Improving Antitrust Sanctions

Daniel L Rubinfeld, Berkeley Law

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Global Antitrust Economics

Current Issues in Antitrust and Law & Economics

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Francine Lafontaine
Carlos Mena-Labarte
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Editors’ Note

DOUGLAS H. GINSBURG
JOSHUA D. WRIGHT
NICOLAS CHARBIT
ELISA RAMUNDO
DUY D. PHAM


Antitrust law has become increasingly important in recent years, especially as the number of antitrust related disputes increases. It becomes crucial to analyze how courts and agencies currently deal with these cases; how they assess the concepts of market definition and market power; how they evaluate coordination issues, such as information exchange and price signaling, and what conduct can be considered as violations of antitrust laws; how they determine remedies and settlements; and how they establish who should be punished in cases of antitrust violation (the violating firm, its agents or both). The Global Antitrust Economics Conference brought together lawyers, enforcers, economists, and academics to animate the discussion on those topics.

In this book, 13 prominent authors offer 11 contributions that tackle some of the most stimulating topics debated during this one-day event in Global Antitrust Economics. Thus, Pierre-Yves Cremieux and Aaron Yeater, while they underline that convergence in antitrust economics is recent and remarkable, they also point out the still existing conflicts in economic evidence presented by competition experts; John Harkrider explains his point of view according to which the US Federal Trade Commission and Department of Justice are both law enforcers and regulators, enforcing laws that are regulatory in nature, relying more on economists than eyewitnesses, reacting more to what may happen, than what has already occurred; Keith Hylton discusses why monetary fines, to be a more effective deterrent threat, should focus on the firm rather than on its agents; Francine Lafontaine offers an analysis of the use of economics in support of the competition mission at the US Federal Trade Commission; Carlos Mena-Labarthe discusses the Mexican experience to show how remedies and their negotiation are valuable tools for emerging competition authorities; Maureen Ohlhausen tackles the “Brother, May I?” problem or the
challenge of competitor control over market entry; William Page tries to identify those signals that solicit cooperation to achieve noncompetitive equilibria, thus bringing about agreements under Section 1 of the Sherman Act; Dan Rubinfeld explains why, in his point of view, our current systems of private and public enforcement can be improved if more attention is given toward increasing individual incentives; Loren Smith and Maria Stoyadinova highlight the prominence of market definition in antitrust evaluation and litigation; Gregory Werden addresses the concept of the relevant market by highlighting that it is a device for separating active competitive forces that directly and immediately affect economic performance (e.g., prices) from forces that are passive or have indirect, delayed, or highly uncertain effects on economic performance; finally, Lawrence White shows why the US Merger Guidelines and its guidance on market definition continue to provide a robust and powerful analytical framework for defining markets for the purpose of merger analysis.

This volume guides readers through some of the most important and cutting-edge issues in global antitrust economics.

The editors would like to give their sincere thanks to the 13 authors for their hours of labor dedicated to this unique collection of articles.
During the Global Antitrust Economics conference that took place last May, we heard from panels on a variety of topics, including the use of economic evidence in antitrust cases, the role of market definition in modern antitrust analysis, the mechanisms through which competitors coordinate with each other, the process of negotiating settlements and remedies, and the relative merits of punishing corporations and individuals. Many panelists submitted papers for inclusion in this volume; in this Foreword we briefly describe each of their contributions.

Commissioner Maureen Ohlhausen of the US Federal Trade Commission led off the event with a trenchant analysis of the challenge to competition when incumbent firms have control over market entry. Like restrictions that require innovators to obtain permission from government gatekeepers before entering a market – which she likened to the childrens’ game “Mother, May I?” – competitor-imposed restrictions upon entry may also undermine free-market principles and economic liberty, and may do so to an even greater extent. This particular problem, which Ohlhausen aptly coins the “Brother, May I?” problem, may manifest itself as a law or regulation, a decision of a financially-interested state board, or exclusionary conduct by a monopolist. The paper examines the problem through the lens of three recent cases: North Carolina State Board of Dental Examiners v. Federal Trade Commission (state licensing boards), Federal Trade Commission v. Phoebe Putney Health Systems, Inc. (certificate-of-need laws), and McWane, Inc. v. Federal Trade Commission (exclusionary conduct). In addition to its sound analysis, the paper contributes to antitrust scholarship a simple expression to describe a widespread problem that may take varied forms. We predict the term “Brother, May I?” will, in short order, be ubiquitous in the vernacular of the antitrust bar.

Pierre-Yves Cremieux of the Analysis Group in Boston proceeded from the observation that, though economists rarely disagree regarding fundamental principles, such as gains from trade or the importance of incentives, highly qualified economists appear on opposite sides of litigation in virtually every case. Use and Abuse: The Myth of Divided Antitrust Economics, which Cremieux co-authored with his colleague Aaron Yeater, posits that the reason for such divergent conclusions is not attributable to theoretical or...
methodological disagreement and only rarely is attributable to unprofessional arguments; rather, econo-
mists reasonably may make different underlying assumptions about the characteristics of the market in
question. As an example, the authors explain that in the highly publicized LCD price-fixing case, one
economist found a 20% overcharge while the other found none. The authors explain that this wide
variation in overcharge estimates is attributable to the economists’ disagreement over whether the Producer
Price Index for microprocessors was an appropriate proxy for costs.

John Harkrider, a partner at Axinn, Veltrop & Harkrider in New York City, writes that the U.S. Department
of Justice and Federal Trade Commission straddle a fine line between law enforcement and regulation.
Harkrider defines the regulatory role as one that aims to address firms’ future conduct, seeks remedies
that require affirmative conduct, and involves interpretation of the agency’s own rules, while a law
enforcement role usually addresses conduct that has already occurred, seeks only cessation of the challenged
conduct, and is governed by court decisions. Although the agencies insist that they are engaged in law
enforcement simpliciter and forswear the title of regulator, Harkrider argues that many of their activities
indeed seem to fit the regulatory role. For example, with respect to mergers, the agencies require pre-
notification, assess future effects, often require affirmative commitments such as guarantees of nondis-
criminatory access to facilities, and are governed not only by court decisions but by the Merger Guidelines,
which the agencies wrote themselves. Because of their twin roles, Harkrider argues, the agencies must
exercise their power carefully and transparently, and should solicit input from market participants regarding
their rules and practices.

Francine Lafontaine, a professor at the University of Michigan and, at the time of the conference, Director
of the Bureau of Economics at the Federal Trade Commission offers heretofore unavailable insights into
the Bureau’s role in the agency. Lafontaine describes, for example, its participation in investigations and
policy formation and its more general research and outreach objectives. The Bureau’s economic analyses
– both theoretical and empirical – allow the Bureau of Competition to make better informed enforcement
decisions. Meanwhile, its outreach efforts take the form not only of public comments but also of informal
discussions with lawmakers, participation in workshops, and contributions to US submissions to the
OECD. The economists cannot do it alone, however; the economic analysis is “greatly enriched by the
interaction and cooperation between the FTC’s economists and attorneys during the course of the inves-
tigations, as they work together to gather relevant information, meet with parties, carry out investigational
hearings, and so on.”

A trio of submissions address the persistent role of market definition in antitrust litigation and agency
analyses despite recent calls to reduce its influence. Greg Werden, Senior Economic Counsel at the
Antitrust Division and a prolific author on antitrust economics, maintains in The Relevant Market Concept
in Antitrust Law that, despite the advent of powerful economic tools that permit economists to examine
competitive effects directly, the concept of the relevant market “is not the relic of a bygone era;” it
properly remains the foundation for all modern competition analysis in antitrust cases. In support of his
claim, Werden discusses the role of the relevant market in coordinated effects merger cases, in unilateral
effects merger cases, and in Sherman Act conduct cases.

Lawrence White, a professor of economics at the Stern School of Business, New York University, likewise
discusses the importance of defining a market. White explains that the first step in merger analysis should
be to establish the boundaries of a market, and then to determine whether the proposed merger might
allow the merging firms to exercise market power, as measured by the hypothetical monopolist or “SSNIP”
test. White argues, however, that the SSNIP test is less useful when applied to unilateral effects cases and
to monopolization cases.
Loren Smith, Senior Vice President of Compass Lexecon and former Federal Trade Commission staff economist, explores the difference between agency analysis and evaluation of mergers and analysis prepared for trial. Smith argues that agencies and practitioners place more emphasis on competitive effects until they prepare for trial, when the focus turns to market definition and other forms of evidence. In The Prominence of Market Definition in Antitrust Evaluation and Litigation, Mr. Smith describes the steps agencies take to analyze mergers, steps that often allow agency economists to avoid market definition altogether, as well as the shift in analytical focus when preparing to persuade a judge that the merger will substantially lessen competition.

The contributions by Professor Keith Hylton of the Boston University School of Law, Should Antitrust Fines Target Firms of Agents?, and by Professor Daniel Rubinfeld, of the New York University School of Law, Improving Antitrust Sanctions, deal with the issue of optimal deterrence of cartel behavior. In particular, they focus on the structure of antitrust sanctions most likely to deter cartels efficiently. A critical question for antitrust policy is whether sanctions for cartel behavior should be borne both by the individuals perpetrating the illegal conduct as well as by their corporate employers and if so, how exactly individuals should be sanctioned. In Antitrust Sanctions, a previously published article by the authors of this Foreword, we argued that the optimal mix of antitrust sanctions requires a significant shift in focus toward individuals, that ever-increasing corporate fines are unlikely to increase deterrence, and that competition agencies ought to embrace debarment as a useful tool to increase the efficiency of cartel sanctions. Each contribution addresses those proposals in the course of developing new economic arguments aimed at improving the efficiency of antitrust penalties for collusion.

Professor Hylton argues that monetary fines levied against firms are always the most efficient deterrent against price-fixing. Hylton’s analysis challenges our call in Antitrust Sanctions for a shift in the allocation of overall “sanction capital” from the corporation to the individual. Hylton argues that if a firm has an incentive to fix prices, and only the firm’s agents are punished, then the firm can always reward its agents enough to induce antitrust law violations. The key assumption of Hylton’s analysis is that agency costs within the firm are sufficiently low that this form of contracting is efficient. In Hylton’s model, because a firm can always contract with its agent to compensate it for the cost of any antitrust sanction imposed on the individual, the individual sanction cannot improve deterrence. Ultimately, he argues, rather than targeting agents, eliminating price-fixing incentives for firms remains the most efficient method for preventing violations of antitrust laws.

Professor Rubinfeld takes the opposite position. He argues that efficient cartel deterrence requires improving the incentives for individuals in the firm to avoid cartel behavior. Exploring different proposals to improve both public and private antitrust sanctions, Rubinfeld argues that the heterogeneity in the sensitivity of different cultures to different forms of sanctions requires competition regimes to think of criminal fines and private actions as playing complementary roles in deterring anticompetitive conduct—with private enforcement emphasizing compensation and public enforcement focused on penalizing anticompetitive behavior. Professor Rubinfeld also offers suggestions for improving both public and private enforcement in antitrust through appropriate and targeted prison sentences along with expanded and increased rewards for whistleblowers.

Enforcement agencies seek to reach effective settlements and implement sound remedies for both merger and non-merger antitrust cases. In Negotiation of Settlements and Remedies by Young Competition Agencies: The Mexican Experience, Carlos Mena-Labarthe, who heads the Investigative Authority in the Federal Economic Competition Commission of Mexico, explores the difficulties young competition agencies face when evaluating the effectiveness of remedies. Labarthe assesses the institutional concerns that young agencies must consider when implementing a settlement policy. Legitimacy, credibility, and
deterrence are all factors that must be weighed on account of the agencies’ limited experience in relation to other jurisdictions. More specifically, the author addresses the challenges faced by the Mexican authority, such as cultivating a comprehensive discourse for addressing competition concerns and setting consistent standards to generate predictability.

Identifying anticompetitive information exchanges and price signaling is necessary for effective antitrust enforcement. Panelists discussed price and behavior signaling as it relates to coordinated conduct. William Page, a Professor in the Levin College of Law at the University of Florida, provides a legal framework for distinguishing lawful from unlawful information exchanges in his paper, Signaling and Agreement under Section 1 of the Sherman Act. Professor Page concludes that prearranged signals are clearly unlawful. He argues that private exchanges between rivals should be viewed skeptically and that implicit signals and public comments made to the market should generally be lawful. By employing this framework, courts, practitioners, and agencies can navigate the differences between tacit and express collusion.

The Global Antitrust Economics conference provides a forum for antitrust economists, practitioners, regulators, and legal scholars to explore the most critical issues, both substantive and procedural, arising in competition law around the world. The papers submitted by panelists and selected for this volume are representative of the careful and insightful perspectives presented at the conference, the wide range of topics discussed, and the power of economic analysis in providing a common language to facilitate communication about issues facing competition agencies and courts around the world.
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Improving Antitrust Sanctions

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Abstract

Our current systems of private and public enforcement can be improved if more attention is given towards increasing individual incentives. Public enforcement can benefit from appropriate targeted prison sentences, while private enforcement would benefit from a more expansive set of whistle blower opportunities and rewards.

* Sarah Tang provided valuable research assistance.
Improving Antitrust Sanctions

I. Introduction

In a recent paper, Doug Ginsburg and Josh Wright have made a number of provocative comments and suggestions concerning corporate liability.\(^1\) The suggestions move us in the right direction by focusing on the distinction between individual and corporate liability and by emphasizing the importance of individual incentives.

Based on the current empirical evidence relating to public enforcement, Ginsburg and Wright proceed from a starting point that presumes under-enforcement. This is appropriate. It is well known that in recent years US enforcement agencies have increased corporate fines to deter anticompetitive activity. The average fine levied on corporations participating in anticompetitive conduct has grown from $28 million in the early 1990s, to well over $500 million in recent years.\(^2\) Yet, despite this dramatic increase in corporate fines, studies have shown that cartel activity has remained constant over the past four decades.\(^3\) This suggests that financial penalties alone generate only partial deterrence.\(^4\)

I offer no evidence to the contrary. Rather, I explain why the question of optimal enforcement becomes especially complex once one takes into account the overlap between public and private enforcement. I also offer some thoughts as to how the current system of public enforcement might be improved.

II. Improving Deterrence

Persistent recidivism reveals shortcomings in the current public enforcement system. From 1999 to 2009, the top 10 recidivist firms in the US were cited for multiple counts of anticompetitive conduct.\(^5\) To illustrate, Ajinomoto, Bayer, and Coca Cola all faced multiple citations each within a two year period.\(^6\) In the current landscape, the probability of detection may not be very high and for some the expected gain of collusion may outweigh the expected fine.\(^7\) It is plausible to expect that relatively high rates of recidivism result, at least in part, from the fact that current measures do not impose sufficient costs on companies or corporate executives.\(^8\)

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2 Id. at 10.
5 Ginsburg & Wright, *supra* note 1 at 15.
There is reason to believe that fines are less effective than prison sentences, at least with respect to key individual offenders. One response is to augment corporate fines with fines on individual perpetrators. This is an apt approach because corporate fines are typically borne by shareholders who do not directly participate in decision making processes. I expect that imposing consequences on parties with direct decision making powers (such as directors and officers) will produce greater deterrence than corporate fines alone.

Of course, individual fines do not present the perfect solution, especially if corporations indemnify individual perpetrators. I am sympathetic with Ginsburg and Wright’s suggestion that we increase the length of prison sentences associated with white collar crimes. Executives are more likely to be responsive to the threat of incarceration, given that it introduces real, lifestyle-altering consequences. Apart from the stigma associated with a criminal conviction, offenders are deprived of their privacy, rights, and future earnings. For members of the bar, disbarment may also present a viable alternative to a prison sentence. Disbarment produces similar deterrent effects by publicizing the offense and imposing reputational and financial punishment on offenders without the social costs of criminal trials. Both of these punishments force the individual responsible to internalize the costs of his or her actions and, therefore, are reasonable deterrence mechanisms.

We can also further improve on the current system by implementing whistleblower rewards. Empirical evidence reveals a strong link between financial rewards and increased cartel reporting. Unfortunately, the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”) currently does not include a whistleblower rewards provision. While the topic remains controversial, many experts agree that some form of reward is vital to compensate whistleblowers for the various risks they face in assisting authorities in cartel investigations. Therefore, a logical next step would be to improve the incentives that encourage employees to report anticompetitive behavior. This could improve deterrence by increasing the pool of potential informants.
III. Private Enforcement

Despite its many flaws, private enforcement continues to serve an important function. Private and public enforcement play complementary roles in deterring anticompetitive conduct, with private enforcement emphasizing compensation and public enforcement focused on penalizing and deterring anticompetitive behavior. Private enforcement also adds to the deterrence effect, especially when private parties face lower information costs than their public counterparts and have the potential to uncover otherwise undetected cartel activity.19

In terms of consumer compensation, the US Department of Justice ("DOJ") has relied primarily on private litigation for damage recovery since 1960.20 A comparison of public and private recoveries from 1990 through 2011 reveals that private litigators recovered $35.8 billion in damages for consumers, three times the amount the DOJ collected in the same period.21 Private litigation, particularly through class action lawsuits, can impose steep damage awards on offending corporations, imposing fiscal consequences beyond the limits of public enforcement.

Private litigation has also been successful in prosecuting cases which have not been pursued by federal or state agencies. In a study of 40 antitrust cases with $23 billion in cumulative recoveries, 46% of recoveries were a result of non-follow on cases.22

Of course, private enforcement is not a panacea. While empirical evidence has proven that private action can expand and complement the scope of public litigation, the current system has many flaws that can and should be corrected. A key complaint regarding private litigation is that its high payouts invite excessive and unnecessary litigation.23 There are clearly avenues for potential improvement and, in recent years, the US judicial system has taken steps to eliminate meritless lawsuits.

Of the other areas of potential improvement, two strike me as worthy of consideration: (1) reforming the complexities that flow from Illinois Brick; and (2) employing a variant of the loser pays system.24

In June 1977, the US Supreme Court in Illinois Brick ruled that indirect purchasers could not file a suit or claim trebled damages from firms that had engaged in anticompetitive behavior.25 The indirect purchaser rule was aimed at protecting defendants from paying double recoveries. The ruling assumed that indirect purchasers would pass on overcharges to direct buyers, making it unnecessary to compensate both parties. While Illinois Brick was certainly a step in the right direction in minimizing unnecessary class action lawsuits, the ruling’s lack of clarity and the complications created by the various state laws that repealed the ruling in Illinois Brick must be addressed if it is to be a cornerstone of the law.26 Recent cases such

22 Lande & Davis, supra note 21 at 897.
as *Bell Atlantic v. Twombly* and *AT&T Mobility LLC v. Concepcion* have added clarity while generating continued controversy by: (i) taking a more aggressive stance toward dismissing meritless cases; and (ii) disallowing class actions in cases in which contracts have arbitration clauses.27

With respect to other possible reforms, I support procedures that would move the current opt-out system to an opt-in system. In the United States, individuals who do not wish to be involved in class proceedings must affirmatively opt-out.28 While opt-out systems inarguably favor victim compensation, they also often result in large costly-to-litigate classes. Indeed, risk-averse defendants have a strong incentive to settle post-certification to avoid lengthy and potentially expensive litigation.29 Opt-in systems prevent abusive litigation by producing a smaller class, and thus smaller contingency fees, which discourage law firms from bringing frivolous suits to court. They do, however, leave open the risk that some (uninformed) consumers will not be compensated and there will be inadequate deterrence.

### IV. Concluding Remarks

While double paying may not be ideal, I do not see it as a major concern given that public sanctions primarily serve a deterrence function, while private enforcement is more directed towards compensation. There is reason to believe that private litigation has uncovered and prosecuted antitrust violations that were beyond the resources of public enforcers, thereby increasing overall detection and deterrence. Despite its merits, however, private litigation has serious shortcomings. Some of these can be addressed through substantive changes such as those I have suggested.

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Editors’ Bios

Douglas H. Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1986 by President Ronald Reagan. He served as Chief Judge from 2001 to 2008. In addition to remaining with the Court as senior status circuit judge, Judge Ginsburg is a full-time faculty member at the George Mason University School of Law. Prior to his appointment to the DC Circuit, Judge Ginsburg was a professor of law at Harvard University, served as Assistant Attorney General of the Justice Department’s Antitrust Division, and was Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget.

Joshua D. Wright is the Director of the Global Antitrust Institute and holds a courtesy appointment in the Department of Economics. On January 1, 2013, the US Senate unanimously confirmed Professor Wright as a member of the Federal Trade Commission (FTC), following his nomination by President Obama to that position. He rejoined George Mason University School of Law as a full-time member of the faculty in Fall 2015. Professor Wright is a leading scholar in antitrust law, economics, intellectual property, and consumer protection, and has published more than 70 articles and book chapters, co-authored a leading antitrust casebook, and edited several book volumes focusing on these issues. Professor Wright also served as Co-Editor of the Supreme Court Economic Review, a Senior Editor of the Antitrust Law Journal, and an Editor of the International Review of Law and Economics. Professor Wright’s teaching and interests include Antitrust, Contracts, Law and Economics, the intersection of Intellectual Property and Antitrust, and Quantitative Methods. Wright previously served the Commission in the Bureau of Competition as its inaugural Scholar-in-Residence from 2007 to 2008, where he focused on enforcement matters and competition policy. Wright’s return to the FTC as a Commissioner marked his fourth stint at the agency, after having served as an intern in both the Bureau of Economics and Bureau of Competition in 1997 and 1998, respectively. Wright received his JD from UCLA in 2002, his PhD in economics from UCLA in 2003, and graduated with honors from the University of California, San Diego in 1998. He is a member of the California Bar.
Nicolas Charbit, PhD, LLM, was admitted to the Paris Bar in 1994. He had been practicing from 1994 to 2005 in the field of competition law with strong emphasis on cartels and network industries. Nicolas wrote for French and international legal journals and taught these subjects at university and business schools. He has published several books and papers on EC and French competition law. He has completed a PhD thesis at Paris Sorbonne University on antitrust law and the public sector. He is the founding partner of the Institute of Competition Law and has been the Editor of Concurrences Review since 2004.

Elisa Ramundo graduated cum laude from the University of Bologna Law School. She holds an LLM at the University of Chicago Law School. Over the years, Elisa has gained professional experience in European, US, and International antitrust law. She worked at the US FTC (Washington, DC) as an international antitrust consultant, and in a tier-one Italian law firm as an associate in the competition practice (Rome/Milan). She also served as a legal intern at the European Commission (Brussels). Elisa is currently the Managing Editor of Concurrences Review and is based in New York City.

Duy D. Pham obtained his JD from the University of Ottawa, graduating cum laude, and his LLM from the Georgetown University Law Center, graduating with Distinction and on the Dean’s List. He was previously a Summer and Articling Student at a top Canadian law firm. He is currently an Associate Editor with Concurrences Review and an International Antitrust and Trade Consultant with the World Bank.
Contributors’ Bios

Pierre-Yves Cremieux, Analysis Group Managing Principal, specializes in antitrust, industrial organization, and econometrics. He has consulted to law firms, corporations, and government agencies and has testified in jury and bench trials as well as arbitrations and administrative proceedings on behalf of clients in the United States and abroad. He has worked on some of the largest US cartel and monopolization cases of the last decade on issues ranging from liability to damages and class certification. Dr. Cremieux has published a number of academic articles on antitrust issues including global enforcement, regression analysis in antitrust litigation, and class certification. His research has also been cited in leading media outlets including The Wall Street Journal and Forbes. Dr. Cremieux is an adjunct professor at the University of Quebec at Montreal and lectures on global antitrust at the Yale School of Management.

John D. Harkrider has worked on some of the largest and most significant antitrust matters over the last 20 years including Ball’s $6.8 billion offer to acquire Rexam, PLC, Thermo Fisher Scientific’s $13.6 billion pending acquisition of Life Technologies Corporation, Google’s $12.5 billion acquisition of Motorola Mobility, Google’s Standard Essential Patent decree, MasterCard’s IPO, AT&T’s $67 billion acquisition of Bell South and AT&T Wireless’ $41 billion acquisition of Cingular. An accomplished litigator, he has litigated four DOJ/FTC merger challenges, two private merger challenges, and was retained by the DOJ in its investigation and suit to prevent WorldCom’s acquisition of Sprint, the largest merger ever challenged by the DOJ. He also litigated a number of Sherman One and Two matters in District Courts throughout the United States as well as the Second, Seventh, Ninth, and Tenth Circuits. He has won a number of awards, including in 2013, American Lawyer Litigator of the Week and Global Competition Review Matter of the Year, and in 2012, Global Competition Review Lawyer of the Year and Global Competition Review Merger Control Matter of the Year. He is ranked by Chambers, who has called him “an extremely intelligent attorney with formidable understanding of business and finance” as well as a lawyer who “has the best understanding of not only how to build a case, but also how to break it.”
Keith N. Hylton, a William Fairfield Warren Professor of Boston University and Professor of Law at Boston University School of Law, joined the BU Law faculty in 1995 after teaching for six years and receiving tenure at Northwestern University School of Law. He is a prolific scholar who is widely recognized for his work across a broad spectrum of topics in law and economics, including tort law, antitrust, labor law, intellectual property, civil procedure, and empirical legal analysis. He has published four books and more than 100 articles in numerous law and economics journals, and serves as a contributing editor of the Antitrust Law Journal, co-editor of Competition Policy International, and editor of the Social Science Research Network’s Torts and Products Liability Law Abstracts. He is a former chair of the Section on Torts and Compensation Systems of the American Association of Law Schools, a former chair of the Section on Antitrust and Economic Regulation of the American Association of Law Schools, a former director of the American Law and Economics Association, a former Secretary of the American Bar Association Labor and Employment Law Section, a former member of the editorial board of the Journal of Legal Education, current chair of the Law and Economics section of the American Association of Law Schools, and a current member of the American Law Institute.

Francine Lafontaine is the William Davidson Professor of Business Economics and Public Policy at the Ross School of Business, and Professor, Department of Economics, both at the University of Michigan. She served as Director of the Bureau of Economics at the US Federal Trade Commission from Fall of 2014 to December 2015. She returned to the University in January 2016 to take on the role of Associate Dean for Faculty and Research at the Ross School of Business. Her research focuses on contracting, especially contracts used in distribution, and the study of vertical restraints and vertical integration decisions. She also conducts research on the effect of contracting practices on firm performance, and examines issues surrounding business creation and survival in retail and small-scale service industries. Her research (with various co-authors) has been published in, among others, the American Economic Journal – Applied, the American Economic Journal – Micro, the Journal of Industrial Economics, the Journal of Law and Economics, the Journal of Law, Economics and Organization, the Journal of Political Economy, and the RAND Journal of Economics. She co-authored The Economics of Franchising with Roger D. Blair, published by Cambridge University Press, and edited Franchise Contracting and Organization for Edward Elgar. She was the President of the Industrial Organization Society from 2010 to 2012, having served as its Vice-President from 2008 to 2010. From 1997 until joining the FTC, she was a co-editor at the Journal of Economics & Management Strategy. She was also co-editor at the Journal of Law, Economics, & Organization from 2006 to 2012, and served as Associate Editor at the RAND Journal of Economics from 1997 to 2007. In addition to her PhD in economics from the University of British Columbia in Canada, Prof. Lafontaine holds an honorary Doctorate from the Université de Rennes 1, in Rennes, France. Prof. Lafontaine also has worked as an expert witness in legal disputes and antitrust cases relating to franchising and contracting.

Carlos Mena-Labarthe was appointed Chief Prosecutor (Autoridad Investigadora) at the Federal Economic Competition Commission of Mexico (COFECE) in October 2014 for a four year term. He has worked for the Mexican competition authority since 2007. He was the head of the Planning, Institutional Relations and International Affairs Unit where he coordinated the efforts to create the first Strategic Plan and the first Annual Plan of the agency and represented the Commission before Congress for the discussions of a new law in 2014. He was director of cartels and interstate commerce from 2007 to 2008 and...
from 2008 to September 2013, he was the Director General of the Cartel Investigations Division. Mr. Mena has extensive experience in the fields of regulation and competition law. Prior to joining the Mexican competition authority he worked for national and international law firms in their competition law practice. He was an international Fellow of the Federal Trade Commission of the United States of America. He has also received training in investigations and management of enforcement agencies at the European Commission (DGComp), the Canadian Competition Bureau and the Australian Competition and Consumer Commission. He has written for numerous publications and is the editor and co-author of five books on competition law, regulation and public policy. Mr. Mena holds a Master’s Degree in Business Law with honors from the Attorney Bar Association in Madrid, Spain; a Master’s Degree in Regulation from the London School of Economics and Political Science with distinction for the best overall performance; and a degree with first-class honors in Law from ITAM.

Maureen K. Ohlhausen was sworn in as a Commissioner of the US Federal Trade Commission on April 4, 2012, to a term that expires in September 2018. Prior to joining the Commission, Ohlhausen was a partner at Wilkinson Barker Knauer, LLP, where she focused on FTC issues, including privacy, data protection, and cybersecurity. Ohlhausen previously served at the Commission for 11 years, most recently as Director of the Office of Policy Planning from 2004 to 2008, where she led the FTC’s Internet Access Task Force. She was also Deputy Director of that office. From 1998 to 2001, Ohlhausen was an attorney advisor for former FTC Commissioner Orson Swindle, advising him on competition and consumer protection matters. She started at the FTC General Counsel’s Office in 1997. Before coming to the FTC, Ohlhausen spent five years at the US Court of Appeals for the DC Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney. Ohlhausen also clerked for Judge Robert Yock of the US Court of Federal Claims from 1991 to 1992. Ohlhausen graduated with distinction from George Mason University School of Law in 1991 and graduated with honors from the University of Virginia in 1984. Ohlhausen was on the adjunct faculty at George Mason University School of Law, where she taught privacy law and unfair trade practices. She served as a Senior Editor of the Antitrust Law Journal and a member of the American Bar Association Task Force on Competition and Public Policy. She has authored a variety of articles on competition law, privacy, and technology matters.

William H. Page is the Marshall M. Criser Eminent Scholar at the University of Florida Levin College of Law. He has authored over 50 articles and book chapters on antitrust law and economics. He is co-author (with John Lopatka) of *The Microsoft Case: Antitrust, High Technology, and Consumer Welfare* (University of Chicago Press 2007) and is the co-author and editor (with Joseph Bauer and John Lopatka) of *Kintner’s Federal Antitrust Law* (Lexis-Nexis). He was a trial attorney with the Antitrust Division of the US Department of Justice and has taught at Boston University and at Mississippi College, where he was the J. Will Young Professor of Law. He received his JD summa cum laude from the University of New Mexico and his LLM from the University of Chicago.
**Daniel L. Rubinfeld** is Professor of Economics Emeritus at the University of California, Berkeley and Professor of Law at New York University School of Law. He served from June 1997 through December 1998 as Deputy Assistant Attorney General for Antitrust in the US Department of Justice. Professor Rubinfeld is the author of a variety of articles relating to antitrust and competition policy, law and economics, law and statistics, and public economics and of two textbooks, *Microeconomics and Econometric Models and Economic Forecasts*. He has consulted for private parties and for a range of public agencies including the US Federal Trade Commission, the Antitrust Division of the Department of Justice, and the State of California Attorney General’s Office. In the past he has been a fellow at the National Bureau of Economic Research (“NBER”), the Center for Advanced Studies in the Behavioral Sciences, and the John Simon Guggenheim Foundation. He received an honorary doctorate from the University of Basel. Professor Rubinfeld teaches seminars in antitrust law and economics and in quantitative methods, and is a member of the American Academy of Arts and Sciences and a research fellow at the NBER.

**Loren Smith** specializes in the application of economic and econometric tools to antitrust and competition matters. His experience includes the analysis of horizontal and vertical mergers, vertical restraints, pay-for-delay, and exclusionary conduct. Since joining Compass Lexecon in 2013, he has assisted clients with government investigations and private litigation in industries that include retail, healthcare, consumer products, and intermediate goods. Prior to joining Compass Lexecon, Smith worked at the US Federal Trade Commission as a staff economist. While at the FTC, he supported significant settlement negotiations such as SCI’s acquisition of the Alderwoods Group in 2006 and major litigation such as FTC v. Watson, co-authored a report to Congress, and provided technical assistance and training to competition agencies in South Africa, Brazil, and Hungary. Smith has taught microeconomics and econometrics at the University of Virginia and Johns Hopkins University, and his research has been published in academic journals that include the *Journal of Applied Econometrics* and the *Journal of Economics and Management Strategy*. Smith received a PhD in economics from the University of Virginia in 2006.

**Maria Stoyadinova** is a Vice President of Compass Lexecon. She has experience consulting on a number of merger and acquisition cases in the food, retail, medical equipment, and information technology sectors. She has also been involved in a variety of litigation and antitrust matters, including breach of contract, price fixing, and intellectual property disputes in the telecommunications, advanced fibers, office supply, and pharmaceutical industries. Previously, Stoyadinova worked as an Associate at LECG, a Managing Analyst at the Compass Lexecon Los Angeles office and a Consultant in the Poverty Reduction and Economic Management division at the World Bank. Maria holds an MA with honors from the Johns Hopkins School of Advanced International Studies, with concentrations in International Law and International Economics.
Gregory J. Werden has worked in the Antitrust Division of the US Department of Justice since 1977 on a wide array of cases and policy matters. Among the policy matters were enforcement guidelines relating to collaboration among competitors, intellectual property, international operations, and mergers. He assisted in the preparation of over 70 amicus briefs filed with the Supreme Court, and since 1985 worked on all appeals in Department of Justice civil antitrust cases. Werden has also authored more than 150 scholarly publications on antitrust policy and related topics, including approximately 30 on the relevant market and how it is delineated.

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Concurrences is a print and online quarterly peer reviewed journal dedicated to EU and national competitions laws. It has been launched in 2004 as the flagship of the Institute of Competition Law in order to provide a forum for academics, practitioners and enforcers. The Institute’s influence and expertise has garnered interviews with such figures as Christine Lagarde, Bill Kovacic, François Hollande and Margarethe Vestager.

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Concurrences Review in partnership with the Global Antitrust Institute of the Law & Economics Center held the Global Antitrust Economics Conference at George Mason University School of Law on May 29, 2015. The conference featured keynote speech from Maureen Ohlhausen, Commissioner of the US Federal Trade Commission, and five panels of prominent speakers that engaged in a heated debate about the different aspects of Antitrust Law and Economics. This book presents contributions on five current issues in Antitrust and Law & Economics:

- Use and abuse of economic evidence in antitrust cases
- Market definition v. Market power: Can they be reconciled?
- Coordination issues: Information exchange and price signaling
- Negotiating settlements & remedies: Do you really need to consent?
- Corporate liability & individual liability: Double-paying?