or creation, and even if the refusal would arguably impede competition in the short run.[125]

In Europe, the dominant firm operates under a more intrusive rule. Intellectual property licensing decisions come under much stricter regulatory and judicial scrutiny, which will only intensify following the recent decision of the Court of First Instance in the *Microsoft* case.[126] Typically, while the dominant firm with powerful intellectual property can refuse to license its property to rivals, it is required to license in "exceptional circumstances."[127] The *Microsoft* ruling significantly expanded the set of so-called exceptional circumstances to include relatively prosaic situations in which smaller rivals demonstrate that they need access to the relevant intellectual property in order to compete "effectively" with the dominant firm in a neighboring or secondary market, in which access to the intellectual property would enable them either to develop a "new" product or to make "technical developments" to their existing ones.[128]

Even before the Court of First Instance's *Microsoft* opinion, the difference between the U.S. and European approaches to compulsory licensing was the subject of heated debate both within and between U.S. and EU anti-

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[122] *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 1992 HORIZONTAL MERGER GUIDELINES, 57 Fed. Reg. 41,552 (Sept. 10, 1992), *revised*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 8, 1997); Council Regulation 139/2004, 2004 O.J. (L 24) 1–22 (EC), *available at* http://ec.europa.eu/competition/mergers/legislation/regulations.html#merger_reg (EC merger regulations).

[123] *See generally* SINGLE-FIRM CONDUCT, *supra* note 43 (analyzing various forms of single firm conduct, such as exclusionary conduct, price predation, and tying in terms of both the anticompetitive and pro-competitive effects).

[124] *See In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1327–28 (Fed. Cir. 2000).

[125] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 27–28 (2007) [hereinafter PROMOTING INNOVATION], *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

[126] Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04 (under the "Cases" column and in the row with "Judgment," follow the "T-201/04" link).

[127] *See* Commission Decision 89/205/EEC, Magill TV Guide/ITP, BBC & RTE, 1989 O.J. (L 78) 43.

[128] *Microsoft*, 2007 E.C.R. ¶ 367, 643.

trust circles.[129] The *Microsoft* case has provided additional fuel for those opposed to the European approach.[130] For the most part, however, the argument has concerned itself with inquiries into practical matters. Whose law is more sensible?[131] Can refusals to license do more economic harm than good?[132] Are courts and regulators able to define and administer workable standards for compulsory licensing in general and for remedial orders in particular?[133] While these are certainly important questions, the discussion has thus far overlooked the fundamental factor accounting for the difference between the European and American views.

In important respects, antitrust law in the United States is animated by a deep-seated faith in the ability of markets to function effectively over the long term. A central tenet of this faith holds that a rule of law encouraging the possession and retention of monopoly power will create strong incentives over the long term for vigorous competition; with each firm striving to become a monopolist, very few succeed.[134] Those few firms that do succeed—lawfully—will in turn encourage others to continue trying, provided of course that the successful receive their just rewards.[135] Another important article of faith holds that since innovation is the best engine of long-term economic growth, antitrust law should foster and protect incentives to innovate by allowing dominant firms with valuable intellectual property to

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129 *See* Valentine Korah, *The Interface Between Intellectual Property and Antitrust: The European Experience*, 69 ANTITRUST L.J. 801 (2001) (describing European intellectual property law on licensing for the benefit of American readers).

130 *See, e.g.*, Press Release, Assistant Att'y Gen. for Antitrust, R. Hewitt Pate, U.S. Dep't of Justice, Issues Statement on the EC's Decision in its Microsoft Investigation (Mar. 24, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm (noting the Justice Department's criticism of the European Commission's decision against Microsoft, suggesting that the Commission's action "may produce unintended consequences" and that "[s]ound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies").

131 *Compare, e.g.*, SINGLE-FIRM CONDUCT, *supra* note 43, (noting the United States generally relaxes the restrictions on dominant firms), *with* Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (Sept. 8, 2008), *available at* http://www.ftc.gov/opa/2008/09/section2.shtm (criticizing the Department of Justice's *Single-Firm Conduct* report for weakening antitrust laws and promoting the interests of dominant companies).

132 *See supra* note 131.

133 *See, e.g.*, Austin Modine, *Microsoft to EC: Define 'Unreasonable'*, REGISTER, Apr. 23, 2007, http://www.theregister.co.uk/2007/04/23/microsoft_responds_to_ec_complaint/.

134 *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. 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*."); Barnett, *supra* note 113, at 865–66.

135 *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

realize the full value of their inventions.[136] Those dominant firms will then continue to invest in invention, their rivals will need to invent to keep up with them, and—in the long term—investment in invention will remain at usefully high levels, all to the benefit of consumers.[137]

This faith in the long term comes with both a corollary and a cost. The corollary requires minimal regulatory intervention in the short term, since unwarranted intervention would, among other things, discourage future investment in invention and deprive society of the valuable long-term benefits that it would otherwise receive. The cost comes in the short run, since an institutional reluctance to intervene in markets dominated by powerful firms necessarily results in consumers paying more than they would under a more aggressive enforcement regime. But faith in the power of the long term requires the U.S. antitrust system to accept this short-term cost.

In contrast, the European competition regime does not trust so completely in the workings of the long term. In its approaches to regulating the dominant firm, merger review, and the specific issue of compulsory intellectual property licensing, it looks primarily to the short-term needs of consumers.[138] It is therefore less tolerant of dominant firms in general and more apt to challenge their conduct. European regulators are also more skeptical of the social value derived from encouraging firms to strive for dominance and of providing long-term incentives to invest in innovation.[139]

B. The Dilemma Exposed—Compulsory Licensing and the Long Term

Two strains of case law are relevant to this discussion. The more general pertains to a dominant's firm's liability for refusing to deal with its smaller rivals. The more particular covers the dominant firm's refusal to license valuable intellectual property to smaller rivals. In both the United States and Europe, these areas of law are regarded as related but distinct.

1. The U.S. Case Law.—In both areas, U.S. law divides itself into two parts: (1) refusals to begin a course of dealing (or licensing) and (2) refusals to continue a course of dealing already begun.[140] With regard to the former, the law provides a simple and readily comprehensible rule: it imposes no duty whatsoever on the dominant firm either to initiate a course of

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[136] *See* Barnett, *supra* note 113, at 860–61.

[137] *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 929–30 (2001) (explaining the Schumpeterian nature of competition in high technology markets, whereby the prospect of monopoly returns drives valuable ex ante competition in innovation).

[138] *See infra* Part II.B.

[139] *See infra* Part II.B.

[140] *See* PROMOTING INNOVATION, *supra* note 125, at 15–32.

cooperative conduct with rivals, or to respond positively to rivals' requests for cooperation.[141]

With regard to the latter, the law is somewhat more complicated. Prior to the Supreme Court's opinion in the *Trinko* case,[142] the dominant firm was constrained in its freedom to discontinue a course of cooperative conduct with its smaller rivals—significantly constrained in the view of some[143]—by the Court's 1985 ruling in *Aspen*.[144] The *Aspen* Court upheld the lower court's finding of liability against a dominant ski resort which had ceased cooperating with its smaller rival in the sale of an all-area, six-day lift ticket. The dominant resort had even refused to sell its own lift tickets at retail to the smaller firm.[145] The Court justified its decision on the grounds that (a) the cooperation had begun when the relevant market was competitive,[146] (b) consumers preferred the market with cooperation to the market without,[147] (c) the dominant firm's behavior could plausibly be characterized as predatory—"[t]he jury may well have concluded that [the dominant firm] elected to forego . . . short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor"[148]—and (d), perhaps most importantly, the dominant firm had failed to offer a valid business justification—an efficiency defense—for its conduct.[149] The Court's decision was very controversial and attracted more than its share of critics,[150] but until *Trinko* it played an important role in U.S. antitrust jurisprudence.

Trinko limited the application of *Aspen*, condemning it to a fate almost worse than death—irrelevance. It located *Aspen* "at or near the outer boundary of § 2 liability," referred to its holding as a "limited exception" to the general right of a dominant firm to refuse to deal with its rivals, and confined its future applicability to cases whose fact patterns neatly matched

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[141] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP (*Trinko*), 540 U.S. 398, 411 (2004) (refusing to recognize the essential facility doctrine or another exception to the principle that there is no duty to aid competitors); Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (*Aspen*), 472 U.S. 585, 600 (1984) (stating that a firm with monopoly power has no general duty to cooperate with a competitor); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (affirming, despite the Sherman Act, "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

[142] *Trinko*, 540 U.S. 398.

[143] *See, e.g.*, KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 203–05 (2003) (reading *Aspen* to "imply[] a duty to cooperate with rivals").

[144] *Aspen*, 472 U.S. 585.

[145] *Id.* at 593.

[146] *Id.* at 603.

[147] *Id.* at 606–07.

[148] *Id.* at 608.

[149] *Id.* at 608–09.

[150] *See, e.g.*, HYLTON, *supra* note 143, at 203–05.

Aspen's own.[151] The *Trinko* Court noted that the defendant in *Aspen* terminated a voluntary (and thus presumably profitable*)* course of dealing, refusing to provide its competitor with "a product that it already sold at retail."[152] Yet after *Trinko,* scenarios such as this—where a dominant firm decides to discontinue an ongoing cooperative relationship with a rival firm—seem to represent the only plausible conditions under which a refusal to deal case might succeed. Indeed, many believe that the limited circumstances in which these conditions will arise places the future of these claims into grave doubt.[153]

U.S. law regarding a dominant firm's refusal to license powerful intellectual property to rivals is somewhat less clear. The Supreme Court has not ruled on the important issues that arise in these cases, but a handful of court of appeals decisions have.[154] From these decisions, several salient points have emerged. First, it seems clear—as it is with refusals to deal in general—that a dominant firm has no obligation to cooperate with its rivals in the first instance, and can reject their requests for access to valuable intellectual property with impunity.[155] No reported case in the United States "impose[s] antitrust liability for a unilateral refusal to sell or license a patent,"[156] and several expressly decline to do so.[157]

The most notable of these rulings is the Second Circuit's 1981 opinion upholding Xerox's refusal to license its plain-paper copying technology to SCM, where SCM claimed that compulsory licensing would create competition in a market without any.[158] Xerox had steadfastly refused to license its technology to SCM, a refusal vindicated on appeal. To rule otherwise, wrote the court, "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system."[159]

The law is less clear regarding refusals to continue licensing intellectual property to one's rivals. Between the circuit courts that have ruled on the issue, slight differences in opinion exist. In *Image Technical Services v. Eastman Kodak*, a rival sued Kodak for Kodak's refusal to continue licensing patented copier parts to other firms.[160] The Ninth Circuit held that a

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[151] Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP (*Trinko*), 540 U.S. 398, 409–10 (2004).

[152] *Id.* at 410.

[153] *See, e.g.*, PROMOTING INNOVATION, *supra* note 125, at 15–32.

[154] *See, e.g., In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000); Image Technical Servs., Inc. v. Eastman Kodak, Co., 125 F.3d 1195 (9th Cir. 1997); Miller Insituform, Inc. v. Insituform of N. Am. Inc., 830 F.2d 606 (6th Cir. 1987).

[155] *See id.*; *see also Trinko*, 540 U.S. at 411 (finding no duty for telephone company to aid competitors under antitrust law by allowing access to its computer system).

[156] *Kodak*, 125 F.3d at 1216.

[157] *See, e.g., In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1329.

[158] SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1197 (2d Cir. 1981).

[159] *Id.* at 1209.

[160] 125 F.3d 1195, 1201 (9th Cir. 1997).

monopolist's desire to exclude others from its lawfully obtained intellectual property "is a presumptively valid business justification for any immediate harm to consumers."[161] The court found that plaintiffs could rebut the presumption of validity by showing—through proof of the monopolist's subjective intent—that the claimed desire to exclude was a "pretextual" cloak for some different and noxious anticompetitive intention.[162]

Three years later, on nearly identical facts, the Federal Circuit adopted a modified version of the Ninth Circuit's test. The claim was brought against Xerox by rivals in the parts and service aftermarkets.[163] Though relatively small, the Federal Circuit's modification is of crucial significance. The court's test eschews any inquiry whatever into the monopolist's subjective intention in refusing to license to its rival.[164] Thus, under this test, unless the monopolist has (a) obtained its intellectual property unlawfully (that is, by committing fraud on the patent office)[165] or (b) brought "sham litigation" to enforce its patent (whether properly obtained or not),[166] its simple unwillingness to allow others to use its intellectual property provides an unassailable defense to antitrust claims brought by disappointed rivals.[167]

It is easy—too easy perhaps—to overemphasize the difference between the approaches adopted by these courts regarding a monopolist's subjective intent.[168] For one thing, focusing too closely on that issue can obscure the large common ground shared by the two opinions. Both make it very difficult for plaintiffs to prevail. Each recognizes the validity and importance of the monopolist's desire to wield exclusionary power over its valuable intellectual property for its own benefit.[169] And each creates a strong presumption favoring the use of that power and disfavoring rivals' attempts to interfere with it.[170] It is also important to recognize that those firms which possess powerful intellectual property and are well-advised by counsel are

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[161] *Id.* at 1218 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)) (internal quotation marks omitted).

[162] *Id.* at 1212.

[163] *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1324 (Fed. Cir. 2000).

[164] *Id.* at 1327.

[165] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965).

[166] *See, e.g.*, Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 56 (1993); Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 993 (N.D. Ill. 2003).

[167] *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1327–28

[168] *See, e.g.*, Michelle M. Burtis & Bruce H. Kobayashi, *Why an Original Can be Better than a Copy: Intellectual Property, the Antitrust Refusal to Deal, and ISO Antitrust Litigation*, 9 SUP. CT. ECON. REV. 143 (2001) (arguing that the differences between the *Xerox* and *In re Indep. Serv. Orgs. Antitrust Litig.* cases did not warrant resolution by the Supreme Court).

[169] *Compare In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1325–26 (recognizing a patent holder's right to exclude so long as the patent is not fraudulently obtained or used for sham litigantion), *with* Image Technical Servs., Inc. v. Eastman Kodak, Co., 125 F.3d 1195, 1215–19 (9th Cir. 1997) (similarly recognizing a patent holder's right to exclude within limits).

[170] *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1329; *Kodak, Inc.*, 125 F.3d at 1218.

not likely to run afoul of *Kodak* in the future.[171] They can easily create a paper trail of bona fide memos announcing the high importance attached to capturing all available benefits from valuable intellectual property.

2. The European Case Law.—Until recently, reasonable people could disagree about whether EU law regarding the ability of the dominant firm to refuse to deal with smaller rivals differed materially from its counterpart in the United States.[172] In general—that is, in cases not involving powerful intellectual property—European courts had adopted a relatively strict version of the essential facilities doctrine.[173] In one illustrative case, a dominant firm in possession of powerful property (including a fleet of trucks which were arguably indispensable for the nationwide home delivery of newspapers) was not required to afford a smaller rival access to that property, since the rival had failed to show—as the law required—that the denial of access "was likely to eliminate *all* competition on the part of" the smaller firm.[174] While not so protective of the dominant firm's interests as U.S. law, the requirements of (i) indispensability and (ii) the likelihood that, without access, all competition in the relevant market would be eliminated, nevertheless provided the dominant firm in Europe with a healthy modicum of discretion.

As to the compulsory licensing of intellectual property, the pre-*Microsoft* legal regime approached access requests cautiously. After affirming the inventor's exclusive right to refuse to allow others to reproduce its patented property in *Volvo v. Erik Veng*,[175] the European Court of Justice expanded the rights of access-seekers, although it did so gradually and only in "exceptional circumstances." In *Magill*, holders of what might be termed "weak" copyrights in weekly listings of television programs were made to license their copyrighted material to a firm seeking to publish a new product that would collect all of the listings in one comprehensive guide.[176] Four factors dictated the outcome: (1) the copyright holders were the only sources of the information indispensable to the compilation of a comprehensive guide; (2) their refusal to license "prevented the emergence of a new product"; (3) there was no good business justification for their refusal;

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171 *Cf.* PROMOTING INNOVATION, *supra* note 125, at 17 (criticizing the *Kodak* decision on the basis that it is difficult to advise clients with respect to refusals to deal that are "pretextual").

172 *See, e.g.*, Kenneth Glazer, *The* IMS Health *Case: A U.S. Perspective*, 13 GEO. MASON L. REV. 1197, 1205 (2006) (noting that "antitrust authorities on both sides of the Atlantic recognize that it is only in the rarest cases that refusing to cooperate with a rival should be prohibited by antitrust law").

173 *See* Case 238/87, AB Volvo v. Erik Veng (UK) Ltd., 1988 E.C.R. 6232, ¶ 8, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0238:EN:HTML.

174 *See* Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH&Co. KG, 1998 E.C.R. 7791, ¶ 38, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0007:EN:HTML (emphasis added).

175 *See AB Volvo*, 1988 E.C.R. ¶ 39.

176 Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann & Indep. Television Publ'ns. Ltd v. Comm'n, 1995 E.C.R. I-743, ¶ 2.

and (4) through their refusal they effectively eliminated *all* competition in the market for weekly program guides.[177]

The holding in *Magill* was ratified in the *IMS Health* case, another dispute involving the refusal of a dominant firm to license "weak" but arguably indispensable copyrighted material to a smaller rival.[178] The Court of Justice in *IMS Health* held that the refusal to grant a license for indispensable intellectual property would constitute an abuse of a dominant position under the following circumstances: (a) the access-seeker "intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand"; (b) the refusal "is not justified by objective considerations [i.e., valid business justifications]"; and (c) the refusal reserves the relevant market for the dominant firm "by eliminating *all* competition on that market."[179]

The *Microsoft* opinion changed European law dramatically by expanding each of the three criteria set forth in *IMS Health*.[180] First, *Microsoft* interpreted the "new product" requirement broadly, allowing it to encompass potential improvements to rivals' existing products already competing in the same market as those offered by the dominant firm.[181] Second, it held that unproven assertions about the general tendency of court-ordered sharing obligations to affect innovation on the margin were insufficient to constitute an "objective justification" for a refusal to license.[182] Rather, it held that such a justification required the dominant firm to "prove" the extent to which its incentives to invest in innovation would be weakened.[183] Third, it changed the requirement that the refusal eliminate "all" competition in the relevant market into one that asks whether the refusal eliminates "effective" competition in that market.[184] Collectively, these changes create a large and uncomfortable gap between the now relatively permissive European regime and the relatively restrictive American one.

C. *What Accounts for the Transatlantic Divide?*

Since both the United States and the EU explicitly identify the protection of consumer welfare as the main objective of competition law, the very existence of such significant transatlantic divergence seems fundamental,

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177 *Id.*at 822–25.

178 *See* Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039.

179 *Id.* ¶¶ 49, 52 (emphasis added).

180 For the authors' view on this decision, see Alan Devlin & Michael Jacobs, *Microsoft's Five Fatal Flaws*, 2009 COLUM. BUS. L. REV 67.

181 Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, ¶ 690 at 3831, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04 (under the "Cases" column and in the row with "Judgment," follow the "T-201/04" link).

182 *Id.* ¶¶ 697–98.

183 *Id.*

184 *Id.* ¶¶ 330, 332.

remarkable, and unsettling. The difference is fundamental because it suggests that there might be, for the very same kinds of conduct, different and competing time frames within which to assess consumer welfare. At the same time, this difference is remarkable because it implicitly asks—even now, at this late point in antitrust history—on which time frame the analysis should focus. Further, this realization is unsettling because the lack of consensus on such a basic matter suggests, among other things, that there are fixed limits to the ability of economic analysis to solve some of antitrust law's most pressing problems, and that perhaps one can and indeed must resort to some political calculus for answers.

In this regard, the European approach focuses on the immediate and obvious benefits to consumers that flow from requiring dominant firms to license valuable intellectual property to smaller rivals. In the short term, smaller rivals can improve upon the relevant technology and offer consumers a greater choice of products, or at least a greater quantity of roughly similar products at (necessarily) lower prices. Access to the dominant technology could well enable the smaller rivals to remain competitive in the short term and protect them from having to cede the market to the dominant player for the foreseeable future. Consequently, in the short term, prices will fall, output will rise, choice may expand, and dominance will be checked. All of this leads to consumer benefits. While the European position would presumably acknowledge the possibility that compulsory licensing might at the margin dampen long-term incentives to innovate, it appears agnostic about this possibility, according it nondispositive weight and only then when the dominant firm can "prove" that the licensing in question would weaken those incentives.[185]

In this area, the United States sees consumer welfare in an entirely different light. It postulates that in the long run consumers benefit enormously from innovation; that ongoing innovation requires a set of incentives and protections that enable inventors and would-be inventors to capture the full value of their inventions; and that legal rules that either discourage the incentives or weaken the protections thereby undermine future investments in invention and thus run counter to consumers' long-term interests.[186] Put another way, the U.S. view rejects the notion that compulsory licensing truly serves consumer welfare.[187] While it would admit—as it must—that compulsory licensing affords consumers greater choice and lower prices in the short term, it insists that those benefits are fool's gold. Eventually, a re-

[185] Indeed, we have argued elsewhere that this agnosticism constitutes a major weakness to European competition policy. *See* Devlin & Jacobs, *supra* note 180, at 105–06.

[186] *See generally* Barnett, *supra* note 113, at 859–61, 865–66 (arguing the importance of dynamic efficiency and innovation in the field of intellectual property and the related societal benefits of realizing these features).

[187] *See id.* at 865–66 (stating that a firm that knows it will have to share its intellectual property will be deterred from investing in its development altogether or in its further advancement after hitting the market).

gime that requires dominant firms to provide rivals with access to valuable intellectual property will sap innovation incentives across the board—incentives not only of the incumbent dominant firm, but also of its smaller rivals and of would-be dominant firms now and in the future. In the long term, these weaker incentives will lead to fewer valuable inventions and a serious net loss of consumer welfare.[188]

Three things about these different approaches should be clear. The first is that each relies on assumptions that economics cannot validate. The second is that their respective costs and benefits are incommensurable, so they cannot be usefully compared. The third follows from the first two: in the absence of a useful economic theory, or a workable metric, the foundations of each approach are inevitably political, valid for each system on its own terms, and somewhat informative for others, but hardly "correct" in some provable fashion.

Economics cannot help determine whether either the EU or the U.S. approach to compulsory intellectual property licensing is sensible. Of course, economics can be used to evaluate improvements to consumer welfare in the short term: compulsory licensing should yield greater choice and increased output. This is not problematic. The problem lies instead in attempting to analyze the tradeoff between those short-term improvements and the supposed longer-term harms. So, again, economics can be used to confidently predict that compulsory licensing will reduce returns to invention and that therefore—on the margin—there will be less investment in invention in the future, a decrease likely to harm consumers.

But how much less investment will there be? And how much less must there be before useful innovation is decreased? Is there a positive correlation between amounts invested in innovation and valuable invention? And what if there is currently over-investment in innovation? If so, then maybe decreased incentives would, over time, reduce investment to the socially efficient level.

But even if the long-term incentives of a more intrusive compulsory licensing regime could be measured in some manner, other significant problems would remain. For example, the short-term benefits of lower prices and greater choice are not readily commensurable with the long-term benefits of higher incentives to invest in invention. Investments do not always yield inventions, for one thing.[189] For another, there are at least four types of relevant investors, each with a slightly different set of incentives: (1) dominant incumbents, (2) smaller rivals (that would have incentives to invent around, or over, the incumbent's intellectual property under U.S. law), (3) existing potential entrants into the relevant market and other intellectual

[188] *See id.*

[189] *See, e.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1892 (2002) ("People innovate for many reasons, and in many industries the existence of IP rights doesn't appear to be chief among them.").

property markets; and (4) future and would-be inventors. Comparing all of these uncertain long-term consequences to the more definite effects obtainable in the near term would almost certainly be an exercise in futility.

These observations cut three ways. First, they mean that the U.S. bias in favor of protecting the dominant firm's incentives to innovate inevitably lacks an empirical foundation, and may even be misplaced. Second, they mean that the European tendency to compel licensing more frequently does not, because it cannot, offset the losses resulting from the likely but unquantifiable disincentives to invest that flow from compulsory licensing. Consequently, except at the most basic level of identifying the very general incentive effects of the relevant legal rules, economic analysis is unhelpful. Third, if economic analysis does not dictate the choice of a legal rule in this area, something else outside of economics must—in other words, something political.

There is neither the need nor the space in this Essay to address in depth the well-known historical differences between the United States and Europe that might account for their differing choices about how to treat the compulsory licensing of powerful intellectual property. For a variety of reasons, markets have generally worked more effectively in the United States than in Europe over the past century. Nearly from its inception, the United States has enjoyed a national market in goods and services relatively free from local interference, while the EU is still in the process of developing such a market.[190] For the most part, markets in the United States have been fluid, and Americans seem to trust their workings.[191] Dominant firms, for the most part, earned their place. They were not, as in Europe, the privatized beneficiaries of state-granted monopolies.[192] Also, the United States has made significant investments in innovation, and these investments seem to have paid big dividends to society.[193] Europe has had very different experiences with markets, local protectionism, dominant firms, and invention. Given these differences and others, it would be odd indeed if the two legal regimes supplied identical rules to the resolution of problems whose answers are not apodictically ordained by economics.

This conclusion holds several important implications for larger issues central to competition law policy and enforcement. But before discussing them, it bears repeating that the issue of compulsory licensing is not the only area of competition law whose questions are answered by resort to historical and cultural referents. The obligation of the dominant firm to license

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190 *See* WHISH, *supra* note 56, at 20–21.

191 *See* Luigi Zingales, *Capitalism After the Crisis*, NAT'L AFF., Fall 2009, *available at* http://www.nationalaffairs.com/publications/detail/capitalism-after-the-crisis.

192 *See* Donna M. Gitter, *The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine*, 40 AM. BUS. L.J. 217, 297 n.409 (2003).

193 *See The Age of Mass Innovation*, ECONOMIST, Oct. 13, 2007, at 89.

its valuable intellectual property to smaller rivals is simply one of a much bigger set of questions pertaining to what kinds of behavior constitute an abuse of dominance, or monopolization. This broader question can arise in many settings and business contexts, but in every case its resolution necessarily begins with certain basic assumptions about the role of dominant firms in general.

The United States not only accepts dominance, but welcomes it.[194] The Supreme Court has recognized that the possibility of dominance creates long-term incentives for every business to invest in assets that might enable it to achieve the monopoly rents available to dominant firms.[195] Of course, if most firms compete to become dominant, then very few will actually succeed; the result will be a competitive economy that promotes consumer welfare.[196] Markets can almost always be trusted to work. But in those relatively rare circumstances when a firm does outstrip its rivals, its success will become a boon to consumers and serve as a pleasant reminder to others that—in the long run—large rewards can accompany dominance that is fairly earned.[197] Moreover, if smaller firms cannot match the dominant firm's appeal to consumers, no tears will be shed on their behalf: in the long term, other challengers will enter the market and the dominant firm, like so many before it, will eventually lose its power to a rival with even more appeal to consumers.[198]

Recently, the Supreme Court, without a dissenting voice, referred to the "mere possession of monopoly power" as "an important element of the free-market system," observing that "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."[199] Restated, the Court's view tolerates certain short-run costs associated with the lawful possession of monopoly power. It imposes a significant burden on those who would complain about monopoly conduct because it regards those costs (and that burden) as indispensable and un-

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[194] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP (*Trinko)*, 540 U.S. 398, 407 (2004).

[195] *Id.*

[196] *See id.*

[197] *See* Kolasky, *supra* note 25, at 537 ("[The United States has] more confidence in the self-correcting nature of markets [than the European Union]. This confidence is especially strong when the markets are populated by strong rivals and strong buyers, who will usually find ways to protect themselves from an aspiring monopolist. Our strong belief in markets and our humility in our own predictive abilities lead us to be skeptical of claims by rivals that a merger will lead to their ultimate demise and to demand strong empirical proof before we will accept such claims.").

[198] *See* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82–85 (1975) (arguing the importance of new technologies, commodities, sources of supply, and types of organizations in driving economic evolution).

[199] *Trinko,* 540 U.S. at 407.

avoidable byproducts of an incentive system crucial to the production of "innovation and economic growth" in the long term.[200]

The EU is suspicious of dominance, rues its arrival, and encourages its demise.[201] It defines dominance more broadly, and limits its exercise more strictly, than does the United States.[202] Opinions of important appellate courts do not contain—as *Trinko* did—judicial praise for the beneficial economic role played by the dominant firm. There is less confidence that competition can undo dominance, and more fear that dominance will become and remain entrenched for the long term. Thus, as *Microsoft* demonstrated, there is a preference in Europe for short-term "fixes" to the "problem" of dominance, for regulation now rather than competition later, and for the preservation (and even the support) of smaller, less efficient rivals in the hope that they can somehow check the power of the dominant firm and protect consumers from future abuse.

We have drawn these differences broadly, but they are no less real for that. Significantly, like the narrower dispute about the proper approach to intellectual property licensing, these broader differences about the nature of the dominant firm and its relationship to the competitive process reflect views that arise largely from divergent experience with markets and dominant firms, and from the differing biases that those experiences have generated. Importantly, these differences exist and endure because economics offers no testable hypothesis about whether dominance should be encouraged or constrained in the long run, and thus is unable to identify the most effective approach to regulating monopoly.

III. ECONOMIC INDETERMINACY AND THE BROADER IMPLICATIONS FOR ANTITRUST POLICY

A. The Short-Run/Long-Run Dilemma and Implications for Antitrust Policy

The preceding discussion explained the deficiency of economic analysis as applied to the long term, and suggested that jurisdictions' sociopolitical leanings tend to fill this void. This positive insight raises a broader question, however. In particular, what are the implications for antitrust policy? We reach four conclusions.

First, the differences in approach are important. They have significant practical implications for the enforcement of competition law, not just in Europe and the United States, but in the world at large. In product markets that are truly international, the most aggressive competition law regime can

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[200] *Id.*

[201] *See* Kolasky, *supra* note 25, at 537 (explaining that the United States has "more confidence in the self-correcting nature of markets" than the European Union).

[202] *See* Wilke, *supra* note 116.

effectively create rules of worldwide application. Now that European law has made it relatively easy for smaller firms to compel dominant rivals to afford them access to valuable intellectual property, it will be difficult if not impossible for jurisdictions with different views on this issue, and the companies doing business in them, to avoid the impact of the European rule. For practical reasons, dominant global firms will often not adopt a range of country-by-country licensing practices, and European law will thus become the de facto rule in many jurisdictions that might otherwise prefer their own distinct approach to this issue. To that extent, European law may create a significant negative externality, serving the short-run interests of Europeans, but in the process imposing significant costs upon the interests of other countries.

Second, the differences in approach are irreconcilable. Antitrust analysis in the United States exalts the social and economic importance of the need to maintain, and even expand, long-term incentives to innovate. Those incentives play a role that is at once powerful and unquestioned. Though it may be both distant and unknowable, the long term is very important in U.S. antitrust law. In Europe, the long term occupies a subordinate status. There seems to be no regulatory or judicial presumption that current legal rules will meaningfully affect incentives for long-term innovation. And indeed, the efficacy of such incentives is—in court—a matter that must be established by proof, rather than through an a priori presumption.

Moreover, the differences are irreconcilable because the values that explain them are incommensurate. The European regime places a high value on short-term benefits. This favors a rule of law that would sometimes afford smaller firms access to the powerful intellectual property of their dominant rivals.[203] The U.S. approach regards those benefits as detriments in sheep's clothing, seeing them as deeply corrosive of more highly valued long-term incentives to innovate.[204] How can one reasonably compare the value of the short-term benefits favored by Europe to the value of the longer term benefits preferred by the United States? Any attempt at such a comparison would require something akin to "judging whether a particular line is longer than a particular rock is heavy."[205] Nor can one assess—except by resort to a calculus that is distinctly political—whether the short-term benefits are somehow more important or desirable than those in the long term. Measurement and comparison are simply not helpful.

Third, the fact that the differences are political—or noneconomic—and irreconcilable suggests that the two regimes are highly unlikely to converge in the future. The differences are apt to be durable. And while the United States and EU, as well as other members of the world's antitrust enforce-

[203] *See supra* Part II.B.2.

[204] *See supra* Part II.B.1.

[205] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

ment community, have in recent years quite usefully adopted convergent approaches to the prosecution of international criminal cartels and to the procedures for reviewing multijurisdictional mergers,[206] there seem to be distinct limits to the possibility of future resolution of the issues discussed in this Essay.

Finally, this analysis contains an important lesson for the world's new and emerging competition law regimes. By arguing that the two most developed systems of competition law disagree markedly in their approaches to the issues discussed here, and that they disagree for reasons of policy, history, and culture, we are suggesting that certain aspects of competition law—although not by any means all or even most—are contingent, and properly variable. Those aspects of the law do not admit of one "right" response, or perhaps any "right" response. Rather, they admit several responses, each contestable, all debatable, and none paramount or universally conclusive. In regard to these issues, newer antitrust regimes might properly regard European and U.S. law as less than fully relevant.

B. The Continuing Hegemony of Economics

While the preceding discussion might be construed as an indictment of economic analysis as applied to competition policy, such a reading would be incorrect. The proliferation of price theory has been an unquestionable boon for the development of antitrust law. Modern competition enforcement now displays a level of sophistication that would have been wholly unrealistic just two decades ago.[207] It would be folly indeed to abandon the central focus so wisely placed on economic theory in the construction of optimal competition rules.

This Essay has shown, however, that economics' normative contribution is marred by grave epistemological limitations with respect to the long-run impact of certain business practices. We suggest that it is a jurisdiction's prevailing political mood—informed by history, culture, and its view of others' success—that gives specificity to the policy decisions that are indefinite from the perspective of economics. In short, price theory's inability to weigh the long run facilitates a meaningful, albeit largely undesirable, cultural approach to matters of competitive concern. Given the vastly asymmetric sociopolitical experiences of different countries and jurisdictions, it therefore seems inevitable that divergence in areas of economic indeterminacy is here to stay. The United States has great faith in the free market to remedy inefficiencies; Europe does not. This suggests that contemporary debate, which is invariably framed in economic terms, may not always be helpful.

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[206] *See supra* note 1 and accompanying text.

[207] *See, e.g.*, BORK, *supra* note 10, at ix–xiv.

Yet, most areas of competition policy *are* susceptible to accurate economic analysis. This holds true even though myriad areas of competitive concern weigh on matters with both immediate and future consequences. As a general matter, price theory can reveal the short run with such specificity that its allure may be worthy of determinative consideration. In other circumstances, economics can demonstrate that possible long-run negative effects are so unlikely and implausible as to be properly discounted.

For instance, with respect to predatory pricing, economists have explained the short-run gains of the practice, but have also shown that the prospect of long-run inefficiencies is remote.[208] This is because a predator's attempt to increase price after eliminating its rivals is apt to attract entry, which will render any ex post monopoly returns ephemeral.[209] Thus, when called upon to assess the legality of potentially below-cost pricing, there is good reason to question the need for strict regulation of these activities.[210] There is sound economic reason, then, to believe that the U.S. approach, which requires a plaintiff to demonstrate a dangerous probability of recoupment, is the correct one. Europe's per se rule against predatory pricing by the dominant firm not only suffers from the fact that such pricing is almost invariably irrational, but is also vulnerable to serious Type I errors,[211] given the ease with which truly competitive pricing may be mistaken for below-cost predation. Although it is possible that below-cost pricing can lead to long-run inefficiencies, there is no good reason to adopt any a priori assumption that such is likely to be the case.

There are many other examples that go beyond predatory pricing, but it is beyond the scope of this Essay to address them all. As a general prescriptive matter, however, one need not deal in absolutes to reach prudent decisions. From the perspective of price theory, there would seem to be numerous business practices that European competition law does not fully understand. For instance, the EU remains transfixed on the economically discredited notion of "leverage," the capacity for which has been debunked by the Chicago and post-Chicago schools of analytic thought.[212] Europe continues to prohibit product tying by the dominant firm on the basis that the practice is apt to leverage dominance from the tying market to a tied market, and on the ground that such tie-ins elevate entry barriers.[213] Neither

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208 *See* POSNER, *supra* note 24, at 207–23.

209 *See id.* at 207–10.

210 *See id.*

211 A Type I error occurs when a hypothesis is found to be false when it is actually true. *See* Katherine L. Gross & Gary G. Mittelbach, *What Maintains the Integrity of Science: An Essay for Nonscientists*, 58 EMORY L.J. 341, 350 (2008). For the authors' view on optimal error analysis in antitrust law, see Alan Devlin & Michael Jacobs, ANTITRUST ERROR, 52 WM. & MARY L. REV. (forthcoming 2010).

212 *See* HYLTON, *supra* note 143, at 279–80.

213 *See* Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04 (under the "Cases" column and in the row with "Judgment," follow the "T-201/04" link); *see also* John Lo-

objection is valid from the perspective of economics. As noted by Judge Richard Posner, such opposition is uncritical—the more sophisticated objection is that bundling and requirement tie-in contracts facilitate a form of price discrimination.[214] Yet, there is no economic basis for construing such discrimination in negative light—economists have yet to determine whether the practice is more, or less, likely to enhance output as a general matter.[215] It has been demonstrated, however, that perfect price discrimination results in perfect allocative efficiency.[216] There is at least some reason to suspect that tie-ins used as metering devices are most likely to approximate this outcome.[217]

Thus, the insights provided by rigorous economic analysis typically provide sufficient guidance to allow competition enforcers to reach a "correct" answer. As a general matter, therefore, transatlantic debate should continue to be framed in economic terms for those practices capable of being assessed accurately by price theory. We consider such practices to run the gamut from vertical price and geographic restrictions to merger policy (with respect to which relevant econometric techniques have grown in sophistication immensely) to most forms of unilateral behavior by the dominant firm. It is only a small minority of practices—defined quintessentially by refusals to deal—that are not subject to reliable and objectively verifiable economic analysis.

We close with a further word of hope. Economics may have some capacity to yield useful insights, albeit empirically unprovable ones, in those areas for which the problem of long-term indeterminacy is most acute. Price theory analyzes such cases through the lens of decision theory. This approach works by judging the probability and costs of possible outcomes, and counseling the course of action deemed to generate the largest expected return. As applied to antitrust analysis, most believe that false positives—the erroneous prohibition of practices that benefit consumer welfare—are more objectionable than false negatives—mistakenly sanctioning anticompetitive conduct.[218] As a result, and because markets tend to self-correct, competition enforcers should err on the side of under-enforcement.[219] Nu-

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patka, *Leverage in the CFI's Microsoft Decision*, ANTITRUST & COMPETITION POL'Y BLOG, (Sept. 21, 2007), http://lawprofessors.typepad.com/antitrustprof_blog/2007/09/leverage-in-the.html (describing the Court of First Instance's reliance on the concepts of tying and monopoly leverage in the *Microsoft* case).

[214] *See* Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1020 (7th Cir. 2002) ("The naive objection [to tying arrangements] is that they extend monopoly; the sophisticated objection is that they facilitate price discrimination.").

[215] *See* CARLTON & PERLOFF, *supra* note 16, at 306–08.

[216] *Id.* at 299–300, 308.

[217] One of the authors has explained this view in greater detail elsewhere. *See* Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L.J. 521, 543–45 (2007).

[218] *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 343–44 (2006).

[219] *See* Easterbrook, *supra* note 45, at 2–3.

merous authors have quite correctly advocated a decision theoretic approach to antitrust issues that are plagued by uncertainty.[220] Indeed, we have argued elsewhere that such analysis suggests that the better rule in the case of refusals to deal is the U.S. one.[221] We acknowledge for the time being, however, that the literature on decisionmaking under uncertainty has not yet progressed to a level that is likely to yield unanimity on the proper approach to refusals to deal and other business phenomena in which the nebulous future is a critically important component of the relevant analysis.[222]

CONCLUSION

Any antitrust article that expresses even mild doubt about the curative powers of economics is apt to attract criticism from those who believe that any aspersion cast upon the all-purpose utility of economics as the best and sole means of conducting antitrust analysis is one aspersion too many. But this Essay does not intend to tear down the magnificent and powerful edifice so usefully constructed and developed over the past thirty years. No, economics can and does answer many of the most important questions that arise in competition law. It simply cannot answer all of them.

A few significant questions—many of which we have discussed here—lie beyond the competence of economics to answer, at least given contemporary empirical techniques. In order to solve the problems not amenable to economic analysis, it seems indisputable that the problem solvers will necessarily draw on history and politics and culture to formulate answers. This prospect is unsettling because it is indeterminate and relative. But it may also be unavoidable, since no better method for solving these problems exists—a fact that ought to be similarly disturbing.

Nor should this Essay be read as advocating carte blanche for new competition law regimes. As noted above, most of the problems arising in competition law can best be solved using accepted methods of economic analysis. In the large majority of cases, and for the vast majority of businesses, a competition law regime driven mainly by political principles and concerns would be confusing and inconstant, and could thus deter more competition than it protected. Newer competition law regimes should be encouraged to use all of the economic tools available to the more expe-

[220] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 73 ANTITRUST L.J. 537 (2007).

[221] *See generally* Alan Devlin, Michael Jacobs & Bruno Peixoto, *Success, Dominance, and Interoperability*, 84 IND. L.J. 1157 (2009).

[222] *See, e.g.*, Joseph F. Brodley, *The Possibilities and Limits of Decision Theory in Antitrust: A Response to Professor Horowitz*, 52 IND. L.J. 735 (1977) (describing one decisionmaking theory approach and the general obstacles that such theories face in being adopted in the antitrust field, and ultimately concluding that decisionmaking theory should be employed in antitrust law).

rienced regulators. But as to the issues for which economics lacks explanatory power, developed competition law regimes seem to lack an objective basis for arguing that the history and politics of their own countries or regions should serve as the universal or international standard. Newer regimes should thus presumably be free to develop their own answers on their own terms to these questions.

All of this is to say that there are limits to economics, even in a field as heavily and beneficially influenced by the discipline as competition law. Even after three decades of its growing influence, during which economics has reshaped and refined competition law, some of the law's most important problems remain resistant to economic analysis. For those problems, politics and history—messy, individuated, idiosyncratic, and unscientific—are the answers of last resort. But these answers have limits as well: no one solution fits all countries; different legal systems cannot completely converge around choices that are essentially political; and the respective values of older systems and newer ones might well conflict. In order to assess whose answers work best, we will have to await the arrival of the long term.