

LOYOLA CONSUMER LAW REVIEW

Volume 22	Number 1
-----------	----------

SPECIAL ISSUE

THE ANTITRUST MARATHON: ANTITRUST AND THE RULE OF LAW

Editor's Note	
<i>Sarah Tennant</i>	1
Panelists' Biographies	2
Introduction	10
Issue Paper:	
Does the Rule of Reason Violate the Rule of Law?	
<i>Maurice E. Stucke</i>	15
Discussion – Stucke Paper	28
Issue Paper:	
Checks and Balances: European Competition Law and the Rule of Law	
<i>Dr. Philip Marsden</i>	51
Discussion – Marsden Paper	62
Discussion – Cowen Paper	83
Issue Paper:	
Does Antitrust Regulation Violate the Rule of Law?	
<i>Elbert L. Robertson</i>	108
Discussion – Robertson Paper	114

CONSUMER NEWS

Federal Ban on Automated Prerecorded Messages, So-Called "Robocalls," Goes Into Effect	130
The FTC Takes Action on Stop-Foreclosure Scams	134
<i>Kyle Gaffaney</i>	

LOYOLA CONSUMER LAW REVIEW

Editor-in-Chief
Sarah Tennant

Executive Editor
Dipesh Mehta

Managing Editor
Katherine Kopita

Publications Editor
Eileen Flaherty

Articles Editors
Evan Page
Aubrey Parlet

Jennifer Woods

News Editor
Kyle Gaffaney

Senior Staff Editors
Thaddeus Hubert
Samuel Kettering

Staff Editors

Larry Banda	Cailin Naughton
Michael Boyer	Leighton O'Connell-Miller
Christopher Casolaro	Michael Patterson
Caroline Erol	Michelle Reed
Joel Finch	Dave Soden
Blair R. Kipnis	Rachel Stern
Peter R. Matejcak	Cody Vitello
Nicholas McCann	

Faculty Advisors, Loyola University Chicago School of Law
Professor Emeritus Frank M. Covey, Jr. Professor Jane Locke

Cite 22 LOY. CONSUMER L. REV. __ (2009)

LOYOLA CONSUMER LAW REVIEW

Advisory Board

Bob Ballen
Swartz & Ballen LLP
Washington, DC

Joseph P. Bauer
Notre Dame Law School
South Bend, IN

Mark D. Bauer
Stetson U. College of Law
Gulfport, FL

Leonard Bernstein
Reed Smith LLP
Philadelphia, PA

Susan Block-Lieb
Fordham U. School of Law
New York, NY

M. Neil Browne
Bowling Green State U.
Bowling Green, OH

Mark Budnitz
Georgia St. U. College of Law
Atlanta, GA

Stephen Calkins
Wayne State U. School of Law
Detroit, MI

Beth Farmer
Dickinson School of Law
University Park, PA

Michael Faure
Maastricht University
The Netherlands

Eleanor Fox
NYU School of Law
New York, NY

Christina Garcia
The Animal Law Office
San Francisco, CA

Paul George
Texas Wesleyan U. Sch. of Law
Fort Worth, TX

Thomas Grande
Grande Law Offices
Honolulu, HI

Alvin Harrell
OCU School of Law
Oklahoma City, OK

Jeffrey Hart
Foley Baron Metzger
Livonia, MI

Brigid Kennedy
Williams, Montgomery & John
Chicago, IL

Jason Kilborn
The John Marshall Law School
Chicago, IL

Gary Klein
Roddy Klein & Ryan
Boston, MA

Robert Lande
U. of Baltimore School of Law
Baltimore, MD

Lawrence M. Landsman
Block & Landsman
Chicago, IL

Thomas V. Laprade
Lambert Coffin Haenn
Portland, ME

Samuel H. Levine
Arnstein & Lehr
Chicago, IL

Salil Mehra
Temple U. School of Law
Philadelphia, PA

Frances Miller
Boston U. School of Law
Boston, MA

Anthony Ogus
University of Manchester
United Kingdom

Dee Pridgen
UW College of Law
Laramie, WY

Don A. Resnikoff
Finkelstein Thompson LLP
Washington, DC

Paul H. Schieber
Blank Rome LLP
Philadelphia, PA

Heidi Schooner
Columbus School of Law
Washington, DC

Norman Silber
Hofstra Law School
Hempstead, NY

Jeff Sovern
St. John's U. School of Law
Queens, NY

Peter Swire
Mortiz College of Law
Columbus, OH

Maxim H. Waldbaum
Schiff Hardin LLP
New York, NY

EDITOR'S NOTE

Dear Reader:

On Friday, April 17, 2009, antitrust scholars from Europe and North America met in Cambridge, Massachusetts to discuss Antitrust and the Rule of Law. This meeting, co-sponsored by the Loyola University Chicago Institute for Consumer Antitrust Studies and the Competition Law Forum (CLF) of the British Institute of International and Comparative Law, was the third in the series of Antitrust Marathons. The roundtable discussion was convened to address a series of issue papers related to Antitrust and the Rule of Law from a comparative perspective. The discussion was based on a series of short issue papers about different aspects of the rule of law in both American antitrust law and EU competition law.

The *Loyola Consumer Law Review* is excited to present the reader with a complete transcript of the event, with minimal alterations. Issue papers prepared for the discussion define the scope of each segment and precede three of the four sections of the transcript. This was done in order to provide the reader with a greater contextual understanding of the discussion. We believe this format will make this important conversation more approachable.

Enjoy,

Sarah Tennant
Editor-in-Chief
Loyola Consumer Law Review

THE ANTITRUST MARATHON

A ROUNDTABLE DISCUSSION

Location: British Consulate

Address: One Memorial Drive, Cambridge, Massachusetts

Date: Friday, April 17, 2009

Moderated by: Spencer Weber Waller and Dr. Philip Marsden

PANELISTS' BIOGRAPHIES

CHRISTIAN AHLBORN is a partner at Linklaters in London. He practices in the area of EC competition law and EC state aid control, UK competition law and German competition law, including notifications to EC and national competition authorities. Prior to joining Linklaters, Ahlborn worked at the NERA economic consultancy in Cambridge, Massachusetts. He also worked at the Federal Cartel Office in Berlin and at the European Commission for Competition.

FEMI ALESE was a Senior Research Fellow at the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law. Prior to his appointment as a Senior Research Fellow, Alese was a Senior Lecturer at the London Metropolitan University. Alese is the author of *Federal Antitrust and EC Competition Law Analysis*. He is a solicitor in the Supreme Court of England and Wales, and a member of the bar of the State of New York. As part of his Fellowship at the Institute for Consumer Antitrust Studies, Alese studied challenged and litigated mergers in the U.S. and EU.

RICHARD BRUNELL is the Director of Legal Advocacy and Senior Fellow of the American Antitrust Institute (AAI), a non-profit advocacy and research organization. Mr. Brunell is also a

lecturer at Boston College Law School, and was a visiting professor at Boston University School of Law and Roger Williams University School of Law. He practiced antitrust law at Foley Hoag in Boston and in the Antitrust Division of the Justice Department in Washington. A contributing editor of the *Antitrust Law Journal*, Mr. Brunell is the author of numerous antitrust articles, including "The Social Costs of Mergers: Restoring 'Local Control' as a Factor in Merger Policy, 85 N. Car. L. R. 149 (2006). He wrote AAI's amicus briefs in the *linkLine* and *Leegin* cases, and argued before the Supreme Court in *linkLine*. He has testified before Congress and the Federal Trade Commission on resale price maintenance issues.

DR. PHIL BUDDEN was appointed Consul General to New England following the departure of the previous Consul General, John Rankin. Prior to his assignment in Boston, Consul General Budden was the First Secretary for the UK's US Science, Technology, Innovation and Business network, as well as technology policy, transatlantic relations and British-American business affairs. His foreign office career has also included postings in London to the European Secretariat, which advises the Prime Minister on EU strategies, and supported the UK's Europe Minister. He was also head of a Public Diplomacy effort that today has led to, among many other innovations, placing science at the heart of UK foreign and public diplomacy.

TERRY CALVANI practices antitrust law in the Washington, DC office of Freshfields Bruckhaus Deringer LLP. Previously he served as commissioner of the US Federal Trade Commission (1983-1990) where he was acting chairman during 1985 and 1986, and later as a member of the Irish Competition Authority and director of the Criminal Cartels Division. During that period, he was an active member of advisory committees for the EU Competition Directorate. From 1974-1983, Terry was professor of law at Vanderbilt School of Law teaching courses on antitrust law. Following his term on the FTC, he returned to private practice until his appointment in Ireland. Terry has served as chairman of several ABA Antitrust Section committees and two terms on its governing council. He is a member of the American Law Institute and serves on the advisory board of the Antitrust Bulletin. Terry has written and spoken extensively on antitrust issues. While in private practice, Terry has worked on acquisitions/joint ventures in a very large number of industries

and their review by numerous competition agencies. He has participated in civil and criminal investigations in many industries by both federal and state authorities. He has also provided antitrust counseling to a large number of companies and several trade associations.

A. NEIL CAMPBELL is a partner in the Competition, International Trade and Public Policy Group at the law firm McMillan in Toronto. His competition law practice covers merger clearances under the Competition Act and foreign investment reviews under the Investment Canada Act. He advises companies on marketing, distribution, grey marketing and joint venture issues, and he represents companies in cartel, abuse of dominance and other competition law proceedings. Campbell's trade practice concentrates on anti-dumping and subsidy proceedings; NAFTA, WTO, GATT, GATS, TRIPS, TRIMS and Canadian Internal Trade Agreement matters; export/import controls and trade sanctions; and investor-state disputes under NAFTA and bilateral investment treaties. Previously, Campbell taught business and law classes at several Canadian universities, including the University of Toronto and York University.

EDWARD CAVANAGH is a professor of law at St John's University School of Law in New York. Prior to entering the teaching field, he practiced law with two major New York City law firms. Professor Cavanagh is currently chair of the ABA Antitrust Section Committee on Ethics and Professionalism and a member of the Section's Antitrust Remedies Task Force. He served as co-chair of the Antitrust Section's Civil Practice and Procedure Committee from 2001-2004 and as vice-chair from 1997-2001. He also served on the Section's Civil Litigation Task Force in 2000-2001. Professor Cavanagh is a past chair of the New York State Bar Association Antitrust Section and currently a member of its Executive Committee. He is a reporter to the EDNY Committee on Civil Litigation and served as a member of, and reporter to, the Civil Justice Reform Act Advisory Group from 1991-1997. He is also a member of the SDNY/EDNY Committee on Joint Local Rules. Professor Cavanagh has lectured and published widely in the areas of antitrust, federal procedure and practice and complex litigation. He teaches Antitrust Law, Civil Procedure, Federal Practice and Law & Economics.

TIM COWEN is the general counsel for BT Global Services. Prior to that, he was general counsel of BT Ignite. He is a member of the BT Global Services Executive Team, with director-level responsibility. Mr. Cowen originally joined BT in 1991, after working in private practice at the Regulatory, Competition and Public Law Division. From 1994 to 1999, he was the head of European Law, responsible for all aspects of EU law and telecommunications regulation affecting the BT Group, and of the legal and regulatory team dealing with deregulation and worldwide alliances. From 1999 to 2000, he was promoted to chief counsel for competition law and public policy. Mr. Cowan worked for five years in private practice for the law firms of Lovell White Durrant and Baker McKenzie, in the London offices. He represents BT as a member of the International Chamber of Commerce Council and chairs the Development Board of the British Institute of International and Comparative Law, as well as the Board of the International Association of Commercial Contract Managers. He is a frequent speaker on management of commercial/legal departments and issues relating to multinational trading and has written numerous academic papers.

STACY DOGAN is a professor of law at Northeastern University Law School. Professor Dogan is a leading scholar in intellectual property and competition law. She has written many articles on the application of trademark and copyright law to the online environment, with a particular emphasis on the role of intermediaries such as Napster and Google. Her most recent article considers the role of antitrust law in regulated industries, and contends that antitrust courts have an important role to play in curbing "regulatory games." In the fall of 2008, she became the co-editor-in-chief of the *Journal of the Copyright Society*, a peer-reviewed copyright journal. She is also the incoming chair of the Intellectual Property Section of the Association of American Law Schools. Before joining the Northeastern faculty, Professor Dogan practiced with the Washington, DC, law firm of Covington & Burling, where she specialized in antitrust litigation. After law school, she practiced with Heller, Ehrman, White & McAuliffe in San Francisco and served as a law clerk to the Hon. Judith Rogers of the US Court of Appeals for the District of Columbia.

HARRY FIRST is a professor of law at the New York University School of Law. He published the first law school casebook dealing with business crime. He is an antitrust and trade regulation specialist, with teaching and research interests in both antitrust and business crime. From 1999 to 2001, while on leave from the Law School, First was the chief of the Antitrust Bureau of the Office of the New York State Attorney General.

HILLARY GREENE is an Associate Professor of Law at the University of Connecticut Law School where she is the Director of the Law School's Intellectual Property and Entrepreneurship Law Clinic. Most recently, Professor Greene was Associate Professor at the S.J. Quinney College of Law at the University of Utah where she taught intellectual property, antitrust, and patent law. Two of her most recent publications include *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse* in the William and Mary Law Review (2006), and *Articulating Trade-Offs: The Political Economy of State Action* in the Utah Law Review (2006). She has also been a Visiting Scholar at the University of Pennsylvania Law School and a Visiting Researcher at Harvard Law School. Prior to teaching law, Greene served as Project Director for Intellectual Property at the Federal Trade Commission and as a litigation associate at Cahill, Gordon & Reindel in New York City. She is admitted to practice in New York and before the U.S. Supreme Court and the U.S. District Court, Eastern District in New York. Professor Greene currently serves on the advisory board of the American Antitrust Institute and is a contributing editor to the Antitrust Law Journal. Professor Greene's research and teaching interests focus upon intellectual property (with a particular emphasis on patent law), antitrust/competition policy and First Amendment Law.

KEITH HYLTON is a professor of law at Boston University School of Law. He has published numerous articles in American law journals and peer-reviewed law and economics journals. His textbook, *Antitrust Law: Economic Theory and Common Law Evolution*, was published by Cambridge University Press in 2003. Professor Hylton joined the Boston University School of Law faculty in 1995 after teaching for six years and receiving tenure at Northwestern University School of Law. At BUSL, he teaches courses in antitrust, torts, and labor law. In addition to teaching, he serves as Editor of the Social Science Research Network's Torts and Products Liability Law Abstracts and Co-

Editor of Competition Policy International, and he also 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, and a current member of the American Law Institute.

PHILIP MARSDEN is Director of the Competition Law Forum and Senior Research Fellow at the British Institute of International and Comparative Law in London. He is a competition lawyer with a particular interest in abuse of dominance, consumer welfare, international competition issues and aspects of the law of the World Trade Organization (WTO) relating to competition policy, telecommunications and dispute settlement proceedings. Philip is editor of the European Competition Journal. Dr. Marsden earned his DPhil from Oxford University, an LLM in European Law from Leicester University, and an LLB and BA from the University of Toronto. He qualified as a Barrister and Solicitor at the Law Society of Upper Canada in 1991, and has been in private practice with law firms in Toronto, Tokyo and, most recently, with Linklaters in London. From 1994-96, he was a case officer with the Economics and International Affairs Branch of the Canadian Competition Bureau.

BECKET MCGRATH practices law at Berwin Leighton Paisner LLP in London. McGrath advises clients on all aspects of competition law, with an emphasis on behavioral issues, compliance, competition litigation and merger control. McGrath was formerly a Branch Director in the Competition Enforcement Division at the Office of Fair Trading (OFT), with responsibility for enforcing competition law in the media, sport and IT sectors. During his time at the OFT, McGrath led teams on numerous high profile cases, including two cases before the Competition Appeal Tribunal, and had a key role in the preparation of the competition provisions of the Communications Act 2003. For a transitional period, he was also responsible for the OFT's competition enforcement work in the financial services sector, including the OFT's relationship with the FSA.

MARK PATTERSON is an associate professor of law at Fordham University School of Law in New York. He received his B.S. and M.S. from the Ohio State University and his J.D. from Stanford University. He has been a member of the faculty at Fordham since 1995. Prior to that, he was the Harry A. Bigelow Teaching Fellow and Lecturer at the University of Chicago Law School and a law clerk for Justice John M. Greaney at the Supreme Judicial Court of Massachusetts. Patterson practiced law at Choate, Hall & Stewart in Boston from 1991-1993. His principal areas of interest include antitrust, corporations, and law and science.

ELBERT ROBERTSON is a professor of law at the Suffolk University Law School in Boston, Massachusetts. He earned a B.A. from Brown University, an M.A. from the University of Pennsylvania's Wharton School of Business, and his J.D. from Columbia University Law School. He teaches Administrative Law, Antitrust, Business Associations, Corporations, Criminal Law, Jurisprudence, Law & Economics, Legal Method, and Torts. His legal experience has included working as a litigation associate for Jenner & Block in Chicago, Illinois, and as a special antitrust attorney and advisor for the Office of General Counsel (Competition Division) for the Federal Communications Commission in Washington, D.C.

DANIEL SAVRIN is a trial lawyer at Bingham McCutchen LLP in Boston, Massachusetts. He represents clients in a wide range of antitrust, white collar defense and complex commercial litigation matters. Daniel has litigated matters in federal and state courts throughout the United States and in various arbitration venues and has provided counsel with respect to proceedings outside the United States. Daniel's antitrust and trade regulation practice includes the representation of individuals and corporations in criminal antitrust matters; civil enforcement matters; individual and class action civil litigation; merger-related proceedings and litigation; and counseling on trade regulation, distribution, and merger and acquisition issues. He is a frequent speaker and author on antitrust subjects. Daniel's white collar defense and business regulation practice includes the representation of both individuals and corporate entities in criminal and civil enforcement proceedings and related internal investigations; litigation; and the implementation of regulatory compliance

programs.

MAURICE STUCKE is a professor of law at the University of Tennessee School of Law in Knoxville, Tennessee. Stucke brought 13 years of litigation experience when he joined the UT College of Law faculty in 2007. As a trial attorney at the U.S. Department of Justice, Antitrust Division, he successfully challenged anticompetitive mergers and restraints in numerous industries, and focused on policy issues involving antitrust and the media. As a Special Assistant U.S. Attorney, he prosecuted a variety of felony and misdemeanor offenses, including running a weekly docket before the Honorable Thomas Rawles Jones, Jr. As an associate at Sullivan & Cromwell, Stucke assisted in defending Goldman Sachs, CS First Boston, and Microsoft in civil antitrust litigation. In 2008, Stucke was elected to the Advisory Board of the American Antitrust Institute, an independent Washington, D.C.-based non-profit education, research, and advocacy organization devoted to competition policy. In 2009, he was appointed Senior Fellow at AAI for a term of two years, elected as a member to the Academic Society for Competition Law, and appointed to the advisory board of the Institute for Consumer Antitrust Studies. In 2009, Stucke was asked to serve as one of the United States' non-governmental advisors to the International Competition Network. His scholarship has been cited by the OECD, competition agencies, and policymakers.

SPENCER WEBER WALLER is a professor of law and associate dean for research at Loyola University Chicago School of Law. He also serves as the director of Loyola's Institute for Consumer Antitrust Studies. He received his J.D. from Northwestern University School of Law, and his B.A. from the University of Michigan. He was a full-time faculty member at Brooklyn Law School for ten years until joining Loyola in 2000. Prior to his teaching career, Professor Waller served as a staff law clerk for the U.S. Court of Appeals for the Seventh Circuit. He also worked for the U.S. Department of Justice, first as a trial attorney in the Foreign Commerce Section of the Antitrust Division and later as a special attorney in the Chicago Strike Force of the Criminal Division. He then practiced at the Chicago law firm of Freeborn & Peters.

THE ANTITRUST MARATHON

INTRODUCTION

CONSUL GENERAL BUDDEN: For those of you who didn't meet me last night at the residence, my name is Phil Budden. I'm the British Consul General to New England. Those of you last night - you've seen the house. This is the other side of British operations in Boston, over here in Cambridge MIT. So you're very welcome here in the consulate. I am going to be nipping in and out with a few consulate matters that have come up today, but I am going to be here as much as I can.

I'll say three very quick things. First of all, we're delighted to have you here. One of the things that this British Consulate has that most of them around the U.S. don't is a room like this. And we've discovered that these are invaluable because having space at the drop of a hat that we can actually set aside and say yes, we want to partner with these people and create space for them to have their conversations is largely how we get our job done. So we're delighted to see you today and look forward to hearing your conversation.

Secondly, we've just had to go through an exercise where we had to take out a new lease and for the British public service this means we have to go back to first principles, and we have to answer the existential question: should we have a British Consulate in Boston? If so, how many people, what should it do, where should it be? We are at the end of the process so I'm much more relaxed talking about this now. We have convinced London that there should be a British Consulate in Boston even though there were suggestions that they could cover it from New York. That doesn't work too well in this town, for those who know Boston. Rivalry and some sports teams have some history apparently. But also we can't even cover it from Boston. We are actually in Cambridge. We're on the left bank of the Charles River here, right next to MIT.

What we've discovered in doing our jobs here is that actually an awful lot of people in Boston will travel, come across one bridge, but to get our job done, particularly on the high-tech side, we need to be right here at the heart of this hub of innovation. So out of that window is MIT, they're building a business school right there and MIT stretches all the way down to the engineering buildings at the end. This is where we need to be. We discovered the finance people will cross the river, the venture capital people, and the people running trillions of assets of management over there in the high-rise area by my house, they'll cross the river. The IP lawyers, they'll cross the river straight over here. People who won't travel are those from MIT who are so busy creating the high-tech companies. They're lazy but they're really smart. So we are going to be right here because this is where it all comes together, having a bit of space where we're able to bring people together. For those of you here in the Boston area and who are interested in any of the things we as a consulate do, we work across a range of high-tech issues from biotech, info tech, telecom, and we do it right here.

The final thing I was going to say – I was just telling Terry this – I've just come from working at our embassy in Washington for the last couple of years where I was primarily focused on telecom and Internet and software companies, one of which is now in this building. And competition policy was just a little addendum at the end of my list of responsibilities until something came along called *Hoffmann-LaRoche*.¹ I was told very early on in my posting that we were going to do something because the Supreme Court had granted certiorari or whatnot and there were going to be some British interests. So as a diplomat generalist, I immediately reached for the nearest competition lawyer who turned out to be Don Baker.

Don sat with me and talked me through what all these bit and pieces meant, and we ended up producing this small green booklet that you all are pretty familiar with. For me as a diplomat, it was a rather interesting introduction. Fortunately, it got me even closer to very smart people who were working on competition policy and it ended up being one of the main standards of what we did there, and I'm delighted my successor furthered my work in Washington. He was actually a lawyer out of the Department of Trade and Industry who was able to take it to new levels and understand what was going on. For me as a last

¹ F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

historian, my contributions to these were fairly limited, but one I did work on with Don Baker was a historical aside in Footnote 18 of the original English statute of the monopoly of 1623.

PROFESSOR FIRST: Or 24, there is a dispute amongst us.

CONSUL GENERAL BUDDEN: The dispute was ended by the British Embassy, finally. We decided 23.

PROFESSOR FIRST: I'll have to pass that on. I talked to a historian recently about this.

CONSUL GENERAL BUDDEN: You can appeal. Which said that back in blighty in those days provided for treble damages and double costs, which Don Baker was delighted about. Having a sense of history is fairly useful for a Brit in this town. The pilgrims landed just south of here in Plymouth. The Puritans landed in just across the way. There was a bit of a fracas in which we are going to be celebrating Patriot's Day. So having a good sense of history and being able to tell a pilgrim from a puritan and a red coat from a revolutionary turns out to be quite useful for a Brit.

I digressed. It's wonderful to have you here. I've made my welcome remarks, which I have to do as I provided the space. I've given away just how nerdy I am. I really love competition law. You don't get many diplomats saying that, but I'm interested in the substance. It's great to have you here. This is what we do at the consulate. We provide this space for people to have these interesting conversations. Thank you for coming together, and I look forward to joining you for as much as I can.

PROFESSOR WALLER: Thank you so much. We are so grateful for your being a co-sponsor and the reception last night, and to Tim Cowen and Phil Marsden who set the ball in motion. My co-host, if you don't already know him, is Phil Marsden who heads the competition law forum for the British Institute of International and Comparative Law. Welcome to the third Antitrust Marathon: Antitrust and the Rule of Law. For me, on behalf of Loyola University Chicago, and our Institute for Consumer Antitrust Studies, this is the first of five conferences and other events that celebrate our 15th anniversary. So I'm happy you're all here to participate in the discussion today on antitrust and the rule of law.

If you haven't already done so, please pick up any and all of the handouts that are outside. And I have been asked by our court reporter that in connection with our discussion you all have

the nameplates. So once we're rolling, when you want to make a submission, turn it up so we can keep track of the queue of who is going to speak and when, and I just ask that when you speak, particularly for the first time, if you would just identify your name so the court reporter can have that and of course speak slowly and be patient if she asks you to repronounce something or the spelling of a particularly odd name.

We are on the record, but prior to publication you'll all have a chance to edit your remarks so it will truly reflect your intent, not necessarily the words that came out. If you haven't already met him, Pete Bergan is Editor-in-Chief of the Loyola Consumer Law Review, which will be publishing both the issue papers in their final form and the transcript for today's discussion.

The format is going to be similar to what we have done in the past. The first marathon was in Chicago the Friday before the Chicago Marathon. The second antitrust marathon was in London just before the London Marathon. There is a pattern here. The fourth marathon will be in Dublin in October, the day after the Dublin Marathon. The formats are roughly the same. We hope you've read or at least skimmed each of the issue papers. The authors of those papers are going to very quickly summarize them in five minutes or so. We designated a commentator, which really just means that person gets to go first, offer a few thoughts, let us gather our thoughts, and then the general discussion begins. Phil and I will chair each of the sessions and basically serve as time keepers and keep the queue of who wants to talk and in what order. And I think those are really all the details. It's my pleasure to introduce my co-host and runner for Monday. We wish him well in his athletic endeavor. Phil Marsden, the first panel is yours.

DR. MARSDEN: Thank you very much. It's great to see so many familiar faces again. Some of you have participated in previous antitrust marathons. When Spencer and I came up with this gimmick about marathons, of course it was related to the fact that in such endurance discussions, we usually took on intractable subjects. So the first couple of marathons were about abuse of dominance and monopolization, and while these can seem like subjects without an end, continued discussion and sharing of views will get us closer to improving our understanding of different regimes.

Perhaps it's appropriate that the space the Consul General has provided for us today is the Watson and Crick Room because

I'm reminded of a paper Bill Kovacic wrote a while ago about the DNA of antitrust. The paper discussed the different forms of antitrust around the world and whether or not when they intermix and intermingle there is any form of mutation in some way or at least learning or improvement. Equally, my co-chair, Spencer, has written on whether or not the Chicago School is some form of virus. Like any virus, this can spread or be rejected, and one question that often comes up in our discussions is whether European competition policy is immune to the Chicago School in some way. Some of those topics I am sure will come up again today.

ISSUE PAPER

DOES THE RULE OF REASON VIOLATE THE RULE OF LAW?

*Maurice E. Stucke**

A “key feature” of all industrial market systems, according to the World Bank, “is a strong state that can support a formal legal system that complements existing norms and a state that itself respects the law and refrains from arbitrary actions.”¹ Under the rule of law, enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly. The law should be sufficiently specific and its enforcement predictable and fair. With clear standards, market participants can channel behavior in welfare-enhancing directions and better predict their rivals’ behavior. Clear standards reduce transaction costs, rent-seeking behavior by market participants, and decision errors by the antitrust agencies and courts. The rules are sufficiently prospective, accessible, and clear to constrain the government (both the executive and judiciary) from exercising its power arbitrarily. Impartial courts can quickly and economically enforce the law, which applies to all persons equally, offering equal protection without prejudicial discrimination.

* Associate Professor, University of Tennessee College of Law. This issue paper summarizes the arguments made in my more detailed article, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009), available at <http://ssrn.com/abstract=1267359>.

¹ WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 4 (2002).

A. Rule of Law as a Precondition for Effective Antitrust Enforcement

If the rule of law is a necessary prerequisite for an effective free market, then the competition laws, which seek to maximize the benefits from a free market economy while minimizing the attendant risks of (and correcting any) market failure, should comport with these rule-of-law principles. (To argue otherwise renders this illogical conclusion: The law generally must comport with these rule-of-law principles for our market economy to function properly; but competition law, which directly governs market behavior, is somehow exempt.)

Competition laws help create the rules of the game. If the competition rules enhance welfare and outline with sufficient clarity what is impermissible, then all can rely on these rules in channeling their behavior in welfare-enhancing directions. For example, firms have certain expectations of the boundaries of their competitors' behavior. Suppose a competitor abides by the competition rules (and incurs costs to do so), while its rival cheats (and seeks a competitive advantage). Failure to uniformly enforce the rules will invite others to cheat. Without rules yielding predictable legal outcomes, firms may refrain from welfare-enhancing activity and opt for less efficient forms of doing business. Alternatively, competitors may engage in socially harmful activity but rely on lawyers and lobbyists to try to clear them of legal difficulties. The rule of law can reduce the negative welfare effects associated with such rent-seeking activities. As Friedrich August von Hayek frames it, "[t]he important thing is that the rule enables us to predict other people's behavior correctly, and this requires that it should apply to all cases — even if in a particular instance we feel it to be unjust."²

Although competition rules can help fix the rules of the game, and proscribe specific actions deemed socially undesirable, the government is not exogenous to the free market. The laissez-faire approach is to exclude the government from the market. But the law, as a positive force, provides the needed scaffolding for a market economy; it facilitates commerce and economic growth. Thus, the rule of law enables political institutions to "provide the necessary underpinnings of public goods essential for a well-functioning economy and at the same time limit the discretion and authority of government and of the individual actors within

² F.A. HAYEK, *THE ROAD TO SERFDOM* 114 (U. Chicago Press 2007) (1944).

government.”³

Clear antitrust rules also mitigate the lack of knowledge and information problems that can lead to decision errors. With a general totality-of-economic-circumstances standard, the current administration may be more sympathetic to one industry or firm than another. As Hayek warned, a vague standard fosters central-planning and concentrates more power in the hands of the privileged. As central planning “becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is ‘fair’ or ‘reasonable’ . . . [T]his means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question.”⁴

Not surprisingly, the OECD’s ideal characteristics of a competition standard dovetail with rule-of-law principles. An antitrust legal standard should promote:

Accuracy (the standard should minimize false positives and negatives),
Administrability (standard should be easy to apply),
Consistency (standard should yield predictable results),
Objectivity (standard should leave no subjective input from the decision-makers),
Applicability (the wider the scope of conduct the standard can reach the better), and
Transparency (the standard and its objectives should be understandable).⁵

B. Rule of Reason’s Infirmities Under Rule-of-Law Principles

So how does the rule of reason, the “prevailing,”⁶ “usual”⁷ and “accepted standard”⁸ for evaluating conduct under the Sherman Act, fare under these rule-of-law principles? Poorly. In the past few years, the U.S. Supreme Court has complained about

³ DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 85 (Princeton U. Press 2005).

⁴ HAYEK, *supra* note 2, at 116.

⁵ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, POLICY ROUNDTABLES: COMPETITION ON THE MERITS 23 (2005), available at <http://www.oecd.org/dataoecd/7/13/35911017.pdf>.

⁶ See *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

⁷ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881-82 (2007).

⁸ *Id.* at 885.

the state of federal antitrust law. The Court decries antitrust's "inevitably costly and protracted discovery phase," as hopelessly beyond effective judicial supervision.⁹ The Court complains that antitrust's per se illegal standard might increase litigation costs by promoting "frivolous" suits.¹⁰ It fears the "unusually" high risk of inconsistent results by antitrust courts.¹¹

But who created this predicament? The Supreme Court did. Over the past ninety years, the Court has supplied the Sherman Act's legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.¹² The rule of reason involves a "flexible" factual inquiry into a restraint's overall competitive effect, and "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."¹³ The rule of reason also "varies in focus and detail depending on the nature of the agreement and market circumstances."¹⁴ "Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."¹⁵ Despite its label, the rule of reason is not a directive defined ex ante (such as a speeding limit). Instead, the term embraces antitrust's most vague and open-ended principles.

⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)); see also CIVIL RULES ADVISORY COMMITTEE, MINUTES 32 (Nov. 8-9, 2007), available at <http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf> (demonstrating that court "spent some time decriing the enormous burdens that could be imposed by [antitrust] discovery, and in doubting the possibility that effective management of staged and focused discovery can be used to enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information exclusively available to the defendants can be used to supply a better preliminary fact showing that will justify full-scale discovery and litigation").

¹⁰ *Leegin*, 551 U.S. at 895.

¹¹ *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007).

¹² FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2, at 3-4 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter COLLABORATION GUIDELINES].

¹³ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

¹⁴ See COLLABORATION GUIDELINES, *supra* note 12, at 4; *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (rule of reason also governs most monopolization claims under Section 2 of the Sherman Act).

¹⁵ *Sylvania*, 433 U.S. at 49.

Moreover, since 1977 the Supreme Court has narrowed the scope of its per se rule. The Court overturned its per se rule for vertical, non-price restraints in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,¹⁶ for vertical maximum resale price maintenance (“RPM”) in *State Oil Co. v. Khan*,¹⁷ and for vertical minimum RPM in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*¹⁸ But in shedding its earlier per se rule, the Court has not offered clear objective rules. Instead, the Court retreated to its rule-of-reason standard.¹⁹ The Court’s totality-of-economic-circumstances standard has drawn heavy criticism over the past 97 years, even by the Court itself.²⁰

The rule of reason has long been criticized for its inaccuracy, poor administrability, subjectivity, lack of transparency, and yielding inconsistent results. In addition, the rule of reason provides little predictability to market participants. It subjects litigants and trial courts to the purgatory of “sprawling, costly, and hugely time-consuming” discovery.²¹ For example, a per se price-fixing claim under Section 1 of the Sherman Act requires proof of an agreement.²² But for all other non-hard-core restraints, the rule of reason applies.

Under the lower courts’ more “structured” rule of reason, antitrust plaintiffs (including the federal antitrust agencies) must not only prove an agreement. They must also establish that the challenged restraint has had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. Absent direct evidence of anticompetitive effects, plaintiffs can demonstrate the restraint’s likely anticompetitive effects by showing defendants’ “market power” as inferred from their high market share within a properly defined product and geographic market.²³ Such market definition, in turn, entails

¹⁶ *Id.* at 57-59.

¹⁷ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹⁸ *Leegin*, 551 U.S. at 885.

¹⁹ *Id.* at 885-65; *Khan*, 522 U.S. at 10; *Sylvania*, 433 U.S. at 49 n.15.

²⁰ *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

²¹ *Twombly*, 550 U.S. at 560 n.6. This also assumes that uncertainty provides no advantage to either private plaintiffs or defendants. In reality, uncertainty may favor the players with greater resources or alternative means to resolve their disputes.

²² *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

²³ The burden is on the antitrust plaintiff to first define the relevant market within which the alleged significant anticompetitive effects of the defendant’s actions occur. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238

issues of cross-elasticity of demand,²⁴ as well as supply substitutability into those markets, and ease of entry.²⁵

After plaintiffs meet their initial burden, the burden of production shifts to defendants to provide a pro-competitive justification for the challenged restraint (including the extent to which the restraint increased productive efficiencies, lowered marginal costs, and yielded pro-competitive benefits to consumers).²⁶

If the defendants offer pro-competitive business justifications, plaintiffs can respond by showing the defendants' pro-competitive justifications as pretextual, that lesser restrictive alternatives exist for the challenged restraint or that the restraint is not reasonably necessary to achieve the pro-competitive objectives.²⁷

And if plaintiffs' rule of reason claim survives to this point, plaintiffs must show that the restraint's anticompetitive effects outweigh its pro-competitive benefits.²⁸ The fact finder then engages in a "careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition."²⁹

(2d Cir. 2003).

²⁴ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (relevant product market is defined as "those commodities reasonably interchangeable by consumers for the same purposes"); *see also* FED. TRADE COMM'N & DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 1.1 (1992 & rev. 1997), *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11> (outlining product market definition for horizontal mergers).

²⁵ *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90 (2d Cir. 1998); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001).

²⁶ *Visa*, 344 F.3d at 238. Only after the antitrust plaintiff has met its initial burden does the burden of production shift to the defendant, who only then must provide a pro-competitive justification for the challenged restraint.

²⁷ *Id.*

²⁸ *Geneva Pharm. Tech. Corp. v. Barr Lab., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

²⁹ *Geneva Pharm. Tech.*, 386 F.3d at 507; *see also Visa*, 344 F.3d at 238; *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 959 (6th Cir. 2004); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Law*, 134 F.3d at 1019.

To prevail under the rule of reason, antitrust litigants generally offer competing economic expert testimony. To confound matters further, the experts' neo-classical economic theories are often premised on "rational" profit-maximizing behavior. These theories, as the burgeoning behavioral economics literature reflects, may be divorced from marketplace realities. Over the next decade, the rule of reason's infirmities will likely worsen. The courts will weigh not only conflicting testimony by Industrial Organization economists but conflicting economic theories, with the rise of behavioral, evolutionary, and New Institutional Economics.

Under the Court's flawed economic theories, antitrust standards will continue to stray further from rule-of-law principles. Evolving (and disputed) economic theory cannot provide the requisite rules for civil and criminal illegality. As one study of the antitrust laws puts it, "[l]egal requirements are prescribed by legislatures and courts, not by economic science."³⁰ Each new economic "wisdom" can affect criminal liability under the Sherman Act. Neo-classical economics cannot predict myriad behavior across markets today. Given many markets' dynamic nature, courts cannot expect to optimize allocative efficiency through its rule of reason. Despite claims of being descriptive in nature, any economics-based competition policy ultimately is normative. Subjective value judgments underlie "objective" economic standards, and the objectives vary.³¹ Legal standards that are premised on the Court's assessment of the latest prevailing economic thinking simply afford too much discretion to the judiciary.

*C. Rule of Reason's Infirmities Under Rule-of-Law Principles
Have Significant Implications on Antitrust Enforcement and
Competition Policy*

The rule of reason's deficiencies have significant implications for antitrust enforcement and competition policy

³⁰ STANLEY N. BARNES ET AL., THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955); *see also Leegin*, 551 U.S. at 914. ("[A]ntitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views")(Breyer, J., dissenting).

³¹ ADVOCACY WORKING GROUP, INT'L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT 25 (2002), *available at* http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf (survey of 33 members identified 10 policy objectives regarding monopolistic behavior).

generally. One implication is, because a rule-of-reason case is so costly to try, fewer cases will be brought. This is significant because private plaintiffs have brought the overwhelming majority of antitrust cases over the past thirty years. Concerned about expenses, plaintiffs with meritorious claims may forego antitrust litigation.³² Since the Court's *Sylvania* decision, there are fewer private federal antitrust cases. Fewer antitrust cases are now brought annually relative to total litigation. Some enterprising plaintiff lawyers seek redress under state business tort claims. Others abandon their client's antitrust claims and forego litigation altogether.

A second effect on antitrust enforcement and competition is the potential loss of protection for consumers and smaller competitors. An independent judiciary and the rule of law may be their only protections. Powerful firms may have little utility for judicial redress of antitrust violations. Entrants with potentially innovative technologies may lack comparable means of self-preservation, and be foreclosed from the market, which is troubling under an evolutionary economic perspective. Indeed, a profit-maximizing competitor should opt for litigation when it represents the least costly (or remaining) alternative. Neither competitors nor consumers will be compensated for their antitrust injuries.

Third, the Court's choice of rules will affect future market behavior (and its future rules) and the incentives for market participants to engage in productive activity. As Douglass North notes, how the game is actually played is a consequence of the formal structure (e.g., formal rules, including those by the government), the informal institutional constraints (e.g., societal

³² Expert economic testimony is often necessary for antitrust plaintiffs to prevail under the rule of reason. Indeed, some have attributed antitrust litigation's significant costs for economic experts as one factor for the decline of antitrust claims and growth of business torts claims. One recent survey of trial attorneys found generally that "[E]xpert witness fees are a significant cost factor driving litigants to settle, ranking just slightly behind trial costs and attorneys fees in that respect." INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3-4 (2008), *available at* <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650>.

norms and conventions), and the enforcement characteristics.³³ A market's performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. Changing the game's rules can lead to different outcomes. If the institutional constraints reward (or are indifferent to) monopolization, monopolies will be the likely outcome in markets conducive to monopolization.

Fourth, a suboptimal U.S. legal standard hinders global convergence. "A key objective of international cooperation between antitrust agencies is to achieve convergence as far as possible (taking into account differences that might exist in each jurisdiction), in rules and standards of review and remedies in order to facilitate the conduct of business in a global marketplace," reported the American Bar Association's ("ABA") Antitrust Section.³⁴ "Without such cooperation, inconsistent rules, standards, procedures and remedies can serve as an obstacle to business investment, growth, and economic expansion by imposing regulatory burdens that are costly or even impossible to reconcile."³⁵ Given the rule of reason's shortcomings under rule-of-law principles, it is difficult for U.S. competition authorities to persuade other nations to converge to the rule of reason. Nor can they plausibly argue that convergence is feasible as long as the Supreme Court remains wedded to its rule of reason; nor can the United States be of much assistance in having other nations model their legal standards for competition on the United States' legal standards.³⁶

D. Recommendations to Align Antitrust's Legal Standards with Rule-of-Law Principles

Over the past few years, the Supreme Court's approach to the federal antitrust laws has taken a perverse twist. Lately, the Court states that its rule of reason is the prevailing, usual and accepted standard for evaluating conduct under the Sherman Act. Then the Court uses the infirmities of its rule of reason (such as high discovery costs and inconsistent outcomes) to restrict

³³ NORTH, *supra* note 3, at 52.

³⁴ A.B.A. SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 42 (2008), *available at* <http://www.abanet.org/antitrust/at-comments/2008/11-08/obamabiden.shtml>.

³⁵ *Id.*

³⁶ *Id.* at 18. An amorphous legal standard for some developing competition authorities can also hinder enforcement and foster corruption.

antitrust plaintiffs' access to (or increased the cost in accessing) the courts, and ultimately governmental interference in the marketplace. It is "hard to see how the judiciary can wash its hands of a problem it created."³⁷ The rule of reason's acceptance did not arise independently from the Court. The Court created the rule of reason and determined the scope of its application. It could now create a new standard. When rule-of-reason analysis is equated with per se legality (for the antitrust plaintiff's bar) or uncertainty (for the defense bar), it signals the standard's deficiencies.

While the Roberts Court has been active in deciding antitrust issues, and addressing the risk of false positives under its per se rule, the Roberts Court never assessed the deficiencies of its rule of reason under rule-of-law principles.³⁸ This assessment, however, is critical. Although a perfectly realized rule of law may be unattainable, antitrust standards must be reoriented toward

³⁷ *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2630 (2008) (discussing punitive damages).

³⁸ In *Leegin*, for example, the Court noted the risk of false positives under its per se rule against vertical price-fixing. 551 U.S. at 895. The Court found that RPM may not always or almost always tend to restrict competition. But the Court lacked any empirical basis as to the percentage of instances when RPM is pro or anti-competitive or competitively neutral, and the magnitude of benefits and harms. For example, if RPM were likely to be anticompetitive 65% of the time, and likely to cause over \$100 billion in harm, while being procompetitive 20% of the time (with \$10 billion in benefits), the Court could decide whether the incremental administrative costs of a more nuanced legal standard is worth its benefits. In addition, the Court never addresses the risks of false negatives (and positives) arising from its rule of reason, and the increase in administrative costs under the rule of reason. For example, the Court opines that its per se rule "may increase litigation costs by promoting frivolous suits against legitimate practices." *Leegin*, 551 U.S. at 895. This is illogical. In determining that a certain restraint is per se illegal, the Court has concluded that the practice is generally illegitimate. Thus, one cannot fault antitrust plaintiffs for challenging such restraints. Indeed the Sherman Act (or any state statute prohibiting unfair and deceptive practices) could be faulted for promoting frivolous suits against legitimate practices. Thus the proper response is providing a better legal standard that effectively spares specific legitimate practices (such as providing a legal exception to the per se rule in cases of new entry). *Leegin*, 551 U.S. at 918. (Breyer, J., dissenting). Moreover, the Court's rule of reason would only exacerbate litigation costs, and thereby increase the risk of promoting frivolous suits against legitimate practices. The rule of reason, given its far broader scope of factual issues and defenses, increases litigation costs. Thus while defendants face the same amount of antitrust damages under either a rule of reason or per se standard, defendants under the rule of reason face higher litigation costs and a less predictable result.

rule-of-law ideals. I offer several suggestions toward that end.

First, the Supreme Court's antitrust standards should be in accordance with the originally intended and understood meaning of the directives of legitimate, democratically accountable lawmaking authorities. Congress never drafted the Sherman Act as a vehicle for the Court to advance its own ideologies, nor those of certain economists. The Court should refrain from announcing new policies based on its perception of "modern" economic theory that run counter to the Sherman Act's originally intended and understood meaning. Reckless statements, like one suggesting that monopoly pricing is an important element of the free-market system,³⁹ can lead to uninformed competition policies that are inconsistent with the citizens' preferences. To give content to the Sherman Act, the Court should update its interpretation of the Sherman Act's words in the light of its legislative history and of the particular evils at which the legislation was aimed. Any trade-off or policy pronouncement should come from Congress, rather than the democratically unaccountable judiciary.

Second, the extreme standards (*per se* and rule of reason) are unsatisfactory for evaluating many ordinary competitive restraints. Rather than reflexively return to ground zero (namely, the 1918 *CBOT*⁴⁰ rule-of-reason factors), the Court should endeavor to cast more intelligible rules that are consistent with the Sherman Act's principles.

Given its infirmities under the rule of law, the full-scale rule of reason should be limited to novel cases where the courts have little experience with the challenged restraint. Even there, the Court should build upon the lower courts' structured four-step rule of reason and minimize the need for judicial balancing. If properly applied, the rule of reason would minimize contentious issues of market definition. Circumstantial evidence of market power via market definition is a weak proxy for direct evidence. If a challenged restraint has been in force for several years, an antitrust plaintiff should identify the restraint's anticompetitive effects. Thus, market definition would play a very limited role. Rather than establishing defendants' market power, it simply would provide some context as to the area of trade or commerce that the anticompetitive restraint affects. By

³⁹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

⁴⁰ *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

focusing on actual anticompetitive effects, the court need not engage in tradeoffs. If the challenged restraint's net result, for example, is higher prices and reduced output, it is difficult to fathom offsetting pro-competitive justifications that defendants can offer. Even if defendants could establish that the practice fosters competition in another market, it is doubtful that the courts and antitrust agencies can quantify these pro- and anti-competitive effects. The courts should not engage in further trade-offs, which are beyond their competence or authority under the Sherman Act. Ultimately, Congress should decide such trade-offs.

Using market share as circumstantial evidence of market power should be relegated to those few cases where the harm is largely prospective (e.g., mergers under Section 7 or nascent anticompetitive restraints). The antitrust plaintiff would establish both the severity and probability of the alleged likely anticompetitive effects, which the defendant can rebut with the magnitude and likelihood of pro-competitive benefits.

On the other hand, except in extreme cases of hard-core cartels or behavior with significant anti-competitive effects, the courts should hesitate in categorically condemning any particular practice without regard to its justification. Commonplace restraints do not merit a rule of reason. Instead, the Court should aim for differentiated rules that further the Sherman Act's legislative aims. As several scholars have argued, in many cases, simpler is better—especially when resources are scarce and the increased complexity leads to slight marginal social benefits.⁴¹

The Court could begin with presumptions based on the prevailing empirical evidence. One key issue (which the majority in *Leegin* avoids) is the percentage of cases where RPM leads to positive and negative effects. The *Leegin* Court fell into the “never” fallacy: “Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.”⁴² But this is also true of horizontal agreements among competitors to fix price, or of many possible criminal acts, like homicide, which can be legal or illegal depending on the surrounding circumstances. The fact that at times killing can be justifiable does not justify the assessment of guilt under the rule

⁴¹ See, e.g., Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of “Per se Rules vs. Rule of Reason,”* 2 J. COMPETITION L. & ECON. 215, 229-33 (2006).

⁴² *Leegin*, 551 U.S. at 894.

of reason. A second issue is whether the new rule (in lieu of per se liability) reduces or increases error and regulation costs. The majority in *Sylvania* and *Leegin* rejected any standard less than the full-blown rule of reason. Justice White in *Sylvania*,⁴³ like Justice Breyer in *Leegin*,⁴⁴ offered an incremental shift away from per se liability. Even if the majority of Justices had concerns with the intermediary standard, they cannot assume that its shortcomings are greater than the rule of reason's shortcomings.

Third, the Court cannot assume that better legal standards will arise independently. The Supreme Court and lower courts have not undertaken the empirical analysis to promote the judiciary's understanding of the impact of the antitrust standards (and decisions) on the marketplace. Nor can they, because their view is limited to the evidence the parties supply; the courts do not unilaterally revisit a particular industry to assess the impact of their decision. Nor can academia and the private bar fulfill this complex mission. Through division of labor and increased specialization, knowledge has dispersed in today's society. This dispersal "requires a complex structure of institutions and organizations to integrate and apply that knowledge."⁴⁵ Collecting information on how various markets work, and the impact of restraints on those markets, entails high transaction costs. Moreover, the relevant information is often nonpublic.

The U.S. competition authorities in the Obama administration should now undertake this empirical testing and learning. Unlike private litigants who are concerned with prevailing and promoting their parochial interests, the competition authorities are acting on the citizens' behalf. This should make those authorities less ideological and more objective. Consequently, to assist the courts in determining the proper legal standard for evaluating certain restraints, the federal antitrust agencies first must better comprehend how markets operate and evolve. This requires more empirical analysis on the agencies' part.

⁴³ *Sylvania*, 433 U.S. at 71 (proposed using market power as screen and exception for infant industries: "Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the Schwinn restraints to justify a rule-of-reason standard, even if the same weight is given here as in Schwinn to dealer autonomy").

⁴⁴ *Leegin*, 551 U.S. at 928 (Breyer, J., dissenting) (modified per se to allow exception for more easily identifiable and temporary condition of new entry).

⁴⁵ NORTH, *supra* note 3, at 99.

DISCUSSION

DOES THE RULE OF REASON VIOLATE THE RULE OF LAW?

By Maurice Stucke

DR. MARSDEN: When you saw the program for today, you may have asked why we chose the rule of law as a topic for an antitrust marathon discussion. Obviously there were intimations from history relating to Boston and the UK and US; but mainly we were thinking about the appropriate use or abuse of power held by authorities. In antitrust, some of this comes up relating to the ambit of discretion and the reliance on increased use of expert economic analysis. There is a growing call in Europe at least for more rule of reason, structured or not, with respect to certain practices. And we felt why not learn from a lot of the American scholarship in particular that has gone on in comparing rule of law and rule of reason, the use of discretion, checks and balances, and the like.

Certainty, predictability and administrability are things that we're struggling with in Europe because even though competition law itself is extremely advanced in the EU, some of the issues that Maurice Stucke has raised are quite new to European eyes because we do have quite a different system there. The European system is far more administrative and judicial checks are far less. I thought it would be nice to start the session today by looking at the ramifications of the current movement to increase the scope of the rule of reason in the EU, considering that the Commission has so much power and discretion. In response to the calls for more rule of reason analysis, we're hearing criticism from what is usually referred to as the Ordoliberal camp: they primarily argue that increasing the use of rule of reason analysis will make it more difficult to administer clear and effective standards that would be predictable for businesses and enforcers. And Maurice has examined many of these issues and helped us learn a lot from the

U.S. experience.

PROFESSOR STUCKE: Thank you Philip and Spencer for organizing this Marathon and inviting me today. My issue paper discusses whether the U.S. Supreme Court's rule of reason legal standard violates rule of law principles. And to jog your memory on my issue paper and as a matter of background, the Supreme Court created the legal standards for evaluating anticompetitive restraints under the Sherman Act.

When first interpreting the Sherman Act, the Court construed it literally that all direct restraints of trade were illegal. Then in 1911, the Court construed the Sherman Act to prohibit only unreasonable restraints of trade and its rule of reason standard was promptly criticized. Over the years, the Court shifted toward *per se* rules, as well as presumptions, as in the *Philadelphia National Bank* case.¹ But since 1977, the Court has shifted back to its rule of reason standard. And today the Court states that its rule of reason standard is the prevailing, usual and accepted standard for evaluating conduct under the Sherman Act.

Now the rule of reason involves a flexible factual inquiry into the restraint's overall competitive effect, and considers the facts peculiar to the business, the history of the restraint, and the reasons as to why it was imposed. There is an odd twist. The Court, on the one hand, says that its rule of reason is its usual and prevailing standard, but then notes in other contexts the shortcomings of antitrust litigation today. The Court complains about antitrust's interminable litigation. It complains about antitrust's inevitably costly and protracted discovery phase as hopelessly beyond effective judicial supervision. It complains that its *per se* illegal standard might increase litigation costs by promoting frivolous suits. It fears the unusually high risk of inconsistent results by antitrust courts. But the Court never steps back to evaluate to what extent it bears any responsibility for this sad state of affairs and to what extent its legal standards for evaluating antitrust offenses are responsible for this predicament.

Ideally the Court should evaluate how its rule of reason standard, the "prevailing" antitrust legal standard, fares under rule of law principles. Now, Tim touched on how the rule of law is considered a pre-condition for effective antitrust enforcement.

¹ United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

In fact, one could argue, as did the World Bank,² that the rule of law is a pre-condition for an efficient market economy. If the law generally must comply with rule of law principles, it logically follows that the nation's competition laws must comply with these principles as well.

Ideally, an antitrust legal standard, under the rule of law, should promote several things:

The antitrust legal standard should promote accuracy. It should minimize false positives and false negatives.

It should be administrable and thus easy to apply.

It should be consistent and thus yield predictable results.

It should be objective and thus leave little if any subjective input from the decision makers.

It should have broad applicability such that the standard can reach as wide a scope of conduct as possible.

Finally, it should be transparent. The standard and its objective should be understandable.

The rule of reason has been criticized for being inaccurate, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results. The rule of reason's infirmities under these rule of law principles have several implications not only on antitrust enforcement in particular but on competition policy in general.

In my longer article³ as well as in my issue paper, I identify several implications. First, the rule of reason's infirmities increase the disincentives to challenge anticompetitive behavior under the federal antitrust laws. Second, there is a loss of protection for consumers and smaller competitors. Third, the Court's rules will affect future market behavior and future market performance. One way to look at legal institutions is not as an exogenous force but as providing the necessary scaffolding for any market economy. The law then plays an important part in providing structure to a market economy.

Fourth, a suboptimal rule of reason will hinder global convergence. Why should other countries be eager to adopt the rule of reason given its infirmities under the rule of law

² WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 4 (2002).

³ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

principles? And fifth, the rule of reason can weaken the *per se* rules.

This is not to say that antitrust standards should devolve into the equivalent of U.S. tax code, and prohibit in detail specific behavior in specific markets. Instead, the rule of law must account for the law's development and growth. It would be overly simplistic to say that a complex regulatory scheme has to be either a rules-based system or a principles-based system. The Court could articulate legal presumptions that are consistent with the Sherman Act's legislative aims while reserving at the margin its rule of reason for novel cases.

Finally, my paper offers several suggestions to reorient antitrust's legal standards towards these rule of law principles. First, the Court should curb its adventures under the rule of reason based on its perception of the new economic wisdom. Any legal standard should be consistent with the Sherman Act's legislative aims.

Second, the rule of reason and the *per se* standards should not be abolished but reserved for the exceptional cases. The Court should strive for simpler, easier-to-apply legal standards that are consistent with the law's legislative aims. The Court should create legal presumptions of a restraint's anticompetitive effects based upon the available empirical evidence.

And third, the federal competition agencies should help the Court in this regard. They should undertake more empirical analysis of the restraint's competitive effects. One thing that I found conspicuously absent from the United States' amicus brief in *Leegin*⁴ was any empirical analysis conducted by the federal antitrust agencies within the past twenty years as to the costs and benefits of resale price maintenance. With more empirical analysis as to the benefits and harms of RPM, the U.S. courts could perhaps employ a better legal standard than the full-blown rule of reason—something perhaps along the lines of what Justice Breyer recommended in *Leegin*.⁵ For example, we might have a presumption of illegality for RPM but allow the antitrust defendant to overcome that presumption in cases of new entry or in actual instances of free-riding that prevented retailers from

⁴ Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480).

⁵ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2737 (2007) (noting that common-law courts would issue decisions that phased out the scope and effect of the rule in question over time).

offering the value-added services and where consumers were harmed as a result. Thank you.

DOCTOR MARSDEN: Thank you very much. Our first discussant will be Mark Patterson. What do you think?

PROFESSOR PATTERSON: When Spencer contacted me about this, I thought I was going to be speaking for about 5 minutes. He got very nervous this morning that I was going to be speaking for that long, and he told me to shorten it. It turns out that his wisdom is shown by how easy it is to cut my comments.

Anyway, I think Maurice does a great job of demonstrating the weaknesses of the rule of reason in this shorter version and in his longer piece, but the one thing I think of when I think about the rule of reason, he doesn't emphasize: we really ask it to do a lot. I think it's probably the hardest task that we ever ask courts to do, even when you think of other vague, fact-specific tests like the reasonableness test in tort law. The scope of that inquiry is so much narrower and the evidence that one has to look at is so much less that it seems like the rule of reason has a more difficult task. So I would say that in some way its weakness is not entirely inexcusable.

I think we'll probably never be happy no matter what sort of scheme we adopt. I think that some evidence of this is that as Maurice points out, there are problems with accuracy in the rule of reason and problems with efficiency. I think those go the opposite direction. To the extent you want more accuracy, you have to get more costly and vice versa. So he is right. Most of us probably think we're not striking the right balance. So the costs are probably too high, even if you think the accuracy is one hundred percent. Under the current rule of reason, plaintiffs almost always lose, but some people, who don't favor strong enforcement, might believe that plaintiffs almost always losing actually is exactly right.

Even if you believe that, I think you would think the cost is still way too high. You might be better off with the plaintiffs winning occasionally as long as the cost drops dramatically. So we would need to figure out how to do that, and Maurice offered some suggestions. But what we really need is some sort of measures of the elasticity of accuracy with respect to particular changes. And just as we don't usually have elasticity numbers for the economic world, we don't really have them for the litigation world either. So I think in some ways

Maurice's paper is a call for more work in that area on this procedural issue.

I actually have some other transient comments on this with respect to market power, the use of market power and with respect to presumptive approaches that Maurice suggests and the approach I always favored, which is the burdenship. But I will stop there.

DOCTOR MARSDEN: Let's open it up for discussion. There are two issues I would like to put on the table for anyone to pick up if they wish. A couple of points that Maurice makes about the fact that with the rise of behavioral economics, evolutionary economics, new institutional economics, that these will exacerbate the infirmities of the rule of reason. And I know that there are competition authorities that are doing a lot of work on behavioral economics, so that they can ensure this doesn't happen. I was wondering whether his conclusion would still follow if the authorities do actually publish their thinking with respect to behavioral economics and those issues related to bounded choice.

The other point I was going to make was with respect to the argument that the full scale of rule of reason or structured four-step rule of reason should be limited to novel cases where courts have little experience with a challenged restraint. It's an argument that I've heard made in Germany. They say well, we have a great deal of experience with certain restraints, for example fifty to sixty years of experience of retroactive fidelity rebates by dominant firms, and therefore we feel comfortable not taking too much economic evidence of the effect on the marketplace of these restraints and just ban them instead. So they say they don't need a full rule of reason analysis for such practices, or any analysis perhaps; but they would save their resources for a more full rule of reason analysis of novel issues.

That view of relying on experience over analysis allows formalistic prohibitions, and is being challenged quite severely by current thinking within economic and legal circles in the European Union, even if you trust the experience that courts and agencies have with a particular restraint.

MR. CALVANI: I very much enjoyed the paper. It was most interesting. Professor Stucke did a marvelous job pointing out the difficulties of the rule of reason, but to what end? Yes, the rule of reason can be quite difficult to apply, but that is hardly unique. Judges make difficult decisions every day.

A judge in the Court of First Instance in Luxembourg

recently observed that his most difficult task while sitting on a high court of a Member State was having to consider the best interest of the child in a custody case. He observed that child custody cases employed an often-difficult rule of reason—every bit as difficult as a rule of reason analysis in a competition case. This observer is not persuaded that the rule of reason is too difficult.

Additionally, the discussion of the legislative objectives of the Sherman Act was curious. *Law & Economic Policy in America: The Evolution of the Sherman Antitrust Act* by William Letwin and the *Federal Antitrust Policy: Origination of An American Tradition* by Hans Thorelli are widely regarded as serious studies of the legislative history of the Sherman Act. This observer, perhaps erroneously, reads both to suggest that it is quite difficult to discern the legislative intent.

Lastly, one might ask whether merger analysis under Section 7 of the Clayton Act is not application of the rule of reason. Is it argued here that contemporary merger analysis ought to be rethought? Should we return to the days of *Philadelphia National Bank*? Thank you very much. Professor Stucke has authored a very fine paper.

PROFESSOR CAVANAGH: When you read Brandeis, *Chicago Board of Trade*,⁶ and his statement of the rule, it's beautiful literature but the reality is if you try to apply it in the courtroom, it's impossible. And the thing that troubled me about the rule of reason was there has to be weighing, and judges don't weigh. I mean they look for trump cards. And somebody screams out free rider. There it is. Without any proof.

And Terry, I know the courts purport to waste stuff all the time. This is an area it just seems to me where they're not good at it. And what has happened is we are a distributor of textile when this rule of reason almost equals judgment for the defendant.

MR. AHLBORN: First of all, rule of reason may mean different things in different jurisdictions. I think if you look at what the European Commission has done in the area of abuse of dominance, they've basically shifted, or attempting to shift from, the rule of reason without affecting the outcome.

And the way you do that is by allocating the standard of burden of proof in the right way. So you could have rule of reason

⁶ Bd. of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236 (1905).

which has different shades of gray, and I think you understand with the rule of reason when Mark just says almost a sort of *per se* legality because it's heavily stacked against the complainant. You could have a rule of reason that shifts that sort of burden somewhat differently and you can probably fine-tune the rule of reasoning that way.

The other thing certainly is asymmetry and that is that you do have certain screens which filter out unproblematic behavior so you have almost a *per se* legality screen. Then where you end up is only the last step of the small number of cases, so it's not that sort of clear-cut *per se* versus rule of reason. It's a mixture of both in the same case.

PROFESSOR FIRST: Maurice's paper is nicely provocative and the presentation continues that. My first reaction is: who could be against the rule of law? So that's a great turn to say that the rule of reason is against the rule of law. Ah ha. We like the rule of law so we don't like the rule of reason. I like that approach.

Now that led me to wonder exactly what we meant by the rule of law. And I think this is an issue that will probably go through the papers all today.

And then I realized that this whole session is talking about the rule of law and whether there is some concept behind it or whether it's just that you have to comply with certain kinds of things. We look at the indicia of the rule of law, but what is behind it, exactly? And, in part, my question about that is whether we would be perfectly happy with antitrust if we had a rule of law that said everything is lawful except for price fixing. We'll throw in the Darth Vader awful part of antitrust, the supreme evil: Price fixing will be illegal but everything else will be lawful. Now that would be, in the terms that rule of law is being defined, a rule of law. I suspect that for many, but not for everyone around this table, that would *not* be what we would want antitrust to be.

So I think in part—and perhaps this is how discussion is starting to go—that we're really talking about the institutional framework of antitrust and how discretion is dealt with, who gets to apply this rule of law and what cabins their discretion? It's a very complicated picture, involving judges and various antitrust enforcers. And I think that's the picture we want to start thinking about.

Of course, as lawyers we will resort to our favorite lawyer's trick, which we all know is presumptions that shift the

burden of proof. So that's where a lot of discussion goes as well. There is substantive content behind all of this and procedural content as well. All of antitrust problems are not encompassed in the substantive rule of law. Actually, the rule of reason isn't even a rule. It's a standard. That's a little weird when you think about it. *Twombly*,⁷ which Maurice talks about as a stumbling point, was not about an antitrust rule of law. It was about whether there was a conspiracy. So that's the factual issue the Court stumbled on, that it didn't want to allow the parties to get to. If it were clear there was conspiracy, then it was *per se*.

So we have a lot of work to do but there really is something in the rule of law and I hope the discussion will continue to try to tease out exactly what the problem is.

DOCTOR MARSDEN: I wonder if a lot of the differences of understanding about what is the rule of law and what is rule of reason is not so much about whether or not judges can be trusted to weigh things in the context of the rule of reason but with respect to their openness and transparency – i.e. how they, and competition agencies, tell us they reached their conclusion; what they relied on, etc. So in antitrust we don't need something like the tax code but we need to be comfortable with the way agencies use their discretion, and how courts review that process, and what would help a lot more is if their reasoning at both levels is clear and we can rely on it. Would that remove quite a few of your concerns about the rule of reason violating the rule of law, or not?

PROFESSOR STUCKE: That would help. I mean there are several problems with the rule of reason. One of them is just, I remember when I was at the DOJ that there was this fear that the court was not going to view this as *per se* legal. In that case, we would need to prepare the case under the rule of reason which entails a lot more in terms of manpower, time, and resources. There is a whole host of problems with the rules of reason not only in terms of weighing, because under the four-tier structured rule of reason done by most of the lower courts, the courts rarely get to the fourth one.

But the weighing can happen in the first and second and also as a point that Ed makes, that sometimes the court just because of the journey that the court sees ahead of it might then decide to avoid that journey on others such as antitrust injury or standing.

⁷ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

So even before you get to the rule of reason, there may be these sort of procedural traps in order for the court to even avoid or, for example, failure to accurately define a relevant product. And I think in that sense, it is foreclosing litigants from quickly addressing the harms. It doesn't give any sort of guidance to businesses and they can't readily internalize with the rule of reason one sort of norms in conducting their affairs.

A couple of points with tort law: the interesting thing is when I teach business torts, we look at the prima facie tort and the prima facie tort is the tort at its infancy, and that is where weighing is seen. Then the court has to look at the defendant's interests and the plaintiff's interests and weigh the two and then eventually come to some outcome. Only a handful of jurisdictions in the United States recognize prima facie tort, but under the Second Restatement of Torts, courts, as they become more familiar with the tort, should do less weighing. Then you might have the elements of the offense and well-recognized defenses.

And the one thing I find the Supreme Court seems to be going against is the evolutionary grain. Rather than the rule of reason now developing into affirmative elements and recognized defenses, it always repeats the *Chicago Board of Trade*⁸ factors. And the *Chicago Board of Trade* doesn't really then give something to the next litigant saying now you can benefit from the prior rule of reason. Instead the court then starts at ground zero with that. It doesn't seem to transmit little over time.

The second, with the legislative aims of the Sherman Act, I agree with you, Terry, but I think when you look at some of the statements coming out of the Supreme Court today and you look at the sparse legislative history with respect to Section 2, you wonder to the extent that monopoly prices are important for pre-market economy. Statements like that seem to be far afield of the legislative aim underlying the Sherman Act. And maybe that's telling me at the margins you're right, it's hard to define. When you have statements such as that that seem to be so far afield and it's based upon the court's new economic wisdom which isn't even actually mainstream as far as I can understand, it's problematic.

With respect to merger analysis, I did another paper on behavioral economics and antitrust which advocates more exposed mergers, to find out in which industries and under what

⁸ Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918).

conditions the agencies are accurately predicting the matter. One of the most frustrating things when I was at the Department of Justice, when we would call up haphazardly, we had another merger in that industry. You know you got the last case wrong, and you thought this would happen but it didn't. And we're not, we weren't really. At least the weather person knows when they're wrong because the next day they can see it.

PROFESSOR FIRST: That doesn't stop them.

PROFESSOR STUCKE: We don't regularly go back to evaluate mergers, particularly in close-call second requests, to see whether or not we got it right or wrong. And there is this disconnect to what you see going on with criminal prosecution; the type of industries that we're seeing and the industries that are under merger review we think collusion may be more likely.

With respect to *per se* legality for the defendant and recent empirical studies, the FTC did a nice Section 2 workshop where they looked at private causes of action involving Section 2. They found that the defendants prevailed over ninety percent of the time either on motions to dismiss or in summary judgment.

But nonetheless, there is still a danger for the defendant because if plaintiffs predictably lose, then how is the rule of reason unpredictable? If the defendants lose in a motion to dismiss, they're confronted with the discovery costs. And if they then lose on summary judgment, those that continue could then face a verdict of treble damages. There was an earlier study done that found that antitrust had a higher rate of dismissal for plaintiffs but also a higher rate of settlement, and that might not be reflected in the statistics as to the amount of dismissals.

And with respect to Harry's point about the rule of law, one of the reasons that there is such consensus on the rule of law is that it is so broad a concept that many different things fall into it, just like consumer welfare. Who is opposed to consumer welfare? But when you start asking different jurisdictions as the ICN did, you find out that they have different interpretations of consumer welfare. I tried to outline in my paper, the longer paper, what I mean by rule of law and rule of law principles.

PROFESSOR PATTERSON: The way I have been thinking about this is what sort of information would we need to decide how to fix this. And thinking back to Christian's comment about the EEC, I always liked the EEC's approach: Article 82 asks for an objective business justification, and under

Article 81 you get an exemption structure. The idea is the defendant has to justify its conduct. So basically you're shifting the burden to the defendant.

But when I start thinking about the rule of law, it's not clear to me that you get more accurate. Do we improve the rule of law? Is it more efficient to do that? I don't know. It shifts the cost to the defendant but does it actually lower cost or just shift it? When you think about accuracy, it probably means the plaintiff wins more, which I think is more accurate, but some people don't think that's more accurate.

And so what we really need is more information, it seems to me, on how you want to allocate the burdens. Antitrust doesn't pay much attention to putting the burdens where they will produce the most cost-effective production of information. It doesn't explicitly talk about that. Some areas of law do that much more. And so I would be inclined to shift the burden to the defendant firms on the view that they have an idea of what they're doing and why they're doing it but not everyone agrees with that. In the old *Limits of Antitrust* article, Judge Easterbrook says, "Well, firms just don't know why they're doing what they are doing."⁹ I don't believe that, but maybe it's true. And so it would be nice to have better data on how cost effectively we can produce accurate information from various sources.

PROFESSOR ROBERTSON: Since *Standard Oil* in 1911, I believe that ultimately the rule of reason is all we have. There are even reasons and rationales behind the *per se* rule.

I'm a great proponent of the *per se* rule first of all because bright-line legal rules are more effective at promoting fundamental rule of law interests in legal predictability. I think Sherman Act litigation should always seek to accomplish this goal. But in any case, and in any of these cases, the ultimate justification for the *per se* rule always rests on the reasonableness of its effects.

For all of the shortcomings of the rule of reason – and I think that Maurice's paper is very rich for pointing those out – the basic problem as I see it isn't only that the contemporary rule of reason is an intractable morass that almost always guarantees plaintiffs are going to lose. It is also problematic that modern applications of the rule of reason rely so heavily on

⁹ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

Chicago School-oriented notions of maximizing economic efficiency as a primary decisional value. Those applications are often so narrow that they leave out many of the other foundational values that were important reasons for why the Sherman Act was passed in the first place. Those reasons and values include societal concerns about fair competition, which were at the root of *per se* prohibitions against price-fixing found in Section 1 of the Sherman Act. They also include egalitarian issues regarding the distribution of wealth, and ultimately the distribution of economic power by outlawing both monopolization and attempts to monopolize in Section 2. Narrow efficiency-oriented balancing forecloses the consideration of many of the most important societal values that reflect the richness of the populist heritage of American antitrust law.

That being said, if the rule of reason could be richer somehow in its application, despite the shortcomings, I wouldn't have so much of a quarrel with it. If it could co-exist as it has for a very long time with bright line *per se* applications, that is, functionally co-exist, so that the broader purposes of antitrust law could be better served, then it certainly would be worth keeping. Now what I'll be taking up to some greater degree later today is a challenge presented by rule of law concerns about consistent, coherent judicial determination of fairness and efficiency considerations in the context of Sherman Act litigation.

The issue presented is whether, because of the way the rule of reason operates, most Sherman Act cases should be taken out of the jurisdiction of the federal courts and placed in the lap of the federal administrative agencies like the FTC which arguably have superior technical economic expertise and therefore greater competence to deal with them. I'll argue that this conclusion about the heightened institutional competence of rule of reason balancing for microeconomic decision-making by administrative agencies is equally problematic for the same reasons Maurice Stucke pointed out in his rule of law critique of the limitations of the rule of reason.

MR. ALESE: Well, I haven't read Maurice's paper entirely, but I was surprised he said that U.S. judges were quite liberal in their application of antitrust law when it was adopted. I don't think that's right. For example, Peckham was extremely conservative. In the very first antitrust decision, *Transmissouri*, he didn't know what to do with the parties' arguments over the fairness of price fixing. Rather than borrowing decisions from common-law which allowed the practice in certain situations and

taking the liberal approach, he just kept telling them you haven't provided me with a standard to deal with the case which more or less links to the notion of fairness in terms of rule of law.

You also talked about Section 2, monopoly perhaps being the phrase. You talked about monopoly saying judges seem to think they're okay. I think that's fair to an extent because you need innovation. You need rivals to come up and challenge monopolies rather than whining about them or running to the courts for salvation. And I thoroughly agree with Christian that we have some cases that are blatantly against the law and some that are borderline – which is where the problem usually arises.

I think in terms of accuracy of decisions, this is extremely difficult to achieve because antitrust is a very dynamic field. It is a field in which judges, like the players, have to constantly refine things. Accuracy is particularly very difficult to move toward in common law jurisdictions where decisions can be case-dependent. I guess rather than thinking about accuracy, judges focus on looking at what is in front of them and moving in the direction that the case takes them. I think they always want to seek out fairness and efficiency in competition cases wherever possible.

PROFESSOR WALLER: I was taken by Harry's comment that of course the rule of reason isn't the rule. It's a standard. Three of the four papers and possibly Elbert's as well cited Lord Bingham and his article and the different factors. And when you look at that, the rule of law isn't a rule, it's a standard also. With multi-factored tests, sometimes one has to be sacrificed in order to achieve another. You do the best you can to satisfy the most, not just to minimize error cost but to maximize accuracy benefits. So it's very difficult, and the only place where I disagree with Maurice is that there are two paths in U.S. antitrust jurisprudence that have not been consistently followed. If they had, they would do a better job at having a structured form of the rule of reason that comports with as many of these rule of law principles as you can in the real world. One is the Taft Ancillary Restraint Doctrine, which pops in and out of mainstream antitrust jurisprudence in very interesting and peculiar and episodic ways.

And the other is the work of Justice Stevens on the rule of reason, which is something I'm in the midst of writing.¹⁰ And I

¹⁰ Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009).

don't think it's a coincidence that Justice Stevens is the only trial lawyer on the Supreme Court, the only one of the current group who made a living trying cases. And most, but not all, were antitrust cases. He was also a scholar and a teacher, but basically a partner in a commercial litigation firm in Chicago that did very sophisticated antitrust work. He realized early on the danger that the rule of reason was a lengthy, expensive way of saying that defendants win, or if that is what you want, there are simpler, cheaper ways of saying that defendants win. And he had the luxury of laying out his views where he wrote for the court a series of opinions about Section 1 of the Sherman Act over a roughly ten year period beginning with, I think, *Society of Professional Engineers*¹¹ and going through several of the other cases after that. He laid out what many people call the quick look, by essentially saying gee, the defendant's conduct looks suspicious. We have reason to believe that there are substantial anticompetitive effects. So defendant you better go first and you better articulate and have some substantial reasonable business justification for doing this.

He had similar views in other areas of antitrust, but that was his basic understanding. He used all the tricks that courts use in the real world, which are presumptions and burdens of proof because he knew the way in his heart and you rarely get to it. And the D.C. Circuit in *Microsoft* used those same tricks of burdens of proof and shifts and presumptions.

But under both the jurisprudence on Section 2 in *Microsoft* and for Stevens, where the defendant really had something real and plausible both legally and factually, they win. When they don't, they lose. And that, I think, is a methodology that would give meaning to the rule of reason. I think the problem is the Supreme Court screwed it up in *California Dental*¹² when they said of course you can do it that way, just we're not sure when you should do it that way. So I think that's the other path not taken that would have gotten us closer to a decent real-world solution.

PROFESSOR HYLTON: There is a fundamental premise in the argument that I have to go against. There has been an old issue about the common law's use of fact-sensitive discretionary balancing tests in contrast to bright line rules, and that debate predates the Sherman Act. Bentham's attack on the common law

¹¹ Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679 (1978).

¹² Cal. Dental Ass'n. v. FTC, 526 U.S. 756 (1999).

included the claim that it was “dog law,” because that is how you teach your dog what to do. You let him do something wrong and then you beat the dog. That was Bentham’s description of what the common law was like.

People have attacked common law reasoning and the common law process on that basis for a long time; that it’s not predictable in comparison to rules of law, things like that. In reality and in practice, I think those arguments have been wrong. I think the world is lucky Bentham was totally unsuccessful in getting countries to adopt his approach and codify their law.

So to some extent I see the strain of this argument underneath what you’re saying, which is an ancient argument that I have to reject, and I think I’m glad the argument has been unsuccessful for the most part.

The rule of law is a vague concept. It can mean a lot of different things. So one notion, in the sense in which I find some meaning in it, and agree with you, is the notion that you don’t want to have legal decision makers unconstrained by the law. And you don’t want to go into court or to agencies and to have someone up there who decides on the basis of his whim or on whether he has connections with you, whether you’re a member of the same political party or whether you contributed money to him, whatever.

The absence of rule of law means a regime in which the rules matter less than whether you have some connection with the person who is making the decision. And that to me is a concept of rule of law that I can buy, and makes sense. And I don’t think that’s what you’re talking about because I don’t think anyone can say that about the rule of reason as an approach to antitrust law. I don’t think anyone has attacked it on that basis, and I don’t think that’s what you’re saying.

Another notion of rule of law has to do with predictability and error costs. But I really think those are different concepts. I think there is a core notion of rule of law, and maybe that’s a notion you don’t want to have in your argument, involving capricious, arbitrary decision-making. Predictability and error costs, those are more functional arguments of what you would like to see out of the law. I personally view those as unhinged to the rule of law concept. I would not link them to the rule of law concept because I think it’s a different concept.

I think when the rule of law gets applied outside of this more conservative sense that I brought up, then it becomes something that people can attach to their own interests and start

to argue, use it as a principle to argue against the things that they don't like. Whatever those things are. And so I'm reluctant to see the rule of law concept moved beyond that narrower sense that I just described.

A few examples on the issue of clarity. I don't think that the *per se* test has been a great advance in clarity or predictability or in the rule of law concept in some applications. Take the whole area of resale pricing where you have *Colgate*¹³ issues. I think the issues made predictability a mess and put a high premium on having good lawyers available to avoid liability rather than making sensible business decisions. Liability depended on whether you had lawyers there to talk to the dealers. So that's not a great advance of success of moving to the bright line rule when the *per se* standard puts a premium on the legal advice rather than making sensible decisions, decisions that all sides of the transaction would think are efficient.

And I guess the other point is the rule of reason has moved over time. We have moved from just a vague balancing framework, and crystallized rules have formed under the rule of reason. Maybe they're not happening as fast as you would like to see them, but they are happening. If you look under Section 2, there is a general balancing test, as described in *Microsoft III*¹⁴. Well, under certain subcategories, we get bright line rules. Under *Brooke Group*,¹⁵ dealing with predatory pricing, you get bright line rules developed in that area. So I don't think the rule of reason is a total failure in trying to move toward bright line rules.

MR. AHLBORN: Similar direction but from a slightly different angle. If you look at the criteria you used for two dimensions, you have accuracy on one dimension, and then everything else is almost sort of no-conflict between the rest in terms of simplicity, predictability and transparency. So the two angles you can go are almost got a tradeoff between the two.

And if you look at the antitrust regimes, which have a very high degree of predictability, I think you can go down what Harry proposed to say "look, price fixing and everything else is fine." Or you can go down like the European Commission which is the opposite, saying that everything is bad. So that's very

¹³ United States v. Colgate & Co., 250 U.S. 300 (1919).

¹⁴ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*).

¹⁵ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

predictable as well.

But then you have to make a trade off if you have a small, very selective sort of enforcement mechanism. You bring the economy to its knees if you apply that standard across the board where there is massive or private enforcement. The only way that works well is where you have an agency that sees three or four cases. The lack of predictability gives you what I call the lightning system, where lightning strikes and you get caught and you have four or five cases and the rest is unpredictable. But you do not get around the fundamental issue that you have to have a proper tradeoff between accuracy and all the rest. And I don't think *per se* rule is the answer.

MR. BRUNELL: My reaction picks up from some comments Harry and Keith made, but it's hard to ignore the role of rhetoric in the substantive debate. Whether you favor the rule of reason may depend on whether the prevailing law is a rule of *per se* illegality and you're trying to argue the rule of reason, as in *Leegin*,¹⁶ or whether the prevailing law is the rule of reason as under Section 2 and you're trying to argue it should be *per se* legality, as in *Linkline*.¹⁷

So the rule of reason is to some extent a kind of argumentative device one uses in arguing about what the substantive rule should be. But I think it is worthwhile to think about the rule of reason on the merits as Maurice suggests in how it relates to rule of law issues. On that score, I think I agree with Keith that the debate about rules versus standards is one that usually doesn't get you very far.

That's an ancient debate and my take on that ancient debate is that it's not that Bentham was wrong. It's just that it's totally indeterminate as to whether a particular rule is more predictable than a standard or not.

And my main rule of law concern about the discretion of courts is more of a separation of powers issue. Who gets to decide what the rules are and what the standards should be? We have accepted this notion that the Sherman Act is this standardless delegation of authority to the Supreme Court to make whatever rule or standard it wants to develop. That is probably a more fundamental problem with a rule of reason that unhinges the Court from any democratic constraint.

¹⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹⁷ *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 U.S. 1109 (2009).

MR. COWEN: Two points related to that last point: it raises the fundamental rule of law question about the whole of the antitrust system in the U.S. I think there is a question that can be raised in that area when you clearly have a political appointment system both in the court process and in the Department of Justice. There is no separation of powers between policy and enforcement. And so there is a really big rule of law question about that which I think we should try to pull out.

Secondly, and more constructively, how to fix the system going forward. What could be done? I think you can build on the criticisms of the system and ask "Why did this agency not look back?" I think that's right and should be a feature of the system. But an agency can also look forward. Authorities can look around. They can actually gather evidence instead of playing a litigation game. They may play the game, which I think people enjoy doing because games are fun, but it may not be very constructive.

The litigation game misses the point that actually the ministerial authorities (and maybe there is more opportunity to do this in Europe than in the system here) could gather information in advance if they were gathering information on a more regular and systematic basis. If such authorities were more systematic about information-gathering we wouldn't have the snapshot problem, which arises from gathering information on a snapshot basis in response to a case.

In a perfect world you would have unlimited amounts of knowledge about unlimited amounts of information and an unlimited amount of time, and that is impossible in any judicial system. The judicial system says that we will only look for a limited period of time, given the limited amount of space that can be assembled and assimilated. To improve things you can look at them over time.

What can be done about that? Authorities and companies can be gathering data on a regular basis. The system can also emphasize looking forward rather than simply looking back from the date of a complaint. Authorities could actually database market information; analyze, assimilate and become more knowledgeable in the industries they deal with; and make better decisions about particular situations.

One of the problems that is exacerbated by the legal system is this idea that things are dealt with on a one-shot basis. It does not have to be the case, and that's certainly something that we've argued and had full study about for 10 years. This is

2009

Discussion - Stucke

47

the issue that the authorities should look at things over time and should dedicate capability to focusing on different sectors to develop industry knowledge. If they did so, we would probably end up with a better, higher quality, more knowledgeable and a closer-to-justice result. That would be moving things forward.

PROFESSOR WALLER: Bill Kovacic at the Federal Trade Commission has been a huge proponent of having the Commission do far more research both in general and case retrospectives than had been the practice in general in the United States.

MR. ALESE: I'm sorry to interrupt. My argument again is that you can do as much market research as you like. This is a dynamic field, products are dynamic, events are dynamic, and to move in the direction where we rely entirely on past knowledge I think would restrict the advancement of the process.

My second point is that Tim raised the issue of political appointments in terms of rule of law and rule of reason application in the U.S. I don't think that has a say in terms of how these things go. The UK does not have a separation of the executive and the judiciary but that doesn't seem to compromise the integrity of the judiciary. In the U.S., judges appointed by presidents sometimes go in different political directions from those of their appointers.

MR. McGRATH: I guess what I find in this debate, being from Europe, is that so far we haven't really focused on what the conduct is that we're trying to stop. And when I'm advising clients, I tell them there are some things which are clearly wrong like hard-core price-fixing. If you put unilateral conduct to one side for the moment, that's where it gets really tricky. You have a very wide middle "it depends" category which covers the infinite variety of commercial conduct, much of which I'm prepared to accept, even as an ex-agency person, is broadly benign. And if two reasonably-informed companies want to write an agreement to do something, then I still think ultimately that once you've been given the benefit of doubt, even if that means it's rather hard for one of those parties or a third party to overturn that agreement in court, then so be it.

I think that's a slight problem I have with Maurice's paper and I can see it colored by the U.S. context. It sort of presumes that it's a bad thing to make it hard for claimants to overturn commercial agreements. A lot of cases in the U.S. seem to be about this sort of commercial conduct, which can be arguable either way. It may well be that legitimate commercial

agreements through different lenses could be about customer allocation or some form or adaptation of price competition. I rely on sort of a gut reaction, and I don't think business people understand. Why are you doing this? Are you doing this to restrict competition, or are you doing it for some sort of wide commercial aim? It's easy to put something in those terms, but you have to start from some sort of presumption, and if there are certain types of conduct that viewed the policy reasons as bad, then as long as that is reasonably clear, that can be helpful.

In the European context, I'm not really persuaded that in economic terms absolute territorial protection is clearly bad. But the European Commission and European courts, for decades of case law, have said absolute territory protection banned on all past knowledge of sales across the border is an infringement. Therefore it is going to infringe. And if that doesn't have a very good intellectual or economic opinion, at least we know where we stand when we advise clients. You can say, well, you should have a battle on all across-the-border sales. That's a policy decision. So as long as you have that, I think that's okay as long as constraints are narrow.

And I think it's often quite useful and informative to see how things go in countries where things get done badly. I am not so much talking about the whole side of the rule of law which is covered by Lord Bingham 6 subrule. I'm parking that to one side to talk about later because I find most interesting the sort of writing or framework of judicial review standards of people acting within the law. But it's simply are they actually applying it sensibly?

I was just talking to colleagues from our Moscow office the other day, and they are saying that there are huge issues in Russia at the moment about how the courts are interpreting the law on resale pricing. They are basically saying that if a supplier has a recommended resale price, then by charging the recommended resale price, it is virtually pricing fixing, which is prohibitive and illegal. And that just seems balmy. But that is the position in Russia.

So I think we should try to sort of take a step back and ask if we're arguing about angels on pinheads or whether we are actually saying, you know, there is a lot of variety of emotional behavior, and if there is a heavy burden on somebody who wants to overturn that, whether or not they're part of that agreement, then that is such a fact.

PROFESSOR FIRST: Am I staying in the way of getting

coffee? I'll just speak at length then. (Laughter)

The last comments were very interesting, reminding us that what we see in court is just a very small tip of the iceberg. There is a lot of practice that goes on in lawyers' offices around the world that we never see. And you really have to think about whatever rules get articulated and what the shadow of those rules are in terms of advice. And in part it goes to what I think the rules should be, not whether we should have a rule but what are we talking about and how should we inform those rules.

I do want to pick up on something Rick said and something I think I heard Keith say as well. A lot of the critique is about judicial discretion to make up the law. I think that at the heart of the rule of law debate is the idea that the judges have just gone a little too far. Scalia said something in *Business Electronics*¹⁸ that the Court applies the common law in antitrust cases, but not static common law of 1890. I apply the common law in my head right now.

So there is an evolutionary quality. It does go to the notion that business practice is very dynamic—go try to find cases from 1890 on standard setting or failure to disclose your patents. Don't look for them.

For Terry, yes, back to *PNB*.¹⁹ Thank you very much. I'll just throw that out. If we're looking for a standard, for a clearer rule, we might just as well be talking about the actual substantive rules. We might be better off with a much tighter merger rule, based on the notion that a lot of mergers fail and the ones that have succeeded are now failing. So why not prohibit them in the first place?

I do want to talk about Brandeis for a minute and the invocation of *Chicago Board of Trade*.²⁰ Brandeis was the modern man. He was the Justice who believed not in formal legal rules, which is what he saw his colleagues following, but he believed in facts. He believed that you could really learn about and understand what business practice was going on and that judges could judge that. Maybe he didn't give us a great standard for doing that, but he was really against the formalism of his day and very much in favor of expanding out and looking at the facts.

¹⁸ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988).

¹⁹ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

²⁰ *Bd. of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

Now that can lead you in interesting ways. Take the *Boston Store* case, involving resale price maintenance on patented phonograph records.²¹ The Supreme Court says you can't do that; it's unlawful under the Sherman Act to impose that restriction.²² Brandeis concurs, saying I'm bound by the cases but I think we should look at this as a matter of economics.²³ This isn't something you decide by the formal legal categories.²⁴ We should look and see what the economic consequences are.²⁵

Now we all know what he thought of resale price maintenance. It was a great idea, because it protected smaller distributors. So I think in the end, we're driven inevitably about what the content of antitrust should be, where this should go.

But there is something about this discretion, and I would just like to put in, right before the break, a little plug for politics. Political values with a little p, not the Chicago (sorry, Chicago) and not the Illinois-governor type of politics, but political values. In a way I have nothing against the Bush administration. They came in. They had political values. I don't like their values, but it seems to me that antitrust is not just a technical exercise. And that has to come in, whether we call them rules or standards. It must come into how we are going to decide these cases; politics has to be a part of it. Antitrust is not just something we give over to technocrats.

²¹ *Boston Store of Chicago v. Am. Gramophone Co.*, 246 U.S. 8, 27-28 (1918).

²² *Id.* at 25.

²³ *Id.* at 27.

²⁴ *Id.* at 27-28.

²⁵ *Id.* at 28.

ISSUE PAPER

CHECKS AND BALANCES: EUROPEAN COMPETITION LAW AND THE RULE OF LAW

*Dr. Philip Marsden**

The rule of law is an eminently European concept. It may well have been exported around the world, achieving constitutional status in some jurisdictions, but it was first discussed by Aristotle and Plato, formed the basis of the Magna Carta, has been enunciated by Blackstone and Dicey, and motivates the thinking of senior Law Lords to this day.¹ The issue that this paper seeks to examine is the degree to which European competition law accords with the rule of law.

Of course, European competition law has evolved within a system of administrative law that itself only developed over the past one hundred and fifty years since Dicey set out his principles. Administrative law acts as a form of constraint on unbridled discretion by any agency, and can make us less concerned than we might otherwise be about strict formal adherence to rule of law principles. Generally, the interplay of agency expertise, discretion and various checks and balances inherent in the European competition law system operate quite well.

The ultimate arbiters of European law - the judges at the European courts in Luxembourg – recognize that they adjudicate cases within such a system. That said, they belong to an important ‘European institution,’ which may explain why in some cases the European courts tend to be reluctant to undermine the position of their sister institutions; particularly the executive – the European Commission. Thus, when challenging Commission decisions in the European courts, there can be a surreal feeling of

* Senior Research Fellow, British Institute of International and Comparative Law.

¹ Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67 (2007).

asking the Church to rule on the Church. It is all the more important then, that even within the structure of European administrative law, the various guardians of the European Treaties are acting – and seen to be acting - in accordance with the fundamental principles of the rule of law.

Quis custodiet ipsos custodes?

The fundamental issue that the rule of law seeks to address is: ‘Who guards the guardians?’ Who ensures that they use the powers we have granted them to protect us in an appropriate, just and fair manner, and that we never need to be protected from them? In the context of competition law, much centers on the use of both the power and the discretion that we have given the authorities. Where are the guarantees that they will be accountable, independent and fair? At the same time, how do we ensure that the courts accord competition authorities the appropriate degree of deference due an expert body, while still holding the authorities to both the *acquis communautaire* and the rule of law?

Do we tell a ‘noble lie’ – as Plato argued - and trust those in power to guard themselves against themselves? Competition officials are, after all, experts, and often part of agencies that are independent from ministries. They are public servants, and will keep this responsibility well in mind. Wisely, we do not have that kind of faith. For example, for various reasons over the years, safeguards have had to be introduced into the decision-making process at the European Commission’s Directorate General for Competition (“DG-Competition”). As there is no requirement that the European Union’s Competition Commissioner be an expert in competition law or economics, we rely on the expertise and analysis of case teams. These are made up of more lawyers and economists than ever before. Their investigations are in turn reviewed internally by a ‘fresh pair of eyes’: colleagues who act as devil’s advocate panels to ensure that the evidence supports the particular theory of harm. This peer review is also supplemented by the rigor and skepticism of the Office of the Chief Economist, which hopefully tempers the fire that we want the case team to have, with added intellectual rigor and objective analysis. There is also obviously the to-and-fro between the case teams and the parties who are obviously directly and highly-interested; added to which independent Hearing Officers monitor oral proceedings to try to ensure both due process and that the rights of defense are

adequately protected. They are also increasingly getting involved in more substantive areas. The Legal Service reviews draft decisions, with an eye on EU law, and the very real pressure that they may have to defend the decision in court some day. Then there is the fact that major decisions go to the College of Commissioners, which, while bowing to the Competition Commissioner's point of view, also provides another layer of review. Then there is the possibility to appeal to the Courts, and the court of public opinion as well: the reporters and the academic community. After this exhaustive process, are there not more than enough 'checks and balances' in the system?

Dicey's three principles of the rule of law require:

- the absolute supremacy of the law over arbitrary power/*discretion*;
- *equality* before the law; and
- that the law be defined and enforced by the *courts*.

How does EU competition law match up to these standards? The EU *acquis* is a unique and impressive achievement: uniting civil and common law regimes through public international law and applied through a unique form of administrative law. It tries to bring together different cultures with different backgrounds, legal traditions, stages of economic development and concentration, and resulting different views on competition, wrongdoing and enforcement.

So we must ask, in such a system with such obvious opportunities for divergent decisions, is EU law indeed supreme? What is the extent of discretion that we want competition authorities to exercise and to what extent is it controllable? Is there sufficient official guidance for undertakings to understand what conduct is permissible? Are case-selection, re-allocation and decision-making consistent and accountable? Is the law really being interpreted and enforced by the courts? Or is it the authorities that are making the greatest strides in this area? Does this raise any problems, and if so, how are these controlled?

I will address these areas by looking first at the European Commission; particularly DG Competition, the European Competition Network, and finally the EU Courts.

1. The European Commission – lingering procedural concerns

DG-Competition investigates, prosecutes and decides on competition law matters, subject to appeal to the courts. The

various checks and balances outlined above constrain the discretion of the enforcers, as do detailed regulations.

Since these many safeguards have been introduced, however, the Organization for Economic Co-Operation and Development (“OECD”) has undertaken a peer review of DG-Competition and found that its “integrated enforcement process, while efficient, has inherent weaknesses”. Previous OECD reviews had raised “concern about the absence of checks and balances”.² This is curious. One can understand why people would be concerned when an authority acts as prosecutor, judge, jury and executioner. But in competition law matters, many authorities have multiple roles. Only a very few have to convince a judge of their case - as the United States Department of Justice does - before enforcement action can be taken. There are ways to ensure that what might otherwise appear to be intolerable still accords with fundamental justice, such as, through the kinds of safeguards that the Commission has introduced as well as through introducing greater transparency into the system. But that can only be the start.

The OECD report focused on a few particulars which make clear that there is still rather a lot of room for improvement. Generally speaking, these all fall within a category of a greater ‘judicializing’ of the system. The OECD noted that there was no right of undertakings to cross-examine witnesses or leniency applicants. Also, they found the Commission to be the only competition authority where the ultimate decision-maker - the College - is not required to attend the oral hearing; nor is the Competition Commissioner, nor even the Director-General. Despite all the checks in the system, questions have been raised about the extent to which this procedure complies with the right to a fair hearing. Article 6 of the European Convention on Human Rights holds that rights, obligations and penalties, particularly those not of a minor nature, should be determined at first instance by an “independent and impartial tribunal” and a right to a subsequent review by an appellate body is not enough.

While the OECD recognized that this issue had arisen before, in the 1980s, it clearly thought it worth re-consideration. The severity of recent fines, and the fact that they are obviously punitive, may have played a part. Perhaps the system is

² ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EUROPEAN COMMISSION - PEER REVIEW OF COMPETITION LAW AND POLICY 62 (2005), *available at* <http://www.oecd.org/dataoecd/7/41/35908641.pdf>.

beginning to require a degree of separation of powers and greater judicial involvement. At the very least, some functions within DG Competition might be separated, formalizing the division between the case teams and the devil's advocate panels. Certainly senior staff – at the Director General or Deputy level - should be more evident at hearings, if such proceedings are to remain an important and credible part of the system. Finally, could DG-Competition investigate and prosecute and then bring their findings to the CFI for review? While it will always be argued that the EU Courts are over-burdened as it is, perhaps it is time for them to be more involved. Given the punitive and quasi-criminal nature of the penalties, and the fact that almost every fine gets appealed to the court anyway, perhaps it is time for a separate chamber to consider such cases, or a separate European Cartel Court.

2. European Competition Network – time for more disclosure

The European Competition Network (ECN) was created by the Modernization Regulation³ to ensure effective supervision of European competition law while simplifying its administration. The ECN itself is a mechanism for authorities to exchange information and reallocate cases. DG-Competition benefits because it can apply its limited resources to a smaller caseload; ideally involving a truly European interest. A more effective and efficient enforcement regime is thus created, and one which accords more closely with the principle of subsidiarity. As ever with all things “EU” it is a unique experiment, and one that seems to be working well.

‘Seems’ is the operative word, because that is all outsiders really have to go on. The network is only for the authorities, and thus is viewed by practitioners as a ‘black box’. The “unknown” naturally attracts suspicion. This is unfortunate because the principles that guide the ECN are sensible and clearly stated in Regulation 1/2003. Generally, the Commission deals with cases affecting more than three EU Member States; the rest go to one or more Member States, based on which is most affected, with the Commission reserving the right to take back some multi-State cases of particular importance, as has happened in the energy and

³ Council Regulation 1/2003, 2003 O.J. (L 1) 4 (EC). (on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty).

telecoms sectors.

Headline results are reported, such as the existence of a meeting of authorities and possibly the subject matter. Over 800 cases have been notified within the ECN, and more than 300 reported to the Commission. A great deal of knowledge and – perhaps more importantly – appreciation for each others' competences has developed.

As the central node, the Commission is responsible for maintaining a degree of consistency. So far it has taken a soft approach, calling authorities, writing letters or submitting amicus briefs to try to ensure that decisions are broadly consistent with EU standards.⁴ This is good and respectful, but it is not going to catch everything. The process depends primarily on the interests and resources of the ECN unit at DG-Competition, which has to monitor more cases in more languages than ever before. Furthermore, it is not always clear that sufficient reporting from national courts is reaching the Commission. Inevitably, there has been divergence, which is to an extent permitted for some aspects of competition law, particularly abuse of dominance.

Inconsistency at the ECN – at the margins

Resale price maintenance arrangements have been approved in Spain, but banned in Italy and Holland.⁵ The infamous *Michelin II* rebates scheme - that attracted such opprobrium and penalties at the European level - has been approved in France. Similarly, British Airways' commissions to travel agents were banned and fined at the EC level, while cases involving similar arrangements of BA were closed by the UK Office of Fair Trading.

Neither the fact that different approaches to abuse cases are expressly allowed nor the inconsistency that results necessarily lead to a concern about the rule of law. What is relevant from that perspective though is how the differences come about. If it is due to a fundamental and clearly articulated difference of approach to the practices being examined, then this

⁴ Kathryn Wright, *European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship*, (Ctr. for Competition Policy, Univ. of E. Anglia, Working Paper No. 08-24).

⁵ Comments of the Global Competition Law Center on the Functioning of Regulation 1/2003 (2008) available at <http://www.coleurop.be/news/1412>.

is not just tolerable, but indeed welcome, and can result in competition among competition regimes that improves decision-making. Unfortunately, cases are often closed due to resource constraints, or after a simple declaration of 'enforcement priorities'. It is the lack of clarity in this regard, the irritation to the relevant party whose claim is 'rejected' and the potential for abuse of such discretion where there may be concern.

The sky is clearly not falling, but different approaches to cases within Europe do show the limits of the system and the inevitable uncertainty this provides businesses with pan-European product offerings. The same is true of the analysis the authorities use more generally. Of course each authority has different enforcement priorities, resources, and functions within a different legal 'operating system; whether it is common law, civil law or something else. They also function in different markets, with different degrees of privatization, economic development and concentration, to name but a few variables. This can lead to different approaches in the ways authorities define markets, identify anti-competitive problems, prioritize cases and intervene.

All of this is not surprising in such different economies. When Articles 81 and 82 EC are enforced, though, consistency is not necessarily the hobgoblin of mediocre minds. At the very least a greater effort at transparency would be welcome so we can understand *why* divergences are happening. Where it is possible, historical data from the ECN intranet of cases should be made public. Equally, authorities should be encouraged to publish non-confidential versions of non-infringement decisions and any informal guidance that they issue.

Greater publication of this sort would also save public resources, be of indirect benefit to business if it can help authorities with their analysis, and ensure that they do not re-invent the wheel, or reach conflicting conclusions about similar arrangements. Public statements of reasoning behind all decisions – including case-closures - will be more effective in 'spreading the gospel' than relying on the Network operating solely through internal checks.

What might be nice to see as well though, is some form of substantive analysis (rather than statistics of cases notified etc.) on the degree of cooperation and coherence within the ECN. How have the authorities found working together? Where have cases been resolved despite different substantive approaches or priorities? Where have problems arisen and how were they resolved?

3. The EU Courts

Recalling Dicey's third principle, there is no doubt that the EU Courts are the ultimate interpreters of the law. But that does not mean there are not problems en route to justice. The main problem is the length of the journey. Back in 1996, the European Court of Justice (ECJ) was found to be largely a victim of its own success due to its wide jurisdiction, the large volume of case law upon which it was the sole interpreter and its reputation for relatively effective enforcement of its judgments.⁶ Delay is still the primary problem.⁷ Cases can take an average of two-and-a-half to five years, and sometimes eight to nine years from initial decision to final appeal. This is too long, and various initiatives have been suggested to speed things up.

Translation issues are still a major factor in the delay, and it really must be asked whether the court's system of holding internal deliberations in French, with the necessary translation, makes sense, where the majority of judges now will have English as their second language and French as a distant third, if that.

Should there be a separate EU court purely for competition issues? A House of Lords subcommittee said it was not yet the right time for such a body.⁸ But something should be done to give appropriate consideration to what is really such an important pillar of EU law, and in which quite important economic interests are at stake. Roving circuit Judges or national panels of the EU Courts have also been suggested; particularly if populated by retired members of the ECJ or the EU's Court of First Instance (CFI). This is certainly a most pragmatic suggestion, and while it may take a while to set up, and might mean that some circuits are busier than others, it is worth consideration.

The most pressing area is always mergers of course, as this is the most time-sensitive of any aspect of competition law. If a merger tribunal is not yet timely at the EU level, then we should

⁶ BRITISH INST. OF INT'L & COMPARATIVE LAW, "THE ROLE AND FUTURE OF THE EUROPEAN COURT OF JUSTICE", A REPORT BY MEMBER OF THE EC SECTION OF THE BRITISH INSTITUTE'S ADVISORY BOARD CHAired BY THE RT. HON. THE LORD SLYNN OF HADLEY 23 (1996).

⁷ Tim Cowen, "Justice Delayed is Justice Denied": *The Rule of Law, Economic Development and the Future of the European Community Courts*, 4 EUR. COMPETITION J. 1, 11 (2008).

⁸ EUR. UNION COMMITTEE, AN EU COMPETITION COURT – REPORT WITH EVIDENCE, 2006 – 2007, H.L. Paper 75, at 15.

explore more ways to free up the CFI in other areas, so that it can apply its expertise to more quickly rule on mergers. Here again, consideration might be given to a separate panel or court dealing solely with relatively straightforward, though no less important, cartel cases.

Dissents or separate opinions

A word of concern about the role of the courts, though: Of course they should continue to rule on the most complex and controversial cases, but how best should they do that? CFI Judge John Cooke, the Judge Rapporteur in the *Microsoft* case, recently revealed, “I tell my clerks that these Article 81 and 82 cases are 20 percent fact, 20 percent law and 60 percent policy”.⁹ We will never know how much of the case was decided on policy grounds, rather than on the facts or the law itself. It might be viewed simply as following EU case law quite closely, but expanding its scope in some areas to accommodate the Commission’s view of the facts. Or it may be yet another judgment¹⁰ representing an Ordoliberal view of competition that is also starkly at odds with the Commission’s stated aim of only intervening when there is clearly identified and likely consumer harm.¹¹ Can we be sure that the judges understand the economic points being made before them, and can take an appropriate view; or is it sometimes all too difficult, and so their default is more often than not to defer to the Commission? Is that appropriate?

There is no doubt that overturning a Commission decision – or finding it manifestly unsupported - can deal a severe blow to the agency. We do not know how much this is in the minds of the judges, or how much it is discussed in their deliberations. Hopefully though – and Judge Cook’s comments aside, policy considerations are not determinative, as judgments must rest on sound and *current* law first and foremost. Where different motivations are behind some rulings, however, then this should be made clear.

Isn’t it time to finally allow dissents at the European Courts? Or at least separate and concurring opinions? The

⁹ See Philip Marsden & Simon Bishop, *Intellectual Leaders Still Need Ground to Stand On*, 3.2 EUR. COMPETITION J. 315 (2007).

¹⁰ See Case C-95/04, *British Airways v Comm’n*, 2007 E.C.R. I-2331.

¹¹ Philip Marsden, ‘*Microsoft v. Commission - With Great Power Comes Great Responsibility*’, COMPETITION LAW INSIGHT 3, 4 (Oct. 2007).

Commission seems confident in leading the world intellectually and through cases. The Courts should be too. It is highly unlikely at this stage that the *acquis* would be destabilized by learning more about how judges interpret European law. Judges, who speak their minds, should not fear national retribution when they retire. Dissents or separate opinions would help make rulings more transparent and the reasoning clearer, and help allow new ideas to be discussed and considered.

The standard of review

The CFI reviews Commission decisions against a ‘manifest error of assessment’ standard which supposedly entails ascertaining whether the facts on which the Commission’s assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account. The limited standard of review is of course a deferential bow to the relevant agency’s expertise, the technical and economic issues at hand and its discretion. But it is not a full appeal; nor even judicial review.

Is this the appropriate balance of the Commission’s expertise and discretion and the CFI’s duty of review? The CFI has not at all been shy of rebuking DG-Competition when it has not argued its cases carefully enough. The three judgments in *Airtours*, *Tetra Laval*, and *Schneider* “were scathing in their criticism of the Commission’s appreciation of the facts and treatment of evidence” and eventually forced the Commission to introduce the very safeguards discussed earlier.¹²

Nevertheless, it can be argued that in very complex economic cases, the CFI’s limited standard of review leads it to rely too heavily on the findings of the Commission. There is also the problem that in the legal tradition of Continental Europe - which predominates at the EU Courts - “opinions” and agency findings can often end up being treated as if they are “facts”. Thus, the Commission’s decision might not be as thoroughly tested as it would be, for example, in a British court.

Given this, do Europeans and others really understand the

¹² Case T-342/99 *Airtours v. Comm’n* 2002 E.R. II-2585; Case T-310/01 *Schneider Electric v. Comm’n*, 2002 E.C.R. II-4071; Case T-5/02 *Tetra Laval v. Comm’n*, 2002 ECR II-4381; See Nicholas Levy, “*EU Merger Control: From Birth to Adolescence*”, 26 *WORLD COMPETITION* 195, 211 (2003).

limited nature of the CFI's review of the Commission's decisions? The CFI is only looking at the adequacy of the decision. Judgments are reported as if they were full appeals; as if a hearing was held of all the issues, witnesses examined, arguments heard in full, in a public forum. The reality, of course, is quite different. There may be Judges' questions – which are starting to grow in significance – but there is no in-depth questioning of officials, witnesses, complainants, and the majority of the work has been done in unavailable written pleadings which are protected from public scrutiny. More could be opened up and thereby provide greater oversight.¹³ How much more credibility would the process have if reporters could genuinely write “today the Court upheld the Commission's decision,” rather than what should be: “today the Court found that the Commission was not manifestly wrong?”

Conclusion – ‘a more economic approach’ may lead the way

This article has argued for more openness and more legal and procedural guarantees. But perhaps the solution will come from another quarter entirely: the rule of reason. As the Commission pursues its “more economic approach,” it will inevitably have to explain its decisions more thoroughly; whether in providing informal guidance, non-infringement decisions or actual prohibitions. This too will help authorities around Europe better understand, share and benefit from this self-discipline. It also means that cases will be more thoroughly reasoned and hard-fought, and thus better tested as they pass through the existing checks and balances. The recommendation I have made is that greater disclosure of agencies' reasoning, access to ECN data, some separation of the investigative and adjudicative functions, allowing full hearings and dissents, and above all greater transparency, would all help the continued development of EU competition law. Ironically though, the reliance on more economics and balancing tests, like the rule of reason, may be what allows EU competition law to better accord with the rule of law. This can only happen, however, if judges are themselves able and willing to undertake more rigorous evaluation rather than rely on precedents that were never informed by economic analysis.

¹³ David Lawsky, *Information Please: Opening Antitrust to the Public – Why more European Union Court and Commission Documents and Hearings Should No Longer Be Secret*, 7 ERA FORUM, 411, 412 (2006).

DISCUSSION

CHECKS AND BALANCES: EUROPEAN COMPETITION LAW AND THE RULE OF LAW

By Philip Marsden

PROFESSOR WALLER: Welcome back. In marathon terms, we have completed the first 10 kilometers or so.

DOCTOR MARSDEN: Are we at Wellesley yet?

PROFESSOR WALLER: I don't know. You will have to tell me Monday. I think we're off to a great start. Obviously many of the issues are going to kind of crisscross between the four sessions that in no way are intended to be airtight. And I think what you'll find is some interesting things in looking at these papers. We have the first of our EU presentations. Both of the EU papers have a heavy procedural view and/or institutional view about the way the rule of law questions play out in the competition area.

I think our discussion from Maurice's paper, and I'm sure with Elbert's paper as well, show at least the two U.S. that focus much more on what are the substance rules that are going to be applied. I think it's interesting. I'm not sure how much I want to make of it. And I hope as we continue with the discussion, we will address one thing that I saw that we left out a little bit in the first paper. That is discussion of the role of agency guidelines because as much as we focus on court decisions, they are the tip of the iceberg in a variety of different ways. In merger law and elsewhere, case law, at least in the U.S., is often quite old and quite at a high level of generality. The agencies have tried to fill in the gaps with long, complicated guidelines and commentary and other things to sort of fill in the gaps. Now it's my pleasure to introduce our co-host, Phil Marsden, to discuss checks and balances in the European competition market.

DOCTOR MARSDEN: Mine is really a little bit of an *amuse bouche* in a way to the far more substantive paper that Tim Cowen has prepared that looks at the European courts. But

I hope that some of what I am going to address picks up our earlier discussion.

I want to look at three areas that come from the rule of law principle. The first area is the exercise of control and discretion. Is the law supreme in that sense? Is it something where we can feel happy about the expertise being exercised? And is it something where we understand the decisions and we feel they are fully objective?

Secondly, is the case handling and allocation within Europe consistent and accountable? Could there be more done to make sure that there is consistency, not just to please the hobgoblins of mediocre minds, but to ensure true equality before the law? And thirdly, is the law really being interpreted and enforced by the courts, or really are the agencies running the show?

So with respect to the first issue, with respect to the control of discretion and expertise, the issue here that has come up in a recent OECD study is the fact that DG-Competition investigates, prosecutes, and adjudicates.

Are there enough checks and balances on this multi-tasking? Of course the Commission's findings are subject to appeal, but in reality that is a very limited review and so the agency has set up a range of internal checks on itself. Now there are multiple checks and balances within DG-Competition. There is the new 'fresh pair of eyes' procedure and peer review within DG-Competition, there is review by the Chief Economist, the involvement of the Hearing Officer and other ways to try to ensure there is some form of due process of decision making.

That said, there are some lingering gaps. At hearings, when they happen, there is no real right to cross-examine a witness. No other jurisdiction in the world has decision-making responsibility where the Commissioner, her Director General, and her senior staff are not required to attend the oral hearings. And there has been an argument raised in courts as to whether or not this fact raises human rights issues because any tribunal that imposes quasi-criminal penalties should be independent and impartial, rather than simply being made up of the case team itself, or having decisions made by a far-removed and distant College of Commissioners.

So suggestions for reform: perhaps there should be separate functions within DG-Competition where you should involve senior staff more, require the director general to attend oral hearings or separate the functions such that DG-Competition

investigates and prosecutes. Then you move more to the Justice Department model where the Commission is required to bring a case to the Court of First Instance to adjudicate and determine whether or not a case has been made, and particularly whether a fine is appropriate. That is the first area relating to the control of internal checks and balances within one agency, the European Commission.

The second topic, relating to consistency, involves the European Competition Network, a mechanism by which the authorities exchange information and allocate cases amongst themselves. There is an argument that the ECN operates a bit like a black box. Nobody, other than the officials, knows how the cases are allocated. And there is concern that something untoward might be going on. Again this relates to a lack of transparency that I was raising in the previous panel. There's a general fear of the unknown that is natural.

There is an argument from the officials that actually '*no, don't worry, we prepare reports for you, there's been 800 cases or so in the last few years and we've referred this many cases to this many authorities, two or three authorities are working on this case one on that, and it is all just mechanical and boring so we don't need to disclose more.*' Of course that kind of response is both true and naive, considering the huge interests that are involved in some cases, both corporate and political. But the main complaint that still arises is this lack of transparency, this black box argument. In addition to that, there is also a concern about a lack of consistency of decision making amongst the authorities.

Now I am going to focus on the Article 82 monopolization provision here with the caveat that the national authorities have been allowed to have a stricter approach to the enforcement of Article 82 than is required under European law. So obviously some inconsistency was provided for at the creation so to speak.

That said, some of the inconsistency raises concerns from a rule of law point of view. There are RPM practices banned *per se* in Italy and Holland but the same practice by the same parties is approved in Spain. You have the Michelin II rebates banned and fined quite heavily at the European level but approved in France. And there is a very nice point stemming from the British Airways case banning loyalty-based commissions to travel agents. Here the European Court of Justice upheld the Commission's prohibition and fine so there was a clear statement of what European law was in this area. The OFT responded by shutting

down its same cases in that area on the basis of lack of resources and lack of enforcement priorities.

It's a nice way of one authority signaling to the rest of the authorities that it doesn't believe in this theory of harm, or these kind of cases, but doing it in a way more like a fudge than anything else. Perhaps they were trying to use it as a nudge of sorts, to move European law on a bit. Nice, but effective? After all, case law at the ECJ presumably has more precedence throughout all of Europe than the act of one national agency.

I appreciate that each member state has different enforcement priorities, different legal regimes, different structures, different operating systems. But on the other hand, DG-Competition and European law is supposed to oversee this. And there is a question with respect to how much the Commission should perhaps be intervening to preserve the *acquis communautaire*. There is a process by which the Commission can intervene to alter these national cases. And we haven't seen much of that yet. Presumably to ensure national buy-in first.

So there are suggestions related to whether the agencies should, when they are shutting down these cases or taking different decisions, do more to at least publish their decisions and be a bit more forthcoming on their theory of harm so that you have that discussion about what is really motivating some of these case closures or decisions. So basically once more from me, a call for greater transparency, which might lead to greater understanding, greater consistency, or at least more informed divergence.

Finally a few words on the court, which Tim will address more directly. The issue here is that in a way, the European courts have been a victim of their own success. There is a huge backlog of cases. Anybody who has appeared before the European courts will know it's not a judicial system that they might be familiar with on this side of the Atlantic. There is quite an extensive pleading system where supposedly all the facts do get out and experts are questioned by the court. But there isn't a system of cross-examination or thorough fact-finding. It is more a system of administrative judicial review than an actual appeal.

One of the points that I would like to raise is the requirement of unanimity in the judgments: some cases have resulted in a situation where there is just a repetition of the law as opposed to an actual evolution of the law, and perhaps this requirement of unanimity should be rethought. If judges

are allowed to dissent or write concurring opinions, you might see a richer jurisprudence developing. And I do think at this stage, just a few decades but still European law is robust now, it can handle a system of concurring opinions or even dissents and that would make European law a lot richer.

The last point: in the Europe context at least, the introduction of more use of the rule of reason could help matters from a rule of law point of view. At least then, with the use of more rule of reason analysis, judges will be required to explain their theories more as opposed to relying on more formalistic points of view. So rule of reason balancing, married to some transparency might help bolster faith in the process of decision making.

MR. CALVANI: During the first session this morning, it was suggested that the asymmetry of plaintiffs' win/loss record in private rule of reason cases was evidence of a problem. It is not. The fact that plaintiffs lose approximately ninety percent of these cases does not establish that something is wrong.

For the benefit of the European participants, it's important to understand a little bit about private litigation in the United States. Much of it is class action litigation. And good class action litigators need to get a case on file early to stake out their territory and advance their claim to be lead counsel. Sometimes an obscene amount of money is at stake. As a result, cases are filed predicated with very little information—sometimes only a snippet of a story that might have appeared in the *Financial Times* or the *Wall Street Journal*. But that is sufficient to prompt the race to the courthouse.

The good plaintiff's lawyer is very much like the Texas wildcatter drilling wells. He or she has to drill a lot of holes to strike oil. The win/loss record is going to be asymmetrical. Filing suits based on very limited information is similar; there will be lots of dry holes. It is not surprising at all that many cases are dismissed, and it is certainly not evidence of a problem.

But now to the assigned task. When Doctor Marsden asked your commentator to critique his paper, he asked for kindness, which your commentator rather disingenuously promised. Nevertheless, it is the commentator's lot to wield the hatchet, and this one fully intended to do so. But despite best efforts, the high quality of the paper renders harsh criticisms impossible. It is a fine paper, and the first part is exceptionally so.

To the question of who guards the guardians in Europe, the answer is "no one." The noble lie is nonsense; DG-Comp is

not capable of guarding itself any more than any government agency. The “fresh pair of eyes” and quality control mission of the Chief Economist are both good ideas. Substantial advances, but they do not come close to providing independent checks. And the idea that the College of Commissioners could fill that role cannot be seriously maintained by anyone with the slightest familiarity with the works of the Commission.

Dr. Marsden’s focus on the OECD sources was spot on. If fault can be found with the discussion, it is with the treatment of the oral hearing. Note that Doctor Marsden stated that neither the Director-General nor the Commissioner, much less the College of Commissioners, attend the oral hearing. Doctor Marsden implied that their absence was a problem. They should have attended the oral hearing. That assumes that something of importance occurs at the oral hearing making attendance worthwhile.

Your commentator has attended many oral hearings, both as an advocate for an addressee or as a member of the Member State Advisory Committee. The oral hearing bears little resemblance to a trial in a common law jurisdiction. Rather, the Commission staff opens and briefly describes the Statement of Objection. The immunity applicant, if there is one, follows with a brief submission. The addressees then typically make what are really jury summations, sometimes augmented by an economic presentation. Oral hearings are very short when compared with trials. One recent oral hearing, in an incredibly complicated case, lasted one week. Each addressee took, on average, about 20 minutes to present their case. Evidence is seldom critically examined. It is not a trial by any stretch of the imagination.

One suspects that the reason why the Director-General and Commissioners fail to attend oral hearings is because they are not important. What is missing, and what is important, is some forum to test the evidence. Consider an email contained in the Commission file purportedly memorializing the content of a meeting. There is no way to cross-examine the author to test his memory, etc. Even though an addressee may contest the accuracy of the evidence in its response to the Statement of Objections, there is no opportunity to really test the evidence from either perspective.

Turning briefly to the European Competition Network, your commentator was a member of the Member State Advisory Committee that considered several aspects of Modernization.

Issues are inevitable. It is too early in the day to render any informed assessment of the ECN success.

Focusing briefly on the community courts, Judge Cooke's comment, which Dr. Marsden memorializes, is certainly curious. It may be a very good thing that Judge Cooke is no longer in Luxembourg and is now back in Dublin. Generally the community courts have played an important, but insufficient, role in reviewing the actions of the Commission in competition cases.

MR. McGRATH: I'll just bring a UK flavor in on it and pick up on Phil's mention of the desire for transparency. Somehow it's a negative view of use of the administrative priority, and as somebody who contributed to that development of that policy, I guess I just need to defend it a bit but also show how it strengthens my point about being called into getting judicial oversight.

In brief, the history in the UK was that in the early days of the Competition Act, after 2000, the office received about 1,200 complaints a year and investigates optimistically twelve, pessimistically three or four a year. So they had to reject a lot, and case handlers were trying to be helpful and would tend to say "We're not going to take this complaint forward because it doesn't show what you would call antitrust harm. It doesn't show an infringement of the law."

And in its desire to get some cases under its belt, the appeal tribunal viewed those cases as full non-infringement decisions, which I think subverted the intention of the statute. But you can understand why it wanted to look at these and only had jurisdiction to review full non-infringement decisions. Form doesn't matter. It's about reaching a view of whether the law has been infringed or not; if so, we can look at it. And these then got subjected to full merit appeal with all the panoply of barristers on one side and barristers on the other with a lot of in-depth factual analysis. This meant the OFT got poked down in a lot of these cases for no, I would argue, real benefit. And the only way out of that particular hole was to use the administrative discretion route.

I remember a meeting I had when I was at the OFT with my counterpart, the Department of Justice over here, and one of the big headaches was sports cases. We had a ream of cases involving horse racing which was an incredible amount of antitrust law in the UK. And I said, how do you deal with sports cases? We just don't do them. We leave it to the private club to

2009

Discussion - Marsden

69

do sports cases. We don't use arbitrating fights between American football stars and their agents and the clubs and you know, it's just not for us. Administrative discretion.

And I thought and I also think it's quite legitimate because the original approach that we were advised to do by the lawyers in the OFT was to say we're rejecting this complaint but don't view this as a decision. This isn't the decision. It was a very sort of sophistic and rather confusing approach, even confusing for a lawyer, small businessman, or consumer who had received this letter and asked what it was.

I used to say if you generally don't think it's a good case and a good use of your time, then it's legitimate to say that. It's legitimate to say this is not a priority. We are not going to take it on. That presupposes that you have priorities and you can say what your priorities are. And I think problems can arise still where you get a mixing up of what are the reasons for dismissing a case.

And I think the *City Cook* case is a fascinating example of where cases get rejected. I won't go into the facts, it's a bit too long and tedious, too personal, painful a memory that case. But essentially you had both the administrative court and the competition appeal tribunal of the court reviewing the OFT's reason for closing the case. And effectively the OFT was saying we can't decide whether this is a clearly object-based case, effectively *per se* infringement, or whether this is an effects case; in other words, a rule of reason case because it would take so long to argue this as an effects case and because we haven't done it as effects case. It was very familiar to all these rule of reason cases where we have to do economic analysis of the service. We decided to just close it because it becomes a prioritized issue not worth doing all the work. That's a bit problematic when you get into that territory.

But essentially, to conclude, their approach is to administer the claims using a priority system even though competition transparency is not a bad thing. I think it's particularly interesting in that context to see how the European Commission has recognized that and to see what the law is in Article 82 and frankly how bad some of the law is in Article 82. Say we are going to use administrative priority in effect and this is how we do it. I don't think the outcome is actually that great but I certainly understand how they ended up there.

PROFESSOR ROBERTSON: I wanted to say to Phil, in light of Professor Stucke's presentation this morning and some of

the points I will make later this afternoon, the movement towards the rule of reason that you are suggesting that the Europeans might also want to make, is one perhaps we'll want to make, but you won't be able to say you weren't forewarned.

There might be norms that exist in the continental traditional notions of fairness and reciprocity that, combined with an enlightened use of economics and political sensibilities, might make for an effective competition policy. It could utilize a rule of reason better than we're using it here right now; we are clearly in an era in which the *per se* rule is devolving.

I would like to make a second point which is, with all due respect to Terry Calvani, who was my Commissioner when I was a fledgling economist-in-training at the FTC back in the early 1980s, there is something fundamentally wrong with an adversary system that essentially dictates that ninety percent of the time plaintiffs are going to lose. There is something wrong with a system like that regardless of whether or not we're dealing with class actions or individual private antitrust enforcement suits. And what is wrong with it is that the universe of false negative space is just way, way too big. And it is so unjustifiably big that raw substantive notions of equal justice for both parties under the rule of law I think are lost. There is therefore an affront at a very basic level to the concept of both procedural and substantive justice in an adversarial legal process that preordains that type of overwhelming result.

That being said, I would like to make one last point about the rule of law. The binding force of the rule of law, however, is that we will accede to the legitimacy of the system, even to one that offers such a lopsided result, as long as the formalistic process that produces it is one that is clear and transparent with all of the other sort of formal features that go along with the rule of law in place.

The last point I would like to make is a warning about the rule of reason to the extent that you hope rule of reason balancing is a way out of rigid civil law formalism that could be hampering competition in the European context. The rule of reason has its own formalistic elements that are highly problematic and Professor Stucke's paper speaks to those elements and their pitfalls very clearly, and I'll talk about that a little bit later on today also. But you can't say you weren't warned.

MR. CAMPBELL: I'm a rule of reason guy. I don't know how much empirical work has been done on how important the

transaction costs are in doing rule of reason type cases, relative to how important false positives and false negatives are. The problem of *per se* rules in this area is that economics are complex and it's hard to get *per se* rules that do a good job and leave relatively few false positives and false negatives.

That is just my gut feeling from what I've seen in my practice. I can't support it quantitatively, but my sense is that this is an area that actually responds well to allowing for fairly fact-intensive and economics-intensive case-by-case analysis on most kinds of issues.

The thing that I think is most notable once you get into a zone of discretion, as opposed to tight rules, is a book I read many years ago called *Discretionary Justice* by K.C. Davis.¹ He starts with the premise that discretion is not necessarily always a negative thing. It actually has a number of very positive aspects in a wide range of contexts, not just courts but tribunals and indeed public officials, police officers, the whole range.

David suggests three basic things. One, to figure out how much you want to confine the discretion, so there is some place for some rules in this process. Once you figure out the zone of discretion, his view is that factors and processes are critical. Structuring is his term, which includes things like guidelines, reasoned decisions and transparency. I think this is where the action really is in this field in terms of getting good decision-making.

And then checking is Davis' term for a broad umbrella of review mechanisms that include internal hierarchical decision-making processes within an organization, peer review or whatever other internal checks may exist, as well as the level of supervision that you get externally.

So from my point of view, the work to be done should focus on the structuring and checking. If you start, as I do, from a premise that rule of reason is useful for fairly open, textured laws with a fairly broad scope for facts and economics to be in play, then you work on how you get good processes that are reasonably streamlined.

MR. SAVRIN: In my comments I want to first extol the virtues of the rule of reason approach and then address the issue that Terry raised with respect to foreclosing access to relief, whether that really is a problem in the U.S. system and whether it

¹ K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (Greenwood Publishing Group 1969).

makes sense for a rule of reason approach to be adopted in the European system.

I think there is a problem with looking at the raw numbers and just saying ninety percent of the cases are dismissed on motions to dismiss or motions for summary judgment in the U.S. and not separating that point from the lure of treble damages. I think functionally a lot of these issues arise because, given the lure of treble damages, cases are brought that are not (1) genuine antitrust cases, or (2) genuinely addressing anticompetitive behavior. So if you're going to challenge the merits of rule of reason, which I am a big fan of, I think you really need to dig down and look at those motions to dismiss and motions for summary judgment and see whether there really was something of a genuine and viable antitrust claim stated and whether it was truly unjust not to allow that case to go forward and allow for some recovery in that circumstance.

Secondly, I do think that the rule of reason does allow some predictability because it does require a court to analyze and put forth an opinion as to why certain behavior is viewed as permissible or impermissible. And in that context it does provide guidance and commercial actors can look at the decisions, can look at the guidelines from the various agencies, and can in that balance do what it is that they essentially do all the time, cost benefit analyses of what is the practical business opportunity and whether the benefits to them outweigh the anticipated harm to competition arguments.

If you're looking at whether it makes sense to adopt it in the EU, I think one of the things I hear from EU practitioners is that transparency, given the amount of decisions and guidance that you get in the U.S. on standards, is far greater here. The existence of those decisions and guidance flows from the fact that we have the rule of reason.

So to your last point in Philip's paper, I do think the rule of reason would get you to greater transparency. There may be lessons — as much as you would like to learn from our experience in treble damages how better to deal with private damages actions — from how we deal with the rule of reason. I think, as a baseline point, use of the rule of reason approach will bring greater transparency in the system, give greater guidance, and will allow commercial actors to really figure out, within the confines of the decisions, what conduct has been found inappropriate or appropriate so that they can reasonably guide or modify their behavior going forward.

MR. AHLBORN: I want to pick up a point which Terry made earlier, the question of validation of evidence which I do think is one of the weaknesses of the system. Even worse though not clear is what evidence or what standard of proof and what standard of evidence is even required after more than fifty years of case law. You still don't know what the status is you work for. I think at least two reasons. One is to pursue even if you don't care much about facts. I think the other problem is if you administer the system which is not adversarial I think you get inferior outcomes.

And the last point of course is one element to value the fact quantity of the court. If you look at the CFI and CJ, you have a large number of members of the court who have actually lost sort of a solid crown in law. Imagine a U.S. example where you have Supreme Court judges who rule on the base of U.S. federal law. That is the equivalent and quite a number said actually sort of not my area of specialty. Then obviously you'll have very, very cautious judicial review, and no one will actually test the commission either as to facts. All those fundamental weaknesses, which explains sort of a lot of the decisions which you have in Europe.

PROFESSOR WALLER: I don't have any experience with either the EU member state courts or the EU courts directly. So I am going to focus my comments on questions of agency discretion. One is to Becket, which is that our agencies have that discretion because of our vigorousness, in some people's view too vigorous a system of private litigation. Obviously that is also an issue for the EU currently. So you have to have viable private rights of action before an agency can simply punt to the private sector. And I'm fascinated because I do read a lot of European Court of First Instance and ECJ decisions, and there are a fair number of them on appeal from decisions not to initiate complaints. This is fascinating for an American because we don't have any equivalent of that other than the occasional press release explaining why something wasn't challenged. I read these things and yet I wonder to what extent do they really control agency discretion for DG-Comp because I can't think of more than one really important case where the court really ever said you should have been initiated when you choose not to. I think it's *Sony-Impala*?² Beyond that

² Case C-413/06 P, Bertelsmann AG. v. Indep. Music Publishers and Labels Ass'n, (July 10, 2008) *available at* <http://curia.europa.eu>.

I'm not sure. They're lengthy and they seem to inevitably validate the decision that it was an appropriate use of discretion not to proceed with whatever the matter is. So if that's guarding the guardians, that struck me as somewhat elusive.

Phil, do you want to respond to anything?

DOCTOR MARSDEN: I'd just like to pick up on something Elbert said earlier, and Spencer's paper that I mentioned earlier about whether the Chicago School is a virus and finally my point that European Union law is already immune from any infection by the 'Law and Economics' movement.

Let's accept that the concerns for fairness and distribution and the related Ordoliberal concerns in Europe about power will never go away. Now, one benefit of the call for a more economic approach and greater reliance on rule of reason analysis would allow these faith-based populist concerns to be tested. Not by the narrow strictures of Chicago School antitrust because we know what will happen; they would be rejected. But since the Chicago School has no traction in Europe, it may well be that the fairness concerns will be tested and supported by new economic, new institutional and game theory thinking. That would help build the acceptability of the concerns themselves and any enforcement based on them.

You see this in certain aspects in the *Microsoft* case in the European Union where there are interesting theories of harm that were developed in that case that are not necessarily something that harkens back to 1960 is U.S. antitrust, but something that actually involves some new theorizing that should be tested.

I'm just querying the system in Europe, the inadequate oral hearing system and limited judicial review of the European Commission's analysis. The court will tend to defer to the Commission because the Commission is the expert, especially in monopolization cases. So I'm hoping a greater introduction of the rule of reason will bring out and test any new theory of harm, so it's not hidden behind old dogma.

MR. COWEN: I'll pick my way through this. I'm reading it.

It struck me that what Harry said before the break worried me in the context of what Becket said, so let me try to explain why I was worried. He said: "well it's okay to have the politics and the politicians appointing the enforcement agencies." Okay? I was then thinking about what Neil said in terms of prosecutorial discretion and the rule of law.

If you have a policy maker who is able to make a decision in the context of evidence, discretion, transparency, clarity, and a system that gives rise to a predictable outcome, is that enough? The basic issue, and one of the nice examples that Lord Bingham refers to, points out that any legislator transgresses a fundamental principle of justice if as he points out, it would be impossible, even if democratically elected, to pass a law that only related to redheaded people. I thought well, fair enough, and does prosecutorial discretion only to prosecute redheaded people actually then amount to the same thing as a law against redheaded people? If you have a policy that allows a discretion in the hands of the policeman to only pick on redheaded people, you have a general law which is only applicable by the policeman directly, they seem to me amount to the same thing: a lack of rule of law. You have a fundamental lack of justice there.

And listening to this question, it seems that maybe Microsoft probably might be one of the redheaded people. It doesn't seem to be terribly fair to pick only the people you choose to pick on when you have the evidence in the system. Where is the objective process that gathers evidence impartially and assesses each new economic theory in that way?

In the U.S. system, I'm interested, very interested, to understand more about that prosecutorial discretion and how it's exercised. It certainly appears to me in my experience over the last eight years that that has been heavily politicized. And then if you contrast that with the European experience, the question really is "Where is the Policy?" At least with the U.S. it's clear here that politicians make policy and that this has been a very clearly politicized system, a problem one way. There's a problem the other way in identifying the political mandate: how does that work actually in Europe?

PROFESSOR STUCKE: A couple of responses. One of them is that regardless of how we may feel that the rule of reason is working, the Supreme Court believes that antitrust is broken. And if they feel that antitrust is broken, then is that more determinative than our individual belief? If they think so and they're going to construct rules that are going to create barriers for the plaintiffs, that may be more determinative than how we may individually feel about it.

Secondly, with respect to Daniel's point about treble damages, I would be sympathetic to that claim if ninety percent or more of plaintiffs in state UDAP claims, those are state unfair and deceptive acts and practices where in several states you can

get multiple damages. If those plaintiffs' claims are being dismissed ninety percent as well as civil RICO claims as well as common law fraud claims with punitive damages, I wonder to what extent are plaintiffs now just simply abandoning antitrust and going into other areas of law such as business tort. So I don't know to what extent, I mean there is always a claim in treble damages in antitrust somehow. I don't know if it's empirically supported because the level of cases brought since *Sylvania*,³ although increasing in number, can be misleading if they themselves are not the levels they were at the time that *Sylvania* was brought.

With respect to Phil's point, I don't think necessarily you need a full-blown rule of reason in order to introduce economics. I think you can engage in some sort of legal presumptions based on the available empirical evidence. You can then say, the person who writes about this where you can have these differentiated rules based on the available empirical, and then you make some sort of proxy, eighty percent of the time is likely to be anticompetitive, and the magnitude of such effects we can then sacrifice twenty percent, or you can create sort of a safe harbor.

And then the final point, Tim will address this, but you raise it in your paper as well, is the extent of having courts to deal with antitrust. And I had two thoughts about that. First is that feasibly, can you divorce competition law from the rest of society, and Tim raises that in his paper and Diane Wood has a nice paper to that effect as well for us. And secondly, is that an admission of failure? Are we saying then that the law is so complex that not even a generalist court much less a business executive can readily apply the standards? We need to have specialists who should undertake this.

MR. BRUNELL: I hate to be the one always commenting about whose ox is being gored. In the U.S., the FTC has this nice judicial-type administrative procedure with cross-examination of witnesses. And a lot of folks here are not particularly happy with seeing cases go to the FTC, notwithstanding this judicial procedure, because they know the result is going to be that at the end of the day, the commissioners are going to rule in favor of the complainant's counsel and then maybe there is judicial review down the road. Sometimes the commissioners do get reversed.

I'm just curious whether in Europe part of the impetus for

³ *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

2009

Discussion - Marsden

77

a more judicial-type of hearing before the Commission has anything to do with getting the decisions to be made by the courts rather than DG Comp.

PROFESSOR FIRST: Well, I really enjoyed your paper. As a U.S. antitrust person, I always am thankful for Europe. Gives us something else to write about and say, Oh my God you have antitrust some place, which is good.

But your paper and Terry's comments show the flip side, which we may tend to overlook in the U.S., because what I hear in your paper is that the process isn't so great in Europe and it's not great in ways that we in the U.S. think we have.

And particularly your comments about what do these hearings look like, you can't really get to fact-finding determinations. Well, you don't have the right mechanisms. So I'm sitting here thinking we call our proceedings "trials." We call fact finders "juries." And despite what the Court has been doing consistently in antitrust cases, which is, oh my God, we don't want to get them into court, and we don't want juries, juries are really the great driver for finding facts. They might not find them perfectly but it's a mechanism to test things where you have to present evidence. And so we tend to lose sight of that aspect of how things happen in the United States and maybe it also has an interplay with what legal standards we have.

That goes with a question that I have that was sort of threaded through your paper, which is this notion of consistency as part of the rule of law, and I just would like to suggest that we don't get too carried away with the virtue of consistency. One of the things we do get from comparative institutions is comparing. We have natural experiments. And we need to make better use of that, so we can compare how things happen in the states, how things happen in Europe. But actually really compare them.

In Europe, judging from your comments, there is a lot of this weird inconsistency. Who knows what the Russians are laughing at? We have no idea. In the U.S., the desire for consistency has tended to be muted recently because we know what the consistency is. The defendant always wins, and the Justice Department says fine. So that's pretty consistent. But we also overlook a little of the inconsistencies which are potential and sometimes bubble up. We have state enforcers. They don't take the view. We do have inter-circuit disparities, differences among the circuits too, as litigators know. Litigators are conscious of these things. We can learn from these inconsistencies.

I was struck by the declination decision and talking about the reviewability of declinations in Europe. There is a reason why we don't spend a lot of time on them in the U.S. They're not reviewable in the United States by courts in any area that we have got. We don't review declinations of prosecution. Now there is something to compare. We have two different sorts of institutions. Unanimity on panels versus dissents in the U.S. There is a lot of work done on panel effects in appellate decisions and the correlation between political affiliations and panel decisions. So we do have a lot to learn by a lack of consistency.

The problem from a defendant's point of view is these are experiments and no one likes to be the guinea pig. So that's a little problem.

Finally, on the politics, I was interested in how you heard what I said because I like what you heard, Tim, but I'm not sure that's completely what I said. I do like political values. The question is political control of the enforcers and how correct or incorrect that is. The state enforcers are elected. State agencies are elected. Antitrust people seem to hate this. You would think that would be good from a democratic point of view. For federal enforcers, political control is less direct and for Europe it's less less less direct. I think these are important things to look at, how that political control works, and to think through.

Political values, this is a hard thing to dice, and it's not just—is Microsoft redheaded (a redhead sounds communist to me)? But there are political values to think about that are involved in antitrust, some that are appropriate and maybe some that are less. One may be taking account of distributive effects, which we have stopped doing but may be an important political value you want to think about.

Concentration, I hate to say it, concentration of economic power is a political value. We washed that out some time ago. Maybe we want to wash it back in. And these are the sort of underlying political values that come in and out of antitrust, and I think there is a place, I think they're always there, it's just a question of whether we consciously think about them or not.

PROFESSOR HYLTON: There were two very general topics that came out of the talk that I wanted to touch on briefly. One is whether the rule of reason constrains decision making, or does it just give judges freedom to exercise their preferences without constraint. And the other is the separation of powers issue that you raised.

So for the people who talked about the rule of reason

issue, maybe I'll try to deal with that quickly. It's true that one way you can look at the rule of reason is that it forces judges to state the grounds of their decisions, which provides information and in that sense offers some predictability advantage and I think in addition to that, that the process has a constraining influence itself that shouldn't be discounted.

The best example I can point to is from the common law of torts. I teach torts so I look at all these old cases. Take an area like nuisance law. In the oldest nuisance law cases, you see the judges acting as if it is almost like a field of applied utilitarianism, the judges weighing the factors throughout. They don't seem to be greatly constrained, there is not a whole lot of earlier decisions for them to base their decisions on. And over time what happens is the common law torts; the judges make the bases of their decisions clear, and you begin to see what sort of factors they're considering. Over time that crystallizes into the form of hardened rules, and the Restatement publishes various six-factor tests.

I have to say that the earlier decisions are often a lot better in stating the grounds of their decisions than the modern decisions. The modern opinions point to six-factor tests. In that sense, the early common law, the discretionary fact-based decision-making process, offers some advantages both in predictability and in constraining judges. I don't think the six-factor test approach that we see today in a lot of courts is superior, or obviously superior to what we had.

My second point is about the separation of powers. The notion behind the separation of powers is a notion of checks and balances, but there is also this notion of different branches jealously guarding their areas of control, and almost a competition between these different branches. And the system was designed for that kind of competition. You wonder whether it can work when one branch defers or says we're not going to compete. We're going to defer to that other branch.

The same question appears in the newspapers now about the current administration backing away from inherent powers-based arguments under the Constitution in the prosecution of war. When in the European system you see the court of first instance and other courts stating manifest error doctrines and other rules that allow them to defer or require them to defer to the EU Commission on some issues, that's a kind of backing away, deferring to the EU Commission, letting them determine the law to some extent, and I don't know if, and I wonder if,

that's good in the long run for rule of law.

If it happened in the U.S., if the courts deferred to the FTC, then I think that would be bad for rule of law, and the reasoning of the law, because the FTC is under some political control. You have different administrations moving from one extreme to another. You would have the law, if the courts were deferring to the FTC on its view of the law, changing frequently depending on which administration gets into power. We have independent courts that say we're going to do this our own way, we're going to set out the law, we're going to frame our own rule of reason. We're not going to defer to the agency on these issues. That gives a lot of predictability and stability to the law that I think would be otherwise missing if you didn't have this competition between different branches of government that are jealously guarding what they are supposed to be in charge of.

I think those are my two reactions to the most general questions that I see coming out of the talk.

PROFESSOR WALLER: As we approach lunchtime, we'll have a couple of short comments. Just one thing, Keith, your comment raises an interesting issue. There is a minor rule of law issue in the United States which is whether the courts are supposed to be deferring to the FTC or don't or at least are not deferring to them to the same extent that they're deferring to other administrative agencies that are similarly situated. That's a real open question in the United States.

PROFESSOR CAVANAGH: I have two very quick remarks. One on discretion. It seems to me judicial discretion is the hole in the donut. Without the donut, the hole is not there. So it has to be cabin by guidelines. And Spencer, I'm just saying in civil procedure, supplemental jurisdiction form not convenience where courts have offensive non-mutual issue. All sorts of tests. Discretion by cabin by factors which you are supposed to take into account. If the courts have that then I think there is a way of keeping them in check. It's harder with the agency, prosecutorial discretion you just don't have that. And also because we know it's just not reviewable, at least in this country not reviewable.

And the second thing is Maurice, you're dead-on right about cases that were antitrust cases becoming other kinds of cases. A WPK right here before Judge Saris in the District of Mass in Boston,⁴ classic example of cases that started as antitrust

⁴ *Alves v. Harvard Pilgrim Health Care, Inc.*, 204 F. Supp. 2d. 198,

cases with and RICO cases where consumer supplemental claims the antitrust case, the antitrust case, RICO cases get tossed in, the consumer cases are there and the defendants are getting hit for millions of dollars. That's exactly what is happening. So the same group of plaintiff lawyers, entrepreneur plaintiff lawyers, are around just looking for the law and if it's not antitrust and it's not securities and not RICO, now the gold mine right now is consumer protection.

MR. McGRATH: On the transparency issue talking about in terms of what Tim was talking about, transparency is nice in principle and it's ideal, but I think there is a danger that people refer to light into the magic in regard to the royal family. It can actually, it can get in the way of agencies making the right decisions, and I always take the approach, having been in the agency, don't look at what the agency says look, at what it does.

And Article 82, the OFT basically isn't really doing Article 82 Chapter 2 cases, other than business relation cases⁵. Local business relation is one of these long running things where the regime has changed in the UK but business relation cases remains. But putting that to one side, it's not really doing those cases. And I think that's not such a bad thing because I think you can apply too much. OFT wasn't able to say that. In fact they said the opposite. I would love some Article 82 cases. Great. Give me your Article 82 cases. I will take them. And was that being transparent, personally I'm not so sure, but what did that have to be said in order to make sure that the funding kept coming for the regime and the regime—maybe it did. Maybe I'm just being cynical.

On the issue of discretion and margin of appreciation, I do think you need to accept that the authorities should have some margin of appreciation, some benefit. And the question is where that is. One area I would say is market definition for example. Because I had two cases in front of the appeals tribunal both rejected, some on market definition and ultimately market definition no matter what the economy may tell me, I think is highly subjective and can be argued many different ways. And if you show you've gone through certain procedures, certain research, and find the market, you talk to the customer, did a certain amount of things, you're not just relying on bare

212-214 (D. Mass. 2002), *aff'd*, 316 F.3d 290 (1st Cir. 2003).

⁵ See, e.g., *Maquarie/S.E. London & Kent Bus Co./E. London Bus & Coach Co.*, Case No. COMP/M.4303, Regulation (EC) No. 139/2004 Article 6(1)(b) Non-Opposition (Aug. 23, 2006).

assertions which many, many Europeans do this. Going beyond that you should have the benefit of the doubt.

Once these sort of issues get reheard and reassessed on appeal, then you're really in a lot of trouble because cases will just not get off the ground and you can spend years putting further layers on the analysis justifying the market definition that you've adopted in that decision, but does that actually help you? Does it lead to a better outcome, I'm not so sure.

PROFESSOR WALLER: We have reached the halfway point. We're going to continue many of these items with Tim's paper in the afternoon. Will we hit the wall? What will happen when we get to heartbreak hill? Stay tuned. We have lunch available.

DISCUSSION

EU COMPETITION LAW AND THE RULE OF LAW II: JUSTICE DELAYED IS JUSTICE DENIED

By Tim Cowen

DOCTOR MARSDEN: Welcome back. Discussion over lunch was interesting and there are so many issues on the table already, but Tim has a contribution for us. You had a chance to look through this. Tim, your views on the rule of law, economic development and the future of the European Community Courts.

MR. COWEN: Somebody asked me why did I come to write something like that. So I thought well, before I get into it, I am going to explain a bit of it.

So a real live point of view. If you go back to the early 1990s and look at what BT did, we started off with an the organization, well-known in the UK providing basic telephone services in the UK. Indeed it was known at the time as the 'land of red telephone box'. Up until about the mid-1990s, the UK was really the extent of the company's opportunity because in this country (the U.S.) BT was defined as an 'alien', and still are, and so I'm now an alien in Boston rather than an alien in New York as the song goes.

Under Section 310(b) of the Federal Communication Act of 1934, BT was defined as an alien and as a result, it was not possible to operate in this country without certain license requirements. And up until the mid 1990s those weren't granted except at the discretion of the FCC. BT made applications and we were instrumental in applying to be entitled to run a telecommunication service in the US as part of the MCI acquisition, so eventually we did gain the right to expand here. And so we sought to expand out of the UK into international markets, and the big chunk of my job at that time was talking to governments about globalization, together with the benefits of liberalization, free market, stimulus to the economy, and actually if you look at BT in the UK, it's at the cutting edge

of the liberalization process.

How did this come about? If you remember the 1980s in the UK there was a certain lady in number ten who was quite keen on liberalization and privatization. Firstly, privatizing parts of the Home Civil Service into the privatized company that became BT. And really is a good example of making money as a regulated entity and at the same time expanding internationally. This wasn't possible in many countries. It wasn't possible in the whole of Europe until we managed to persuade the European Commission and Heads of State that liberalization would be good as a way of stimulating the basic economy and improving GDP growth.

And as part of the liberalization of the EU market program, which I won't go into in any detail, was a series of pieces of legislation that granted the new liberalized market players the rights to provide data services and private voice networks, business services and eventually full liberalization of all communication services throughout the European Union. Incidentally, that legislation is going through another round of refinement from the European Parliament at the moment. So BT expanded across the EU and then we turned our attention to other countries around the world. We most recently gained licenses in places like India and many of the countries in Asia.

So the real live thing is you have a company expanding. You have that company expanding on the back of the regulatory opportunity and seeking to do business in other countries. Now the business is one of providing a data service. That business still depends on the local operator providing you with access to his wires. The buildings in any country will be cabled by the incumbent operator who is also a competitor. They will already be provided with fiber or copper and it's necessary to do a deal with the incumbent operator in order to get access. The incumbent operator is essentially an access monopolist, and that still hasn't really changed in pretty much every country around the world.

And the liberalization legislation which was originally agreed in the 1990s at WTO which applied throughout the world recognized that in seeking to impose what I think many people here would think of as nondiscriminatory access obligations on the incumbent players is a classic antitrust remedy. So if you look at BT's business, it is fundamentally dependent on access obligations to many companies who are essentially our competitors. And that represents a substantial

2009

Discussion - Cowen

85

proportion of the underlying costs. So much of my job actually involves going into countries like Germany, France, Italy, Spain, and saying the incumbent monopoly access operator is either not supplying or supplying on discriminatory terms.

Given a quite hostile environment for investment, we started by doing a piece of work as to which countries in the world would it be worth investing. And to do that analysis, the question was well, "What is the telecommunications regime? Is it possible to enforce nondiscrimination obligations? Can we get nondiscriminatory access and expand the business? That was the first question. You will appreciate that at a glance basically half the countries in the world aren't going to be worth investing in. However we identified a number of countries with regimes that indicated some sort of enforcement pattern where it might be possible to rely on the local regime and expand the business but even if we did so, we had to answer the underlying question of the capabilities and rule of law in the underlying local legal regime.

We were rather optimistic. We thought that across continental Europe, the underlying regime would probably provide the reasonably efficient redress knowing the vagaries on the ground, we realized that you have to have an efficient court system.

So that is the background to why the paper was written; we needed to check and test and question whether the underlying court system could provide remedies to the business issues we faced when dealing with incumbent monopoly access providers.

So what I'm talking about in the paper and here in the slides is perhaps regarded as a bit academic but there is a really serious real live set of issues behind it.

Let me go through it. What I've covered in this slide pack is really the problem with the delays and inconsistencies and the procedural issues at a national level in Europe, and then the question that was raised along the way about the speed of process, and the effective negation of any remedy if you can't get efficient enforcement within a reasonable period of time. And so what I've written down here, in the problem statement is the procedural delays, consequences of delays, raise a significant impact, and I'll come to that in a broader sense than in just in telecommunications.

I refer in the next slide to a number of pieces of work that were done, one of which was a House of Lords Select Committee

inquiry. That followed the report that people at the British Institute did in the early 2000s about the inadequate remedy systems for telecommunications which was confined to just looking at those systems at national level without looking at the underlying court system. If you then look at the court system on top, that is another layer of problem. But there is a big report about that which we generated. There is also a very extensive submission to the House of Lords about the speed of process in the European court from people like the International Chamber of Commerce, IBA, CBI and a number of industry groups.

In the next slides I then go into what the issues are around the process. And I put in here options for reform. As I was talking to somebody last night, actually this is a paper which has taken about eight or nine years to develop, and the thing about the piece at the end that is where I started.

MR. CAMPBELL: You're talking about speed.

PROFESSOR FIRST: Night work.

MR. COWEN: It wasn't really, after all the study it came out this way, I discovered that the problem was lack of speed but—anyway, so the procedure today is the problem. I think it's swiftest to just to read this out for you:

"Bo Vesterdorf said in 2005 the main problem with the current system of judicial review is not its effectiveness in terms of how closely the courts scrutinize the Commission's decision but in terms of the speed of that review. The average time for proceedings in the European Court of Justice on preliminary rulings is 19.3 months. Direct actions is 18.2 months."

Remember this is from the point of which you've been through the national court process and it's the stat going from national court to ECJ. You don't have a decision at the end but you just get a ruling out of the ECJ. So this is a middle piece of the activity.

The court of first instance is, as Philip mentioned earlier, victim of its own success because the caseload has increased and the resources have not increased, and since the caseload increased, of course it can be expected that it's going to get slower. This is a classic management consultancy problem about flow and speed of activity, and how you manage a process. However I think it does not have to be a completely linear relationship. Process and efficiency improvements could no doubt be made that would speed the system up without costing dramatically more in terms of resource. Here there is something of a strategic issue as the increased caseload will increase delays

in the absence of process improvements.

I started by looking at these issues from a narrow telecom's perspective point of view and in BT we created a correlation analysis measuring the predictability of the system and the extent of investment, which I haven't put in here but which is available on the ECTA website. This statistical correlation analysis really came out of an antitrust analysis. The theory was in saying, "Well, if this judge and this regulatory person makes a discretionary statement and discretionary decisions that will have an impact on investment." It clearly does and the analysis we did allowed us to decide which countries have a legal system that is conducive to investment and which do not. As a matter of analysis the special thing about the telecoms laws is that they were all based on the same EU laws, they were new and we could test what the variables were among all the different countries implementing the same laws. Also telecom is a great example because there hasn't been any investment absent a monopoly. So you can chart that. And so we did.

The thing that is striking is that the real differences are in the underlying legal systems. We correlated the extent of investment by comparison with how discretionary, slow, untransparent, or whatever, the local legal system was. We then got an external economist to do the statistical work. And at BT we've been following that for about eight years. That is now published with a trade association called The European Competitive Telecommunications Association (ETCA) in Europe. It has become a benchmark tool for charting and encouraging regulators to be in a sort of competition with each other—to outdo each other in being more predictable, less black box, more transparent and the like and by charting each we could understand in detail the activities that bear on investment potential.

Having done this work, what was a bit of a surprise was something that I found in the World Bank. The World Bank has been doing some similar work and all the stuff in the World Bank's Rule of Law index demonstrates that the issues that we were facing in telecoms had become much more widely understood in the development community.

This was a breakthrough in thinking for encouraging GDP growth and investment and supported the liberalization process. First in Telecoms but now more broadly applied across thinking about economic development. The thinking in the development and foreign aid communities for many years had

been about providing direct aid, food, that type of thing. And then it went through a phase of development in terms of teaching and institution building. I think more recently the Rule of Law index created by the World Bank has been demonstrating it's actually through institution building that GDP growth and investment takes place and it is the place to start. The example they use, the one about give a man a fish and he eats for a day, teach him to fish and he eats for a lifetime needs amendment. Without the rule of law and institutions to protect it then no development takes place at all. If the fishing rod is stolen by the local terrorists no one gets to catch anything. So you need to have the whole, you need the institutions in place to protect property. And I guess that's what this correlation analysis really starts off with. Recently there has been fascinating economic analysis in Latin America that takes the same perspective. I forget the name of the economist, who did very similar work by creating land rights to protect and establish property rights as the starting point for creating sort of capitalist or home-owning democracy.

PROFESSOR WALLER: I think you're thinking of Hernando DeSoto.

MR. COWEN: Exactly right. Whether it's proven or not is another question but we have shown that it probably works in Telecoms. In the next slide I put in the correlation analysis, which essentially tends to show that the greater the predictability of a legal system, the greater its propensity to increase GDP. That is not fact surprising really. You're not likely to invest in a place where you think you may get all your money stolen.

One comment that has been made to me after I wrote the paper was that this was nonsense, because hot money has gone in and out of developing countries to various different parts of the world over the last two or 300 years and it hasn't done that on the back of a robust legal system. I think the response is that if you look at hot money by definition, it can go in and out very quickly and if there is a problem with a local legal system, hot money leaves fast. This may be more true of financial markets such as exchange rate trading than of long term investments in infrastructure and buildings that have to depend on the local legal system working well. Money and investment that can take place quickly and go in and out, does so very quickly. If you look at the sort of investment that BT has to get involved in, in the telecom business, it's a very sticky sort of investment. When you're digging up roads and installing wires and cables and full

systems, the exit costs are much higher.

And so the rule of law is even more important if you are generating sustainable economic growth. I think there is a powerful point behind this which is the functioning and ability of the system is even more important for serious investment decisions that relate to infrastructure builds of any substantial nature. Rule of law and predictability is critical where there is an ongoing need for the investor to still be there, which is true of the telecom business because the return you get on your investment takes place over a relatively long time. This is not true of other capital spent or high-fixed-cost infrastructure projects that do not have long-term revenues attached. The quality of a legal system is not an issue to somebody who builds a dam and turns it on and gets paid for doing the work.

If you look on the website of the World Bank you can have a lot of fun with different countries. I'll show you on one of the slides. Switzerland is at the top and at the bottom you have Zimbabwe, which is sort of what you would expect, I guess. Switzerland is, after all, widely perceived to be a very predictable, safe, central country in Europe. What is interesting is the United States has slipped. And where various countries are in the list, depending on how you choose them, you can actually search some very interesting things but you can see that better on the website than you can on the slide. I'll leave you to play with that one.

So far that establishes essentially the basic point that rule of law is important for investment. As I said before, I don't think it's really a big surprise that predictability of the legal systems is important for investment. It is something that certainly seems to be forgotten or overlooked by a lot of people making economic decisions. But it is worth thinking about all of the big issues of the day through this lens.

One thought that I had when coming here to Boston was, "Is this part and parcel of something that's gone wrong with financial markets recently?" Perhaps the enforcement side of the rule of law equation is the thing that is missing there. And we can come back to that.

Anyway, turning to the next slide, I reviewed the analysis Lord Bingham made (in the middle of the work) where he came out with his eight principles and that built on a number of very good pieces of work on the definition of the Rule of Law, which are referred to in the paper. The ABA has established a project called the World Justice Project and there are a number

of papers that have been published on definitions on their web site.

For the rule of law system to work and deliver GDP growth, you need the whole system. It is no good if the system exists but works too slowly. The question is what timing is needed in terms of speed? This is where we come to justice delayed being justice denied. I think there is a broad consensus now that the legal systems in the EU are just too slow. One of my colleagues at City University has described the European justice system as having been built in the 1800s and suitable for Jane Austen, but not much use to Bill Gates. And why would we expect it to be suitable in 2000? That is a good way of thinking about it, because it's not just that it needs to be quicker, but it needs to be quicker against the needs of a modern economy.

The modern economy moves very fast. When you look at the telecommunication business, the change is enormous. The first mobile phones were developed less than twenty or so years ago for the UK market and certainly they were a bit bigger than the small ones we have today. Who remembers fax machines? I don't know whether you still use them or not. But these things change very rapidly.

The court system takes the amount of time we're talking about here, when you look at it in this context, it is hopeless in achieving any sort of justice. It is not a reasonable timeframe. If you start with real life in a big company, the time horizon that financial markets allow management is a quarterly period. So, at the moment we're looking at a three-month time horizon within which to increase profitability and revenues; longer than three months is medium term and over a year is over the horizon. Quarterly profits and expectations are driving most every business decision in most of the major businesses around the world. And if I say to a senior businessman, well, it's going to take thirteen months from the point of which we ended up litigating a particular thing before we even get to the door of the court, court and then back again, this is just not going to get any attention. This is an ineffective system.

Whether you win or not is irrelevant. It just takes too long to find out. It is beyond the time horizon of many people in business. I used the expression 'over the horizon' as being longer than a year. I don't think that's understood by the people working in the system. I'm certain that the lack of appreciation of urgency came through from the conclusions of the House of Lords in the Select Committee hearings. The fact that the system takes a

long time seems not to be a particular problem. Indeed, it was recognized by everybody in business who made submissions that the time periods are too long and the Select Committee recognized that as well. I think it was established as a fact. However, what to do about it was not resolved, and it is remarkable that the Select Committee didn't raise any question of urgency to solve the problem.

I've listed a number of reasons for the lack of speed and delays. The reason obviously for doing that, is that if I can identify the issue then that may create a momentum to fix these things. That might speed the system up, enable the rule of law and the system to work effectively and increase GDP.

Now is the time for reform of the court system. In the EU we have had a considerable enlargement but there has not really been any reform of the court system or process. Expansion of areas of competence, increased use of legislation, harmonization, growing awareness of European law and lawyers actually applying the law inevitably increases the size and volume of court cases. When I wrote the paper, it looked like the Lisbon Treaty was going to be implemented. The UK has endorsed and supported it. I don't know whether it's going to be passed into law at the domestic level. The Irish are doing a second or third go around. So it may at some point come into law.

That raises a big question because essentially there is a charter of human rights that are enshrined and established in the Lisbon Treaty. (Whether they apply to individuals directly or not is a moot point.) But one thing that will happen, as happens with all new laws is that it will raise attention, and as attention is raised, there will be more work on those issues, and those issues will be higher up on the agenda. It is likely that there is going to be more questions in relation to a new system. All of which suggests that the court process, which is already creaking might creak further, or slow to a stop altogether.

One major issue that I touch on in the paper and the slides is the amount of time wasted in translation. There are twenty-three working languages and 380 possible different linguistic combinations. I suggested that, in the Select Committee hearings, that if the parties to the case and the judge agreed on the language of the case, then that could become the language of the case. This would make life simpler and easier for all concerned. Then that could become the official language of the decision. That idea was supported in the *Wall Street Journal* in an article by Bo Vesterdorf, at that time a Judge at the ECJ. Not

my idea. It was his. And I believe that it was his practice for some time until the President of the Court reminded him the official language required the translation through the jurist linguist process into French. So he had to stop and that is no longer I believe the practice. So for a period of time there was some speeding up. Now we are back to square one.

Bo Vesterdorf did give evidence to the Select Committee and he was asked about his comments in the Wall Street Journal. He responded that those were comments that had been made in his private capacity and in his capacity appearing before the Select Committee he had no further comment to make. I read that very much as being that the official position of the court was that they're not changing anything and not keen on improving the position. There we are. I understand that translation alone adds an additional seven months into the process as far as we can tell, from talking to various judges. This is not business at the speed of thought.

Of course if another language could be chosen, it would be English. I don't see why people are embarrassed to say that. It's not simply because it's my second language. It is many European people's second language. I refer in the paper to the head of the French Chamber of Commerce speaking to the present French President in English and this produced a quick withdrawal by the French President who refused to speak in English. There are some amusing anecdotes about that in the article in more detail. The situation is far too important to let misplaced national pride get in the way of growth and jobs. One thing to do would be to change the language or make it simpler for the system to operate in a single language at the request of the parties.

Turning to 'Options for Reform.' I put them into two categories: procedural changes and changes to the judicial structure. The much more exciting one is the changes to the judicial structure. I am not suggesting that we throw the process or the baby out with the bath water. The obvious point is that any system needs to be predictable and it needs to secure the unity of community of law and needs to be transparent and needs to dispense justice in a sensible way in a meaningful time period to the 21st Century.

One grave worry with tinkering with any part of the judicial system or any form of reform is that it actually might cause more problems than it solves. There is the following queuing issue which has been put to me. If you increase the attractiveness of the court process you're likely to end up with

more cases and this may undermine enforcement. Bigger queues means slower justice and you are not solving the problem along the way. I think that's a pathetic criticism and one that misses the need for speed. More cases means more opportunity to resolve more issues and increase predictability for the people and companies concerned. If there is such a level of pent-up demand for more resolution that indicates a more general failure of legislation; perhaps some weeding out and prioritization would solve that problem. We often hear of politicians taking initiatives to reduce legislation. It is clear that there is a problem and important to remember then actually what you're trying to do is increase justice.

I am not going to go into more on procedure. In looking at a way that would allow more cases to be heard with little incremental cost, I put forward an idea which I think deserves a bit more thought. Which was what I call the "Nomination System" and other people have called it a "Halfway House."

In Europe we have a domestic court system—a lot of different places under different procedures and different substantive laws working to different timeframes. We have a European court system at the top. It would be quite possible to nominate a court that could operate as a chamber of the European Court of Justice. This is now actually feasible under the Nice Treaty. I see no need in the modern, in a diverse, evolved, and open economy that the national courts could not wear a European hat. In the same way they can be virtually present in any national building that deploys the relevant technology. We could have chambers sitting in different jurisdictions and use effective technology and virtually be in any place you want to be.

So you could, for example, nominate the CFI to nominate the Competition court in the UK or an equivalent local court with appropriately qualified judges in any other jurisdiction to sit under the jurisdiction of the CFI. That's a sort of "Halfway House" which would take cases from the national jurisdiction and deal with them locally. It is not just that the court would be physically closer; if a nomination system were adopted, we would actually increase the capacity of the system to deal with cases and thereby reduce the amount of time involved. Justice could be speeded up.

I have gone through some of the benefits in the paper. Perhaps not explicitly written there here, the nomination system would ensure that the cohesiveness of community law is achieved

in another way. It would provide an opportunity for retired judges from the ECJ to work at the national level in the nominated court. This is also a way of increasing both knowledge and experience and capacity and would probably be a very good thing.

Another possibility other than the nomination system would be a circuit court type of system. I know the U.S. has those systems. We have them in the UK or have had them in the past in the UK. There could also be alternatives such as a sort of merry-go-round of judges going around different parts of Europe or some variation of the two. In the context of the Lisbon Treaty, part of the treaty requires greater collaboration between the member states, and there are systems and processes in the treaty that seek to improve decision-making powers. This would be in some ways in parallel to that sort of thinking.

I talked about language. Another thought would be simply fast-track procedures. The issue here is which court process would apply. If an ECJ chamber was operating at the national level and in order to retain the coherence of the entire EU system, it would probably have to apply European court process at the national chamber level. Otherwise, competition between national courts could take place and one set of processes would no doubt be more attractive than another. There are dangers but some degree of competition in the system might be no bad thing. It would clearly make very little sense for a chamber of the ECJ sitting in Barcelona hearing two local Spanish companies that want the case to proceed in Spanish to have to translate everything into French through the juris consults in Luxembourg.

This is a useful example because most of the cases, if not all of them, would be referred from a national court in a national language to a national judge, and deal with the case in front of him in the natural language. I have no problem at all with translation so that people could see what is being done or maybe operate in a language that we all understand. But that is something that possibly doesn't need to hold up the quest for justice.

MR. COWEN: One point. What has happened since putting the suggestions forward is that there has been some movement in the ECJ in terms of pulling some of the cases away from the CFI in creation of the trademark court. The idea is that if the court removes the case from CFI to a judicial panel, then that might do something, but it seems to be very limited in its effect, and there has been no real reduction in delay as far as I

2009

Discussion - Cowen

95

can see.

Another thought that I put in here is the idea of creating individual specialist chambers. We can cover it in discussion if you like. So to conclude, I think we can easily summarize: something must be done and the question really is "What?"

Thank you very much.

DOCTOR MARSDEN: Other than the language issue, obviously quite a few of the issues that you raised will be familiar to scholars of other judicial systems around the world. So why don't we start with Professor Cavanagh who is going to comment on your point and open up the discussion.

PROFESSOR CAVANAGH: I must confess that I had some mixed feelings after Spencer had recruited me. I had tickets for the Yankees for opening day, which I gave up, and thank God they got hammered yesterday 10-2 so this was a better place to be.

Tim, I thought your paper was great. I enjoyed reading it. I can understand why it would take a long time to search the literature very carefully. And that's getting to be a lost art. We have too many scholars who aren't doing the work. The idea is to create what I think exists here, somewhat a treasure trove of ideas that people can cite and that's what we ought to be doing in academic writing. The nice thing here is that this is a good repository for a lot of ideas and that really adds value here. Very thorough discussion. I'm also happy in my other life. I'm a civil procedure professor, so I'm happy to deal with procedural issues, that in this case obviously complements what we are talking about, antitrust.

One thing I wanted to raise that you didn't was the threshold matter. We have been talking here today about rule of law and what does that mean. You make an interesting point. With respect to law is it good because it's a law or is it a law because it's good? Very fundamental jurisprudential question that we ought not to lose sight of when we discuss this.

And you talk about laws instrumentality. The only thing the law does is do what the law giver wants, any dictatorial system wants. Or is the law what I think, and I think should be what you think it should be, is sort of a compilation of what the populous thinks, complication of society deals. Then good, that gets codified and you make that point and I think that's good. And of course that promotes, from that flows freedom of democracy and all of the benefits that we have

been discussing.

You talked about the need for reform, and as an American I am sitting here looking at the statistics, 19.3 months in the European court of justice, 18.2 months for direct actions, 17.8 - that is not so bad for antitrust. Most antitrust in this country, if you're two to three years that is good. Many take that much longer. So I suppose in one sense it's where you come from. Now we have some things, unique problems here in the United States. Speedy Trial Act requires criminal trials to go forward within 120 days. That doesn't always happen, but the point is, in courts like Eastern District of New York where you have a heavy criminal docket, there is a crowding out effect of civil cases, and particularly complex civil cases. The individual assignment system we have. A judge gets assigned to a case, if he has a heavy workload you may get pushed back. And then of course things that you don't have like discovery, which pushes things back on the time line.

But there are different causes I guess for delaying in our system and your system. One problem I see, the language thing may be insoluble, but the merger thing is something I think has to be addressed. We've addressed that in the U.S. through expedited procedures with TROs and preliminary injunctions. And it would be good I think if you could develop a system that was like that. The reform proposals talked a little bit about procedural reforms and actually the article recognizes some of the things we tried to do in the United States. Hands-on management since 1983, the Federal Rules of Civil Procedure require courts to exercise more management. Firm deadlines, faster decisions.

You talk about the United States' system in terms of federal and state courts and power sharing, and I guess that's where we start going in opposite directions because that's not a model that you want with your nomination system, your halfway house. You're introducing a program that is probably uniquely European and maybe it's the way it should be. I'm not sure at the end of the day whether more procedure is going to be successful. And I'll tell you why.

We in the United States have had a lot of procedural reform in the 1980s and 1990s and this grows out of the recognition that pre-trial discovery is very expensive, it often drives outcome, particularly from a defense perspective, it's just too expensive to litigate this in the pre-trial phase. We'll just pay to get out. And the sense that that is somehow a form of highway robbery or extortion has pushed the courts to

2009

Discussion - Cowen

97

do something oddly enough substantively and that's what you're seeing in the *Trinko*¹ and *Twombly* cases.

The sense, particularly you see this in the *Twombly* case, and the Supreme Court citing Judge Easterbrook saying procedural reforms don't work.² And the reason they don't work is because the party is not the court's control of discovery. The party is not the court's control of the pleadings. Judge Easterbrook said that in 1986. That is definitely not true anymore. If it ever was it's certainly not true after the 1993 Federal Civil Rules or the 2000 amendment.

But yet there is a sense now after *Twombly* that the way to deal with delay is not to address it procedurally but to address it substantively. And how do we address it substantively? We cut the case off at a time we know that we survive which is the motion to dismiss stage. Or if you survive the motion to dismiss now after cases after the *Hydrogen Peroxide*³ case in the Third Circuit, *Canadian Export*⁴ in the First Circuit, and *IPO*⁵ in the Second Circuit, if you get through *Twombly* now you get cut off at the class action stage.

So it's interesting that even in the U.S. where we have a lot of procedural law, a lot of procedural protections, the key to swiftness is now being viewed substantively, as a substantive solution not as a procedural solution and in that sense probably we may be going backwards.

Specialized courts, we may have some specialized courts in the United States. Tax courts, court of claims, but generally the concept that you should have on any given day is that federal judges in the United States are generalists, the concept you should have maybe judges specialize in certain areas is not, well, we still want to have the idea, the ideal of the judge is the generalist. There is a lot of pressure in the United States mostly from the judicial conference of the United States, which is the administrative arm of the Supreme Court.

Justice Roberts is not only Chief Justice in the United

¹ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

² *Twombly*, 550 U.S. 544 at 560.

³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

⁴ *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1 (1st Cir. 2008).

⁵ *In re Initial Public Offering Antitrust Litig.*, 471 F.3d 24 (2d Cir. 2006).

States, he is head of the federal court system. And the administrative conference, they like to push cases. And they like speed, maybe speed for speed's sake. And in that respect I believe antitrust cases have always been viewed as being somewhat generous.

I think your position is antitrust cases are very important to hold them up; hold up business decisions and that's not good. In the United States it's like this is the program. You get it. If you're going to have an antitrust suit it's going to take a long time. Except in the merger context where we do have expedited procedures. But I think at the end of the day I wonder the extent to which given our experience in the U.S., the extent to which procedural devices are going to create speed or if you're going to have to go to something like they've done in the United States which is certainly in my view making a deal with the devil.

PROFESSOR WALLER: We heard a reference to specialized courts. I welcome the thoughts of the people who also specialize in the IP side who have some experience with certain courts for the federal circuit, not as to the substance of the law but as to whether those having a specialized court has brought swifter justice.

PROFESSOR FIRST: I don't do IP law, but the contrast between swiftness and justice was a good one, for the Court of Appeals for the Federal Circuit. But certainly if you're trying to draw on U.S. experience there has been a lot of writing about what the effect is of having that specialized court, but I don't think the writing has been particularly on the speed of the court, but maybe Stacey can say, but more on how it's affected patent law, and I think many people are unhappy with that specialization. That said, there are apparently, my understanding is, that there are district court judges who are now tending to specialize on the trial level in patent litigation, sort of an informal specialization not one done statutorily. So there are always these tensions.

One of the questions I wanted to raise actually, something I picked up in Phillip's paper and yours as well, is that I'm wondering when we're all talking about appeals, if we are talking about the same things. And I thought about it also with Terry's comment. I have a sense of appeals as not being hearings, but just straight on the law. But when I read Philip's paper, talk about, it's not even a full appeal as opposed to what I think of as an appeal. So the context of what the CFI does as an appellate

tribunal and what the DC circuit does—which turned *Microsoft* around in four months after oral argument—you have to think about that sort of comparison is as well. You may even be talking beyond speed, asking what the functions are in this system of review, particularly if you can't count on the fact finder to have really found the facts. I just throw that out.

PROFESSOR DOGAN: I agree that the purpose, and I think the function of the federal circuit had as much to do with substance as with speed, and that it had a pro-patent design and effect. The federal circuit was supposed to bring uniformity to the patent system, and to make the patent more robust. It certainly had the latter effect, probably more than originally intended. Interestingly, from my recent conversations with patent lawyers, the perception is that the Supreme Court's correction in the last couple of years has radically changed things. So we're seeing a pendulum swing in the other direction.

On the point of specialized courts more generally, my reaction whenever someone talks about specialized courts is to ask why this class of cases is entitled to a specialized court as opposed to some other type. Many jurisdictions have specialized intellectual property courts, because lawmakers (with the "encouragement" of the United States Trade Representative) were persuaded of the need for substantive specialization as well as speed in deciding these cases. I think as a policy matter you need to make a persuasive argument as to why your particular business concern is more deserving of the speed of justice than many of the other deserving concerns out there.

MR. CAMPBELL: With respect to specialty courts, Canada has a competition tribunal, which is a specialized entity for the purpose of adjudicating these kinds of cases. It is a first instance tribunal that hears cases, so in a sense it is supervising our competition bureau, which is our enforcement agency.

One lesson is that I think there is scope to use special procedures and get an expert body to do things differently, including faster in areas where that is important. We have struggled over twenty years to do that. We started with a hybrid membership of judges plus economists and other lay experts. The judges in fact tended to control the procedure and we ended up with a very court-like approach that wasn't very much faster. However, over a period of time, there has been some streamlining of rules, procedures, and time limits, as well as proactive case management. I think we could still do more in

these areas.

The second lesson is that you need a critical mass of cases. One of the problems is getting decision-makers who are good quality appointees. Many people in Canada would not take an appointment to the tribunal because they would be sitting around not doing anything. And so case flow is needed for the specialty structure to get quality appointments. The Canadian model is a possible model for people to look at despite its imperfections.

DOCTOR MARSDEN: You can't have specialist competition courts in every jurisdiction because there isn't enough work for them; besides I'm all in favor of them being expert judges first of all, and having experience in any manner of hearings so they maintain high evidential standards, keep cases on schedule, and write clear judgments.

PROFESSOR PATTERSON: To follow up on Stacey's comment. As a patent lawyer the federal circuit is not well thought of. If we think back, between efficiency and accuracy, even if it were efficient, generally you get different panel fits with each other, paying no attention what is being said, Supreme Court constantly backing it whenever it takes a decision. Contrasted with a court chancery which is quite well thought of, and an expert business court and interesting that the federal circuit court of appeals, chancery court is more like trial court and makes you wonder if that has a role in terms of, or maybe the federal circuit is dysfunctional for reasons we don't understand.

PROFESSOR WALLER: One other issue you might want to address before you jump in. Your paper and presentation have convinced me that there is a serious problem, but you haven't convinced me that the problem is as acute in the merger area, which you seem to use as the poster boy. And the reason I say this, not because I also agree with you but that a long court proceeding is often death to a merger without regard to its competition attributes. But my real concern is, correct me if I'm wrong, but that in the real world it seems like the agency decision to challenge is the more frequent death meld to the merger or even to open a second request/phase two sort of investigation. That's where the deals often fall apart. And of course anything that lengthens that process increases the chance. But by the time you're in the court system, the parties have already made one guess about what the competition aspects are. The agency has made another guess, and whether you're the Department of Justice or the FTC seeking an injunction or the firm seeking an

appeal, it's almost too late at that point whether it's six months or eighteen months.

MR. COWEN: The option of a nomination system could increase capacity and should speed up decision-making. I tend to be persuaded that specialized courts could be a problem in EU law. Sir David Edward reminded everyone at the Select Committee that the whole EU treaty is about competition. So how can you possibly divorce one special case of another, and half the patent cases are monopoly and the other side, splitting these things up? I see huge difficulty in a EU context with that. Just increasing capacity in the current system is another thing that could be done. I don't think that would actually be as attractive as perhaps some form of decentralization.

One worry that I've got and which has actually been said by a number of judges off the record is that the capability and quality of the judges in Luxembourg in Competition law has been reduced in recent times given the lack of a history and culture of competition law in many of the newer member states.

To the point about substance solving the procedural problems, I see how that can be done. I am told that one very well-known judge has said that there isn't very much competition in Europe anyway so the easiest way of resolving all these competition cases is not to have cases going to the court. Robust case management is needed to prevent abuse of the system, and I can see that in relation to discovery there may be a temptation for the defense to use broad-based discovery as a way of slowing down cases. However, at some point robust case management raises a question of fairness and justice.

If judges are making decisions to discourage cases because they don't understand them, that's a really big problem. It is likely that there is little of that going on though and the system has many checks and balances so it would be very visible. Alternatively there are cases where the decisions are interrelated with a wider foreign policy objectives and a need to establish huge U.S. national, if not world, champions. There is no doubt that the outgoing US administration talked about the "New American Century" and was keen on *laissez faire* policies that allowed large organizations to become massive multinationals. This rationale has been put forward quite seriously behind the scenes. I think if you look at *Trinko* in particular, that could be seen to be a case where such thinking had influence. As we discussed earlier, this is not sinister in the U.S. system; the economic policies that were referred to by Scalia were prevalent

in the government at the time.

What this paper practice did was to point out the ineffectiveness of the system to actually achieve enforcement of the law. That is a really big problem. I think it's probably a bigger problem today than when I wrote it because we didn't have the same degree of economic concern. The credit crunch should make us more sensitive to the need to make sure that all aspects of the system work in a way that secures and supports economic growth and jobs.

I think that is partly an answer to the question about mergers. If you look at liberalization telecoms, water, and energy gas, which have taken place in Europe over the last twenty years, they have provided a huge focus for the single market and the market has expanded and economic growth has taken place. The speed with which the system keeps the market open is less visible than with mergers. Mergers are a great example of how some developments can be just literally stopped dead in their tracks because of the slowness in the system.

The thing about that, when we were doing evidence to the Select Committee, the question was asked "How many more appeals from the European Commission to the CFI did we think there would be, if the court process were more effective?" The answer is that it is quite a difficult thing to be able to establish. And I think that our response was well, you wouldn't want to generate a large number of appeals. The parties to mergers are not likely to do that because their incentive is to close the deal as quickly as they can.

The real concern which we pointed to on mergers is that parties to a merger will agree to a very large number of things, not because they are the right things to agree to, but because the agencies know that they can force concessions, because of the lack of speedy judicial oversight. If you look at the number of cases where concessions were given (the work was done by the ICC) and you look at the number of cases where concessions had been provided in the second stage or to avoid second-stage mergers, they're really quite substantial. What we didn't know at the time is whether those concessions were regarded as really necessary.

Certainly, my personal experience of mergers is that a number of things get asked for that are totally unrelated to any substantial concern but they give the official the ability to claim a scalp, and it is part of the price to get the deal done that demonstrates at a superficial level that an official is doing

2009

Discussion - Cowen

103

something. Indeed there is an office in DG Comp, it's called the trophy room, where they have all of the different things that they've got as concessions for mergers. And I think that's very telling. In an objective system of justice should anyone be proud of a trophy room? That could be seen as a worrying indication of the culture that you're dealing with.

PROFESSOR GREENE: Fascinating discussion. One thing that interests me about mergers within the U.S. is the long-standing history of antitrust agency promulgated guidelines during which they have morphed, in international law terms, from soft law into something more akin to hard law.

With that as background, my question is two-fold: In the first instance, what have been the EC Guidelines' primary effects upon the procedural and/or substantive review of mergers by enforcement officials? Secondly, have the merger guidelines crystallized or otherwise articulated the law in a manner that has influenced the courts?

MR. COWEN: From my perspective, U.S. merger guidelines or what the European Commission does?

PROFESSOR GREENE: European Commission. Though I would be curious about observations regarding either.

MR. COWEN: Christian can probably comment as well. If you look at the series of procedures that are adopted by the European Commission in merger filings, they particularize those facts that are needed and on the face of it can speed things. On the face of it that can be the case but there is a lot of discretion still built into the system and failure to submit even a small set of facts can in practice be sued to argue to slow things down. Typically parties will prepare the form CO, discuss it with the officials in advance of filing in order to attempt to agree on a relevant fact base. In practice this gives officials more time before the clock starts. And that's become quite widespread in practice. This is not all downside for the parties concerned. I don't know whether it's something that others do or generally do not do, but my experience is that the period before the clock starts provides an opportunity to educate for a considerable period of time before the full procedure starts. This enables the parties to get more done in stage one. In principle, stage one is officially one month but there can be a long lead-in period. This raises the time available for third parties and whether they are getting similar time to present their case to the authorities. This may be a big issue particularly in a merger in a contested case.

I think there are real issues of the amount of time that is

available to the party by comparison with the amount of time available to a third party. I found out during the course of the first week of September 2008 that a transaction was taking place that had been announced on the 15th of August 2008 when most people are on holiday, and as an affected party we hadn't been notified of it by the Commission, and one of the external firms rang me up and said, do you know about this? This is incredible. There is a real issue for third parties to be able to make their comments known during that initial one-month period. Being wise to this, some parties have adopted a bit of a practice of doing things during the summer and the Christmas holidays, which may be pragmatic but not terribly fair.

MR. AHLBORN: I think my guess would be that the biggest impact of the Commission's behavior toward mergers at the cases subsequently brought but I can't sort of put any evidence to it is the quality of the judicial review. And what you saw was in merger cases you had a period where sort of merger did excellent work and then they overreached and so what happened, they were sort of extending theory of worse and worse and GE Honeywell was sort of probably the best example and then came a point when the court said enough is enough. And because you didn't have proper judicial review in terms of it was taking too long, parties were never challenged, the Commission completely went out of control.

You then had the Commission was whacked in 2002 a couple of times on the merger side and since then things have been significantly better. So the quality of judicial review is much more important than whatever guidelines you can possibly have.

And the problem we have at the moment is that the average quality of the judges have gone down dramatically downhill. And so for me the most important thing is how do you select judges, because I do not believe there are no good judges in the new member state—becomes a dumping ground of politically sort of people who need sort of a job and what you have ended up with is a quality of the court which leaves a lot to be desired. So the first issue you need to address is maybe to make self selection.

CFI actually has a role in deciding, determining who is going to be as part of the judges. And I think that question is much more important. Specialist courts, if you have high quality generalist, I prefer that to dumb specialists. And I think the generalist is finely tuned, and you see to some extent debate with the last two commissioners, not at court level but commission level, where you have someone now who, let's

put it this way, is sort of lightly is a generalist but what you know politically very attuned.

So what you have done in terms of positive aspects she has grounded competition policy and sort of what is political acceptable rather than what is particularly brilliant competition policy compared to the previous commissioner who was technically far superior but there you have it between generalist and specialist.

PROFESSOR HYLTON: Just a minor point. It strikes me speed and substance are inevitably linked, and that whether we say the court is making a link or not, they're going to be linked anyway. Suppose you increase the delay in the court system. That's going to have important substantive effects because people on the plaintiff's side will say it takes too long and therefore I am not going to sue, which then gives a shield to potential defendants who face a reduced risk of a lawsuit so there is less of a perceived need on their part to comply with the law. So there is one substantive effect, if you think of substance as a real effect of the law on people's conduct, then that's a way in which delay has a substantive effect.

Another argument is that as you increase the length of proceedings and delay, then people who are sued know that it's more costly to them. That has an effect on them. They say to themselves "once the lawsuit comes it is going to cost me so much no matter what I did, so whether I comply with the law or not I am going to have to pay a whole lot of money." It strikes me that is another way in which we get an unavoidable link between procedure (or speed) and substance. And *Twombly* is a case where the court openly says we're going to recognize that link. We are going to do something about it. They could have gone in either direction.

The Court has been motivated by these error cost arguments lately, particularly by the concern over false positives. *Twombly* reflects that. *Twombly* reflects a reaction to this inevitable link between speed and substance, but moving in a direction that is motivated by the concern about false positives, or false convictions, and therefore cutting off plaintiff's lawsuits quickly. The Court could have gone in the other direction and said we're concerned about false negatives instead.

It strikes me that you are going to have that link no matter what, and instead of seeing *Twombly* as a deal with the devil, I would view it as a court openly saying we are going to do something about this. As I think common law courts have

done for a long time. And there is a debate that people can have over the direction of the court. But to me the link is there. It's up to a court whether to confront it and to that extent I think it's desirable for courts to confront this link.

MR. ALESE: I think your question is whether cases going to the courts in Europe are reduced since the guidelines were issued. My take is that since the EC guidelines, just like the one you have, are not really laws and are not binding on the courts, there should be no increase in the amount of challenged cases.

PROFESSOR GREENE: Give them time.

MR. ALESE: Exactly.

PROFESSOR GREENE: Did it clarify the law in a way where it sort of, did it bring a certain clarity to what it was so people had a different sense of what their odds were going in?

MR. ALESE: I think it does for those in the world competition. But I think lawyers and economists were using most of the concepts in the guidelines before they came in officially – so no net effects, really.

Coming back to part of Tim's paper on the relationship between GDP competitor and rule of law, this is the first time in my life that I see a table in which Nigeria is below Pakistan. Usually, Nigeria always beat Pakistan to the first place in tables relating to corrupt countries and practices across the world – perhaps, we got bribed by the Pakistanis to come below them here. However, there is an importance to this table because we're discussing here antitrust and the rule of reason. GDP competitor relates to economic efficiency. Economic efficiency, on the other hand, is something that can only thrive where there is rule of law. In many developing countries, like Nigeria, the rule of law is not upheld to the same standard you'd find in Western countries. And this goes back, to an extent, to what Keith Hylton was talking about in the morning, when he defined the concept in a narrow sense.

PROFESSOR STUCKE: One thing to pick up on Keith, interplay between procedural and substantive. We were at the antitrust division after Arch Koal and where the court rejected, it required us to do then much more fact-specific inquiry and that then is very costly and very time consuming. And as you move away from presumption, even as you start moving away from the guidelines to have to even bring on tougher showing after *Oracle*,⁶

⁶ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2005).

2009

Discussion - Cowen

107

that is in turn going to have cost as well. So you are always, I mean to one extent, it goes back to the fundamental question about rule of reason is that yes you might have the times that you can get it correctly but then there may be attendant cost in terms of cost, delay, and the like that you need to be aware of as well.

ISSUE PAPER

DOES ANTITRUST REGULATION VIOLATE THE RULE OF LAW?

*Elbert L. Robertson**

Professor Stucke has presented a rich and provocative issue paper detailing the modern Rule of Reason's functional foibles, pitfalls and methodological infirmities. He cites the Rule of Reason's propensity towards inaccuracy, poor administrability, subjectivity, lack of transparency, vagueness, logical circularity and yielding inconsistent results. As you reflect on Professor Stucke's critique of the Rule, Justice Peckham's literalist interpretive alternative of *Trans Missouri* fame (a largely discredited relic of antitrust history) begins to look comparatively refreshing. These formalistic, functional and consequential shortcomings of the Rule of Reason make its use highly problematic under the Rule of Law.¹ Prof. Stucke states, "Under the rule of law, enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly. The law should be sufficiently specific and its enforcement predictable and fair."

Statutory interpretive norms like the Rule of Reason in the context of the Sherman Antitrust Act, serve as foundational secondary rules as in H.L.A. Hart's Concept of Law provides functional legitimacy for competition policy commands and decisions within our legal system. We can say that a legal system satisfies the Rule of Law if its commands are generally binding

* Professor, Suffolk University Law School, Boston, Massachusetts.

¹ See Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1 (1992).

and authoritative, knowable and performable.² Of particular importance for the development of my thesis is Professor Stucke's assertion that under the Rule of Law, antitrust enforcement must be clear and fair. I strongly agree, and have argued elsewhere that the devolution of "bright line" per se doctrine in favor of complex and murky Rule of Reason decisional processes will often result in substantively unfair outcomes to an injured antitrust plaintiff. This devolution exclusively focuses on Chicago School neoclassical economic efficiency oriented value when evaluating a defendant's alleged anticompetitive conduct, or its effects (vertical and increasingly horizontal).³ The substantive unfairness is the denial of compensatory relief to injured market competitors unless some proof is made of economically inefficient "public injury" to the competitive process itself, regardless of the relative economic position of the parties or the form of the injurious restraint. In fact, in terms of the Rule of Law's precondition of outcome predictability, extensive Rule of Reason processes have a well-recognized predictability feature. As Prof. Steve Calkins has noted in his "*Not a Quick Look But not the Full Monty*" article on the problematic nature of *California Dentists*⁴ quick look Rule of Reason process, "beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win."⁵

In sum, with the devolution of the per se rule and the ascendancy of the Rule of Reason, a presumed over-inclusive secondary rule (per se) is replaced by a vague, effectively under-inclusive secondary rule (the Rule of Reason). Professor Stucke is correct when he observes that the Rule of Reason is an undefined rule ex ante, embracing antitrust's most vague and open-ended principles while simultaneously incorporating essentially contested paradigms of neoclassical economic theory for "efficient" competitive end state solutions. Attempts have been made to formalistically restructure the Rule of Reason into a more "workable" and or "flexible" operational test than the onerous, vague, indeterminate balancing of incommensurables

² Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

³ See Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741 (2000).

⁴ Cal. Dental Ass'n v. United States, 526 U.S. 756 (1999).

⁵ Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 521 (1999)

offered by Brandeis in *CBOT*, or the original general announcement of the Rule as the operational measure of promoting competition for purposes of interpreting the Sherman Act since *Standard Oil*. Variants of the Rule of Reason, like the modern Quick Look methodology have emerged to allow the federal courts a means of sidestepping the analytic quagmire of a full blown Rule of Reason inquiry without risking the dangers of per se condemnation (e.g., false positives, structural inappropriateness). However the legacy of *California Dentists* leaves the subjective touchstone of a federal judge's "intuition" as the threshold condition for the application of this more streamlined alternative. This result hardly advances the Rule of Law Requirement that legal decision-making by rendering authority be objectively determinant and predictable.

Despite these difficulties, the Rule of Reason remains the primary interpretive paradigm for adjudication for Sherman Act cases involving horizontal and vertical restraints on competition, with even further devolution of the per se rule evidenced by the recent *Leegin* decision which overturned the 90 year precedent of *Dr. Miles* which held that vertical minimum RPM was per se illegal price fixing. Citing modern neoclassical economic arguments for the procompetitive benefits of RPM and the greater higher risk of "false positives" associated with per se condemnation, the Court shelved *Dr. Miles* opting instead for a Rule of Reason assessment of whether minimum RPM violates the Sherman Act. Can such radical departure from stare decisis and precedent (antitrust common law precedent and congressional legislation limiting minimum RPM) be consistent with Rule of Law if it substitutes a secondary rule norm that itself conflicts with the substantive requirements of the Rule of Law, namely clarity, determinacy and fairness? Will adopting the Rule of Reason in the *Leegin* litigation context raise the probability of facilitating false negatives by essentially immunizing dealer-based RPM from detection by making plaintiffs' discovery too costly or onerous?

Prof. Stucke's issue paper on the Rule of Reason is highly successful in raising these troubling questions. As a point of departure from the framework his paper established, I would ask are any alternatives to these conflicts with the Rule of Law and precedent raised by predominant interpretive role the Rule of Reason plays in Sherman Act adjudication? One suggestion is to move antitrust law adjudication more firmly into its regulatory mode. Antitrust law is often characterized as an alternative to

economic regulation because it is the law of free and open market competition, merely stating and reinforcing the “rules of the game” and not dictating the results of the competitive process. The fixed determination of price, output quantity and distribution (or redistribution) is the hallmark of a planned or regulated economy. Antitrust law does not fix or allow the fixing of prices or quantities, nor does it command ex ante distribution of goods produced in a competitive market economy. However this definitional separation is artificial, historical and overly-simplistic in light of antitrust reality. *The truth is that antitrust law is most often effective economic regulation.* I am shocked at this heretical assertion – equivalent to shock that there was gambling in Casablanca. Antitrust adjudication in the federal courts determines winners and losers in disputes about market competition under the Sherman, Clayton, Robinson Patman and FTC Acts, and to this extent, it regulates markets (prices, pricing and production) for goods in interstate commerce indirectly. Antitrust-oriented law and policymaking processes directly regulate the marketplace by rulemaking and adjudication of federal administrative agencies with economic competition and regulatory mandates written into their enabling legislation by Congress.

The paradigmatic example of an independent federal agency with explicit antitrust regulatory responsibility is the US Federal Trade Commission (the “FTC”). An important point from American legal history is that the 1914 legislation that became the FTC Act passed largely in response to political demands for institutionalized competition policy expertise designed to help the federal courts navigate application of the nebulous Rule of Reason as announced by Justice White in *Standard Oil*. The FTC has a broad and general mandate to curb “unfair methods of competition.” It has been argued that adjudication and rulemaking processes by the FTC would offer a superior alternative to the federal courts’ inconsistent and unworkable applications of Rule of Reason.⁶ Its superiority would stem from its primary expertise in antitrust and competition policy issues. Federal judges, on the other hand, are legal generalists and lack such technical expertise or competence to correctly resolve complex trade regulation policy disputes. Under the *Chevron* doctrine federal courts would defer to the

⁶ See Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391 (2000).

FTC's policy judgments.

A good example of antitrust regulatory rulemaking is presented by the DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors.⁷ The purpose of these Guidelines is to give clear guidance to horizontal competitors about the range of collaborative activity permitted by the agency, and therefore not in violation of the antitrust laws, especially competition-enhancing activities like R&D. To the extent that published guidelines promote transparency, clarity and predictability, they serve a basic Rule of Law enhancing purpose. However, close inspection of the Guidelines' provisions reveals that they are almost totally premised on a Rule of Reason balancing of the perceived efficiency benefits of competitor collaborations regardless of the form those collaborations take. Therefore, a horizontal collaboration involving a naked restraint of trade that generated significant efficiencies would not be prohibited. What implications does this have for enforcement in the *Maricopa County* or *Topco* context? Even *Palmer* would receive rule of reason evaluation under these Guidelines.

While the guidelines recognize per se rules, they also state that the agencies will evaluate all efficiency-enhancing collaborations as mere ancillary restraints under the Rule of Reason. If the Rule of Reason's reliance on nebulous, efficiency-balancing norms conflicts with the Rule of Law's basic tenets, these Guidelines must also conflict with the Rule of Law, because despite expressed recognition of per se illegality, any restraint reasonably ancillary to an efficient integration will always be allowed. The possibility of false negatives will be present whenever naked ancillary restraints of trade are part and parcel of collaborations that have more apparent efficiency benefits on balance. How is it that the danger of permitting false negatives is so less important than the danger of false positives associated with the per se rule? From the perspective of corrective justice, the option of allowing the FTC to administratively settle competition disputes between private parties is inadequate because there is no right of private or state enforcement of Section 5. Therefore, there is no administrative scheme for compensating private antitrust injury. This is substantively unfair and, as I have argued elsewhere, inconsistent with the

⁷ See U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for Collaboration Among Competitors, § 3.2 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (last visited Sept. 10, 2009).

dictates of the Rule of Law.

Finally, from a legal process perspective, what does it mean to utilize the Rule of Reason as a mode of interpretation, given its infirmities? The decision to privilege neoclassical economic cost-benefit approaches in interpreting a statute that doesn't even have the word "competition" in its text is inherently political.⁸ *California Dentists* demonstrates how the Court may refuse to defer the FTC's fact-finding process as presenting "substantial evidence" under APA Sections 556 and 557, earning Chevron deference if its application of the rule is intuitively suspect. If antitrust law is to be successfully integrated into the broader body of a legal system that promotes both justice and economy under the Rule of Law, then the Rule of Reason must be more than a rubric for neoclassical efficiency balancing. In interpreting the Sherman Act under the Rule of Law, the rule must be reasonable, fair, efficient and consistent.

⁸ See Sherman Act, 15 U.S.C. § 1 (2004).

DISCUSSION

DOES ANTITRUST REGULATION VIOLATE THE RULE OF LAW?

By Elbert L. Robertson

PROFESSOR ROBERTSON: Does antitrust regulation violate the rule of law? I think the rule of law part of this we've got down pat pretty well across a wide range of papers today with Maurice having starting us off. We understand what the basic idea of the rule of law is, and that we are under a legitimate system of law if it is one that is generally binding, authoritative, transparent, fair, knowable, informative, one that offers opportunities for due process, etcetera. The general concept is that in a legal system under the rule of law, the law is equally binding on us all and we're tied together by that system.

However, the next part of this title that is probably a little tricky and perhaps maybe a little eccentric as it relates to this antitrust regulation stuff. You might ask: What in the world do you mean by antitrust regulation? Most of us here are antitrust lawyers or competition lawyers and we understand that antitrust basically is one thing and regulation is something else. Antitrust following from the Sherman Act is sort of the legal rules of the game for the process of economic competition, even though as we all know the word competition is not even in Section 1 of the Sherman Act, at least literally the word is not there. It was read in.

We know that antitrust law and process are the rules of the game. However, economic regulation is thought and taught to be largely something else. Standard textbook definitions would say it is a process of assigning prices and quantities for economic goods, done oftentimes by government bureaucrats, because markets have failed to achieve desired allocative outcomes. So in contrast, antitrust law sort of sits on the proposition that there are markets that are functioning to some degree but just need to be cleaned up some way or other. While regulation sits on the idea

that markets have essentially failed, and therefore intervention is warranted to try to get the next best possible results in terms of prices and outputs of goods that would be produced and this is the proper goal of the regulatory scheme. So when I talk about antitrust regulation, I'm not talking about two concepts that are necessarily exclusive. Are they? And my answer is, if you read down a little bit in the piece, absolutely not.

I think that antitrust wherever it is really effective and meaningful it is regulation. In fact it is the most effective form of regulation. And this separation which I refer to, is both artificial and ahistorical. This reminds me of that hilarious film noir moment in *Casablanca* where the police chief commandant is escorted into the casino and exclaims suddenly, "Gambling in Casablanca? Well, I'm shocked! This is shocking!" He says while a few of his gambling chips are in his pocket with his cronies in abundance. Totally shocked! Antitrust regulation.

We shouldn't be shocked by this at all. The fact is a lot of antitrust process, activity and law by necessity involves effective regulation. And it's a different type of regulation in most cases than standard traditional rate-structure regulation because when antitrust law regulates and decides, it often is deciding between a plaintiff and defendant. So it is also therefore deciding about a winner and a loser.

Another very important part of what the antitrust impulse is increasingly ignored and undermined in the modern world of Chicago School doctrinal dominance. It is the extent to which competitors and would-be competitors (and derivatively consumers) are injured, harmed, damaged, and sometimes even ruined by illegal, unfair anticompetitive devices and not effectively compensated. Under rule of reason processes facing a ninety percent plaintiffs' defeat rate. Plaintiffs prospects of either corrective or compensatory justice, I think have been skewered, largely out of the picture by contemporary economic formalism, and I think one of the classic paradigmatic examples of this is the demise of the *per se* rule which brings us back full circle to Maurice's paper at the beginning of the day which cites so eloquently, all of the problems, the problematic of the rule of reason.

And as I said, I agree strongly that those structural and functional infirmities exist, but what exacerbates the problem even more are not just to the structural and logical infirmities of the rule of reason. It's the fact that *per se* bright line rules which reflect presumptions of illegality premised on factual

predicates and precedent have been increasingly, and are increasingly being run out of town on the rail. Under Chicago school influence *per se* condemnation for Section 1 complaints involving vertical restraints under the *per se* standard have disappeared. (See *Leegin*.) *Per se* rules should never have existed in the realm of Section 2, but we know some of the same issue about the dominance of false negative space over false positive space is an issue in Section 2 context as well. When you think of Justice Scalia's rhetoric in his *Trinko* dicta, it serves as fair warning about how far the extremes of that way of thinking can go.

That being said as a broad introduction of the theme, the enterprise in this, the core part of the enterprise in this paper is sort of picked up by a challenge that was suggested in a paper by Tom Arthur in a 2000 super volume of articles in the Antitrust Law Journal in response to *Cal Dentist*. In fact, Mark Patterson who's here today published his famous "market power" piece in that volume, it included a series of really great articles that in light of quick-look rule of reasons demise in the *Cal Dentists* ruling.

Tom Arthur wrote a very powerfully provocative Chicago School oriented article in which he essentially throws down the gauntlet and says. . . This is what we should do! Let's just get all of these horizontal restraint Section 1 cases out of the federal courts. The rule of reason is a mess. It's a morass; settling these cases is impossible without running into all of the problems that Maurice has suggested. Why don't we give this to the FTC to resolve? They are going to do a better job in the federal court because first of all federal courts involve lawyers, and judges who are generalists. I'm just wondering, just give the stuff to the FTC. We are here; we have the economic expertise and superior competence to settle these types of issues.

And I make the historical point that of course the FTC did in fact come into being largely because after Justice White announced the rule of reason and *Standard Oil*, there was such an outcry that Woodrow Wilson was able to get the FTC established because just the thought of having the American economy sort of subject to the blowing winds of the rule of reason was enough almost to send people back out into the streets rioting like they were ready to do in 1890 when the Sherman Act was initially passed. So Arthur threw down the gauntlet. Now I pick it up.

The other part of what I would like to talk about a little

bit is whether or not administrative agency expertise in economic matters, and I say this once again remembering that the FTC and Commissioner Calvani gave me my first job in Washington some twenty-five years ago, and I like to think that the fine group of economists I worked with back in those days might very well be capable of doing something that the federal courts can't do, which is to find efficient effective antitrust results that will promote the broader goals of the American economy in a more effective way than the federal courts under the rule of reason currently are able to do.

I like to think or at least ponder whether or not that is true. I pondered it for a moment and I have decided that it's false. And it's false for a couple of important reasons. First of all, serious formal structural infirmities exist within administrative law decision-making processes as well, which do not categorically privilege agencies over courts. That being said, if we get around the legal process question of whether or not the delegation/non-delegation doctrine ultimately gives that responsibility to the FTC more so than it would give it to the federal courts since the federal courts still would have ideally the last say on these legal questions the way our system works.

Putting that aside for a moment and we'll come back to that, I don't think that it necessarily is going to work very well because the Commission and pretty much any other regulatory body that does conventional law economic decision-making already follows a cost-benefit variant of the rule of reason. As I said earlier to Maurice, ultimately the rule of reason is all we have. We can even characterize the *per se* rule as the *per se* rule of reason. It's just more sharply attenuated based on factual presumption. And in following the rule of reason it falls into all the pitfalls and that you pointed out so well in your paper.

Now, I've spread around a copy of the DOJ/FTC guidelines, and I took this out of Einer Elhauge's text. If you just look at it, it doesn't take very long at all. Just eyeball it. Would you look at the purpose definitions scope, the terms for collaboration, and these are our guidelines. These are our horizontal guidelines. They boil down to one thing. They all boil down to the principles of a very seminal old antitrust case, *Addyston Pipe and Steel*.¹ Because the sum total of these conditions essentially is that horizontal restraints that are merely ancillary to the main purpose of a legitimate contract are

¹ *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

going to be evaluated on the rule of reason, and if they generate sufficient enough efficiencies, they are going to be allowed. That's the Commission's position. That is the Department of Justice's position. That's the rule of reason.

But that is also the rule of reason with all the problems, Maurice, that you pointed out that the rule of reason has, and that doesn't necessarily get us all that far for the same reason that the rule of reason as you pointed out doesn't get us all that far. Not only is that a problem, the other part is that the FTC and the other administrative bodies even if their adjudicatory capacities don't have private enforcement or state enforcement powers that would settle what I think is the other important part of the question which is whether or not private clients injured by these devices are going to be able to correctively compensated. The answer is they don't do it. So we'll be back to the court again anyway if the antitrust law was going to provide that compensation, and the antitrust laws I don't think can be just or effectively under the rule of law unless they can provide.

Last point and this is looking back from the perspective of the *Leegin* case which I think is the last big major decision of the Supreme Court on issues of horizontal restraints, *per se* rule of reason, in which the sort of last vestige in the vertical restraint context of regarding minimum resale price maintenance was wiped out, as a *per se* criteria, and is now going to be judged like everything else, under the rule of reason. Universal space of *per se* shrinking, shrinking, shrinking. And why? Because the argument is that the universal space of protection from false positives has to grow, grow, grow. Very much consistent with Chicago ideology.

So we have Justice Kennedy who says, look, wide evidence out there, the retail price maintenance can be a good thing, and while there may be some evidence out there that in some cases it may be a bad thing, the *per se* rule should only be applied when something is so inherently bad that it's almost always a bad thing otherwise we might generate false positives, and lord knows we never want to do that. But if some false negative through, we'll work it out. But false positives, no, that we can't do.

The administrative challenge from the perspective of doctrine like *Leegin* doctrine, puts a very interesting I think spin on this problem in terms of the interpretive statutory interpretive dimensions of the force of the rule of reason. This is what I mean. The rule of reason now is the predominate

paradigm. It's almost the only paradigm.

And that means when we interpret the Sherman Act we read the Sherman Act, we got a huge varying of the rule of reason to figure out how we're going to crank out the results and whether or not Section 1 has been violated. And we see like under these guidelines we get enough efficiency, no violations. That means, for example, a case like *Topco*² horizontal divisions, enough efficiency, no per se. None. I mean broad categories of law that under *stare decisis*, precedent wouldn't have allowed these behaviors for *per se* reasons are now going to be reshaped. Well, as *stare decisis* is increasingly disregarded, isn't the rule of law increasingly impaired? Predictability? Reliability? Fairness? We don't have to worry about that, but the rest of us do.

Antitrust lawyers and competition lawyers and in Europe hopefully you will continue to be concerned about that and if you are, you be careful about the extent of which you employ the rule of reason. That's it.

MR. McGRATH: There are two specific points in Elbert's paper that I thought were interesting to me as a European lawyer. One was I was less shocked about the idea that antitrust may invoke regulation and without going into too much detail given the time I'll just give an example of a particular regime in the UK where we don't just have a prohibition on anticompetitive—but we also have a market investigation regime which involves looking at an entire sector and if there is a problem with that sector, then rules can be introduced to change how that sector operates. And it's a long running practice in a monopoly regime, in its later incarnation from 2003 but goes back much further than that.

And it is a very administrative system. It's a system based on very in-depth financial analysis of a sector, profit margins, and other measures, financial measures of a sector, and according to what was previously viewed as public interest now is in principle competition test but it is a very, very broad competition test.

And it is a very uncertain regime. I think they didn't necessarily expect after a few years they would be required to sell some of the crown jewels of the estate but that is how the regime operates in the UK and that's part of in a very raw term could be classed as antitrust law. And I also remember from my time at the OFK that it was commonplace to talk about competition

² United States v. Topco Ass'n, Inc., 405 U.S. 596 (1972).

policy not competition law. It was a matter of law and they were uncomfortable with the idea that they were a competition enforcement law enforcement agency.

Also moving on to the false positive point. I do still think that it's not a bad thing to be weary of false positives, and I think an authority should be very humble and very reluctant to interfere with what commercial entities have autonomously decided. I see it in a form of Hippocratic oath, do no harm. Do not go in there and mess about with things you do not understand. An example I would give is the French authorities recently banned the exclusivity agreement between France Telecom and Apple about exclusive marketing of the iPhone in France. Now I don't know the case in detail, but I don't see quite what the problem is. Apple does not have market power in mobile phones. France Telecom might have a bit of market power but not sufficient to make that a real problem. They just went in and banned it, and I think this would have a chilling huge effect on pro-competition, pro-consumer investment.

My final point, I'll abuse my privilege slightly to sum this up, I think there is an important distinction between the different areas of rule of law. There is a distinction between what the law is and how the law is applied. And I think to seek perfect consistency and predictability on what the law is a chimera and that reaction comes through in Elbert's presentation. And I also think it's nice to have but if you don't get the administration of the law right, if you don't get the procedure right, then you are lost. That is a must. So I think I'm probably being very European on that point and really pressing on procedure but I think you have to get that right.

PROFESSOR DOGAN: I have a variety of thoughts that relate not only to this conversation, but also to many different comments that have been made throughout the day. Different people have talked about whether antitrust law or competition law is working well. At the moment, for example, we're discussing whether regulatory antitrust works well or not, and under what circumstances. And these kind of comments – about how well antitrust law is performing or can perform – have occurred throughout the day. I keep coming back to a question – under what metric are we measuring antitrust's performance? What is the measure for deciding whether the law is working well or not? And I guess it states the obvious that the answer turns on our predispositions about the normative goals of antitrust law.

It depends on whether we're more concerned about

protecting the ability of businesses to dictate their own business ventures without interference from the government or whether we're more concerned about competitors who are harmed by those businesses when they act in exclusionary ways. That itself is a judgment that is influenced by one's economic and political viewpoint. And so I have been feeling all day like these conversations end up being circular because our views of the law's efficacy turns on our view of what antitrust law ought to be doing.

One final point. Even if we can't fully agree on the normative goals of antitrust laws, I think there's some opportunity for empirical work on the costs and benefits of alternative legal approaches. So, for example, I think there's a baseline level of agreement that if a firm's behavior has a demonstrable adverse welfare effect, and if we can identify the behavior reliably without the risk of false positives, it ought to be found a violation of the law.

It seems to me that in the merger context, and perhaps in the retail price maintenance context, there could be some empirical work, event studies, and other studies that look at the effect of the behavior on prices in the market. That might be a satisfying way of going about determining what kinds of behavior, as a rough guess, ought to be presumptively viewed as competitive or anticompetitive.

PROFESSOR STUCKE: First, one of the things that you picked up on, and *Leegin*, the court now can say under our new economic wisdom we're no longer bound by the policies underlying the Sherman Act. You may disagree with what are the policies. But the court can say we are determined by what we perceive to be the new economic wisdom. And Justice Breyer said how are we going to determine that? Are we going to count heads of economists? And the people at the Supreme Court at that time hearing oral arguments laughed.

Basically the court can say here is the new economic wisdom and we feel the purpose of the antitrust law is to protect interbrand competition at the expense of intrabrand competition. Then that is going to be itself another element of subjectivity that the court will then weigh. And do we really want the court, any court, not only in the United States but also elsewhere particularly when the Sherman Act is both criminal as well as a civil status to govern the standards based on its perception of new economic wisdom.

Now with respect to your point about first do no harm,

that assumes that markets operate independently of the government or the legal institutions, and that if markets left alone will achieve allocated efficiency. Well, I think you have to recognize that markets and government and legal institutions are reinforcement, that the legal institutions provide the framework in order to achieve allocated efficiency. It can effectively lower transaction cost. And there are many instances, for example, in consumer protection law where the law seeks to prevent market failure and to foster transactions and the like. So I think it's more nuance in terms of yes, you have to have a respect for false positives but you also have to look at false negatives.

PROFESSOR WALLER: I had two brief comments and then I have Harry, Christian, and Elbert in the queue and whoever wants to weigh in before we break.

My two comments are in part building on Maurice's which is I think humility is important but I think it's a two-way street. And I think we have strong evidence that largely unregulated commercial arrangements contributed significantly to the economic wreckage that we're trying to sort out here. So humility and public and private decisions is clearly a good thing and in too short supply. I think we are in a situation of competition administrative law on both sides of the Atlantic. I think we're there already and I think it's just a question of what is good administrative law. And that is a lens that we haven't gotten into exclusively but does really guide us to what agencies should do and courts should do after agencies have done their decision making process. In the U.S., it's very peculiar. We have one administrative agency that was set up as an administrative agency.

Obviously those of you who know me, I start from a very different place than Tom Arthur does, but I get close to his destination which is we really did set up the FTC to be the principal administrative agency for really complex stuff and obviously not the price-fixing stuff which is part of our criminal law system. But that in my mind is the only law enforcement aspect of antitrust that is really left in the U.S. And the Justice Department has the sole statutory authority to bring these cases. They do so under democracy—publicly, they do so vigorously. And they do a reasonably good job at it.

One could make a good argument beyond price fixing is you have two agencies, one of whom is an administrative agency by design with procedures and various things and one is the rest of the antitrust division which is acting like an administrative

agency through guidelines, consent decrees, other kinds of things but isn't constrained by our administrative procedures act and also doesn't get the benefit of deferential court review. So we have a very peculiar system. Maybe it all sorts out in the end in a very pragmatic way that it works like administrative law, but I'm still enough of a rule of law person that if you do it that way somebody, i.e. Congress, should really say so.

But I do think the focus is what is good administrative law because I think we've evolved in a variety of ways for perfectly sensible reasons, just a lot of hydraulic pressures to have agencies make these complex trade-offs subject to some kind of deferential court review. But again you have to make sure the agency is doing its job and the court is doing its job.

PROFESSOR FIRST: Three points from the discussion. One of the things I hear about rule of law is predictability, *stare decisis*, and then I think about the common law's ability to change and overrule precedent. So I want to put in my plug right now for non-*stare decisis* and not at this moment saying, guess what, let's freeze the rule of law right now, because actually I think some people, not everyone, would like to not be stuck with the current rules of law, which in many ways people think actually are deficient, and to be able to take account of whether for better or worse we are stuck to some degree with these economists, or to take account of other economics than what the court has considered. So there is a bit of a trap in the "we love the rule of law" because the rule of law right now is not what I love. So that's the first thing.

The second thing is to thank you Elbert for plugging *Topco*. Peter Carstensen and I did a piece about it. There is a series, for those of you who don't know, called *Antitrust Stories*. This is a series of books that Foundation Press has put out in various areas, property, tax, antitrust, and as we know we have lots of great stories. So Peter and I did a story, not a story because it's the truth about the *Topco* case. And for those of you who don't recall, *Topco* involved an agreement among a group of sort of mid-sized supermarket chains basically in an idea to divide markets using the licensing of the *Topco* brand private label to keep each other out of each other's market.

This is a famous *per se* case, avoiding a "ramble through the wilds of economic theory." We can't do this, says Justice Marshall, and the case is the poster child for why the Warren Court is so God-awful. But *Topco* was really interesting in one part because so far as you can tell from the facts it really was

a cartel of potential competitors and they were trying to keep each other out of their markets.

But I want to give you a sense of what a *per se* trial was in 1967. It consisted of no depositions taken by the government. No expert witnesses for the government. The government didn't even depose Topco's expert witnesses. The trial consisted of a government lawyer presenting answers to interrogatories and resting. That took four minutes. And then Topco itself took seven trial days to present its defense. This was the trial. And very efficiently, in the end the Supreme Court decided that this was *per se* illegal. And Peter and I think that actually that was the right decision substantively, although there was not really a full record. You probably could do more to understand the facts.

The trick is how much more do you really need, but what you probably don't need is a full rule of reason. There really wasn't a good justification. Post-*Topco* history was Topco then had to license its label. The members couldn't keep each other out of each other's markets. They all entered. They competed vigorously. They have new private labels now and Topco is the second largest group of grocery store product sellers, second after Wal-Mart. They have been fine. Great victory for antitrust. So that's my *Topco* story. Be sure to buy the book. I actually don't get royalties. My colleague Eleanor Fox who is the editor probably gets the royalties. But there are lots of great stories.

A third point. This is a concern for enforcement modesty, and having spent a little time at the New York State Attorney General's office, you get a little sense of what your concern is about false positives in enforcement and doing no harm. But just a little counter-story on the other side. This again is a 1960s story. In 1966 a complaint was finalized, a 104-page complaint, against General Motors, to break up General Motors. It was finalized, leaked to the *Wall Street Journal* in 1967, but as we know, it was never filed. So just take a moment. Think about how different the world may have looked if the government had filed that case—it couldn't have been modest to do that. To take on General Motors and file that case. Suppose the government had won. We wouldn't have had voluntary restraints on exports, keeping Japanese cars out. There was a cartel to restrain competition in smog technology. That might not have happened, and if it had happened you wouldn't have had a president who squelched further enforcement against the cartel, as Ronald Reagan did in the 1980s. Very different history. So if

we're worried about false positives, we also need to think about false negatives.

MR. AHLBORN: Two brave comments and I have to reverse the order. One was on the market investigation. Harry, what you just said if you had market investigation you asked that would have been exactly the way to go about it. If you look at it from an antitrust perspective that I think is easy. You look at you have an agreement, you have no agreement. Market investigation is sort of industrial policy. I don't like this structure, I'll break it up. I don't like the information flow, etcetera. So I think for me I find it sort of not only do no harm; it's just roll up the sleeves and play around it.

My other point is sort of type one, type two, I think there are two of them. One on the export investigation, I happen to think that agreement of behavior and investigated. The more important one is what signal does that have in hope people change their behavior, as a result of the case. And that to me is more important sort of type one and type two area and puts a bar on the complexity of what antitrust can do. Let's assume the Commission got it wrong in Microsoft, or in some of the other cases, almost irrelevant what signal it sends out. As to how people change their behavior is really what matters and sort of on a very limited information what business people have in order to come to view on how they behave, and therefore I think sort of the rules have to be relatively simple because otherwise if you make it too complex, you send out the wrong signals.

PROFESSOR ROBERTSON: Two quick points. First goes to Stacey's question about empirical evidence and this is brought up both in Breyer's and Justice Kennedy's majority opinion in *Leegin*. The facts are in. Minimum vertical resale price maintenance basically results in higher prices. The ground shifts. Discussions about what interbrand is versus intrabrand and whether or not that additional gravy that ensued as a result of the high prices is going to result in a better optimal mix in terms of the goods provided to people, consumers, and the jury is out on that. We don't know. But we know one thing, the *per se* rule is gone as a standard. So much for empiricism.

Second point about what is good administrative law in this context. And from a legal process perspective, I would have to wonder assuming that the delegation is profit, to the commission, what is it really going to mean in order to have adjudicatory and rule-making processes predicated on ancillary restraint structures when ancillary restraint structures are so

easily deconstructed? When we teach *Addyston Pipe and Steel* what is the first thing we ask the students? What is the main purpose and isn't it circular to talk about a lawful contract before we determine what the main purpose is? I mean that level of deconstructability is still going to be an issue that is going to be faced by the administrative law judges and experts in the agency. How far is that advancing the ball in terms of the rule of law concerns?

PROFESSOR WALLER: Elbert, you're right, but just for what it's worth, it's the FTC that did the heavy lifting, the highly suspect classification from Detroit automobile case through tenors, and that's the formulation of the quick look that has gotten the most respect and support from the courts. It didn't come out of the DOJ.

MR. CALVANI: We have heard not one but two defenses of *Topco* today. That is very unusual—perhaps bizarre.

PROFESSOR FIRST: We pile on.

MR. CALVANI: Undoubtedly a Woodstock retrospective on competition law.

PROFESSOR FIRST: I want to thank you. That's one of the nicer things I've heard said today.

MR. CALVANI: Sex, drugs and rock 'n roll, and now Woodstock/New Age competition law. The dual or concurrent jurisdiction of the Antitrust Division of the Department of Justice and the Federal Trade Commission is a perennial topic. Academicians in search for a research topic ought to note the very nice natural experiment that has been taking place for a long time.

Both agencies have current jurisdiction over Section 7 of the Clayton Act and both of them handle mergers. It would be very interesting to measure how the agencies have done. Perhaps one could compare their output and come to some reasoned judgment about which has done a better job. Serious work on this topic would help inform the debate.

PROFESSOR DOGAN: How do you define better?

MR. CALVANI: Perhaps one could study post-transaction output or price? Doubtless design of such a study would not be easy, but the results could be very interesting.

PROFESSOR GREENE: Picking up on Commissioner Calvani's last point. I believe that the FTC, at times in conjunction with the DOJ, has undertaken in a more generalized manner a portion of the type of historical analysis you advocate. I am thinking in particular of the FTC's retrospective review of

hospital mergers and the FTC/DOJ's workshop and data dissemination focused on agency merger enforcement decisions over the course of a half dozen years. I would hope these and such other initiatives will increase in the future. Of course, even with the benefit of hindsight there will be cases in which reasonable minds will disagree about the lessons to be learned.

With regard to comparisons between the two agencies within the merger arena, I also agree that further research would be useful. One obvious, albeit more historical, point of reference are the two merger guidelines (each agency produced its own policy statement) released on the same day in 1982. The two documents diverged in some fascinating ways, which, I have argued, are probably attributable in part to the agencies' different institutional designs. Given their ongoing, overlapping jurisdiction, the natural experiment continues. Switching topics slightly here, I would argue that the FTC has not always sufficiently exploited its natural strengths and comparative advantages. Section 5 of the FTC's enabling legislation could provide a logical outlet for doing so.

Briefly turning to Harry's comments, I would second his defense of non-*stare decisis*. And, as Harry also discussed, the relative appeal of *stare decisis* at any particular point will likely reflect one's substantive estimation of the prevailing legal holdings. Society clearly benefits when legal analysis evolves to reflect increasing economic sophistication. Some have argued, and I believe correctly at times, that changes in economic usage have been ideologically driven. Overall, I believe antitrust has been well-served by its grounding in broad-based legislation coupled with common law evolution.

MR. COWEN: I was just going to comment about something that Becket raised and that seems to me, I may be wrong, things are taking place in the wrong place. If you are in an administrative authority you should act as an administrator carrying out policy defined by politicians, shouldn't you? I remember writing a long brief to the British government in the late 1990s, which asked what is competition policy? In principle I suggested that before the government set out what the law is it needed to set out what it was seeking to achieve and actually have to have a policy. We couldn't find out what it was. In the course of the proceedings in the House of Lords we decided it would be quite fun to write down what we thought government policy was supposed to be and let some Labour peers see it and then take it up or not depending on whether they agreed. If you

read Lord Cox's speech in the House of Lords on the Competition act, I'm quite happy to say I wrote it because I did. He disclosed his interest before he gave his speech.

And a couple a years ago I actually asked a researcher can you go find me what UK government competition policy is? What does the government actually think? This researcher came back and gave me Lord Cox's speech in the House of Lords. Which I was quite pleased with, but also very disappointed to think that nothing had progressed. I think that's the starting point problem. This is your question "What do we care about?" Well that's a policy matter. You can elect people to make decisions, but I think it's wrong for other judges or officials to be making that up as they go along. What worried me most about Scalia's judgment in *Trinko* is that what he said is policy not law and he appeared to be able to do that but he is a Judge not a politician, at least he is a Judge because he sits in the Supreme Court and if judges do the policy work of politicians I think that breaches the separation of powers principles and that's all completely wrong.

And the final thought which is something Phil and I were talking about over dinner, why do it in Boston and why do it before Patriot's Day. I was reading at the time Tom Payne and Tom Payne was famous for many things. He wrote this brilliant pamphlet called Common Sense, and in the pamphlet he said there is a fundamental difference between merry old England and the soon to be established United States of America. This was that in England the king is the law whereas in America the law is king. And that's a very neat exposition which I think we've sort of missed in this area of antitrust, or there seems to me some degree of encroachment on that principle, if you have judges deciding what policy is what is the role for an administrator or a politician? I think that's really made a mess of things. It's a final thought.

PROFESSOR WALLER: I think this discussion today, if it was a marathon time, it wouldn't be particularly impressive. But we covered a lot of ground from a lot of different perspectives, and I think that we did in fact pick the right topic, and thank all of you for contributing your different geographic, ideological, procedural, and substantive perspectives to the discussion. You're all cordially invited to the next Antitrust Marathon IV: Marathon with Authority. That would be the Irish Competition Authority in Dublin in October.

DOCTOR MARSDEN: I want to thank you again,

2009

Discussion - Robertson

129

especially those who traveled so far. Thanks to the Consul General for putting our British taxes to such good use and hosting us. And yes, if you are able to make that very short hop across the pond on October 27, 2009, in Dublin, and we're going to be looking at issues that Terry raised: the role of the institutions themselves, different institutional models, concurrency and other policy interactions. A pleasure to see so many of you again and to meet new friends.