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Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules

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I. INTRODUCTION

"A single dish cannot serve the tastes of a hundred people," says an ancient Chinese proverb. So it is with the rules for assessing whether practices engaged in by firms with significant market power are anticompetitive. More than one hundred countries have competition laws and most of them have government authorities entrusted with enforcing those laws in the first instance.[1] Yet these jurisdictions are a varied lot. Some have emerged from decades of communist rule while others have only recently privatized companies responsible for substantial parts of the economy. Their legal institutions differ, as do perhaps their tastes for dominant firms. It would be remarkable if a single dish of antitrust rules could satisfy so many.[2]

This Article establishes the proposition that divergence is the norm for antitrust rules. It argues that the quest for convergence is quixotic and the disdain when another jurisdiction has a different rule than one's own is uncalled for.[3] Along the way we consider two beacons of divergence that appeared on either side of the Atlantic at the end of 2008—the US Department of Justice's

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1 Keith N. Hylton and Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects,* 74 Antitrust L J 271, 272 (2007).

2 For a review of company policy around the world and its growth over time, see David S. Evans and Frederic Jenny, *Trustbusting Goes Global* in David S. Evans and Frederic Jenny, eds, *Trustbusters: Global Competition Authorities Speak Out* (Competition Policy International 2009).

3 The general approach taken in this Article applies to all antitrust rules including those involving concerted practices and mergers. The Article emphasizes unilateral conduct because divergence is currently the greatest there.

report on unilateral conduct and the European Commission's enforcement guidelines on abusive exclusionary conduct.[4]

Jurisdictions would adopt different antitrust rules even if they all agreed on the economic principles governing rules and adopted the same goal, such as maximization of economic efficiency.[5] This Article develops this general proposition in the next two sections. Section II summarizes widely accepted theory concerning how to design antitrust rules for maximizing a particular objective related to competition in the market. Section III then shows how one can apply that theory to design rules that are tailored to the particular circumstances of a jurisdiction. It concludes that even if all jurisdictions had the same black box for designing antitrust rules—one programmed with uniform economic principles and a particular objective to maximize—differences in the inputs of information and assumptions to the black box would lead to different antitrust rules coming out the other end.

Sections IV and V examine the reports on single-firm conduct from Washington, DC and Brussels, which come to very different places on the enforcement spectrum. The US Justice Department report is based on an explicit framework for designing antitrust rules. While one can disagree with the rules advocated by this US authority, it is relatively easy to discern the assumptions and analysis that led to them. The European Commission's approach is less transparent and has scant consideration of the possibility that competition authorities and courts make mistakes given the lack of complete information for making a determination. Nevertheless, some of the divergence between the two approaches likely results from objective differences between these jurisdictions.[6] The most important differences are the lack of significant private enforcement in the European Community, and the prevalence of dominant firms that were privatized by their member-state governments in relatively recent times.

Divergence is hardly a happy state of affairs for companies that compete in multiple jurisdictions. It is also a source of tension among competition authorities that are working from different rulebooks, as they jointly regulate the game of competition among firms playing on a world stage. In fact, as Section

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4 See US Department of Justice, *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act* (2008), available online at <http://www.usdoj.gov/atr/public/reports/236681.pdf> (visited Apr 17, 2009); European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2008), available online at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf> (visited Apr 17, 2009) ("Guidance Report").

5 The terms "maximize economic efficiency" and "maximize social surplus" are used equivalently.

6 For an analysis that reaches a similar conclusion see Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 Antitrust L J 375 (2005).

VI argues, individual jurisdictions will adopt competition rules that are suboptimal from a global perspective. They will take into account the maximization of social surplus within their jurisdictions but will not necessarily account for adverse spillovers—what economists call "negative externalities"[7]—on other jurisdictions through rules that hinder the ability of firms to operate multinationally. Nevertheless, the convergence of antitrust rules across jurisdictions is not optimal either. A social planner who sought to design competition rules to maximize global economic efficiency would find it optimal to tailor rules to different jurisdictions based on local circumstances even after accounting for externalities. As with many issues involving a world composed of sovereign nations the pragmatic question is how to reduce negative externalities while respecting each jurisdiction's right to maximize its own objectives.

Section VII concludes with the observation that convergence should not be seen as a desirable end in itself. Instead, competition authorities should seek antitrust rules and enforcement measures that balance their local needs against the costs of divergence to competition by multinational firms in a global economy. That would also move the discussion away from jingoistic claims of superiority. Moreover, by focusing attention on convergence, some commentators seem to have lost sight of one of the most remarkable developments of that last decade: the emergence of a global antitrust community with many shared values and a common language.

II. THE THEORY OF OPTIMAL ANTITRUST RULES

As Sir John Vickers, the former chairman of the Office of Fair Trading, has observed, antitrust is "judicious regulation to bring out the best in *laissez-faire*."[8] In market-based economies, governments typically defer to the competitive process in which rivalry among firms is counted on to ensure efficient outcomes for society. Sometimes that process results in firms acquiring significant market power or even monopolies, and antitrust seldom stands squarely in the way of that happening. Rather, competition policy "referees" this rivalry. In deciding whether certain behavior is "out of bounds," it relies on

7 An externality refers to an effect that an individual action has on others. A positive externality results when one actor's actions benefit another's. For example, a homeowner who maintains a nicely landscaped property will benefit her neighbors. A negative externality results when one actor's actions harm another's. For example, a factory emits a foul odor that offends people who live in close proximity.

8 John Vickers, *Competition Economics*, 3 Annual Public Lecture of the Royal Economic Society (Dec 4, 2003), available online at <http://www.oft.gov.uk/shared_oft/speeches/spe0503.pdf> (visited Apr 17, 2009) (emphasis in original).

various rules.[9] A competition authority is often the umpire in the first instance although its decisions can be appealed to higher courts.[10] The rules themselves tend to evolve over time based on changing interpretations of original statutes, authority decisions, and court judgments.

Government regulation is typically outcome oriented. For example, public utility regulation usually seeks to achieve the greatest output from firms at the lowest possible cost to the consumer. That has led to very specific rules concerning pricing, investment, and other aspects of the business. Banking regulation mandates specific practices to ensure the safety and soundness of the financial system, as well as the prevention of various practices that might harm consumers. That is not the case with competition policy, which does not, as a general matter, dictate or second guess most decisions of firms—even the dominant ones that are its principal subjects. Unlike most sports, the rules for the game of competition say little about how the game should be played, only how the game should not be played. The rules identify certain foul practices, although with varying degrees of particularity.

Competition policy results from a two-step process.[11] The first step involves drawing a boundary between practices that are clearly lawful or unlawful. The second step entails deciding whether particular practices, at or near those boundaries, are lawful. The first step begins with the adoption of a competition law through legislation such as the Sherman Act or through constitutional provisions such as Articles 81 and 82 of the European Community ("EC") Treaty of Rome.[12] It has not ended there, at least in the US and EC. The boundaries change as authorities and courts consider more cases, as learning advances, and as views on the robustness of markets shift. Thus the US moved some coordinated practices from the clearly unlawful side of the boundary to the boundary itself, where they could be evaluated under the rule of reason. The EC has resisted condemning supra-competitive pricing by dominant firms even though Article 82 specifically allows the authorities and courts to do so.[13] Over time, the location of the boundaries for competition and the rules for assessing fouls evolve.

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9 David S. Evans and Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and its Implications for the Objectives of Antitrust*, 4 Competition Poly Intl 203, 208 (2008).

10 That is not true for the US, in which most antitrust litigation is private, as discussed below.

11 Evans and Hylton, 4 Competition Poly Intl at 205 (cited in note 9). The distinction is somewhat similar to that between rules and standards in the law and economics literature. See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992).

12 Treaty Establishing the European Community (1997), arts 81–82, 37 ILM 56, 93–94 (1998).

13 Evans and Hylton, 4 Competition Poly Intl at 222–23 (cited in note 9). It is unclear whether the Commission will continue to adhere to this policy.

Optimal control theory provides a general framework for considering the design of competition policy.[14] It involves devising rules that maximize the return from a system over time. A car is an example. Engineers design the gear-shift ratios to maximize car performance as measured on a number of dimensions. These ratios are simply regulations for what gears to use at various speeds for the system. The financial system is another. Macroeconomists design changes in the money supply to maximize the long-term performance of the overall economy based on a variety of factors such as inflation and unemployment.

In the case of competition policy, the optimal control problem concerns designing a set of rules that maximizes the present discounted value of some outcome of the market, total economic well being for example, subject to a variety of constraints, such as those imposed by the legal system. The solution to an optimal control problem generally entails sacrificing some short-run efficiency from the system in return for longer-term efficiency. The US antitrust laws reflect this solution in permitting firms to obtain and exercise significant market power. This choice reflects a tradeoff between short-run welfare losses that result from the exercise of market power and the long-run welfare gains that result from profits encouraging investment and innovation that promotes economic efficiency.

Statistical decision theory provides specific guidance for designing rules.[15] It involves making the best decisions in the presence of uncertainty over many of the factors that influence the optimal decision. To illustrate the approach, consider a health system that is designing a screening test to determine if a man is likely to have prostate cancer. The health system may want to maximize the overall well being of people in the system over time. However, it faces uncertainty: it is not possible to detect prostate cancer with perfect accuracy through noninvasive tests. Moreover, even when a man has prostate cancer, there is uncertainty over how long it will take to become a health risk because it is a very slow-growing cancer. In designing the test, the health system must take into account two types of errors, each of which has costs. The test will have

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14 For a general discussion, see Donald E. Kirk, *Optimal Control Theory: An Introduction* (Prentice-Hall 1970).

15 A rule in this case involves deciding between two alternatives, such as which fork in the road to take. For a general discussion, see Howard Raiffa and Robert Schlaifer, *Applied Statistical Decision Theory* (Harvard 1961). Richard Posner first introduced this approach to the analysis of laws in 1973 and Frank Easterbrook applied it to antitrust in 1984. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J Legal Studies 399 (1973); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1 (1984). US courts have adopted elements of the decision-theoretic approach explicitly in a number of antitrust cases, beginning with *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp*, 475 US 574 (1986).

"false positives," which show that a man has prostate cancer when he does not. False positives lead to costly further tests such as biopsies, and also cause anxiety on the part of the patient. The test will also have "false negatives," which show that a man does not have prostate cancer when he does. That error results in the cost of having to treat a more serious prostate cancer condition later in life and possibly the premature death of the patient. The decisionmaker thus faces a tradeoff between the cost of false positive and negatives. Calibrating a test to reduce the frequency and the overall costs of false positives necessarily increases the frequency and the overall costs of false negatives. In the example, if the health system increases the threshold for screening for prostate cancer, it will reduce the cost of biopsies and false alarms, but it will increase the cost of treatment for those who have prostate cancer later and increase the number of premature deaths.[16]

A basic insight of statistical decision theory is that the optimal decision rule depends on the cost and frequency of mistakes. Obviously, all else being equal, one should design rules to avoid mistakes that are especially costly. An important but subtle finding concerns testing for conditions that occur rarely in the population. Consider the case in which 20 out of 20000 men (0.1 percent) have prostate cancer. Suppose we entertain a test that results in false positives 5 percent of the time and false negatives 5 percent of the time. The application of the test would result in 1000 men (0.05 x 20000) who do not have prostate cancer being subject to biopsies. It would fail to detect prostate cancer in one of the 20 men who do (0.05 x 20). One might argue that the cost of the mistaken biopsies is worth saving the one man who really does have prostate cancer. But suppose the combination of anxiety and the biopsy procedure results in a fatal heart attack for one out of 1000 men. Then we would conclude that the cost of false positives is too high and we should accept a higher rate of false negatives.

The application of statistical decision theory to the design of rules of competition practices involves numerous considerations. To begin with, what does competition policy seek to optimize? Let us assume for the sake of argument that it is long-run social welfare. If we knew for certain that a particular practice increases or decreases long-run social welfare, the problem would be easy. But we do not know this for a variety of reasons. The economic theory about the effect of that practice on welfare may conclude that the answer depends on various facts and assumptions and only some of the facts that would

16 The tradeoff between false positives and negatives is enshrined in criminal law with the Blackstone ratio: it is better to let ten guilty men go free than for one to suffer. It is implemented in criminal law in a variety of ways including having the "beyond a reasonable doubt" standard of proof. See William Blackstone, 4 *Commentaries* ch 27 (Chicago 1979).

help us determine this are known while others are uncertain.[17] The decision-makers—the competition official, judges or jurors—who process these facts may simply make mistakes. Thus, we would want to know a priori the likelihood that a particular kind of practice is bad and the cost of making a mistake—a false positive or negative in applying the test. Many factors would help us estimate these. Are there reasons to believe that this practice is commonly used in the market in ways that harm social welfare? Would condemning the practice harm welfare because it is efficient and because there are few alternatives to it? Also, we would want to recognize feedback effects between the legal system and the market. Significant investments in detection and deterrence may discourage enough "bad practices" that there is a higher likelihood that the remaining practices are not bad. Lastly, any analysis of the socially efficient rule would require a consideration of the costs to the legal system and to the subjects of that rule of complying with it. Authorities and courts must spend more resources to apply complex rules and businesses must spend more resources to ensure compliance with complex rules.

Statistical decision theory usually relies on "Bayesian" analysis which, roughly speaking, involves making predictions based on a combination of prior beliefs—which could come from past experience—and the facts at hand. In the case of competition policy, given the lack of certainty over many key factors, the "priors" have a significant influence on rules and their applications. If one believes that competition abuses are common, one would likely conclude that the optimal rules should take a relatively stringent approach toward business practices. If one believes that unfettered markets generally maximize social welfare, then one would likely conclude that optimal rules should tilt against intervention. In practice, prior beliefs are often unstated and seldom backed with evidence, as we will see later in this Article.

III. THE DESIGN OF RULES FOR A JURISDICTION

Competition authorities and courts can rely on certain economic principles regardless of their particular situations. The benefits of the invisible hand and the risk of men of the same trade conspiring against the public are universal laws. Demand curves slope downward whether one is in Beijing or Brussels. The checklist of facilitating practices for cartels works most everywhere. Modern antitrust embraces the discipline of economics, and concepts drawn from this social science form an important part of the lingua franca for the competition community globally.

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17 See Heyer, 72 Antitrust L J 375 (cited in note 6).

Other factors may differ across jurisdictions, however, and this section highlights several critical ones.

A. OBJECTIVES

Competition regimes could, for example, adopt different objectives. A consensus seems to have emerged, however, that antitrust should ultimately benefit consumers through lower prices, greater output, and better products, and that antitrust should not protect firms from competition except insofar as it benefits consumers.[18] In the words of EC Commissioner Kroes: "When we strive to get markets working better, it is because competitive markets provide citizens with better goods and better services, at better prices."[19] The Chinese Anti-Monopoly Law that was enacted in August 2007 and implemented in August 2008 has also adopted consumer welfare as its goal.[20]

The US and the EC—and other countries that have adopted elements of these approaches—have had competition policy regimes that over long periods of time are consistent with their attempting to maximize long-run efficiency by balancing the benefits of the short-run adverse effects of the exercise of market power on prices and output against the long-run beneficial effects of the prospect of market power on stimulating innovation and investments. That balancing effort is seen in the fact that these regimes do not prevent firms from acquiring and exercising significant market power, except in particular circumstances.[21]

Factors that are unique to a jurisdiction can still color the common objective to advance consumer welfare. The EC competition laws were adopted as part of a treaty that was designed to create a common economic area. The European Commission and the courts have been sensitive about business practices that restrict trade or otherwise create economic differences among

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18 See Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart 2007).

19 European Commission, *Report on Competition Policy 2006*, 3 (Foreword by Neelie Kroes), available online at <http://ec.europa.eu/competition/annual_reports/2006/part2_en.pdf> (visited Apr 17, 2009).

20 Interview by Shujuan Feng with Mr. Ming Shang, Director of the Anti-Monopoly Bureau, MOFCOM (Oct 8, 2007), available online at <http://finance1.jrj.com.cn/news/2007-10-08/000002754887.html> (visited Apr 17, 2009) (Transcript is in Chinese.). For a discussion of the Chinese Anti-Monopoly Law and protecting consumer welfare, see also Xinzhu Zhang and Vanessa Yanhua Zhang, *The Antimonopoly Law in China: Where Do We Stand?*, 3 Competition Poly Intl 185 (2007).

21 See Evans and Hylton, 4 Competition Poly Intl at 204 (cited in note 9). For analysis of why antitrust policy should not limit the ability of dominant firms to "extract" the benefits of their position, see Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* (Economic Analysis Group, Discussion Paper No EAG 082, 2008), available online at <http://www.usdoj.gov/atr/public/eag/231610.pdf> (visited Apr 17, 2009).

member states in ways that are not relevant to the highly integrated US economy. The Chinese competition law accounts—one can argue whether appropriately so—for the significant role that government control and state-owned companies play in the economy.

B. LEGAL REGIMES

Legal regimes differ across jurisdictions in ways that could affect the likelihood and the cost of errors as well as the extent of anticompetitive practices. These differences reduce the extent to which administrative agencies are responsible for the enforcement of competition laws. In the EC and most other jurisdictions, the enforcement of the competition laws rests primarily with a competition authority which investigates possible violations of the laws, decides whether a violation has taken place, and imposes fines and remedies on companies that have engaged in violations. The alleged victims of violations of the competition laws have limited ability to pursue claims in court and limited ability to obtain awards of damages.[22] In the US, by contrast, about 95 percent of antitrust cases are filed by private plaintiffs who can seek treble damages.[23]

This contrast results in a remarkable difference in the level of enforcement. In 2006, the European Commission issued fourteen statements of objections based on Articles 81 and 82 of the Treaty, while the US Department of Justice and the Federal Trade Commission took a total of forty-one enforcement actions in non-merger–related cases.[24] However, that same year, 986 new civil

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22 The EC and some of its member states have begun to make way for some private actions, but most proposals provide for only limited use of class actions and no proposal, to my knowledge, considers providing for multiple damage awards or other incentives to spend money to bring cases. In many jurisdictions, the lack of multiple damages, the rule that the loser must pay litigation costs, and the lack of effective class litigation mechanisms make it unlikely that private actions will become significant vehicles for enforcing the antitrust laws. See, for example, Christopher Cook, *Private Enforcement of EU Competition Law in Member State Courts: Experience to Date and the Path Ahead*, 4 Competition Poly Intl 3 (2008); Assimakis P. Komninos, *The Road to the Commission's White Paper on Damage Actions: Where We Came From*, 4 Competition Poly Intl 81 (2008); Renato Nazzini and Ali Nikpay, *Private Actions in EC Competition Law*, 4 Competition Poly Intl 107 (2008).

23 *Sourcebook of Criminal Justice Statistics Online*, available online at <http://www.albany.edu/sourcebook/pdf/t5412007.pdf> (visited Apr 17, 2009).

24 In 2006, the European Commission issued fourteen statements of objections based on Articles 81 and 82 of the Treaty. *Directorate General for Competition Annual Activity Report 2006* 4, available online at <http://ec.europa.eu/atwork/synthesis/aar/aar2006/doc/comp_aar.pdf> (visited Apr 17, 2009). In 2006, the Department of Justice antitrust division filed forty-five total criminal and civil cases in federal district court, of which ten were merger cases, and the Federal Trade Commission brought six enforcement actions challenging a variety of anticompetitive conduct in the non-merger area. Organization for Economic Co-operation and Development, *Annual Report on Competition Policy Developments in the United States*, available online at

antitrust cases were filed in federal courts in the US.[25] Few private actions were filed in the EC during that period.[26] While few hard data are available and any conclusion is necessarily tentative, it would appear that the financial cost of antitrust enforcement for companies is significantly higher in the US than in the EC. First, in the US legal regime, companies bear the direct legal costs plus opportunity costs of employees responding to extensive discovery requests. Second, companies bear the cost of treble damages (which is factored into settlements) for private litigation in addition to the fines imposed by the US Department of Justice. Third, companies face class action lawsuits which increase their financial exposures and tend to induce settlements.

The likelihood that businesses will engage in anticompetitive practices depends in part on the probability that they will be caught and in part on the punishment they will face. Although further research is needed to compare the levels of enforcement efforts between the US and the EC, it would appear that the EC legal regime invests fewer economic resources in the detection of anticompetitive practices, since it has minimal private actions and does not make up for that with a significantly higher level of government enforcement. Overall, it would appear likely that the expected financial cost of antitrust litigation for firms, including fines and damages and firm resources for responding to discovery, is higher in the US than in the EC.[27]

These differences, though, also affect the likelihood and cost of errors in complex ways. The far larger volume of cases in the US enables its courts to gain much more experience with antitrust matters than their counterparts in the EC. The American courts likely benefit from that learning in deciding cases and fashioning rules, both of which reduce the likelihood of errors. US companies

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<http://www.ftc.gov/bc/international/docs/usann07.pdf> (visited Apr 17, 2009). These comparisons do not include cases filed by EC Member States or by State Attorneys General in the US.

25 According to the 2006 Annual Report of the Director of the Administrative Office of the US Courts, 986 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2006. *Annual Report on Competition Policy Developments in the United States* (cited in note 24). Note that many US private actions are dismissed and most are ultimately settled before reaching trial.

26 A comparison of private enforcement in the EU and US shows that in fifty years of EC law there have been twelve successful actions and twelve unsuccessful actions (not counting settlements, as there is no public record of them). Denis Waelbroeck, *Actions For Damages For Breach of EC Competition Law*, Presentation (2006), available online at <http://www.imedipa.com/files/downloads/Dennis%20Waelbroeck%20slides.ppt> (visited Apr 17, 2009). See also the discussion in Nazzini and Nikpay, 4 Competition Poly Intl at 107 (cited in note 22).

27 There is nevertheless remarkably scant information available on the overall costs of private antitrust litigation which includes the costs of the litigation, treble damage awards that have been upheld on appeal, and settlement costs. There is not enough information available to estimate even crudely the expected cost of antitrust litigation to American firms.

may also have greater certainty concerning the likely outcome of challenges. However, private cases in the US that survive various procedural hurdles ultimately are decided by lay jurors. That fact, combined with the common use of class action lawsuits in the US, makes antitrust cases highly risky for businesses sued there. More importantly, to the extent that businesses account for the possibility that courts may mistakenly condemn procompetitive business practices and impose significant costs on them, they will curtail those procompetitive practices and thereby reduce economic efficiency over time. The US Supreme Court has pointed to the possibility of such chilling effects in several recent decisions that have made it more difficult for cases filed by antitrust plaintiffs to reach juries.[28]

The EC, on the other hand, relies on an administrative agency staffed mainly by well-educated career civil servants to determine whether firms have violated antitrust laws. That expertise suggests the EC agency will make fewer mistakes than the jury-based process in the US. However, there are other institutional differences that might lead in the other direction. The Directorate General for Competition ("DG Competition") at the European Commission investigates cases and makes the decision in the first instance on whether there has been a violation. The lack of separation between the judging and prosecutorial functions results in an insular process that allows little learning from outside review. The European courts give the Commission a great deal of deference. That is most apparent in unilateral-conduct cases. The European courts have never completely overturned a Commission decision on Article 82 in the fifty-year existence of EC antitrust.[29] That fact does not bode well for the likelihood and cost of errors as criticism is such a vital part of learning.

C. PRIOR BELIEFS ON ANTICOMPETITIVE BUSINESS PRACTICES

The legislators, courts, and competition authorities that design competition laws will come to their task with different views on the extent of the problem with which they must deal. Those views will have been based on both objective and subjective considerations. These are likely to differ across jurisdictions.[30]

History matters here. Economies in which more or less laissez-faire competition has ruled for long periods of time will likely have different market

28 See, for example, *Bell Atlantic Corp v Twombly*, 550 US 544 (2007).

29 See Christian Ahlborn and David S. Evans, *The Microsoft Judgment and its Implications for Competition Policy Toward Dominant Firms in Europe*, 75 Antitrust L J 3 (2009); Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 Econ Poly 741, 762 (2006).

30 Also see Heyer, 72 Antitrust L J 375 (cited in note 6).

structures and sets of ingrained behavior than economies that have only recently embraced markets after long periods of state ownership or central planning. Many countries have only recently ended state ownership of businesses and introduced competition into sectors such as electricity, telecommunications, and transportation. Previously state-owned firms have significant market power that is not necessarily the result of innovation or investment, or the result of their being especially efficient. Several countries have only recently adopted public policies that condemn price fixing. The Japanese economy is still dominated by interlocking business interests and a culture of cooperation among businesses.[31] As recently as two decades ago, some large European economies did not specifically outlaw cartels.[32]

Ideology matters too. Policymakers may have varying degrees of faith in the ability of largely unfettered competition to yield the right outcomes or in the ability of governments to make better decisions than the market. The EC Enforcement Guidelines state that "exclusionary conduct . . . can normally not be justified on the grounds that it also creates efficiency gains."[33] That may be based on a view that rivalry advances consumer interests in the long run even though it may lead to some short-run inefficiencies. French President Nicolas Sarkozy has asked, "Competition as an ideology, as a dogma, what has it done for Europe?"[34] That reflects a belief that state guidance of industry, and the promotion of national or European champions, is superior to the market for delivering benefits to consumers. By contrast, US Supreme Court Justice Scalia, in a decision that was joined by five other justices, observed that the pursuit of monopoly profits "induces risk taking that produces innovation and growth."[35] While one can debate the relative merits of these positions, it is important to recognize that each view may have been influenced by historical experience and the state of competition in the economy, among other factors.

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31 See, for example, Michael L. Gerlach, *Alliance Capitalism: The Social Organization of Japanese Business* 3–6 (California 1992); Masahiko Aoki and Ronald Dore, *The Japanese Firm: The Sources of Competitive Strength* 310–49 (Oxford 1994).

32 See Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* 24–26 (Oxford 2003). The UK, Ireland, France, Estonia, Hungary, Romania, the Slovak Republic, and Slovenia have only recently adopted criminal sanctions for cartel activity. See Nicole Kar, Fabio Falconi and Priya Sahethevan, *Recent Developments in Cartel Enforcement at EC and UK Levels: Adjusting the Mix of Carrot and Sticks*, 2 Global Competition Poly 1, 7 (2008).

33 European Commission, *Guidance Report* ¶ 29 at 12 (cited in note 4).

34 *Competition Has Served Europe Well; Sarkozy Has Not*, Financial Times (June 25, 2007), available online at <http://www.ft.com/cms/s/0/85a2d268-2346-11dc-9e7e-000b5df10621.html> (visited Apr 17, 2009).

35 *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398, 407 (2004). Scalia was joined by Breyer, Ginsburg, Kennedy, O'Connor, and Rehnquist, with Souter, Stevens, and Thomas concurring on procedural grounds that did not reach the substance.

D. THE SOURCES OF DIFFERENCES IN RULES ACROSS JURISDICTIONS

Let us suppose that each jurisdiction was trying to use the principles of optimal control and statistical decision theory to maximize long-run economic efficiency. One could imagine these principles as being contained in a software program. Designers of rules would input the sort of information described above that helps determine how best to regulate the competitive process. The software program would return the best set of rules.

Even though each jurisdiction is, by assumption, pursuing the same objective and is using the same software to design its rules, it is likely that the optimal rules would differ among jurisdictions simply because the inputs into the design algorithm differ. One would expect significant differences between regimes that rely mainly on administrative bodies to enforce the laws, and regimes that rely mainly on plaintiffs that have been harmed by anticompetitive practices to sue in court. One would also expect differences based on the political and economic history of the jurisdiction. We would therefore expect divergence at a point in time. That divergence could diminish over time as state control or ownership of industry recedes into the past and if the degree of competition across jurisdictions becomes more similar. But so long as the legal regimes differ, we would not expect full convergence in competition rules.

By the end of 2008, following several years of discussion and debate, the US Department of Justice and the European Commission released, within three months of each other, recommended approaches towards assessing whether firms have engaged in unlawful single-firm conduct. The reports illustrate the divergence between the US and the EC. Our task in the next two sections is to relate how the different results could reflect objective differences in the circumstances of the two regimes rather than fundamental differences in principles.

IV. THE US DEPARTMENT OF JUSTICE REPORT ON SINGLE-FIRM CONDUCT

The Justice Department's analysis of unilateral conduct is based on two key premises which it argues are grounded in US antitrust jurisprudence.[36] First, robust competition in free markets allocates resources efficiently and spurs

36 The US Federal Trade Commission issued a statement signed by three Commissioners that disagreed sharply with the conclusions of the Justice Department report. See *Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice*, available online at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf> (visited Apr 21, 2009).

innovation. Antitrust policy should prevent unilateral conduct that harms the competitive process but not prevent aggressive competition—including aggressive competition by firms that have significant market power. Second, it is difficult to distinguish business practices that reduce economic efficiency from ones that increase it. Antitrust policy should err on the side of not discouraging efficient behavior because of the high long-run and economy-wide costs of doing so. Given these two premises, the Justice Department endorses various specific rules concerning particular kinds of exclusionary and predatory practices. It also argues for a general rule that the courts should conclude that conduct is anticompetitive only when the anticompetitive effects are substantially disproportional to the procompetitive effects.

A. The Conflicting Role of Market Power in Promoting Static and Dynamic Competition

The Justice Department's report summarizes a long history of antitrust jurisprudence which recognizes the role of market power in promoting economic growth. Although the competitive process is a game of skill, it has the risk and reward features of a lottery. Most bets do not pay off. The winners therefore must expect to receive a prize to entice them to place a bet. In the market system, the prize for the entrepreneur is obtaining, if they are successful, enough market power to compensate for the risky investments of capital and effort they have made. Although the Sherman Act makes it unlawful for a firm to monopolize or attempt to monopolize, US courts have held, beginning with the 1911 Supreme Court decision in *Standard Oil*,[37] that it is not unlawful to have a monopoly. In the 1945 *Alcoa* decision, Judge Learned Hand summarized the state of the law with the oft-quoted line that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[38] The Supreme Court noted in *Grinnell* in 1965 that monopolization must be "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[39] Most recently, the Supreme Court concluded in *Trinko* that

> [t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only lawful; 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.[40]

37 *Standard Oil Co of New Jersey v United States*, 221 US 1 (1911).

38 *United States v Aluminum Co of America*, 148 F2d 416, 431 (2d Cir 1945).

39 *United States v Grinnell Corp*, 384 US 563, 571 (1966).

40 *Trinko*, 540 US at 407.

The underlying premise of US antitrust law which the Justice Department endorses is that the pursuit of monopoly power spurs investment and innovation and that the exercise of monopoly provides the necessary rewards for success. The task of antitrust is to ferret out business conduct that interferes with this dynamic competitive process.[41]

B. THE PROBLEMS OF IDENTIFYING ANTICOMPETITIVE UNILATERAL CONDUCT

According to the Justice Department, determining whether business conduct is harmful is a difficult task. It has become a harder task over time as a result of economic learning, which suggests many unilateral practices the courts presumed to be harmful in fact serve various efficient purposes. Economic theory has found that various practices directly benefit consumers, or solve distortions in the market that indirectly benefit consumers. For example, "[e]xclusive dealing can enhance efficiency by aligning the incentives of trading partners, by preventing free riding, and in other ways."[42] Many of these practices, such as tying, must yield efficiencies of some sort since firms without significant market power routinely engage in them. Moreover, empirical studies have found little evidence that many unilateral practices are generally harmful.

The Justice Department does not deny that certain predatory and exclusionary practices could "harm the competitive process."[43] However, in considering rules, it relies on statistical decision theory to argue for erring on the side of assuming that practices are procompetitive. In its analysis of bundled discounts, for example, it concludes that

> the Department believes that the risk of false negatives posed by employing the safe harbor is insufficient to warrant further consideration of conduct that comes within the safe harbor, given the administrative costs of proceeding, the risk of erroneous condemnations of conduct, and perhaps most importantly, the potential chilling effect on legitimate price discounting.[44]

The "belief" stated in the paragraph is fundamental to the Department's conclusions about how to design the rules for the game of competition.

41 See Carlton and Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* (cited in note 21).

42 US Department of Justice, *Competition and Monopoly* at xi (cited in note 4).

43 Id at 13.

44 Id at 102.

C. SUBSTANTIAL DISPROPORTIONALITY TEST

Given these two premises, the Justice Department report proposed various screening tests for assessing whether particular types of conduct, such as predatory pricing, harmed the competitive process. These tests provide for safe harbors which give businesses greater certainty that certain practices cannot be challenged. They also effectively place the burden of persuasion on the plaintiff to demonstrate that the conduct in question is anticompetitive. Unilateral business practices, even when conducted by firms with significant market power, are assumed to be procompetitive unless shown to be otherwise.

When the courts do not have a specific rule in place for certain conduct, the Justice Department advocates that they only condemn conduct if "its likely anticompetitive harms substantially outweigh its likely procompetitive benefits."[45] That contrasts with current judicial practice, which relies on an effects-balancing test that condemns conduct when the anticompetitive effects are not offset by procompetitive effects. The Justice Department justifies this test on statistical decision theory considerations. In particular, the test "recognizes that the cost of legal rules that erroneously condemn procompetitive conduct likely will be higher and more persistent than the cost of rules that erroneously exonerate anticompetitive conduct."[46]

D. RULES AND PRIORS

Statistical decision theory forms the spine of the Justice Department report. The Justice Department is clear in stating its prior beliefs about anticompetitive conduct and its risks to the competitive process. It believes that markets generally work, that much of the conduct that the courts have found unlawful in earlier decisions generates efficiencies, and that the costs of wrongly condemning certain business conduct significantly outweigh the costs of wrongly allowing certain business conduct. The US Supreme Court has endorsed similar prior beliefs in a number of decisions, most recently in its opinions in *Trinko*,[47] *Leegin*,[48] *Weyerhauser*,[49] *Credit Suisse*,[50] and *Twombly*.[51]

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45 Id at 45.

46 Id.

47 *Trinko*, 540 US 398 (2004).

48 *Leegin Creative Leather Products v PSKS, Inc*, 127 S Ct 2705 (2007).

49 *Weyerhauser Co v Ross-Simmons Hardwood Lumber Co*, 549 US 992 (2006).

50 *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007).

51 *Twombly*, 550 US 544 (2007).

Some of the Justice Department's views are supported by evidence that, while arguable, is at least tangible. There is considerable economic theory and empirical work indicating that conduct—such as tying—that courts had presumed to be questionable is common and usually efficient. Other views are expressions of opinion for which there is no objective evidence.[52] The Justice Department's report repeatedly asserts that the cost of false positives outweighs the cost of false negatives. But it does not offer any empirical support for that proposition and, while one can offer arguments about whether this proposition is likely to be true or false, there is no systematic evidence either way.

The Justice Department and the courts have relied on beliefs concerning the market to fashion competition policy in their antitrust jurisprudence. These "priors" were not based on empirical data but on an inchoate combination of practical experience and opinion. Knowing what these priors are allows us to at least understand why the Justice Department has adopted the views that it has and provides us with the opportunity to at least question these priors.

V. THE EC ENFORCEMENT PRIORITIES ON ARTICLE 82

The European Commission released a seventy-two page draft discussion paper in December 2005 that provided a framework for analyzing exploitative abuses under Article 82; such abuses are approximately equivalent to monopolization under US laws. The draft discussion paper was to serve as the basis for guidelines. Three years later, after a time of controversy both in and outside DG Competition over how to deal with unilateral conduct, the Commission issued a twenty-six page document entitled "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings." The purpose of this document, unlike the earlier one, is to "provide greater clarity and predictability on the general framework of analysis"[53] which the Commission uses in deciding whether to bring an action. There are no guarantees that the Commission will follow the approach in the guidelines in drafting its decisions or in arguing appeals before the Community Courts. The Commission does not adopt an explicit statistical decision–theoretic framework. Therefore, one must read between the lines to uncover the premises and beliefs behind the rules.

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52 Some observations are presented as fact even though they appear to have no empirical support. In discussing bundled discounting, the Justice Department asserts: "Bundled discounting is common, usually benefits consumers, and generally does not raise antitrust concerns." A footnote in support of this claims that "discounts having a retroactive feature" are commonly used by firms that lack market power. US Department of Justice, *Competition and Monopoly* at 91 (cited in note 4). The reference does not support that claim and in my experience—no substitute for empirical study—this is not true.

53 European Commission, *Guidance Report* ¶ 2 at 4 (cited in note 4).

Before considering the Commission guidance report in more detail, it is important to emphasize that it marks a significant advance in the treatment of unilateral conduct in the EC. The case law of the EC courts concerning Article 82 has been based largely on a series of rules that make certain kinds of unilateral conduct by dominant firms per se unlawful. As with price fixing, the courts have assumed that if a dominant firm engages in the conduct it must be harmful. No further analysis was necessary. Moreover, the EC courts have tended to find practices that harm rivals unlawful to the extent that they lead to a more concentrated market structure. Their analysis is influenced by the German "ordoliberal school" of the 1930s, which argued that competition law should make dominant firms "act as if" they were in competitive markets.[54]

Although couched in terms of guidance for enforcement priorities, the Commission report departs from the case law in two significant ways. First, it makes the prevention of harm to consumers the preeminent purpose of competition policy by announcing it "will focus on those types of conduct that are most harmful to consumers."[55] Second, it rejects helping competitors that are less efficient than the dominant firm. Its analysis of pricing abuses is guided by the "efficient competitor test" which identifies anticompetitive practices largely by determining whether they would tend to drive firms that are as efficient as the dominant firm from the market.[56] These are welcome developments. Unfortunately, at other points, the Commission rejects modern learning that should educate antitrust rules in all jurisdictions.

A. THE ROLE OF DYNAMIC COMPETITION AND EFFICIENCY

The EC Guidance Report appears to take a different view on the role of market power in stimulating dynamic competition than does the Justice Department report. It begins by making the observation that "it is not itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits."[57] The EC Guidance Report does not explain why that is the case, nor does it endorse the US view that such limitations would reduce long-run economic efficiency and ultimately harm consumers by removing incentives to invest and innovate. Moreover, it leaves open the possibility that the Commission may decide to intervene, as it can

54 Ahlborn and Evans, 75 Antitrust L J at 17–19 (cited in note 29).

55 European Commission, *Guidance Report* ¶ 5 at 4 (cited in note 4).

56 Id, ¶ 24 at 11.

57 Id, ¶ 1 at 4.

under Article 82, if firms engage in exploitative abuses such as charging excessively high prices.[58]

The Commission's analysis of refusals to supply illustrates its views on the role of market power in promoting investment and innovation. It acknowledges that imposing an obligation to supply "may undermine firms' incentives to invest and innovate and, thereby, possibly harm consumers" and tempt rivals to "free ride on investments made by the dominant undertaking."[59] However, it reaches a different conclusion than does the unanimous US Supreme Court in *Trinko* under which it would be very difficult for a plaintiff to compel a dominant firm to share its property. It also reaches a different conclusion, it would seem, than the European Court of Justice in *Magill*,[60] *Bronner*,[61] and *IMS Health*;[62] under those cases a dominant firm can be compelled to share its property only in "exceptional circumstances" that include showing the property is indispensable to compete in the market.[63]

The Commission, partly following the Court of First Instance's *Microsoft* judgment, adopts a weaker rule.[64] The exceptional circumstances test, articulated by the European Court of Justice in *Magill*, *Bronner*, and *IMS Health*, required that for a refusal to share by a dominant firm to be an abuse, the property in question had to be indispensable, and that the failure to provide it would lead to the elimination of competition in a downstream market. According to the Commission, "an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter—at least in the long term—the negative consequences of the refusal."[65]

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58 The Commission has long had a policy of generally not pursuing excessive pricing cases. See Christopher Bellamy and Graham Child, *European Community Law of Competition* 9–74 (Sweet & Maxwell 5th ed 2001). The brief statement in the Guidance Report suggests that it may have had a change of views on this. To the extent it does so, it would prevent firms from enjoying the fruits of significant market power and result in a policy that is at odds with the longstanding US approach as well as the approach it has adopted through prosecutorial discretion for many decades.

59 European Commission, *Guidance Report* ¶ 74 at 22–23 (cited in note 4).

60 *Radio Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities*, Cases C-241/91 P and C-242/91 P, 1995 ECR I-743 (Apr 6, 1995) (refusal to license copyright works, TV program listings).

61 *Oscar Bronner GmbH and Co KG v Mediaprint Zeitungs*, Case C-7/97, 1998 ECR I-7791 (Nov 26, 1998) (access to home delivery system of newspapers).

62 *IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG*, Case C-418/01, 2004 ECR I-5039 (Apr 29, 2004).

63 European Commission, *Guidance Report* ¶ 77 at 23 (cited in note 4).

64 *Microsoft Corp v Commission of European Communities*, Case T-201/04, 2007 5 CMLR 11 (Sept 17, 2007).

65 European Commission, *Guidance Report* ¶ 82 at 24 (cited in note 4).

The *Magill* and *IMS Health* cases required a further showing for intellectual property that the refusal would prevent the appearance of a new product on the downstream market. The Commission replaces this prong with a consumer welfare test that compares the negative consequences of refusal to supply against the negative consequences of the obligation to supply. The Commission says it will consider claims by the dominant firm that the refusal is justified by its need to obtain an adequate return. However, as discussed below, it will do so as part of the "objective justification" defense for which the defendant bears an essentially impossible burden of proof.

B. Error Costs

The EC Guidance Report does not explicitly mention the possibility of making mistakes that result in either ignoring anticompetitive conduct or condemning procompetitive conduct, or the costs of these errors. However, both its framework of analysis and the specific rules it advocates suggest that the Commission wants to have great latitude in deciding whether unilateral conduct is anticompetitive and that, to the extent it embraces the notion of error cost at all, it is more concerned with under-deterrence. That is, it is more concerned with false negatives.

The Justice Department report and US case law allow firms to demonstrate that their conduct results in efficiencies. Under the standard balancing test, a firm is not liable if the procompetitive benefits outweigh the anticompetitive costs—that is, if the net effect on consumer welfare is positive. Under the Justice Department's "substantially disproportional" test, a firm would not be liable unless the anticompetitive effects were significantly greater than the procompetitive ones. By contrast, the European Commission has adopted an "efficiency defense" that would be rather difficult for a dominant company to meet. The defendant "must provide all the evidence necessary to demonstrate" that: (1) efficiencies result from the conduct; (2) there is no less anticompetitive alternative that would provide the same efficiencies; (3) the efficiencies outweigh any negative effects of the conduct on consumer welfare; and (4) the conduct does not eliminate effective competition.[66]

66 The fourth condition particularly distinguishes the EC from the US approach. The Commission argues that "the protection of rivalry and the competitive process outweighs possible efficiency gains." Neither the US case law, nor the Justice Department report, recognizes the preservation of rivalry as a desirable goal in and of itself. The EC's Guidance Report adopts the "efficient competitor" test in much of its analysis of specific rules. It is unclear whether the view on the protection of rivalry for the analysis of objective justification involves the protection only of as efficient rivals or of less efficient rivals as well. European Commission, *Guidance Report* ¶ 29 at 12–13 (cited in note 4).

The Justice Department Report endorses a variety of screens the US courts have developed for unilateral conduct and proposes more. These screens are supposed to sift out likely procompetitive business practices and make it difficult for these good practices to face a balancing test that might reach the wrong outcome. The Justice Department and US courts recognize that these screens may inadvertently sift out anticompetitive business practices, thereby resulting in false negatives. On the other hand, the Commission's Guidance Report does not incorporate many of these screens. The predatory pricing test does not require evidence of recoupment. The refusal-to-supply test does not require strict indispensability. As a result, a far greater range of business practices are likely to be subject to an ultimate decision as to whether they are anticompetitive under the Commission's approach than under the Justice Department's approach (which in large part is consistent with US case law).

C. THE EUROPEAN COMMISSION AND PRIOR BELIEFS

The Commission's approach is consistent with its holding certain views about markets and about the likelihood and cost of errors. First, the Commission believes that rivalry among firms in the market is critical for delivering benefits to consumers. Whenever it has the opportunity, it places its thumb on the side of the scale that emphasizes static over dynamic competition. Thus, rivalry trumps efficiency and the effects of mandating refusals to supply on incentives to invest and innovate are dismissed. Second, the Commission does not believe that the costs of condemning procompetitive practices are significant. It does not mention error costs at all, which could mean that it believes that it makes few mistakes. However, its overall approach and the specific rules it advocates suggest that it wants to make sure that it sweeps up as much anticompetitive conduct as it can and that it wants to minimize the number of false negatives.

It would appear, therefore, that the European Commission bases its rules concerning unilateral conduct on a different set of prior beliefs than does the US Department of Justice. It is at least conceivable that both sets of prior beliefs are reasonable for each jurisdiction and analysis of the desirability of either set of rules needs to account for that possibility.

The US places great weight on dynamic competition. That makes particular sense in an economy in which it is easy to start a business and in which there is a culture of entrepreneurship and a well-developed venture capital industry that bets on innovation. It makes less sense in the EC in which government regulations have made it costly to start new businesses and in which the venture capital industry is immature. Innovation-intensive industries such as information technology and biotechnology have thrived in the US but not in Europe. The new highly disruptive companies of the early twenty-first century, such as

Google and Facebook, hail from the US and not from the EC. At the same time the EC has had state-owned monopolies in a number of industries. Although many of these monopolies have been privatized in the last twenty years, competition has grown slowly. These differences likely lead to different perceptions on the likelihood and cost of errors.

The other important difference between the US and EC concerns the cost of mistakes. As noted earlier, because of the role of private litigation and class actions, the US legal regime appears to create much greater financial exposure to antitrust lawsuits than does the EC legal regime. A rule that expands the scope for liability may therefore lead to greater costs of mistakes in the US than in the EC.

One can argue whether the prior beliefs adopted by either the US or the EC are correct for their respective jurisdictions. Perhaps the US places too much weight on false positives and perhaps the EC places too little emphasis on the role of significant market power in stimulating investment and innovation. But it is impossible to have a sensible dialogue about the rules these jurisdictions have adopted without analyzing the premises for those rules and considering whether different rules are necessitated by objectively different circumstances in these jurisdictions.

VI. CONVERGENCE IN A HETEROGENEOUS WORLD

Expressing an oft-stated concern about the divergence in the antitrust policy towards unilateral conduct, two Canadian lawyers recently noted that, "[a]s commercial activity becomes increasingly global and competition regimes proliferate, the divergence in such laws is likely to produce considerable conflict between jurisdictions, compliance burdens for business, and chilling effects on economically beneficial conduct."[67] The authors, like others, go on to argue for an approach that largely follows the US in narrowing the circumstances under which unilateral conduct is unlawful based on the rationale that unilateral conduct cases are subject to significant errors that could chill procompetitive conduct. Much unilateral conduct analysis is not, indeed, based on sound economic principles in many jurisdictions including the EC.[68] Nevertheless, these advocates of convergence, like others, leap from the observation that some jurisdictions have badly designed rules to the conclusion that jurisdictions should have similar rules and ones that follow those of the US.

67 A. Neil Campbell and J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence*, 75 Antitrust L J 267, 267 (2008).

68 See note 66.

The logical error is most apparent in their analysis of enforcement. They observe that competition authorities pursue few unilateral conduct cases. According to their data, the EC had a total of 87 cases in an economy of $13.7 trillion. They conclude from this statistic that abuses of unilateral cases are uncommon and that unilateral conduct laws "should be designed and applied with considerable caution, because even the chilling of a modest amount of procompetitive activity could outweigh the benefits achieved from stopping remedying rare anticompetitive situations."[69]

That conclusion does not follow. First, the number of cases opened in a jurisdiction reflects the resources available to the authority together with its decision to allocate these resources to unilateral conduct cases. It does not necessarily reflect the number of violations in the economy. Second, it is not possible to compare enforcement efforts between the US and other regimes without accounting for the role of private actions and treble damages in the US. There were 1,004 antitrust cases filed in US district courts in 2006, 96 percent of which were private cases, and the number of open cases during any year is a multiple of that.[70] These cases would appear to impose significant litigation costs on the defendants as well as the prospect of treble damage awards, as discussed above. Some of the cases are class action cases.[71] The US does not necessarily have more unlawful unilateral conduct, but it does have a legal regime which provides significant financial incentives for plaintiffs to seek their day in court. However, the end result is that the US as an economy (and controlling for size) would appear, although this conclusion must be tentative given the lack of hard data, to invest far more into the detection and punishment of unlawful monopolization than the EC and perhaps many other jurisdictions. It is true as

69 Campbell and Rowley, 75 Antitrust L J at 277 (cited in note 67). The data is "based on surveys of enforcement agencies," and it is therefore difficult to verify that the EC actually did have as many as eighty-seven unilateral conduct cases open in 2006.

70 Although that number reflects all antitrust cases, not just unilateral conduct, it's still clearly a significantly higher number and demonstrates the important point that most antitrust cases in the US are private cases, not brought by the US government. *Sourcebook of Criminal Justice Statistics Online* (cited in note 23).

71 The interchange fee controversy provides an example, although it is technically a coordinated conduct case. The European Commission reached a decision adverse to MasterCard, which is on appeal to the Community courts. See European Commission Decision COMP/34.579 Europay (Eurocard-MasterCard) (Dec 19, 2007); MasterCard Press Release, *MasterCard Files Appeal of European Commission Decision* (Mar 3, 2008), available online at <http://www.mastercard.com/us/company/en/newsroom/pr_EC_Decision_Appeal.html> (visited Apr 17, 2009). MasterCard was not subject to any fines. There is also an ongoing investigation of Visa. In the US, plaintiffs' lawyers are seeking to represent a class of essentially all retail businesses in the US in a challenge to the interchange fee rules adopted by MasterCard and Visa. The defendants in the case include these two card networks in addition to many banks that issued credit cards. The plaintiffs are seeking tens of billions of dollars in damages in addition to injunctive relief.

noted above that Europeans are taking steps to increase private actions, but without multiple damages or effective class actions, it is unlikely they will catch up to the US in litigiousness.

In comparing antitrust regimes and in designing competition rules, the difference in economy-wide investments in the detection and punishment of unlawful conduct is the elephant in the room. The US conducts far more "tests" of unilateral conduct than does the EC and therefore, with equally accurate tests, it would have far more errors than would the EC. Moreover, with equally accurate tests, a procompetitive business practice would be far more likely to be challenged in the US than in the EC. Thus, the chilling effect on competitive behavior would be greater in the US than in the EC. Holding the legal regime constant, we would therefore expect that a court system that is conscious of error costs would adopt rules that make convictions harder the greater the level of enforcement effort; that is, it would sacrifice some false negatives to reduce the number of false positives.

There is another potential error in the proposition that convergence is needed because of the chilling effect on global firms. Although a great deal of press surrounds multi-jurisdictional cases such as Intel and Microsoft, most of the cases in jurisdictions around the world involve companies whose primary place of business is in those jurisdictions.[72] To assess the chilling effect, one would need to examine the likelihood that a global firm will face an investigation involving unilateral conduct in multiple jurisdictions around the world. Given the Canadian authors' observation that there are relatively few open investigations[73] and that many of these investigations do not involve global companies, it would appear likely the probability of a multinational corporation facing an investigation outside the US is low.

Uniformity in competition rules across countries certainly has value. Businesses benefit from having to learn one set of rules and being able to follow similar business practices in multiple jurisdictions. Those benefits are greatest for business practices such as technological tying that cannot be easily tailored to one country, and lowest for ones such as pricing that are often tailored to a particular country anyway. Jurisdictions also benefit from uniformity and imposing relatively low costs on businesses from competition-policy enforcement. The competition-policy regime is one factor that businesses would be expected to take into account in doing business in a jurisdiction. One would expect that businesses would avoid jurisdictions that impose greater costs on

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72 See A. Paul Victor and John C. Chou, *United States Antitrust Jurisdiction Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and Timberlane*, 10 Fordham Intl L J 1, 9–11 (1986) (discussing the reluctance of US courts to accept cases with extraterritorial jurisdiction).

73 Campbell and Rowley, 75 Antitrust L J at Table 1 (2008) (cited in note 67).

them from enforcement and greater costs as a result of their rivals being able to engage in anticompetitive practices.

The debate about convergence is a worthy one to have, but the current discourse is not as constructive as it could be. It is conceited for Americans to criticize the European Commission for having overly aggressive enforcement of unilateral conduct matters without considering how the differences in legal regimes, enforcement and deterrence efforts, and economic history might have influenced those choices. It is equally presumptuous for Europeans to criticize the Supreme Court decisions that make it harder for plaintiffs to pursue unilateral conduct cases without also considering that the Court is reacting in part to a system that is more litigious than their system.

Statistical decision theory provides a rigorous framework for examining competition-policy regimes. It can be used to examine whether different rules are the result of different objectives, economic principles, prior beliefs, or objective circumstances. It can then be used to consider the legitimacy of those differences. Europeans sometimes point to the role of previously state-owned companies in their more interventionist rules on refusal to supply. One can evaluate whether that is a valid justification for a rule that applies to all companies and whether there should come a time when previously state-owned companies should be treated like any other company. Americans point to the chilling effect of competition rules, yet there is little research on this matter. We do not, for example, have data on whether the effective elimination of predatory pricing cases in the US has resulted in more price competition or more predatory pricing.

While heterogeneity is the norm for optimal antitrust rules, the adoption of those rules by each jurisdiction is unlikely to be optimal from a global basis. We can see this from a simple application of statistical decision theory.

Suppose we appointed a global social planner to design antitrust rules that would apply to every jurisdiction in order to maximize global social welfare. The social planner would take into account local circumstances as well as externalities across jurisdictions in the enforcement of rules. Since most economic commerce is local, the heterogeneity in local circumstances would result in heterogeneity in the antitrust rules, for the reasons we have discussed above. The heterogeneity of antitrust rules—in other words, divergence—is probably optimal.

Yet, if each jurisdiction selects antitrust rules to maximize social welfare within its jurisdiction, it will not account for the spillover effects on other jurisdictions. Suppose the jurisdiction enforces its antitrust rules against multinational firms and these enforcement actions affect the business practices of these firms outside the jurisdiction. That could happen directly if an enforcement action has extra-territorial implications (as was the situation in EC's case involving Microsoft), or indirectly if the uncertainty of enforcement actions in various jurisdictions results in companies designing practices for the more restrictive regimes. Furthermore, firms will engage in some inefficient forum shopping to pursue cases against their rivals in the more restrictive regimes. Locally-adopted antitrust rules are probably sub-optimal.

As with other matters involving the economic relationships among sovereign countries, the practical problem we face is trying to resolve negative externalities among countries while respecting the rights of those countries to pursue their own interests. Given the diversity of environments, there is no compelling reason to believe that the answer for antitrust is having the same rules. Rather, we need to identify the negative spillovers that result from inconsistent rules and fashion solutions for them. Understanding why jurisdictions have adopted particular rules will prove important in carrying out a respectful dialogue.

VII. CONCLUSION

Over the last decade, most countries have adopted competition laws as part of their move toward having market economies.[74] Competition policy professionals around the world speak a common language even though there may be different dialects. The International Competition Network[75]—an association of competition authorities—encourages the adoption of best practices which necessarily results in convergence. There is far more similarity among countries in their approaches to competition policy in 2009 than there was even a decade ago.

There is, for example, far less difference between the EC and US approaches to unilateral conduct today than existed ten years ago. A decade ago, the European Commission followed the Community courts in having a form-based approach to unilateral conduct, in ignoring competitive effects, and in focusing more on harm to competitors than harm to rivals. It did not embrace economic analysis and did not have a chief economist charged with looking over competition policy. Brussels and Washington, DC, were very far apart even during a Democratic administration and before the spate of Supreme Court antitrust decisions. Today, the European Commission agrees that the purpose of competition policy is to promote consumer welfare, it embraces economics and has a chief economist, and it has moved in the direction of replacing a form-based approach with an effects-based approach. Washington, DC, led mainly by the Supreme Court reaching consensus decisions, has moved toward less

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74 See Evans and Jenny, *Trustbusting Goes Global* (cited in note 2).

75 For an example of its efforts with regard to unilateral conduct, see ICN Unilateral Working Group, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws*, available online at <http://internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf> (visited Apr 21, 2009).

stringent antitrust rules. Brussels has moved far more in the same direction, and the US and EC regimes have thus grown closer together.

There remain significant divergences between the US and the EC and other jurisdictions, especially over the laws concerning monopolization. Those differences will narrow in part because competition policy has become a global discipline. Professionals in different parts of the world are converging in their views on the purpose of competition policy and the economic principles that underlie it. They frequently meet and compare notes. That is being helped by the emergence of global forums such as the International Competition Network, where competition policy officials from around the world periodically meet and form relationships. The differences will not disappear completely, nor should they. Jurisdictions should adopt competition policy rules that adhere to general principles but that take into account the specifics of their countries or regions. To develop better competition policy worldwide and to develop desirable convergence, we should be examining whether jurisdictions have adopted the best rules given their circumstances and negative spillovers on other jurisdictions.

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