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EVALUATING ANTITRUST ENFORCEMENT: ECONOMIC FOUNDATIONS

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I. INTRODUCTION

There has been considerable debate in recent years about the state of global antitrust enforcement. Given recent changes in EU competition law (both public and private) and the incredible growth of public antitrust worldwide, it is appropriate to take a careful look at where we are, and where we are heading. In this paper, I offer an economist's view on the issues that are most important, and an update on the economic foundations that may help to shed light on those issues.

From an economist's perspective, the question of whether and to what extent antitrust enforcement is "efficient" in maximizing social welfare raises complex issues, despite the fact that the focus on efficiency avoids important concerns relating to the effects on consumers versus business and on the implications for the distribution of wealth. Achieving economic efficiency inevitably involves balancing the benefits associated with enforcement (deterring inappropriate behavior) with the costs of doing so (the transactions costs associated with enforcement, including litigation costs, the costs of excess enforcement and the costs of disruption associated with the inappropriate enforcement versus legitimate competitive behavior). The hard questions flow from the need to find the right balance between the benefits of enforcements and the associated costs.

Further complicating this already complex picture is the fact that enforcement today is global, dynamic, and both public and private. One's ultimate view as to whether antitrust enforcement is excessive, insufficient or neither, is likely to vary based on one's own national perspective, antitrust experience and political perspective on the efficacy of government enforcement.

Those with a more conservative bent are likely to have: 1) a substantial faith in the workings of the market, and 2) a lack of faith in the ability of government to successfully intervene to remedy perceived market failures. In terms of antitrust law, the conservative perspective includes: 3) a belief that the antitrust laws should focus on economic

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efficiency and be directed towards the improvement of social welfare broadly defined, and not the interests of particular subgroups of the population (e.g., small business). Those with a more liberal perspective are likely to: 1) see more instances of market failure; 2) have more faith in the ability of government enforcers to intervene successfully; and 3) have a view that economic enforcement should emphasize consumer welfare and the promotion of more rivalry in the competitive process.

Whatever one's political inclinations, however, there is a common set of economic principles that drives the views of commentators who look at the economics of antitrust enforcement. Section II discusses each of those principles and their implications. In Section III, I offer some brief concluding remarks.

II. ECONOMIC PRINCIPLES

A. Active, Effective Antitrust Enforcement Supports Economic Growth

There is little doubt that significant investment in research and development (R&D) is an essential element of the innovative process. There continues to be a debate, however, as to how much R&D is desirable, and which market structure is most conducive to innovation.[1] The former point raises a distinct set of issues not directly related to antitrust enforcement (evaluating the tradeoff between duplication in R&D when multiple firms innovate and the loss of competition for innovation when only one firm innovates). In this essay, I will focus on the second point – the relationship between market structure and innovation.

Since there are often substantial economies of scale in R&D, it appears that a market with a large number of small competitors may not be the best market structure to support innovation. Yet, there are examples of highly successful companies that were built on innovations that began small, and later grew through scale and network effects. On the other extreme, Schumpeter (among others), has espoused the view that large enterprises are necessary for innovation and growth.[2] This seems sensible, given that large firms frequently have substantial financial capital to invest in R&D and are likely to have a strong market position from which to pursue an aggressive strategy to maintain that position. Firms with substantial existing installed customer bases have a ready market for the next generation of products if their innovative efforts are successful.

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[1] I take it for granted that innovation is beneficial to society. That case was recently made in J. Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation." (Am. Antitrust Inst. Working Paper, No. 07-04, 2007), available at SSRN: http://ssrn.com/abstract=962261.

[2] J. A. Schumpeter, Capitalism, Socialism, and Democracy (New York: Harper & Row, 1942).

We now know that the Schumpeterian view is overly simplistic, given that some large firms choose to acquire new innovations rather than develop them internally.[3] Furthermore, there is empirical evidence that scale economies in R&D may be limited, so that a wide range of market structures are likely to support the innovative process.[4] Indeed, many empiricists believe that there is an inverted U in innovation, with innovation being the greatest in industries with oligopolistic market structures.[5]

Despite the continuing controversy on this subject, it seems reasonable to interpret the literature as supporting the view that strengthening competition policy is good for innovation.[6] An active competition policy can help to maintain market structures that are supportive of innovation. It can also increase the likelihood that firms with entrepreneurial talent will be sustainable. Indeed, the maintenance of competition can support entrepreneurship and growth by giving firms the right economic signals and encourage firms to respond to the right economic incentives.[7]

The evaluation of competition policy would be simplified if there were clarity as to which market structure, and which set of behavior rules, were most conducive to economic growth. However, as even this very brief introduction has shown, there is no general rule that applies in each and every case. One might be tempted, for example, to suggest that highly concentrated industries are most supportive of innovation, and indeed,

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[3] See K. Arrow, "Economic Welfare and the Allocation of Resources for Invention," in The Rate and Direction of Economic Activities: Economic and Social Factors (R. Nelson, ed. 1962), arguing that innovation may not be appealing to a monopolist if the opportunity cost of innovation is foregone current profits.

[4] See, for example, F. M. Scherer, Innovation and Growth: Schumpeterian Perspectives. (Cambridge Mass.: MIT Press, 2004); W. Cohen, "Empirical Studies of Innovative Activity," in Handbook of the Economics of Innovation and Technical Change (P. Stoneman, ed., Cambridge, Mass.: Blackwell, 1995), pp. 182-264, and a recent essay, L. White, "The Role of Competition Policy in the Promotion of Economic Growth" (NYU L. & Econ. Res. Paper No., 08-23, 2008).

[5] See, for example, W. Baldwin & J. Scott, Market Structure and Technological Change, 63-113 (1987); see also P. Aghion, N. Bloom, R. Blundell, R. Griffith, and P. Howitt, "Competition and Innovation: An Inverted U Relationship," 120 Q. J. Econ. 701 (2005).

[6] See, for example, P. Howitt, "Innovation, Competition and Growth" A Schumpeterian Perspective on Canada's Economy 1 (C.D. Howe Institute, Commentary, No. 246) (April 2007); see also H. Pate, 2004, "Promoting Economic Growth Through Competition and Innovation," U.S. Dep't of Justice, Antitrust Div., available at http://www.usdoj.gov/atr/public/speeches/204931.htm.

[7] W. Baumol, R. E. Litan and C. Schramm, "Sustaining Entreprenurial Capitalism," 2(2) Capitalism and Society, (2007). See also, R. Gilbert, "Looking for Mr. Schumpeter; "Where Are We in the Competition-Innovation Debate?" In 6 Innovation Pol'y & the Econ. 159 (Adam B.Jaffe, Josh Lerner , & Scott Stern, eds. 2006).

that monopoly power is most supportive of R&D, since it is likely to avoid duplicative investments in innovation.

There is evidence, however, that competition can spur innovation. Even in industries in which there are powerful scale economies and network effects, two (or more) successful firms that have achieved minimum efficient scale are likely to be more conducive to innovation than a market with a single firm that faces little or no competition. According to Paul Romer, testifying with respect to potential remedies in the *U.S. v. Microsoft* case, "Information processing is a pervasive activity in our economy. Even small changes in the rate of innovation in this area can, over time, lead to large productivity gains and big improvements in the standard of living ... By creating conditions that encourage increased competition in the operating system market, this remedy [creating separate operating system and applications companies] will increase the rate of innovation in the software industry and thereby increase the rate of growth for the economy as a whole. The lasting stream of benefits that can be expected to follow from this remedy will substantially outweigh any temporary costs that it might involve." [8]

There remains substantial debate as to whether the case against Microsoft in the U.S. and the case in Europe have had or will have a significant effect on innovation and growth. Taking a broader perspective, however, leading academics who study international business, led by Michael Porter, have also found that in many industries greater firm competition within countries leads to higher productivity for firms in that country.[9] According to Porter, "active domestic rivalry is strongly associated with international success [while] creating a dominant competitor rarely results in international competitive advantage."[10]

Of course, not all innovation is good for growth, and not all firms in competitive markets are likely to be sufficiently stimulated and rewarded to invest heavily in R&D. A good antitrust policy is one that evaluates the relationship among market structure, competition and innovation on a market by market basis and makes its enforcement decisions accordingly.[11]

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[8] Declaration of P. Romer, U.S. v. Microsoft, Civil Action No. 98-1232, 1998.

[9] M., Porter, The Competitive Advantage of Nations (1990); see also the related discussion in J. Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation." (Am. Antitrust Inst. Working Paper, No. 07-04, 2007), available at SSRN: http://ssrn.com/abstract=962261.

[10] See, J. Klein,"The Importance of Antitrust Enforcement in the New Economy," Address before the New York State Bar Association, Antitrust Law Section Program, (Jan. 29, 1998).

[11] I. Segal & M. Whinston, "Antitrust in Innovative Industries," (NBER Working Paper, No. 11525, Aug. 2005) (provide examples of situations in which an active antitrust policy can stimulate innovation).

To be most effective, competition policy must be directed towards goals that are consistent with the long-run interests of consumers and businesses worldwide. In a global environment with multiple public enforcement agencies, this raises two concerns, both of which make the evaluation of competition policy difficult. First, even if each and every competition authority actively pursues the interests of its own citizens, it does not follow that global welfare will be maximized. Because competition among enforcement authorities can lead to a "race to the bottom," cooperation rather than competition among enforcement agencies is essential if global welfare is to be optimized. Second, competition authorities must pursue the welfare of their citizens broadly defined and not the narrow, limited interests of particular industries or firms. There have been a number of occasions in the past decade when commentators have raised the possibility of competing US-EU industrial policies: the proposed Boeing-McDonnell Douglas merger and the proposed GE-Honeywell merger come to mind. While in each case claims of bias on the part of the enforcement agencies remain unsubstantiated, it is appropriate and indeed essential that the decisions of the enforcement agencies (to take action or not to take action) be carefully monitored.

B. Economic Analysis Should Allow for both Static and Dynamic Efficiencies

Economics should be not be concerned about the existence of market power in a given market, per se. The attainment of market power - even substantial market power — through the skill, foresight and knowledge of a firm is seen as an appropriate reward for the successful innovative and other competitive activities of the firm. Rather, it is the implications that flow from that power that should be studied.

Along with the attainment of market power is the possibility of its misuse, and improper actions by a firm to maintain or extend its market power can be anticompetitive. Although there is some debate as to exactly where to draw the line between permissible and impermissible behavior, it is generally accepted that one ought to distinguish between a) conduct of a firm designed to benefit from what the firm has created, without consideration of the effect of that conduct on the firm's rivals (and, by extension, its customers), and b) conduct that increases a firm's profits by weakening or eliminating altogether competitive constraints provided by a particular rival.[12]

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[12] In evaluating the behavior of firms with monopoly power, I have advocated a "profit sacrifice" perspective, under which an anticompetitive action is one that would not be profitable except for the direct harm to a targeted competitor. See, for example, F. Fisher & D. Rubinfeld, "United States v. Microsoft: An Economic Analysis," pp. 1-44, in Evans, Fisher, Rubinfeld, & Schmalensee, Did Microsoft Harm Consumers? Two Opposing Views, 2000 (AEI-Brookings Joint Center for Regulatory Studies, 2000); see

Economists generally agree that firms should be allowed to engage in the first type of conduct, because permitting a firm, even one with substantial market power, to benefit from what it has created legitimately preserves incentives to invest and innovate. Antitrust laws in the United States are routinely applied in a way that permits firms to capture as much value that they – by their own initiative foresight, and knowledge – have created. That is why transactions that do not affect the competitive status quo are not seen as anticompetitive.

The economic reasoning behind this view rests on the importance of "dynamic efficiency." A dynamically efficient policy is one that generates appropriate incentives for firms to continue to invest in their business, to develop new products and new ways of delivering services, and to engage in efficiency-enhancing transactions. Dynamic efficiencies should be distinguished from "static efficiencies," which are short-run gains that flow from behavior that causes a firm to lower its price to its customers.

The danger of basing competition policy solely on concerns for static efficiency was described more than half a century ago by Schumpeter. According to Schumpeter, what is most important is: "competition from the new commodity, the new technology, the new source of supply, the new organization ... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives."[13]

C. Permitting Firms to Earn Returns from Their Investments Promotes Dynamic Efficiency and Is Consistent with Sound Competition Policy

Allowing firms that have acquired their market power legitimately to extract value (and, thereby, earn profits) provides critical incentives for firms to continue to invest and innovate; and ongoing investment and innovation are widely acknowledged as creating significant benefits for society as a whole. Consequently, while allowing a firm to capture economic "surplus" might appear to be inefficient in the short-run, the costs of this inefficiency can be offset by the long-run efficiencies that are created for the economy as a whole when incentives to invest and innovate

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also, D. Melamed, "Exclusive Dealing Agreements and Other Exclusionary Conduct-Are there Unifying Principles" 73 Antitrust L. J., 2006, pp. 375-412. Others have argued for a test that balances that the procompetitive benefits of a firm's actions against the anticompetitive harm. See, for example, S. Salop, "Exclusionary Conduct, Effect on Consumers and the Flawed Profit-Sacrifice Standard," 73 Antitrust L. J., Vol. 73, 2006, pp. 311-374.

[13] J. Schumpeter, Capitalism, Socialism, and Democracy 84, (New York: Harper & Row, 1942).

are preserved.[14] These dynamic efficiencies include innovative business arrangements that create benefits such as a more appropriate sharing of risk, the provision of higher quality services and the provision of goods and services at lower cost.

Forcing a firm to pass through to others legitimately acquired surplus, instead of permitting the firm to capture it, would discourage firms from investing or innovating, even if those activities would generate outcomes that would be desirable from society's perspective. Despite the potential chilling effects on investment and innovation, however, competition authorities and regulators are often asked to focus on the short-term – which tends to treat levels of investment and innovation as a given – by taking actions that would improve static efficiency at the expense of dynamic efficiency. However, fundamental principles of economics – and more broadly the "law and economics" that underlies the antitrust laws and the ways they are enforced – promote dynamic efficiency by permitting firms to engage in activities that allow the firms to capture surplus.

Given the social value created by permitting firms to capture static surpluses, it is natural to ask whether there ought to be limitations from an economic perspective on the practices pursued by firms, especially those with market power. So long as the firm's activities involve seeking to extract surplus from legitimately gained market power, those activities should not be seen as economically harmful. However, it is appropriate and indeed essential to look closely at practices that are designed to extract surplus from rivals weakened by the targeted strategies of firms with substantial market power.

I note that this perspective is widely supported within the antitrust economics field. For example, this is the view advocated by the current Acting Deputy Assistant Attorney General for Economics, Ken Heyer, and the most recent Deputy Assistant Attorney General for Economics, Dennis W. Carlton in distinguishing between "extraction" and "extension" in assessing the conduct of firms:

> [W]e distinguish between two types of single-firm conduct. The first, which we call "extraction," is conduct engaged in by the firm to capture surplus from what the firm has itself created independent of the conduct's effect on rivals. A simple example would be pure price discrimination. The second, which we call "extension," is single firm – conduct that increases the firm's profit by weakening or eliminating the competitive constraints

[14] In an industry in which significant elements of investment have long economic lives and are effectively sunk, an exclusive focus on enhancing static efficiency also makes it riskier to make the investments that are necessary if one wishes to replenish existing assets needed merely to *maintain* existing services and service quality.

> provided by products of rivals. An example would be exclusive dealing where the effect is to eliminate smaller rivals from having access to distribution.
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> We subscribe strongly to the view that an essential element of appropriate antitrust policy is to allow a firm to capture as much of the surplus that, by its own investment, innovation, industry or foresight, the firm has itself brought into existence. We believe that alternative approaches to single-firm conduct, including in particular ones aiming to enhance static efficiency at the possible cost of dynamic efficiency, as well as ones seeking to maximize overall welfare through more targeted intervention on a case-by-case basis, threaten seriously to impede economic growth and welfare over time.[15]

I agree with the Heyer-Carlton conclusion that approaches that "aim to enhance static efficiency at the possible cost of dynamic efficiency" "threaten seriously to impede economic growth and welfare over time."

To recap, the means by which a firm with market power chooses to extract its economic surplus should not be a concern from a competition standpoint, unless those practices involve the extension of that market power made possible by weakening the competitive constraints imposed by rivals.

D. There are Significant Economic Benefits That Flow from Global Antitrust Convergence

The rapid growth of global antitrust enforcement is a phenomenon that has raised significant issues, many of which have been the subject of discussion within the ICN. In this section I focus on one overarching issue – whether and to what extent the global antitrust community ought to strive to achieve significant convergence with respect to the regulations and the enforcement policies of the various antitrust authorities around the world.

There is no doubt that diversity can in appropriate circumstances be highly beneficial. In the broader context of the political economy of federalism, it has been suggested that diversity supports broad political participation, encourages experimentation, and allows for the preferences of a variety of groups of within a population to be satisfied.[16]

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[15] D. Carlton & K. Heyer, "Appropriate Antitrust Policy Towards Single-Firm Conduct," Economic Analysis Group, Antitrust Division, Department of Justice, Working Paper, EAG 08-2, Mar. 2008).

[16] I develop this point in great detail in my joint work with Robert Inman; see, for example, Robert P. Inman and Daniel L. Rubinfeld, "Rethinking Federalism,"11 J. of Econ. Perspectives, (Fall 1997) pp. 43-64.

Nevertheless, diversity can be problematic in certain cases, and antitrust enforcement is one. The problem is that divergence creates a choice of regulatory environments for firms that operate internationally. Given a choice, it seems plausible that many firms, including those that are dominant in their own industries, would opt to be covered by the antitrust authority that is not very aggressive with respect to enforcement. The result could be a forum-shopping "race" that encouraged countries to under-enforce certain laws so as to benefit those businesses with greatest political influence. Whether this would ultimately be attractive to business generally, to generate jobs and to increase tax base, remains an open question.[17]

Indeed, the story is not nearly that simple. As suggested earlier, active enforcement can stimulate economic growth, which in turn will increase the demand for the firms' products. As a result, it will be in the long-run interest of many firms to support an active enforcement regime. Whatever the desired level of enforcement, however, there are significant benefits that flow from convergence (especially with respect to cartel and merger enforcement). Convergence creates network effects, and is likely to generate clearer incentives for firms and reduce litigation and transactions costs.

Given the complex political economy of antitrust enforcement, and the variety of constituencies throughout the globe, can we predict the long-run implications of competition among antitrust enforcers? Is it more likely to be a race to the top or a race to the bottom? In the paragraphs that follow, I review some of the relevant literature; that literature suggests to me that we should be concerned about a possible race to the bottom. The implication is that there will be substantial value generated if there is a successful push for some form of global antitrust convergence.

One version of the race to the bottom scenario goes as follows. Enforcement officials in countries wishing to spur economic development find it advantageous to offer a lenient enforcement policy as part of a broader pro-business regulatory climate in order to support the commercial tax base. (Some countries might opt to raise revenue through merger filing fees.) Other jurisdictions respond to such programs with similar pro-business policies. In the end, when all is said and done, the resulting equilibrium will be one in which most countries will under-enforce antitrust.

While the possibility of an inefficient race has not often been discussed in the competition policy context, it has been a subject of frequent discussion among public finance economists. George Break, for

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[17] In "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways," 75 N.Y.U. L. Rev. 1781, (Dec. 2000), Eleanor Fox suggests that there some support for races to the bottom in antitrust, but that there is also a race to the top. She argues also that there is little competition among enforcement regimes to attract investment.

example, focused on inefficient tax competition, noting that Aactive tax competition ... tends to produce either a generally low level of state-local tax effort or a state-local tax structure with strong regressive elements.@[18] Alice Rivlin used the race to the bottom argument as the basis for her proposal for a national value-added tax and a system of tax sharing among the states.[19]

Characterizing the nature of the competitive process as a Arace@ is itself misleading. As noted, the literature focuses on the nature of equilibria, not on the dynamics of the competitive process itself. Putting that aside, however, it is important to ask how one can distinguish the conditions under which competition will lead to an inefficient equilibrium from the conditions under which the opposite "race to the top story will hold?" The key is whether most nations believe that aggressive enforcement will stimulate economic growth. If active enforcement does indeed support growth, the resulting equilibrium will be one in which most countries actively enforce antitrust.

My review of the relevant economics literature suggests that the race to the top story is likely to hold only under highly restrictive assumptions. Among other things, firm mobility must be relatively easy. Otherwise, countries would likely engage in competitive, strategic behavior, as each takes into account the interdependence of its decisions and the decisions of other countries. The appropriate economic model would appear to be a Nash equilibrium model in which a fixed number of countries have enforcement authorities, and in which the strategic, competitive enforcement behavior of individual countries could be advantageous.[20]

The race question has, of course, arisen at the international level in contexts other than antitrust. Within the European Union, for example, there have been continuing debates concerning the appropriateness of decentralizing regulatory activities to member states along with imposing uniform regulatory standards at the center. There are, however, additional issues that arise when thinking about international as opposed to domestic

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[18] G. Break, Intergovernmental Fiscal Relations in the United States (Washington, DC: Brookings Institution) 1967, pp. 23-24.

[19] A. Rivlin, Reviving the American Dream: The Economy, the States & the Federal Government. (Washington, D.C.: The Brookings Institution, 1992).

[20] Models offering a set of conditions under which the race to the top is an appropriate characterization of competition include Wallace E. Oates and Robert M. Schwab. "Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?" 35 J. of Pub. Econ., 333-354 (1986) and Wallace E. Oates and Robert M. Schwab. "The Theory of Regulatory Federalism: The Case of Environmental Management," in Wallace E. Oates (ed.); The Economics of Environmental Regulation. (Cheltenham, U.K.: Edward Elgar, 1996) pp. 319-331, who focus on issues relating to taxation and public services, and Richard Revesz, "Rehabilitating Interstate Competition: Rethinking the Face for the Bottom Rationale for Federal Environmental Regulation," 67 N.Y.U. L. Rev. 1210 (1992), who emphasizes environmental regulation.

races, as Klevorick has noted.[21] First, in many international contexts the political decisionmaking processes are likely to vary widely. Second, individuals harmed by a race to the bottom within a single country are more likely to be able to obtain relief than would individuals whose country's internal political system has failed to maximize the welfare of its citizens because it could not compete effectively with other nation states.

E. The Presence of Public Enforcement Regimes Adds Substantially to the Complexity of Antitrust Enforcement

There are enormous benefits from private enforcement. Private enforcement can generate increased deterrence that cannot readily be achieved by a system of public enforcement whose scope and remedy authority are limited. Moreover, a well-designed private enforcement system can create incentives for efficient discovery. Furthermore, put in place in the context of a loser-pays system, as is currently present in most EU countries, private enforcement has the potential to generate substantial benefits by providing the right incentives to litigants. Finally, a private enforcement system provides a direct means by which victims can be compensated.

It is easy to see that private and public enforcement systems can be highly complementary. However, to the extent that the systems substitute for one another, it is possible for the combined system to lead to duplication of effort and inefficiency.[22] The fact is that the systems of public and private enforcement differ on a number of dimensions, and neither perfectly aligns the public interest with the private interests of the parties subject to litigation.

In a recent article, McAfee and his co-authors stress their belief that private parties are likely to be better informed than public agencies,[23] although likely to use the antitrust laws strategically to their private advantage. Segal and Whinston also see trade offs in the two systems, pointing in particular to public enforcers being better positioned to undertake the appropriate balancing in rule of reason cases.[24]

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[21] A. Klevorick, "The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy." Yale L. & Pol'y Rev./Yale Journal of Regulation Symposium: Constructing a New Federalism (1996).

[22] For a broad discussion of this subject, see R. Schmidbauer, "The Institutions Involved in EC Antitrust Enforcement under Regulation 1 and the Green Paper on Damages Actions – An Overview, Critique and Outlook" (2006), available at SSRN: http://ssrn.com/abstract=914169.

[23] P. McAfee, H.. Mialon and S. Mialon, "Private v. Public Antitrust Enforcement: A Strategic Analysis," (Emory L. & Econ. Res. Paper No. 05-20, 2008) available at SSRN: http://ssrn.com/abstract=775245.

[24] I. Segal & M. Whinston, "Public vs. Private Enforcement of Antitrust Law: A Survey," Stan Law and Economics Olin Working Paper No. 335, 2006, available at SSRN: http://ssrn.com/abstract=952067.

In the end, there is no easy answer to the question of whether the system of private enforcement in the U.S. is or is not excessive. It is noteworthy that the EU proposals for a new system of private enforcement temper the U.S. system substantially (e.g., single rather than treble damages).[25] That alone tells us that there are differences of opinions, but it does not tell us which system is likely to be the better on benefit-cost grounds.

There are many unanswered or untested questions with respect to the EU's proposed system. If both direct and indirect purchasers can sue, will too much deterrence be generated? What are the appropriate forums – member states, the EU or both? If class actions are not allowed, will there be under-deterrence or will criminal penalties and private enforcement be sufficient? What are the appropriate burdens of proof and persuasion that should be placed on the parties?

There are lessons to be learned from the U.S. experience about these and other questions of import.[26] The ultimate questions are unlikely to be answered, however, until we evaluate the actual EU experiences as they unfold.

III. CONCLUDING COMMENTS: WHY ECONOMISTS DIFFER

As we move through the first decade of the new millennium, we continue to see important differences among economists in their perspectives on antitrust law and its enforcement. In this section, I briefly highlight a few. First, there remain differences as to whether economic efficiency should be the sole norm in antitrust, or a norm that should be balanced against others such as consumer welfare and the promotion of small business. One interesting debate surrounding the importance of such norms surrounds joint ventures and acquisitions involving daily newspapers. Grunes and Stuckey, both writing as attorneys of the Antitrust Division, argued that editorial diversity is an important and distinct norm that should be highly valued when looking at newspaper transactions. The parties to transactions have typically argued to the contrary.

Second, there remain differences as to the ability of the courts to sort out complex legal and economic questions and the ability of the antitrust authorities to successfully undertake and complete investigations accurately and in a timely fashion. This is particularly the case when investigations involve dynamic network industries. One recent debate on

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[25] See the EU Green Paper, "Damages actions for breach of the EC antitrust rules," SEC (2005) 1732.

[26] See D. Rubinfeld, "An Empirical Perspective on Legal Process: Should Europe Introduce Private Antitrust Enforcement," in New Frontiers of Law and Economics (Univ. of St. Gallen, Switzerland, 2006, Schulthess) pp. 141-48 for details.

this subject surrounds *U.S. v. Microsoft*.[27] Fisher and Rubinfeld (2000) support active intervention in an industry in which innovation is significant. Evans and Schmalensee (2000) argue to the contrary, claiming in part that intervention is unnecessary in a world of dynamic Schumpeterian competition.

Third, there remain differences as to the importance of economic theory and empirical regularities; some place more weight on the former and some on the latter. The recent U.S. Supreme Court decision in *Leegin* offers a prime example.[28] Some economists who support the decision believe as a matter of economic theory that the incentive to engage free-riding is so powerful that even a rule of reason approach to vertical minimum price fixing is not going far enough (they would support per se legality). Many economists who oppose the decision believe that there is substantial empirical evidence supporting the anticompetitive use of vertical price restrictions.

Fourth, differences remain as to the ability of enforcement authorities and courts to successfully enforce the antitrust laws in complex cases. For those that support a reduced enforcement effort, cases that are brought by the agencies and lost in the courts are seen as evidence of over-enforcement (so-called "Type 1 errors"). For those who more aggressively support enforcement, a primary concern lies with the failure to bring cases against firms that are violating the antitrust laws ("Type 2 errors")

If one were to take a poll of economists as to their positions on the four issues I have just raised, I believe that one would find a great variation in responses and a substantially less-than-perfect correlation between responses and one's attachment to the Chicago School. Recent decisions notwithstanding, the long-run evolution of the antitrust laws and antitrust enforcement is heavily driven (with a lag) by the state of antitrust economics. That is not to say, however, that politics does not matter. One's views as to the likely success of particular types of antitrust enforcement may well differ over the political business cycle.

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[27] 147 F. 3d 935 (D.C. Cir. 1998).

[28] Leegin Creative Leather Prods v. PSKS, Inc., 127 S. Ct. 2705 (2007).