Fordham Law Review

Volume 81 | Issue 5 Article 12

2013

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Recommended Citation
Roger D. Blair and D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement* , 81 Fordham L. Rev. 2497 (2013).
Available at: https://ir.lawnet.fordham.edu/flr/vol81/iss5/12

WELFARE STANDARDS IN U.S. AND E.U. ANTITRUST ENFORCEMENT

Roger D. Blair & D. Daniel Sokol***

The potential goals of antitrust are numerous. Goals matter to antitrust. We believe that it is total welfare rather than consumer welfare that should drive antitrust analysis. We use this Article as an opportunity to explore both a comparative analysis of welfare standards across E.U. and U.S. competition systems and the impact of welfare standards on global antitrust systemwide welfare.

In this Article, we analyze two types of situations in which there would be a different outcome based on the goal implemented. One scenario involves resale price maintenance (RPM). For RPM, we argue that even if there were a different welfare standard across jurisdictions as between Europe and the United States, in practice, it would have very little global impact. The second scenario involves merger control. We analyze a divergence in welfare standards between merger regimes where the use of efficiencies might play out differently across Europe and the United States depending on the welfare standard used. Under this second scenario, the welfare standard matters globally as to business outcomes in a way in which it does not under the first scenario. If one major merger regime blocks the merger, it effectively blocks the merger globally. Finally, we provide our concluding thoughts on the future and desirability of convergence around total welfare as the sole goal in the practice of competition economics globally.

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INTRODUCTION

Goals matter to antitrust.[1] While proponents of antitrust (in the United States) and competition law (most of the rest of the world) may have had multiple goals when initially enacting legislation,[2] two goals predominate modern academic and policy discourse: total welfare (the overall surplus from producers and consumers) and consumer welfare (the surplus only from consumers).[3] Much of the time these goals are indistinguishable in practice, because behavior that violates antitrust law often reduces both consumer and total welfare. However, there are certain situations in which the behavior in question violates only one of these goals. In those situations, the goal selected matters to the execution of antitrust law, particularly when there are not per se legal rules regarding legality or illegality.[4]

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1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978). Ambiguity about the goals (a distinction between rules and standards) or inconsistency among goals may be costly. Indeed, divergence among standards across countries is costly, and we believe that total surplus is the superior standard.

2. *See* INT'L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT (2002), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf ("[O]bjectives of competition laws vary widely from one jurisdiction to another . . . . [P]arallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws.").

3. We note that there is a difference between welfare and surplus, but we use the term "welfare" as shorthand throughout this Article because the debate has been framed as between consumer welfare and total welfare. For a discussion of the difference between welfare and surplus, see Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2010).

4. *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 498–502 (2012) (providing examples of joint ventures, mergers, bilateral monopolies, physician cooperative bargaining, all-or-none offers, two part pricing, and bid rigging in English auctions, in which a different welfare standard may lead to divergent outcomes for the same type of behavior).

As we have argued elsewhere,[5] we believe that it is total welfare rather than consumer welfare that should drive antitrust analysis. This is not a new position within antitrust scholarship. Indeed, it seems to be the dominant one.[6] Under a total welfare standard, any behavior that reduces total welfare would be deemed unlawful, whereas any behavior that does not would be lawful.

As part of the total welfare analysis, we utilize the Kaldor-Hicks compensation principle to assess the impact that various practices would have on total welfare.[7] The strength of Kaldor-Hicks is its ability to provide an economically sound methodology for separating objectionable and unobjectionable business behavior. For example, a merger may be Kaldor-Hicks efficient if the winner (the monopolist) is able to compensate the loser (consumers) and still have profits left over.[8]

Welfare standards within antitrust have been studied in great depth within a single jurisdictional setting.[9] Most of the time, the battle over welfare standards has been overblown, and there is no difference in outcome. We use this Article as an opportunity to explore both a

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5. *See generally id.*

6. *See, e.g.*, BORK, *supra* note 1, at 50; MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE (2004); RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001); Dennis W. Carlton, *Does Antitrust Need To Be Modernized?*, 21 J. ECON. PERSP. 155 (2007); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL'Y INT'L 3 (2006); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L 29 (2006); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010).

7. *See* RICHARD E. JUST ET AL., THE WELFARE ECONOMICS OF PUBLIC POLICY: A PRACTICAL APPROVAL TO PROJECT AND POLICY EVALUATION 32–38 (2004) (discussing the Kaldor-Hicks compensation principle); *see also* J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions in Economic and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

8. *See* Blair & Sokol, *supra* note 4, at 483–89.

9. Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175 (2013); Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2013); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); Eleanor M. Fox, *Against Goals* 81 FORDHAM L. REV. 2157 (2013); Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163 (2013); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197 (2013); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013); Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013); Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575 (2013); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

comparative analysis of welfare standards across E.U. and U.S. competition systems[10] and the impact of welfare standards on global antitrust systemwide welfare. This analysis provides an opportunity to discuss situations in which the difference between different standards—consumer versus total welfare versus non-antitrust political factors—may lead to disparate outcomes.[11] The analysis's comparative element is distinct from its international element in that a difference across antitrust systems may have a global impact. When there is a disagreement across antitrust regimes as to welfare standards that have global impact, there may be, for example, behavior that is forbidden even when it enhances total welfare globally and should be permitted based upon the strictest major antitrust jurisdiction to review the merger. This is only a small set of situations, most notably efficiencies in a merger or joint venture context. Most of the time, the welfare standard does not matter.[12]

In any discussion across legal systems about the goals of antitrust, one must ask if there is substantive convergence, and if there is, is it a good thing. The answer to the first question is both yes and no. There is some global substantive convergence around the goals of antitrust. We believe that this convergence is happening around a narrow competition economics vision of the goals of antitrust, as we explore in Part I.

The process of antitrust convergence across countries is not easy.[13] Institutional structures are a function of both the time in which they were set up and the institutional development based upon this initial endowment.[14] This creates path dependence to institutional development that makes the integration of new learning more difficult for some antitrust

10. Most recently summarized across the United States, Canada, Europe, and China in Pingping Shan et al., *China's Anti-monopoly Law: What Is the Welfare Standard?*, 41 REV. INDUS. ORG. 31 (2012).

11. For a general conceptualization of regulatory competition, see Francesco Parisi et al., *Two Dimensions of Regulatory Competition*, 26 INT'L REV. L. & ECON. 56 (2006).

12. Indeed, numerous articles suggest that maximizing consumer welfare will bring antitrust closer to total welfare. *See, e.g.*, Sven-Olof Fridolfsson, *A Consumer Surplus Defense in Merger Control*, *in* THE POLITICAL ECONOMY OF ANTITRUST 287 (Vivek Ghosal & Johan Stennek eds., 2007); Damien J. Neven & Lars-Hendrik Röller, *Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control*, 23 INT'L J. INDUS. ORG. 829 (2005), *available at* http://ces.univ-paris1.fr/membre/tropeano/pdf/polconc/artciles 0607/nevenrollersurplus.pdf; Bruce R. Lyons, *Could Politicians Be More Right Than Economists? A Theory of Merger Standards* (Ctr. for Competition & Regulation, Revised Working Paper No. CCR02-1, 2002), *available at* http://www.uea.ac.uk/polopoly_fs/1.104451!ccr02-1revised.pdf.

13. *See* Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 913–15 (2003) (explaining soft convergence in antitrust); D. Daniel Sokol, *International Antitrust Institutions*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 187 (Andrew T. Guzman ed., 2011) (suggesting the areas in which soft law antitrust convergence are possible).

14. *See* William E. Kovacic, *Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions*, 66 ANTITRUST L.J. 231, 244–45 (1997); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995).

systems (primarily agencies and courts) than others.[15] Different path dependencies complicate the possibility of convergence across systems for any potential singular goal of antitrust.

Consequently, a number of factors are at play regarding antitrust convergence. Law matters,[16] macro level political economy factors matter,[17] as do the quality and ability of courts and agencies to shape doctrine into policy.[18] In the European Union and United States comparison, a number of developments in the U.S. institutional framework are different from those of Europe. They include private treble damages,[19] a robust system of class actions,[20] and a judicial-based enforcement system (unlike the European administrative-based competition system).[21] Private remedies do not exist in a meaningful way in Europe, which might explain stronger E.U. remedies by government enforcement[22] if one assumes that total enforcement (public and private) should be roughly the same between the two jurisdictions.[23]

Other factors also shape the institutional path dependency of antitrust. To a certain extent, it is history and politics, rather than efficiency, that explain divergent antitrust systems, although economics' application to antitrust also plays a role.[24] For example, many of the assumptions in the

15. D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055 (2010) (describing institutional analysis within antitrust).

16. Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271, 276–81 (2007).

17. Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1 (2009); William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001).

18. D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009); William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION L.J. 25 (2011).

19. Stephen W. Salant, *Treble Damage Awards in Private Lawsuits for Price Fixing*, 95 J. POL. ECON. 1326, 1327 (1987).

20. John H. Johnson & Gregory K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3 J. COMPETITION L. & ECON. 341 (2007); William H. Page, *Introduction: Reexamining the Standards for Certification of Antitrust Class Actions*, 21 ANTITRUST 53 (2007).

21. Thomas C. Arthur, *Competition Law and Development: Lessons from the U.S. Experience*, *in* COMPETITION LAW AND DEVELOPMENT (D. Daniel Sokol et al. eds., forthcoming 2013); Javier Tapia & Santiago Montt, *Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust*, *in* THE GLOBAL LIMITS OF COMPETITION LAW 141 (Ioannis Lianos & D. Daniel Sokol eds., 2012).

22. *See* Per Hellström et al., *Remedies in European Antitrust Law*, 76 ANTITRUST L.J. 43, 58 (2009) (discussing E.U. remedies).

23. On the discussion of the relationship between public and private antitrust enforcement see, for example, Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385, 386 (1988); David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870, 883 (1990).

24. *See* DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION (2010); DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998); Arthur, *supra* note 21. There is a similar discussion in

United States and its antitrust system—with a history of limited government regulation and a dearth of state ownership—do not provide a direct analogy to the competition regimes in Europe, which had more state intervention. European competition law also has specific provisions regarding state aid[25] (subsidies) and provisions specific to public undertakings.[26]

An additional policy, unique to the supranational nature of the European Union, adds richness to European competition law goals. The initial focus of the European competition system and European Union overall was to integrate the economies of the member states. Moreover, competition policy in Europe has had a more distributive flavor than its American counterpart. There has been far more concern in European case law about choices for consumers,[27] even if preserving choice has translated into enforcement policies that disfavor more efficient competitors.[28]

We recognize that institutions vary and that the current set of institutions both within the United States and European Union (let alone other competition systems) are not easily calibrated to ensure that total welfare could be utilized as the singular value of antitrust/competition law. Indeed, if anything, it seems to be consumer welfare that is the standard on which there is increasing international convergence. However, the purpose of this Article is to note that, because of the misalignment of institutional capabilities and goals, certain fault lines emerge between competing economic goals of antitrust as well as between political and economic goals. We articulate where these fault lines are currently. We also note

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corporate law regarding comparative corporate governance systems. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) (describing a political and historic view of what shapes corporate governance in the United States); Donald C. Clarke, *"Nothing but Wind"? The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMP. L. 75 (2011) (providing an overview of comparative corporate governance scholarship); Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006) (explaining comparative corporate governance through political economy and historical factors); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997) (discussing how law matters to corporate governance).

25. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, Mar. 3, 2010, 2010 O.J. (C 83) 91 [hereinafter TFEU] (limiting "any aid granted by a Member State . . . in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market"). For analysis, see KELYN BACON, EUROPEAN UNION LAW OF STATE AID (2d ed. forthcoming 2013).

26. TFEU art. 106; *see also* Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751, ¶ 79; Case C-49/07, MOTOE v. Elliniko Dimosio, 2008 E.C.R. I-4863, ¶ 25; Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, AOK Bundesverband v. IchthyolGesellschaft Cordes, 2004 E.C.R. I-2493, ¶ 58. For academic treatment see, for example, Okeoghene Odudu, *Are State-Owned Health-Care Providers Undertakings Subject to Competition Law?*, 5 E.C.L.R. 231 (2011).

27. *See* Paul Nihoul, Freedom of Choice—The Emergence of a Powerful Concept in European Competition Law (June 5, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2077694.

28. *See* William E. Kovacic, *Transatlantic Turbulence: The Boeing–McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001).

particular situations in which a divergence of welfare standards either matters or does not matter globally.[29]

This Article analyzes the United States and European Union because at present, global antitrust is bipolar. That is, a global business strategy that one of the U.S. antitrust agencies or the European Commission (EC) successfully challenges may have global repercussions and may spell the end to such a strategy in ways that would not be true if other jurisdictions were to challenge a global deal. Future growth of Chinese and possibly Indian economic power may impact the antitrust setting.[30] The result may be the creation of a multipolar world of antitrust for which a successful agency action by either the United States, Europe, India, or China may derail a business strategy whether it be via conduct or merger.[31]

Part I of this Article discusses the importance of the development of economic analysis in U.S. and E.U. competition law to better explain how the choice of an economic welfare standard has fundamentally become the choice of a goal for antitrust/competition law. This discussion sets up our substantive analysis of goals, where we analyze two types of situations in which there would be a different outcome based on the goal implemented. In Part II, we discuss the first scenario. This scenario involves resale price maintenance (RPM). For RPM, we argue that even if there were a different welfare standard across jurisdictions, it would have very little global impact. In Part III, we analyze the question of different global standards with regards to merger control. In this second scenario, we analyze a difference in welfare standards between merger regimes where the use of efficiencies might play out differently between the European Union and the United States depending on the welfare standard used. Under this second scenario, the welfare standard matters globally as to business outcomes in a way that it does not under the first scenario. If one major merger regime blocks the merger, it effectively blocks the merger globally.[32] Part IV

29. Conceptually, total welfare of a given country actually means the sum of consumer surplus and domestic firms' profits. *See, e.g.*, Pedro P. Barros & Luís Cabral, *Merger Policy in Open Economies*, 38 EUR. ECON. REV. 1041 (1994). If, however, the consumer welfare standard is adopted, then all firms should be treated equally.

30. *See* D. Daniel Sokol & William Blumenthal, *Merger Control: Key International Norms and Differences*, *in* RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 319 (Ariel Ezrachi ed., 2012).

31. On antitrust developments in India, see Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 J. COMPETITION L. & ECON. 609 (2008); Rahul Singh, *India's Tryst with "The Clayton Act Moment" and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics*, *in* COMPETITION LAW AND DEVELOPMENT, *supra* note 21. On China, see, for example, Ping Lin & Jingjing Zhao, *Merger Control Policy Under China's Anti-monopoly Law*, 41 REV. INDUS. ORG. 109 (2012); Shan, *supra* note 10, at 31.

32. *See* Sokol, *supra* note 15, at 1094 ("On an international level, a key concern is when one of the major powers in antitrust, the European Union or the United States, has a lower standard for a finding of wrongdoing than other countries. The lower standard effectively operates as the global standard because remedies often have global implications."); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 62 (2007) ("A single country

provides our concluding thoughts on the future and desirability of convergence around total welfare as the sole goal in the practice of competition economics globally.

I. ECONOMIC ANALYSIS IN ANTITRUST VERSUS OTHER GOALS AND DIFFERENCES BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

This part explores the importance of goals in the implementation of antitrust law and policy. It begins with an overview of the different types of goals in antitrust. It then examines the shifts in goals over time in both the United States and Europe. In the long run, antitrust goals have narrowed to ones based on industrial organization economics. This is without question the current state of play in the United States. In Europe, the shift to industrial organization economics based goals is less well developed.

A. Goals

The potential goals of antitrust are numerous. Moreover, the goals of antitrust in any given antitrust system may change over time.[33] A current snapshot of the different goals of the International Competition Network (ICN) members shows the diversity and, at times, overlapping or conflicting nature of the goals of antitrust. These goals include: ensuring an effective competitive process, promoting consumer welfare, enhancing efficiency, ensuring economic freedom, ensuring a level playing field for small and mid-sized enterprises, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatization and market liberalization, and promoting competitiveness in international markets.[34]

Noneconomic goals may play a role in some antitrust regimes. This discussion is similar to the choice of goals in economic regulation generally. There may be other areas of economic regulation in which other legitimate factors get included in the goal. Regulation frequently seeks to address issues relating to externalities, health and safety, industrial policy,

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can hold up consummation of a merger, adding significant costs to or even scuttling the proposed deal entirely.”). On the economics of international antitrust, see Oliver Budzinski, *International Antitrust Institutions*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., expected 2013).

33. *See, e.g.*, BORK, *supra* note 1; Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999); Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 51 (Robert Pitofsky ed., 2008).

34. *See* INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 38 (2007), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

distributive justice, or financial stability among others.[35] At times, some of the goals are prone to risk of capture and present problems familiar within the public choice literature.[36] It is just that these other regulatory goals are not considered in an industrial organization antitrust analysis, nor do we think that they should be.

We believe that there are better mechanisms for achieving distributive effects than antitrust. By distributive goals within antitrust, we mean either distributive goals via the implementation of a consumer welfare standard or through justifications that are not economics based within antitrust law. Other mechanisms for distributive concerns, such as taxation, would be more effective.[37] As for the achievement of multiple goals that include the promotion of competition concurrently with goals that may be pursued through sector regulation, we believe that sector regulation is better suited to address political tradeoffs because of its broader goals, such as "public interest," than is antitrust.[38]

Antitrust, as practiced in the modern, advanced jurisdictions, is more predictable and better able to produce welfare-enhancing results than a system based upon public interest concerns, in which interest group clashes may predominate. This economic effects based form of antitrust is antitrust technocracy.[39] We prefer that the antitrust system be technocratic in the sense that antitrust be defined narrowly to examine only those issues that are purely within antitrust's ability to be measured and understood using industrial organization as the basis for economic analysis. This technocratic approach moves noncompetition economic considerations to areas such as sector regulation, the legislative process, or executive fiat. Such areas are better equipped than antitrust to deal with political trade-offs between law

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35. For an overview of the regulatory state and its justifications, see BARAK Y. ORBACH, REGULATION: WHY AND HOW THE STATE REGULATES (2012); W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST (4th ed. 2005); Barak Orbach, *What Is Regulation?*, 30 YALE J. ON REG. ONLINE 1 (2012), http://yale-jreg.org/what-is-regulation/.

36. *See* Fred S. McChesney et al., *Competition Policy in Public Choice Perspective*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32 (providing an analysis of domestic public choice issues); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1041–48 (2011) (providing an overview of international antitrust public choice issues). On public choice more generally, see DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

37. *See* Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, *in* THE GOALS OF COMPETITIVE LAW 3, 5 (Daniel Zimmer ed., 2012). *See generally*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

38. *See* D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 133–35 (2009) (discussing public interest goals of sector regulation and how they might clash with antitrust based analysis).

39. Generally, technocracy is a school of thought that governmental powers, especially regulation, should be in the hands of industry experts and problem solvers. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1162 (2008). Antitrust technocracy is more prevalent in the United States. *See id.* In Europe, "technocracy" seems to be riddled with political trade-offs. *See* Chris Townley, *Inter-generational Impacts in Competition Analysis: Remembering Those Not Yet Born*, 11 EUR. COMPETITION L. REV. 580 (2011); Chris Townley, *Which Goals Count in Article 101 TFEU?: Public Policy and Its Discontents*, 9 EUR. COMPETITION L. REV. 441 (2011).

and policy because of their ability to deal with conflicting policy issues, whether based on legitimate goals or rent seeking.

There has been, and continues to be, convergence around the use of industrial organization/competition economics as the basis for the analysis of competition law/antitrust.[40] We believe that it is merely a matter of time until all of the major established antitrust regimes come to a point in their institutional and case law development in which the only choices among the goals of antitrust will be industrial organization based goals of total and consumer welfare.[41] Essentially, nonindustrial organization economic goals and political goals will be pushed so far to the margin as to become inconsequential. Developments to date suggest that this movement has not been uniform, but the trend in many countries suggests that this is in fact what is occurring.

B. U.S. Goals

In the United States, several goals have defined antitrust law as it has developed, from those of the Sherman Act[42] to the goals contained in current case law and agency thinking.[43] Over time the discussion of the goals of antitrust has shed its overtly political elements in favor of goals that are based on different economic welfare standards, largely as a result of the Chicago Revolution.[44]

U.S. competition law enforcement and the institutions that support it are evolutionary.[45] The evolution occurs along a number of dimensions, such as shifts in judicial interpretation, economic thinking, and government

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40. *See, e.g.*, *ICN Recommended Practices for Merger Analysis*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (last visited Mar. 19, 2013); ICN Unilateral Conduct Working Grp., *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf (last visited Mar. 19, 2013).

41. However, it remains unclear whether different antitrust systems will choose total welfare, the policy choice we believe to be superior. This is the subject for a different article.

42. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53–99 (1965); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 15 (1996); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 227 (1955); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73, 75 (1985); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263, 273–74 (1992); Richard Hofstadter, *What Happened to the Antitrust Movement?*, *reprinted in* THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 20, 23–24 (E. Thomas Sullivan ed., 1991); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 4–5 (1985).

43. *See, e.g.*, Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59 (2007); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century*, 78 ANTITRUST L.J. 147 (2012).

44. *See* BORK, *supra* note 1.

45. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005).

policies and priorities.[46] As the antitrust statutes are purposely vague, courts have developed and refined antitrust jurisprudence through the common law[47] and have increasingly used economic analysis to drive this refinement.

The judiciary is a key player in the U.S. antitrust system through its review of antitrust cases. By reviewing agency actions, the judiciary has power to ensure that legal actions are upheld and enforced through injunctive relief, disgorgement, and financial penalties. The more recent focus on economics has reduced the areas of per se illegality and increased the areas where the rule of reason operates because of procompetitive justifications for the business behavior.[48] A similar move has been underway in the merger control area.[49]

With a shift to the rule of reason, courts now provide more in-depth analysis. But even these courts have failed to understand how critical the welfare standard is in this analysis.[50] Thus, given the welfare standard, courts (including the Supreme Court) remain confused as to how to implement the rule of reason.[51] This confusion creates circumstances in which the use of a different welfare standard might lead to a divergent outcome as between total and consumer welfare.

As a result of shifts in agencies and courts, sophisticated economic analysis is now at the forefront of antitrust in the United States.[52] Perhaps

46. DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011); Sokol, *supra* note 15.

47. *See generally* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

48. *See* Kobayashi & Muris, *supra* note 43, at 152–53 ("One result of the incorporation of economics into antitrust law has been the widespread rejection of broad rules of per se illegality.").

49. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

50. The prohibitions in sections 1 and 2 of the Sherman Act appear to be both categorical and uncompromising. "Every contract, combination in the form of trust or otherwise, or conspiracy" that restrains trade appears to be condemned under section 1. 15 U.S.C. § 1 (2006). "Every person" who monopolizes a market appears doomed by section 2. *Id.* § 2. But the Supreme Court soon recognized that a literal interpretation of the statutory language was both unwise and unworkable. The test of illegality quickly centered on "reasonableness." In *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 558–60 (1898), a section 1 case, and *Standard Oil Co. v. United States*, 221 U.S. 1, 81–82 (1911), a section 2 case, the Court found only unreasonable restraints or business practices to be unlawful under the Sherman Act. This, of course, raises the obvious question of how reasonableness should be determined; that is, what benchmarks or standards should be used to distinguish the reasonable from the unreasonable? For the contemporary analysis of the rule of reason, see, for example, Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012).

51. *See* Blair & Sokol, *supra* note 4, at 474–81.

52. Liran Einav & Jonathan Levin, *Empirical Industrial Organization: A Progress Report*, 24 J. ECON. PERSP. 145, 152 (2010) ("Thirty years ago, it was common for antitrust arguments to rest on simple summary measures of industry structure such as concentration

unique among legal fields, antitrust is one in which the Supreme Court regularly cites not merely to law journal articles that employ economic analysis but to economics journal articles. In its 2007 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* decision,[53] the Supreme Court cited to an economic textbook and articles from the *Journal of Law and Economics*, *RAND Journal of Economics*, *Quarterly Journal of Economics*, and the *Journal of Political Economy*.[54]

One anecdote illustrates the change within the United States perhaps better than any other. When Richard Posner wrote his antitrust book in 1976, its title reflected the tension within antitrust legal scholarship and policy of the time. Its title was *Antitrust Law: An Economic Perspective*.[55] This was a provocative title. As one prominent scholar wrote in his review of the book, "[Posner's *Antitrust Law*] comes at a time when the limits of traditional microeconomics as a tool of antitrust policy have become starkly apparent, limitations which suggest that antitrust law should be moving outside the economist's world rather than burrowing more deeply into it."[56] By the time of the second edition in 2001, Posner's title had been abridged to *Antitrust Law*.[57] The economic revolution was so complete that all antitrust analysis has become economics based,[58] and it was superfluous to mention the economic perspective in the title.[59]

The change in discourse to one based on economics has framed antitrust scholarship such that any goal other than total welfare must be framed within an economic analysis lens. Many of those who embrace a consumer welfare standard may do so based on their broad reading of the multiple

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ratios and Herfindahl-Hirschman indices. Nowadays, the Department of Justice and the Federal Trade Commission, which are tasked with reviewing proposed mergers, commonly undertake sophisticated econometric studies to define industry boundaries and to assess the likelihood of price increases or collusive behavior following a merger. These exercises often draw on academic research, and in turn have motivated the development of new empirical models."); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733 (2011) (providing empirical support of the shift to economic analysis); Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 439 (2012) ("The evolution of antitrust has been shaped by changing lines of economic thinking and ideologies.").

53. 551 U.S. 877 (2007).

54. *Id.* at 890–92, 921.

55. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

56. Harry First, Book Review, 52 N.Y.U. L. REV. 947 (1977).

57. *See* POSNER, *supra* note 6.

58. Kovacic & Shapiro, *supra* note 47, at 58–59.

59. Indeed, Harry First adopted economic analysis of antitrust in his writing. *See, e.g.*, Peter C. Carstensen & Harry First, *Rambling Through Economic Theory:* Topco*'s Closer Look*, *in* ANTITRUST STORIES 171 (Daniel A. Crane & Eleanor M. Fox eds., 2007); JOHN J. FLYNN, HARRY FIRST & DARREN BUSH, ANTITRUST: STATUTES, TREATIES, REGULATIONS, GUIDELINES, POLICIES (2011); Harry First & Andrew I. Gavil, *Re-framing Windows: The Durable Meaning of the* Microsoft *Antitrust Litigation*, 2006 UTAH L. REV. 641; Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127 (2009); First & Waller, *supra* note 9.

goals of antitrust.[60] From its inception, there were numerous goals of the Sherman Act. As noneconomic goals of antitrust have been removed from the U.S. discussion as a result of the ascendancy of the Chicago School, the ideological fight over promotion of economic goals versus other goals has given way to a debate about different economic conceptualizations of welfare effects that approximate the more "populist" notions of competition within an economics framework. In this current populist formulation, it is consumer welfare that would be maximized at the expense of producer-and-consumer welfare.

C. E.U. Goals

There is a rich literature of the goals of European competition law.[61] Though in the space of this Article we cannot do justice to various approaches suggested, for purposes of this Article we do not need to. We merely note that there is a difference in how competition law has been conceptualized in Europe (and we exclusively deal with the E.U. level rather than at the level of national competition authorities) and the various goals to which competition law has been and continues to be applied. We

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60. *See, e.g.*, Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008); Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005); Russell Pittman, *Consumer Surplus As the Appropriate Standard for Antitrust Enforcement*, 3 COMPETITION POL'Y INT'L 205 (2007); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329–33 (2006); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

61. *See, e.g.*, GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER: THE DILEMMA OF LIBERAL DEMOCRACY IN THE HISTORY OF THE MARKET (1997); RENATO NAZZINI, THE FOUNDATIONS OF EUROPEAN UNION COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102 (2012); CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY (2009); BEN VAN ROMPUY, ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTITRUST POLICY? THE ROLE OF NON-EFFICIENCY CONSIDERATIONS UNDER ARTICLE 101 TFEU (2012); Christian Ahlborn & Carsten Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, 2 COMPETITION POL'Y INT'L 197 (2006); Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, 26 WORLD COMPETITION 149 (2003); Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3 EUR. COMPETITION J. 329 (2007); James Kavanagh et al., *Reform of Article 82 EC—Can the Law and the Economics Be Reconciled?*, *in* ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION 3 (Ariel Ezrachi ed., 2009); Frank Maier-Rigaud, *On the Normative Foundations of Competition Law: Efficiency, Political Freedom, and the Freedom To Compete*, *in* THE GOALS OF COMPETITION LAW, *supra* note 37; Giorgio Monti, *Article 82 EC and New Economy Markets*, *in* COMPETITION, REGULATION, AND THE NEW ECONOMY 17, 40 (Cosmo Graham & Fiona Smith eds., 2004); Alberto Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, 4 EUR. COMPETITION J. 127 (2008); Heike Schweitzer, *Parallels and Differences in the Attitudes Towards Single-Firm Conduct: What Are the Reasons? The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82, at 119 (Claus Dieter Ehlermann & Mel Marquis eds., 2008).

provide a basic overview merely, first, to set up our discussion of how different goals may have an international dimension when goals are not aligned and, second, to note what seems to be an increasing (though still somewhat nascent) shift to a true consumer welfare standard.[62]

Unlike in the United States, the divide in Europe has not been between total welfare and consumer welfare.[63] Instead, the divide is between different visions of competition—one based exclusively upon industrial organization economics versus a mix of industrial organization economics and noneconomic political goals. The latter mix encompasses an industrial policy that favored European over non-European firms[64] and a focus on "fairness" that includes competitor effects and consumer choice.[65] E.U. competition law is one of a number of competing goals under the treaty and these are bound together by the single market imperative.[66] It was also influenced by the Ordo-Liberal tradition.[67]

Although there is no explicit discussion of the goals of antitrust within the current Treaty Establishing the European Community or its predecessors,[68] the Lisbon Treaty overall has certain goals, such as a unified market, that at times work within a traditional competition economics analysis for antitrust goals but at other times might lead to a divergence.[69] Some of these important factors suggest a focus other than consumer welfare.[70] However, since the E.U. competition system has been modernized to reflect, among other things, an analysis more heavily based on economics, the focus increasingly has been on consumer welfare,[71] even

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62. Bork sowed significant confusion with his use of "consumer welfare," which in his formulation was not consumer welfare at all but total welfare. *See* BORK, *supra* note 1, at 81–115.

63. *But see* NAZZINI, *supra* note 61, at 102 (arguing that dominance in Europe is based on a total welfare goal).

64. Nihat Aktas et al., Market Reactions to European Merger Regulation: A Reexamination of the Protectionism Hypothesis (Nov. 11, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961188.

65. *See* TFEU pmbl.; *see also id.* arts. 119–120. For academic commentary, see AMATO, *supra* note 61, at 2 (discussing consumer choice) and DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 37–38 (1998) (discussing the ordoliberal tradition and fairness). There is a certain similarity between these conceptualizations and that of U.S. cases that have now been discredited such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

66. This is reflected in the fact export bans (i.e., preventing a distributor in one member state from selling to customers in another) are treated as an 'object' agreement (as serious as price fixing).

67. Nicola Giocoli, *Competition vs. Property Rights: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy*, 5 J. COMPETITION L. & ECON. 747 (2009).

68. Laura Parret, *The Multiple Personalities of EU Competition Law*, *in* THE GOALS OF COMPETITION LAW, *supra* note 37, at 61, 63.

69. GERBER, *supra* note 65; VAN ROMPUY, *supra* note 61.

70. Parret, *supra* note 68, at 64–74.

71. For a general discussion, see PINAR AKMAN, THE CONCEPT OF ABUSE IN EU COMPETITION LAW: LAW AND ECONOMIC APPROACHES (2012). For a discussion on both procedural and substantive modernization, see David J. Gerber, *Two Forms of*

if some suggest that a consumer welfare rationale within European competition law might be at odds with the European Community Treaty.[72]

To the extent that the case law is shifting (as opposed to agency decisions, guidelines, and discussion papers), the move to a serious economic analysis is still at an early stage. To our knowledge, the first time that the European Court of Justice (ECJ) ever used the term "consumer welfare" was in its *Post Danmark A/S v. Konkurrencerådet* ruling of 2012.[73] While Pinar Akman's impressive work argues that total welfare was closer to what the drafters had in mind when they drafted the Treaty provisions,[74] this interpretation of the goal of European competition law remains a minority position.[75] It also seems not to have been adopted by E.U. case law. Rather, most court decisions formulate the goals of E.U. competition law differently. In *GlaxoSmithKline Services v. Commission*,[76] the ECJ noted:

> 62. With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of [Treaty on the Functioning of the European Union (TFEU) 101(1)] nor the case-law lend support to such a position.
>
> 63. First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [TFEU 101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.

Modernization in European Competition Law, 31 FORDHAM INT'L L.J. 1235, 1256, 1263 (2008).

72. David J. Gerber, *The Future of Article 82: Dissecting the Conflict*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82, *supra* note 61, at 37, 46–49.

73. Case C-209/10, 2012 ECJ EUR-Lex LEXIS 2559, ¶ 42 (Mar. 27, 2012) ("[I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and *consumer welfare* in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition." (emphasis added)).

74. Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29 OXFORD J. LEGAL STUD. 267 (2009).

75. DAMIEN GERADIN ET AL., EU COMPETITION LAW AND ECONOMICS 21 (2012) ("[This approach] finds no clear-cut support in the wording of the Treaty . . . .").

76. Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, 2009 E.C.R. I-9291.

> 64. It follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law.[77]

A broader review of case law suggests multiple goals, both economics based and noneconomics based.

The *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* decision[78] provides another recent formulation of the multiple goals of European competition law. It states, "[TFEU 101], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[79] In *Konkurrensverket v. TeliaSonera Sverige AB*,[80] the court explained in the dominance context:

> Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.[81]

Similarly, in the dominance context, the court has explained that "[TFEU 102] thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition."[82] This formulation seems to show concern for competitors, consumers, and the functioning of the internal market. These goals may at times be at odds with each other.

The ECJ has taken similar positions regarding multiple goals in *Sot. Lelos kai Sia EE v. GlaxoSmithKline AEVE Farmakeftikon Proionton*[83] and *T-Mobile Netherlands*.[84] Some of the recent case law in the Article 102 TFEU context suggests the protection of rivalry as a value in itself. These cases include *Konkurrensverket v. TeliaSonera Sverige AB*[85] and *Visa Europe & Visa International Service v. Commission*.[86] The move within E.U. courts now seems at times even more expansive. Decisions emphasize that the purpose of E.U. competition law is "to prevent competition being distorted to the detriment of the public interest, individual undertakings and consumers,"[87] thereby ensuring the "well-being of the European Union"

77. *Id.* ¶¶ 62–64 (citations omitted).
78. Case C-8/08, 2009 E.C.R. I-4529.
79. *Id.* ¶ 38.
80. Case C-52/09, 2011 E.C.R. I-00527.
81. *Id.* ¶¶ 22–23.
82. Case C-280/08, Deutsche Telekom v. Comm'n, 2010 E.C.R. I-09555, ¶ 176.
83. Joined Cases C-468/06 to C-478/06, 2008 E.C.R. 7139.
84. Case C-8/08, 2009 E.C.R. I-4529.
85. Case C-52/09, 2011 E.C.R. I-00527.
86. Case T-461/07, 2011 E.C.R. II-01729.
87. Case C-52/09, 2011 E.C.R. I-00527, ¶ 22.

both in TFEU 101 and TFEU 102 contexts. Whatever the mix of these multiple goals, it is certainly not total welfare and not even clearly consumer welfare.

Where there has been a noticeable change to embrace consumer welfare, it has been from EC's Directorate-General for Competition (DG Competition) itself. Its Merger Guidelines make explicit the goal of consumer welfare.[88] The Commission similarly did so in its Article 82 Guidance.[89] Overall, the shift towards consumer welfare exists both at the level of top management[90] and from the work product of the DG Competition itself.[91] It may very well just be a matter of time before European courts embrace what is a clear attempt by DG Competition to refine and narrow the goals of competition to the singular purpose of consumer welfare. This same trend should shift, with time, convergence among the national competition authorities toward the DG Competition formulation of welfare goals.

D. Convergence of Economics in Antitrust Law

Even though a convergence of U.S. and E.U. case law towards a unified economic-based standard remains distant, this divergence is not the case in the academy, which has moved closer since the 1970s. The "A" publications for European industrial organization economists are the same for U.S. equivalents. Faculties attend the same conferences, write joint papers, and teach together. The most important revolution in industrial organization in the past thirty years has been the game theory revolution. From this standpoint, it is interesting to note the fact that Jean Tirole originally wrote his textbook—the standard graduate level economic textbook around the world—in French rather than English.[92] Thus, to a certain extent, economic analysis of antitrust has already converged.[93]

88. EUROPEAN COMM'N, EU COMPETITION LAW: RULES APPLICABLE TO MERGER CONTROL 184 (2010), *available at* http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf.

89. Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 9–10, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

90. Neelie Kroes, European Comm'r for Competition, European Competition Policy—Delivering Better Markets and Better Choices, Speech at the European Consumer and Competition Day (Sept. 15, 2005), *available at* http://europa.eu/rapid/press-release_SPEECH-05-512_en.pdf ("[A]im is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.").

91. Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 ECON. POL'Y 741 (2006).

92. JEAN TIROLE, CONCURRENCE IMPARTAIT (1985), *translated in* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION (1988). For a deeper discussion, see Daniel J. Gifford & Robert T. Kudrle, *Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union*, 7 J. COMPETITION L. & ECON. 695, 715–23 (2011).

93. This is true not only in Europe and the United States but elsewhere such as Australia, Canada, Chile, China, Israel, Korea, and Japan, to name just a few other jurisdictions. *See*,

Where there are differences, they seem to be at the margin—although hotly contested in these areas.[94]

Differences remain in the use of economic analysis within the legal scholarship across the Atlantic. First, the publication outlets are different in the United States than in Europe. Second, economic analysis of law within this field seems to be, on the whole (with some notable exceptions), less used in Europe as European competition law scholarship is far more doctrinal.[95] The way in which law is taught contributes to this. There is far less economic analysis of the cases in the leading European competition law casebooks than in their U.S. antitrust law counterparts. Indeed, every single major U.S. casebook has a Ph.D. economist among the casebook authors.[96] This development is not unique to the field of antitrust/competition law. Europe in general has been less receptive than the United States to the economic analysis of law among law professors, although in Europe economic analysis of law is more significant among economists.[97]

A snapshot of the current European law reviews provides evidence of the different approaches to economic analysis of antitrust/competition law. We compared the articles from the August 2012 issues of the *European Competition Journal*[98] and the *Antitrust Law Journal*.[99] Of six articles and a book review in the *European Competition Journal*, three articles reference an economics journal in the footnotes and two of those articles have economists as the author or coauthor. Of the remaining articles, only one article referenced any economics journals. Compare this to the *Antitrust*

e.g., Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, 58 J. INDUS. ECON. 895 (2010); Joshua S. Gans & Stephen P. King, *Paying for Loyalty: Product Bundling in Oligopoly*, 54 J. INDUS. ECON. 43 (2006); David Gilo et al., *Partial Cross Ownership and Tacit Collusion*, 37 RAND J. ECON. 81 (2006); Zhiyong Liu & Yue Qiao, *Abuse of Market Dominance Under China's 2007 Anti-monopoly Law: A Preliminary Assessment*, 41 REV. INDUS. ORG. 77 (2012); Ki-Eun Rhee, *Collusion in the Presence of Externalities*, 55 J. INDUS. ECON. 475 (2007); Ken-Ichi Shimomura & Jacques-François Thisse, *Competition Among the Big and the Small*, 43 RAND J. ECON. 329 (2012); Ralph A. Winter, *Colluding on Relative Prices*, 28 RAND J. ECON. 359 (1997).

94. *See* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32 (providing a literature review and discussions of convergence and divergence across a number of different areas of antitrust economics).

95. Neven, *supra* note 91.

96. *E.g.*, PHILIP AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES (6th ed. 2004); ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (2d ed. 2008); E. THOMAS SULLIVAN ET AL., ANTITRUST LAW, POLICY AND PROCEDURES: CASES, MATERIALS, PROBLEMS (6th ed. 2009).

97. Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602 (2006); Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555 (2008); Oren Gazal-Ayal, *Economic Analysis of "Law & Economics*,*"* 35 CAP. U. L. REV. 787 (2007).

98. *See European Competition Journal*, INGENTACONNECT, http://www.ingentaconnect.com/content/hart/ecj/2012/00000008/00000002 (last visited Mar. 19, 2013).

99. *See Antitrust Law Journal Archive*, AM. BAR ASS'N, http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publishing/antitrust_law_journal/at_journal_v78i1_full.pdf (last visited Mar. 19, 2013).

Law Journal, in which ten of eleven articles cited at least several economics papers, and the one article that did not reference an economics article was a short afterword that summed up most of the other articles.

The lack of significant economic analysis within European law schools means that the pipeline of both ideas and practitioners of economic analysis in competition law is weaker in Europe than it is in the United States. In the United States, it was the law-and-economics academy that first transformed the analysis of antitrust, starting in the 1950s.[100] The courts followed, responding to the emerging scholarship. Courts began to shift antitrust doctrine from per se to rule of reason (and greater economic analysis) starting in the late 1970s, while at the same time transforming procedural standards.[101] These changes next influenced the antitrust agencies,[102] which in turn further strengthened the changes within the courts.[103]

In Europe, where the legal academy has not been the driver of economic analysis, the sequence has been different. It has been DG Competition and the courts rather than the legal academy that have promoted greater use of economic analysis of antitrust in Europe.[104] However, all is not lost regarding convergence of economic analysis of law. Indeed, the trend is positive even within the European legal academy. Additionally, practitioners have acted as catalysts of convergence in Europe. Law firms and economic consulting firms have offices on both sides of the Atlantic and try to coordinate theories and analyses across antitrust agencies and before courts.

International antitrust norms through international organizations such as the Organisation for Economic Co-operation and Development (OECD) and ICN support some legal convergence around economic analysis. The dynamics of these organizations allow them to help foster convergence among countries around the world.[105] Convergence within the international antitrust realm has tended to be stronger around procedural rather than substantive matters. Nevertheless, in those substantive areas in which

100. David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); Stephen Martin, *Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics*, *in* THE POLITICAL ECONOMY OF ANTITRUST, *supra* note 12.

101. *See* Kobayashi & Muris, *supra* note 43; Kovacic, *supra* note 47.

102. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 ("More judges and lawyers learned the rudiments of antitrust economics, and antitrust economists became more effective as consultants and expert witnesses. It is fair to say that at the beginning of its second century antitrust law has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of the law and allied disciplines can be proud."); Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1007–09 (1999); Richard Schmalensee, *Bill Baxter in the Antitrust Arena: An Economist's Appreciation*, 51 STAN. L. REV. 1317, 1323–30 (1999).

103. Elhauge, *supra* note 43.

104. *See supra* notes 88–91 and accompanying text.

105. *See* Oliver Budzinski, *International Antitrust Institutions*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32; Sokol, *supra* note 32.

convergence is possible, these organizations have helped foster convergence around best practices, which allows for integration within existing legal systems.[106]

Is this convergence a good thing? The answer is not straightforward. Convergence is not the same as uniformity. Indeed, it would be naive to think that antitrust has reached an end of history in which every country interprets the same goal and applies it uniformly. Competitive pressures do exist regarding ideas, and over time populist noncompetition economic theories of antitrust have dwindled and been moved to other areas of regulation across jurisdictions. However, this has not led to a uniform standard, just as complex businesses themselves do not all share the same internal organizational structures.[107] Antitrust will not reach a single global goal based on some sort of economic Darwinism where the marketplace of ideas will eventually lead to the total elimination of competing theories.[108]

From an economic standpoint, convergence is positive if it leads to the same analytical economic approach across jurisdictions, since this provides for a certain level of predictability in both process and outcome.[109] Without convergence, developments in Europe will affect business behavior in the United States. However, convergence may be problematic if it leads to sub-optimal enforcement or if there is convergence around a suboptimal standard. Thus, convergence around a better substantive standard would allow for "trading up" and a race to the top, whereas bad standards would force some countries to trade down and create a race to the bottom with respect to regulatory standards.[110]

Below, we explore two situations in which there is a divergence in the welfare standard for behavior between the United States and the European

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106. John Fingleton, The International Competition Network: Planning for the Second Decade, Address at the 9th Annual Conference in Istanbul, Turkey 4–5 (Apr. 27, 2010), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc617.pdf ("The ICN has proven successful in developing international best practices in relation to substantive standards, as we have seen in the areas of mergers and cartels, discussed above. Similarly, the ICN provides a forum to discuss differences, a 'marketplace for ideas'. The ICN has also provided part of the underlying infrastructure for many bilateral and regional improvements . . . .").

107. *See generally* Richard R. Nelson, *Why Do Firms Differ, and How Does it Matter?*, 12 STRATEGIC MGMT. J. 61 (1991).

108. *See* MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS (1953) (providing a classic analysis).

109. *See* David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161, 162 (2009) ("Divergence is hardly a happy state of affairs for companies that compete in multiple jurisdictions. It is also a source of tension among competition authorities that are working from different rulebooks, as they jointly regulate the game of competition among firms playing on a world stage."); Gifford & Kudrle, *supra* note 92, at 695.

110. *See* Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423 (2005). These issues of regulatory convergence and the theories behind them play out across regulatory fields. *See, e.g.*, CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY (2012); David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563 (2008).

Union and the implications of those divergences. We begin with RPM and then examine merger efficiencies.

II. TREATMENT OF RPM

There are some restraints that have been condemned under the antitrust laws despite having ambiguous welfare effects. A prominent example is RPM, which is when a supplier sells its product to a distributor on the condition that the product not be resold below some specified minimum price.[111] The difference between the U.S. and E.U. approaches regarding RPM has to do with the legal presumptions underlying each[112]—in the United States, RPM is not presumptively illegal while in Europe it is. In the verticals setting, there is no global systemwide antitrust problem. The least common denominator problem tends not to be as significant because a distribution strategy for end goods tends to be national.

A. U.S. Treatment

It has been argued that RPM can be used to facilitate a horizontal conspiracy among manufacturers or among distributers.[113] These cartels are clearly undesirable and should be condemned. As price rises and quantity falls, both consumer welfare and social welfare may be reduced. Without some colorable claim of enhanced efficiency, the practice will have no redeeming virtue and will fail a rule of reason test. But the existence of an RPM program is not evidence of a horizontal price fixing conspiracy among manufacturers or distributors.

The U.S. Supreme Court found RPM to be illegal per se in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, a 1911 decision.[114] After nearly 100 years, the Court overturned *Dr. Miles* in its *Leegin* decision.[115] The

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111. Prohibitions on resales above a *maximum* price do not have ambiguous welfare effects. Such restraints promote both consumer welfare and social welfare. *See* Roger D. Blair & John E. Lopatka, *The* Albrecht *Rule After* Khan*: Death Becomes Her*, 74 NOTRE DAME L. REV. 123, 168–69 (1998). This restraint is subject to the rule of reason. *See generally* State Oil Co. v. Khan, 522 U.S. 3, 22 (1997).

112. *See* Ulf Bernitz, *Resale Price Maintenance in Comparative Perspective*, *in* RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW, *supra* note 30, at 441–50.

113. RPM supports a cartel by making it more difficult to cheat. Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 96–99 (1960) (explaining the cartel motivation for RPM and pointing out the weaknesses in those uses of RPM). Herbert Hovenkamp examines the background of *Dr. Miles Medical Co. v. John D. Park & Sons Co.* and argues that there was a widespread conspiracy among distributors that explained the use of RPM in that case. *See* ENTERPRISE AND AMERICAN LAW: 1836–1937, at 342 (1991).

114. 220 U.S. 373 (1911). This decision has received a good deal of scholarly criticism that began long ago. For an account of the early reactions, see William Breit, *Resale Price Maintenance: What Do Economists Know and When Did They Know It?*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 72 (1991).

115. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). There has been a wealth of commentary on this decision. For a sampling, see Special Issue, *Antitrust Analysis of Resale Price Maintenance After* Leegin, 55 ANTITRUST BULL. 271 (2010), *available at* http://www.federallegalpublications.com/antitrust-bulletin/201007/ab-2010-55-2-antitrust-bulletin-vol-55-no-2-summer-2010, as well as Thomas C. Arthur, *The Core of*

weight of scholarly research, as discussed in the *Leegin* opinion, revealed that RPM was neither invariably anticompetitive nor invariably procompetitive. Consequently, a rule of reason analysis seemed necessary to determine whether a particular instance of RPM was lawful or unlawful. This is what *Leegin* now requires.

B. E.U. Treatment

In theory, RPM is not per se illegal under Article 101. However, it has been treated as such under the block exemption[116] and so, in practice, it has the same effect as a per se violation under Article 101(1)[117] (even though the 2010 block exemptions recognize for the first time some form of efficiencies argument under Article 101(3), which companies could in theory use).[118]

The EC adopted its most recent vertical block exemption in 2010.[119] A block exemption in relation to vertical agreements did exist before 2010.[120] What preceded that (pre-1999) was a messy system of individual exemptions (through a notification system) and an inefficient system of black and white listed clauses.

Though the 2010 block exemption came out after *Leegin*, the EC took a different approach to RPM. The block exemptions are more restrictive in some sense than U.S. measures. Under the block exemption, no distinction is made between express RPM on the one hand and measures that may serve to influence RPM on the other. Both are restricted where there is "a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties."[121] Restricting both types of behavior is different from the approach used in the United States, where many price-

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Antitrust and the Slow Death of Dr. Miles, 62 SMU L. REV. 437 (2009); Elhauge, *supra* note 43; Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After* Leegin, 2011 U. ILL. L. REV. 805. As of this writing, there is pending legislation that would amend section 1 of the Sherman Act to overturn *Leegin*. *See, e.g.*, Discount Pricing Consumer Protection Act of 2009, H.R. 3190, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bills/111/hr3190; Michael A. Lindsay, *From the Prairie to the Ocean: More Developments in State RPM Law*, ANTITRUST SOURCE (Aug. 2012), *available at* http://www.dorsey.com/files/Upload/antitrust_lindsay_RPM_080712.pdf.

116. Block exemptions allow for some level of safe harbor from competition law enforcement. ARIEL EZRACHI, EU COMPETITION LAW—AN ANALYTICAL GUIDE TO THE LEADING CASES 1 (3d ed. 2012) ("Agreements covered by block exemptions are presumed to fulfil the conditions laid down in Article 101(3) thus relieving the parties to these agreements from the burden under Article 2 of Regulation 1/2003 of establishing that the agreement satisfies the conditions of Article 101(3) TFEU.").

117. *Commission Notice: Guidelines on Vertical Restraints*, ¶ 223, SEC (2010) 411 final (Oct. 5, 2010) [hereinafter *2010 Guidelines*], *available at* http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

118. *Id.* ¶¶ 47, 223.

119. Commission Regulation 330/2010, on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1 [hereinafter Block Exemption].

120. Commission Regulation 2790/1999/EC, 1999 O.J. (L 336) 21.

121. *2010 Guidelines*, *supra* note 117, ¶ 226.

affecting measures, including RPM, are presumptively legal.[122] The differences are not limited to price restraints but also include non-price restraints where Europe (but not the United States) has drawn distinctions in a number of areas, such as selective versus exclusive distribution[123] and online versus brick-and-mortar sales.[124]

One reason for the different treatment of vertical restraints in Europe may have been the historic and path dependent concern about market integration.[125] This remains the case for the ECJ in its recent competition vertical rulings; noncompetition economic arguments regarding market integration trump all else in both *Football Ass'n Premier League Ltd. v. QC Leisure*[126] and *GlaxoSmithKline*.[127] However, at the lower level, the General Court in its *GlaxoSmithKline* decision has been more open to competition economics based arguments,[128] so perhaps over time a change might be possible in European case law.

C. Promotional Uses of RPM

Several procompetitive motives have been offered for RPM.[129] These uses of RPM are promotional in nature and are intended to cause the

122. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); United States v. Colgate & Co., 250 U.S. 300 (1919). In Europe, vertical restraints outside of the price area are less permissive than in the United States. These include lower market shares than the United States, which is more stringent with regards to territorial restraints. *See* FRANK WIJCKMANS & FILIP TUYTSCHAEVER, VERTICAL AGREEMENTS IN EU COMPETITION LAW (2d ed. 2011).

123. Block Exemption, *supra* note 119, art. I(1)(e).

124. *2010 Guidelines*, *supra* note 117, ¶ 58.

125. Giocoli, *supra* note 67, at 779–80. This is true not merely of vertical conduct but of vertical mergers as well. *See* James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005) (discussing vertical conduct); Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 453, 471–72 (2005) (discussing vertical mergers).

126. *See* Joined Cases C-403/08 & C-429/08 (Feb. 3, 2011), http://curia.europa.eu/juris/document/document.jsf?docid=114111&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1019182.

127. *See* Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, 2009 E.C.R. I-9291; *see also* Bernitz, *supra* note 112, at 441–50.

128. Case T-168/01, 2006 E.C.R. II-2969.

129. *See* Telser, *supra* note 113 (discussing the product-specific services theory of RPM). Marvel and McCafferty examined the role of RPM in protecting the investment of retailers that certify the quality of the products they carry. Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984). Springer and Frech examined the incentives retailers have for free riding on a manufacturer's reputation to the detriment of consumers. Robert Springer & H.E. Frech III, *Deterring Fraud: The Rule of Resale Price Maintenance*, 59 J. BUS. L. 433 (1986) (providing theoretical and empirical support for the beneficial use of RPM). Ackert argues that the prestige associated with prestige goods stems at least in part from their price. Consequently, that prestige can be lost through discounting, as consumers would begin to think of those goods as ordinary. *See* George R. Ackert, *An Argument for Exempting Prestige Goods from the Per Se Ban on Resale Price Maintenance*, 73 TEX. L. REV. 1185 (1995). Generally,

demand function to shift rightward. The increase in demand will increase the supplier's profits, but it may also improve consumer welfare even though the price rises. Under other circumstances, however, it will not increase consumer welfare and may even reduce total welfare.

A clear case is illustrated in Figure 1, where D_1 represents final good demand without any promotional services and the supply is represented by S_1. In Figure 1, we analyze a simple case of unit demand. This is the case in which a consumer will buy only one unit of the good in question.[130] In this case, the quantity sold also tells us how many consumers are in the market. In the absence of promotional services provided by the distributors, the equilibrium price and quantity will be P_1 and Q_1, respectively. Now, suppose that the manufacturer wants its distributors to provide promotional services that increase the demand for its product. For many consumers, the promotions increase the value of the product. Because the value of the product increases when these promotional services are performed, the demand shifts from D_1 to D_2.[131] Of course, these promotions are costly and, therefore, the supply curve will shift from S_1 to S_2 to reflect the increased cost. The new equilibrium is P_2 and Q_2. In this case, the promotion not only leads to an increase in price from P_1 to P_2, but quantity also increases from Q_1 to Q_2 because the vertical shift in demand exceeded the vertical shift in supply.[132]

In this case, consumer welfare is unambiguously enhanced. Without the promotion, consumer welfare is given by the triangular area cdP_1. With those promotions, however, consumer welfare rises to area abP_2. This is clearly larger—and always will be—as long as the shift in demand is parallel and results in a quantity increase.[133] Without promotion, producer welfare is given by the triangular area deP_1. With promotions, producer welfare increases to triangle bfP_2. This will also be larger as long as the shift in supply is parallel and results in an increase in quantity. Consequently, total welfare is given by the area of triangle *cde* without

RPM is a means of correcting an incentive alignment problem. This is highlighted in Richard E. Romano, *Double Moral Hazard and Resale Price Maintenance*, 25 RAND J. ECON. 455 (1994).

130. This assumption of unit demand is not critical to our analysis, but facilitates some comparison of tradeoffs.

131. In Figure 5, we assume that D_2 is parallel to D_1, which means that every consumer places an equal value on the promotional services. This, of course, may not be accurate; we deal with that possibility below.

132. If this were not the case, the manufacturer would not push the promotional services because it would not be profitable to do so. The derived demand for the product by the dealers would fall rather than rise, and the manufacturer's profits would suffer. Frederic M. Scherer and David Ross point out that such services will be expanded until no further gains exist. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 541–48 (3d ed. 1990). At this point, the increased cost of additional services will be precisely equal to the increased value of the product resulting from the increased services.

133. Triangles abP_2 and cdP_1 are *similar* because the corresponding angles are equal. Since the base of abP_2 is larger than the base of cdP_1, the area of the former must be larger than that of the latter. This will always be the case with a parallel shift in demand.

promotion. With promotion, total welfare expands to area *abf*. In this context, RPM is used in a way that improves both consumer welfare and the manufacturer's profits. This use of RPM would be lawful under a rule of reason analysis regardless of whether the court is pursuing consumer welfare or social welfare.

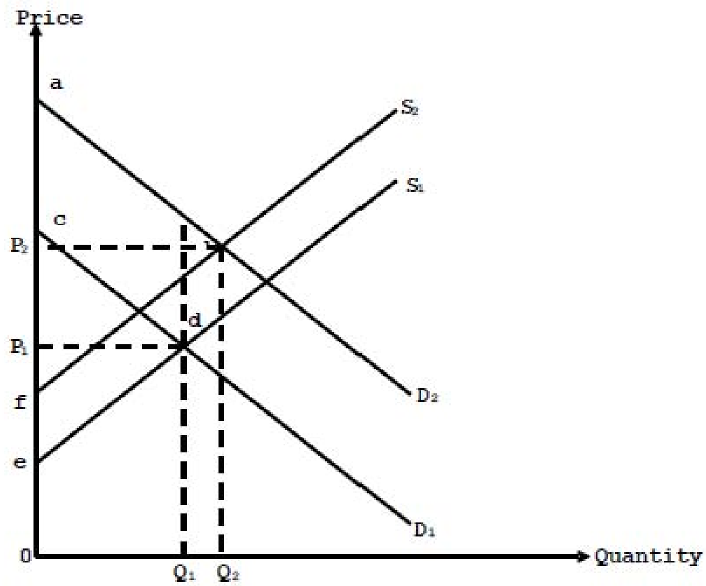
In the United States, the use of RPM depicted in Figure 1 would pass muster; but in the European Union it would not. From an economic perspective, this is a curious result. Consumers are clearly better off as a result of $Q_2 - Q_1$. More people will consume the product; among consumers, no one is worse off. Producer welfare also rises, so there is no loss there. There are no losers, so a Kaldor-Hicks tradeoff is unnecessary.

This raises an obvious question: assuming that policymakers in the European Union understand the economic analysis, what goals are they pursuing? It could very well be that because of the vertical guidelines, treatment of RPM may be framing the discussion in a way that it would not otherwise be if one were to create a new block exemption from scratch. It also may be that the nonindustrial organization economics goals may play a larger role even in court cases. Because of the historic harsh treatment of RPM, there is less empirical work in this area than other areas involving vertical restraints, but the work to date suggests that the European approach is not borne out by the economic evidence,[134] and so European policy in this area seems to accept noneconomic goals.

Below we show graphically the difference of outcomes across U.S. and E.U. systems.

134. For a discussion of the empirical RPM work to date, see Benjamin Klein, *Online Resale Price Maintenance*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32; Francine Lafontaine & Margaret E. Slade, *Franchising and Exclusive Distribution: Adaptation and Antitrust*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32.

Figure 1: RPM Unambiguously Improves Both
Consumer and Total Welfare



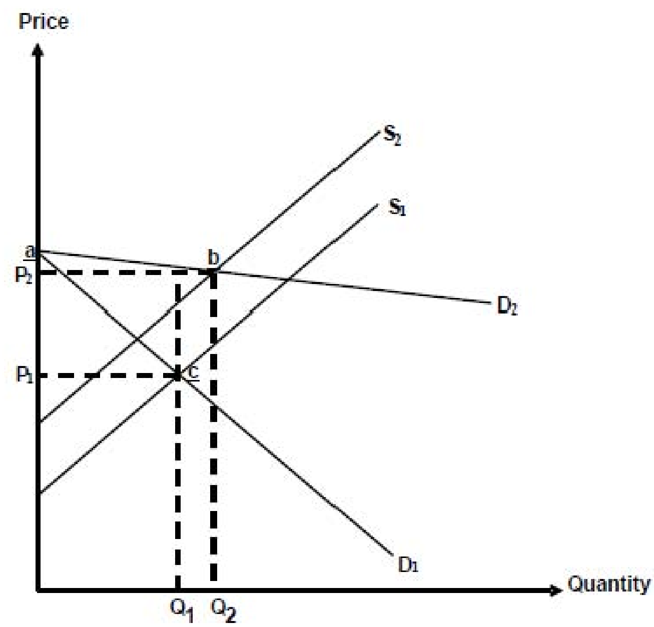
In Figure 1, the parallel shift in demand from D_1 to D_2 indicates that all consumers value the promotion equally (i.e., each consumer's willingness to pay increases by the same amount). This, however, may not necessarily be the case, as all consumers may not value the promotions equally.[135] In our economic model, this means that the shift in demand will not be parallel. In Figure 2, the promotion leads to a rotation of demand from D_1 to D_2. We have constructed this example so that the increase in price from P_1 to P_2 and the increase in quantity from Q_1 and Q_2 in Figure 2 are precisely the same as the corresponding prices and quantities in Figure 1. In this case, consumer welfare without the promotion is equal to area acP_1 and with the promotion equal to area abP_2. In some cases (like the one depicted in Figure 2) consumer welfare will decline even though RPM is being used for promotional purposes. In other cases, however, it will increase.[136] Thus, the impact on consumer welfare is ambiguous on a priori

135. The economic consequences for consumer welfare were developed independently by William S. Comanor and F.M. Scherer. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); F.M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687 (1983).

136. As a result, the appropriate antitrust policy is unclear. *See* Roger D. Blair & James M. Fesmire, *The Resale Price Maintenance Policy Dilemma*, 60 S. ECON. J. 1043 (1994). Richard Posner does not believe that this refinement can be handled in a judicial setting and, therefore, should be ignored. *See* POSNER, *supra* note 6, at 176. Judge Posner may be right as a practical matter, but ignoring this refinement necessarily abandons the consumer welfare standard.

grounds. As a result, the effect of RPM on consumer welfare is an empirical matter. For all practical purposes, however, estimating the effect of RPM on consumer welfare while controlling for all other influences is problematic at best.

Figure 2: RPM May Improve Total Welfare but Reduce Consumer Welfare



In Figures 1 and 2, all of the corresponding prices and quantities are equal. As a result, RPM can lead to identical price and quantity increases but different outcomes for consumer welfare. In Figure 1, RPM is clearly reasonable because both consumer welfare and total welfare increase due to RPM and, therefore, is presumably lawful in the United States. In contrast, the RPM plan depicted in Figure 2 is unreasonable in the sense that consumer welfare declines, but may not be unreasonable on total welfare grounds. Consequently, it is crucial to have a clear antitrust goal: consumer welfare or total welfare. Without such clarity, policy prescriptions are murky at best. Producer welfare is the same in Figures 1 and 2 since the relevant areas are the same in both figures. Thus, the impact on social welfare depends on the impact on consumer welfare. If RPM causes consumer welfare to rise, then total welfare rises and vice versa. It is therefore critical to determine the effect of RPM-induced promotion on consumer welfare.

Determining the economic effect of RPM on either consumer welfare or total welfare is complicated by the fact that there are no simple tests. It is clear that neither an output test nor a price test provides an answer to the question of reasonableness. RPM is supposed to lead to higher prices, but higher prices alone do not tell us what happens to welfare. As the results in Figures 1 and 2 show, somewhat surprisingly, an output test also fails to distinguish the effects on consumer welfare. Thus, it will be necessary to embark on a difficult econometric journey to resolve the reasonableness inquiry. It would seem that whoever bears the burden of proof will lose the battle.

There is another circumstance that poses a severe challenge for the rule of reason. Suppose that the producer introduced a new product and sold it to distributors subject to an RPM policy. In that event, all we would know is the price and quantity associated with the RPM-induced promotion. There would be no information regarding the price and quantity that would have resulted in the absence of the RPM-induced promotion. In that event, we could measure consumer welfare, at least in principle, with RPM and the promotion but not without the promotion. Thus, a rule of reason analysis would be impossible, because there would be no way to determine the effect of RPM on consumer welfare.

D. The OTCs and RPM

Online travel companies (OTCs), such as Expedia, Hotels.com, Orbitz, Priceline, and Travelocity, provide information on flight schedules, airfares, hotel room rates, and car rentals. In many respects, OTCs are travel agents that are open twenty-four hours a day and, therefore, offer a more convenient service than the traditional travel agent. As OTCs have grown in importance, several legal issues have arisen. For the most part, OTCs have attracted the attention of tax-starved states and municipalities over forgone tax revenues.[137] Most recently, however, RPM issues have surfaced.[138] These price restraints may receive different antitrust treatment in the United States and the European Union.

Consumers may consult various OTCs when searching for hotel accommodations. These sites provide information on availability and rates in the destination city. The consumer may then contact the hotel's reservation system and book a room for, say, one hundred dollars. If the applicable tax rate were 12 percent, the consumer would pay one hundred and twelve dollars to the hotel, which would keep one hundred dollars and transmit twelve dollars to the taxing authority.

The consumer could also book the room through the OTC. The hotels provide discounts to the OTC of, say, 20 percent. In our example, the OTC would pay eighty dollars for the room along with nine dollars and sixty cents (i.e. 12 percent of eighty dollars) in taxes. The consumer would still pay one hundred and twelve dollars pursuant to an agreement between the

137. *See* James Mak, *What Should Be the Appropriate Tax Base for OTCs' Hotel Room Sales*, 65 ST. TAX NOTES 775, 775–86 (2012).

138. *See* Benjamin Klein, *Online Resale Price Maintenance*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 32 (discussing online RPM issues).

hotel and the OTC that the OTC will not undermine the hotel by competing with it through discounting. On this booking, the OTC will earn a gross profit of twenty dollars through the discounted room rate and another two dollars and forty cents because it pays taxes of nine dollars and sixty cents while collecting one hundred and twelve dollars from the consumer. This lost tax has been subject of much litigation.[139]

For our purposes, however, we are interested in the agreement between the hotel and the OTC that the OTC will not use the discount to undercut the hotel's reservation system. In effect, the hotel sells the room to the OTC at a wholesale price on the condition that the OTC not resell the room below a specific price set by the hotel. This, of course, is RPM. There are several antitrust issues surrounding these business practices.

First, the vertical agreements between a hotel and each of the OTCs appear to be bilateral. That is, there is no evidence of agreement among various OTCs. But may one infer agreement under the logic of *Interstate Circuit, Inc. v. United States*[140] in the United States or *Toshiba Corp. v. Commission* in the European Union?[141] Second, since the hotel is engaged in a form of dual distribution, is it unreasonable for the hotel to avoid competing with itself? In other words, is it unreasonable as that term is used in the antitrust context to refrain from competing with the OTCs?

As described above, the hotel is engaged in dual distribution. It produces hotel accommodations for travelers and sells directly to the consumer. It also sells hotel rooms through the OTCs. In doing so, it hope to increase its occupancy rates. But the hotel runs the risk of competing with itself, which it wants to avoid through an RPM agreement with the OTC. This agreement clearly restrains the OTC's ability to reduce the price to the consumer, but is that *unreasonable*? Presumably, the hotel would argue that the OTC has reduced consumer search costs, which is a procompetitive benefit of the dual distribution. It would also argue that it would abandon dual distribution if it could not protect itself with the RPM agreement. This argument (or one similar) may persuade a jury that the RPM agreement is a reasonable restraint.

Now, suppose that the hotel has similar agreements with all of the major OTCs. As long as these agreements are truly bilateral, each agreement can

139. *See* Mak, *supra* note 137.

140. 306 U.S. 208, 221–28 (1939).

141. Case T-113/07, ¶ 82 (July 12, 2011), http://curia.europa.eu/juris/document/document.jsf?docid=107961&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1021087 ("[T]he Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, can, in the absence of another plausible explanation, constitute evidence of an infringement . . . ."); *see also* Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P & C-219/00 P, Aalborg Portland A/S v. Comm'n, 2004 E.C.R. I-123; Case C-199/92 P, Hüls AG v. Comm'n, 1999 E.C.R. I-4287.

be supported by the same claim of reasonableness. To the extent that each OTC honors its agreement with the hotel, there will be no price competition among the OTCs. This, however, should not undermine the reasonableness of the RPM agreements.

Contrary to this hypothetical, however, suppose that there is an agreement among the OTCs not to compete with one another. This would make these bilateral agreements a horizontal agreement that unreasonably denies consumers the benefits of price competition and should therefore be deemed unlawful under section 1 of the Sherman Act.[142]

Another complicating factor is that the major hotels that presumably compete with one another have similar RPM agreements with the OTCs.[143] This in itself is not indicative of horizontal collusion among the hotels but may suggest to some that there is a restraint on competition.

E. Recent Litigation Regarding RPM and OTCs

In the United Kingdom, the Office of Fair Trading (OFT) has filed a Statement of Objections against IHG and others that challenges the RPM agreements that prevent OTCs from undercutting the hotel reservations systems. These supposedly bilateral agreements will prevent price competition among the OTCs.[144] There are complaints from smaller OTCs that the larger OTCs demand that the hotels prevent discounting. This alone, however, is not suspicious. After all, if a large OTC honors its bilateral agreement with a hotel, it necessarily will resent being undercut by another OTC that is not honoring a similar agreement.

In the United States, a consumer class action has been filed alleging that the RPM agreement is rigorously enforced against smaller OTCs so that the larger OTCs do not face price competition.[145] In essence, the complaint alleges a *horizontal* rather than a *vertical* restraint. If such an agreement is proven, it will violate section 1 of the Sherman Act. If, however, the RPM agreements between each OTC and each hotel are simply a collection of bilateral agreements, then the RPM agreements will have to be proven to be unreasonable.

III. MERGERS

In this part, we give a historic overview of the development of merger enforcement in the United States and European Union and examine the legal context of merger efficiencies. Thereafter, we provide an analysis of how a proposed merger might be impacted by disparate merger standards

142. *See* United States v. Sealy, Inc., 388 U.S. 350 (1967).

143. Posner has found industry-wide use of RPM suspicious. POSNER, *supra* note 6, at 67–68.

144. Press Release, Office of Fair Trading, Statement of Objections against Booking.com, Expedia and Intercontinental Hotels Group (July 31, 2012), *available at* http://www.oft.gov.uk/news-and-updates/press/2012/65-12.

145. Class Action Complaint, Turik v. Expedia Inc., No. 12CV04365 (N.D. Cal. Aug. 20, 2012), 2012 WL 3568787.

across major jurisdictions. The difference in outcomes can be seen through the example of the use of efficiencies arguments in case law regarding mergers. In both cases, the dominant approach seems to be consumer welfare in both the United States and the European Union.

Oliver Williamson first identified the efficiency trade-off raised by merger-specific efficiencies that may accompany an increase in monopoly power postmerger.[146] There are some instances in which a business practice improves efficiency (i.e., reduces costs of production and/or distribution). The easy case is one in which the merger does not enhance market power. As a result, cost savings from the merger will be passed on to some extent to consumers in the form of lower prices. This case is easy because the merger increases both consumer welfare and total welfare.

The more difficult case occurs when the improved efficiency accompanies increased market power postmerger that leads to a price increase above the previous level. This situation creates a need to weigh the benefits of improved efficiency against the costs of allocative inefficiency, since this merger should be allowed on total welfare grounds but not on consumer welfare grounds. Before we examine these cases, we provide a review of how merger analysis has developed.

A. Merger Goals, Efficiencies, and Antitrust Systems

This section traces the development of merger control in the United States, the first antitrust system to create a robust merger-control regime that includes merger guidelines to shape practice before agencies and courts. This section then examines the development of U.S. merger case law regarding efficiencies. Thereafter, it undertakes a similar analysis regarding European merger-efficiencies case law before noting areas of divergence between the two systems. Finally, the section explains the economics of how different welfare standards could lead to disparate outcomes in the decision to allow or block a merger and how this might have a global impact.

1. Historic Overview of U.S. Mergers

Perhaps more than any other antitrust system, the United States' experience with merger control has shown the most dramatic shift from the influence of overt political factors to sole primacy of industrial organization economics considerations.[147] Antitrust case law began to reflect the shift

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146. *See* Oliver E. Williamson, *Economies As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

147. For example, in the United States, even though the economic understanding of cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), is retrograde by today's standards, agencies still cite to them when they want to block a merger. The latest methods in industrial organization recommend the least amount possible of political intrusion specific to industrial organization economics into antitrust policy. *See* ULRICH SCHWALBE & DANIEL ZIMMER, LAW AND ECONOMICS IN EUROPEAN MERGER CONTROL (2009); Mats A. Bergman et

from political factors to industrial organization economics in the late 1970s, although the change specifically in merger case law lagged a bit relative to the abolition of per se rules regarding conduct.[148] As Judge Ginsburg has noted in the case law development,

> Even in such cases where there is no consensus among economists, there is, nevertheless, virtually universal agreement among antitrust economists and lawyers alike, that the Court should answer questions of antitrust law with reference to economic competition—matters of consumer welfare and economic efficiency—rather than make political judgments about such economically irrelevant matters as the "freedom of traders," or "the desirability of retaining 'local control' over industry and the protection of small businesses."[149]

Classic merger cases such as *Brown Shoe Co. v. United States*,[150] *United States v. Von's Grocery Co.*,[151] and *United States v. Philadelphia National Bank*[152] would be decided quite differently both in approach and outcome today. Moreover, changes in priorities became embedded not merely in the case law but also in the agencies with the rise in the importance of economics.

The introduction of economically informed merger guidelines has created a framework to analyze mergers, and the approach of writing and operationalizing guidelines has been copied in many of the world's jurisdictions. The importance of the merger guidelines to antitrust merger and the use of various economic theories and approaches have been tremendous. There has been an iterative process of tweaking the guidelines as the economics of the time have changed. This has been true in the United States with each iteration of the merger guidelines—1968, 1982, 1984, 1992, 1997, and 2010.[153] This economic approach based upon the merger guidelines has become embedded within U.S. case law.[154]

Scholars have quantified the shift of merger enforcement. Indeed, there is much empirical literature examining the political economy of federal government antitrust enforcement. Judge Posner first set the stage by examining data on the Department of Justice antitrust litigation.[155] Others

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al., *Comparing Merger Policies in the European Union and the United States*, 36 REV. INDUS. ORG. 305 (2010); Tomaso Duso et al., *An Empirical Assessment of the 2004 EU Merger Policy Reform* (WZB, Discussion Paper SP II 2010-16, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721412.

148. *See* Greene, *supra* note 49.

149. Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, at 3 COMPETITION POL'Y INT'L 2, 22 (2007) (quoting Albrecht v. Herald Co., 390 U.S. 145, 152 (1968); *Brown Shoe Co.*, 370 U.S. at 315–16).

150. 370 U.S. 294 (1962).

151. 384 U.S. 270 (1966).

152. 374 U.S. 321 (1963).

153. Sokol, *supra* note 15, at 1105–09.

154. *See generally* Greene, *supra* note 49.

155. Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 402 (1970).

have since updated, revised, and extended his work.[156] Collectively, the empirical evidence shows that (1) there is no consistent relationship between the party of the President and federal antitrust enforcement, and (2) the relationship between aggregate economic activity and federal antitrust case-activity is ambiguous—the typical finding being a weak-positive or no link. Empirical work suggests that overt industrial organization economics based politics has, for the most part, become a nonissue in U.S. merger enforcement in recent decades (1990s onwards). As Malcolm Coate states, "Populism was forced to a fringe position."[157] This is a change from earlier studies of U.S. merger control that examined the 1980s and suggested that there were noneconomic factors at play in merger control.[158]

Examining even earlier merger enforcement, and given the current state of industrial organization economics, U.S. merger enforcement and case law from the 1950s and 1960s is an intellectual embarrassment. The agency priorities and case law reflected the idea that big was bad and that the protection of competitors mattered more than some notion of efficiency.[159] In a large sense, overt noneconomic political factors mattered most within antitrust merger analysis.[160]

2. E.U. Mergers Historic Overview

Empirical work that analyzes the pre–"effects based" period of European merger enforcement shows that protectionism existed in merger control in terms of deals challenged. The analyses show that DG Competition had a

156. Malcolm B. Coate et al., *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & ECON. 463, 481–82 (1990); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 339 (1982); Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 94–95 (2000); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733, 736, 740, 759 (2011); John J. Siegfried, *The Determinants of Antitrust Activity*, 18 J.L. & ECON. 559, 561 (1975).

157. Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission 19 (Sept. 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314924; *see also* Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/65_Stan._L._Rev._Online_13.pdf. *But see* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 33, at 235, 248–51.

158. Malcolm B. Coate, *A Test of Political Control of the Bureaucracy: The Case of Mergers*, 14 ECON. & POL. 1 (2002).

159. FTC v. Procter & Gamble Co., 386 U.S. 568, 574–75 (1967); *In re* Foremost Dairies, Inc., 60 F.T.C. 944, 1084 (1962). This approach was not limited to mergers, but also applied in the monopolization setting. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945) ("[G]reat industrial consolidations are inherently undesirable, regardless of their economic results.").

160. *See, e.g.*, Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010) (exploring the broader political bargain of antitrust); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (providing a defense of noneconomic factors).

higher probability of intervention against non-European firms when there were European competitors in the same market.[161] This supports the view that the welfare standard (at least at that time) was not a traditional consumer or total welfare standard but one that included non-antitrust economic factors.

Things have changed in Europe. Empirical work that focuses on more recent European merger control suggests that protection of European firms from non-European firms is no longer a factor within European level merger control.[162] With time, European merger analysis has improved, as European merger law has increasingly featured economic analysis as a result of certain doctrinal and structural changes.[163] Changes have included reform via the 2004 Horizontal Merger Guidelines,[164] which made economic analysis a more vital part of merger analysis, case law developments (*Airtours/First Choice*,[165] *Schneider/Legrand*,[166] and *Tetra Laval/Sidel*[167]),[168] and the creation within DG Competition of the chief economist position and an economics group that is not subservient to the legal team in its analysis.[169]

161. Nihat Aktas et al., *Is European M&A Regulation Protectionist?*, 117 ECON. J. 1096, 1117–18 (2007); Tomaso Duso et al., *The Political Economy of European Merger Control: Evidence Using Stock Market Data*, 50 J.L. & ECON. 455 (2007); Serdar Dinç & Isil Erel, Economic Nationalism in Mergers & Acquisitions (May 18, 2012) (unpublished manuscript), *available at* http://fisher.osu.edu/fin/faculty/erel/papers/Dinc_Erel_2012May18.pdf. On the use of financial stock market return event studies for competition policy, see Tomaso Duso et al., *Is the Event Study Methodology Useful for Merger Analysis? A Comparison of Stock Market and Accounting Data*, 30 INT'L REV. L. & ECON. 186 (2010).

162. Nihat Aktas et al., Market Reactions to European Merger Regulation: A Reexamination of the Protectionism Hypothesis (Nov. 15, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961188. However, it does still seem to be the case that in at least certain high profile circumstances, member state–level protectionism is alive and well within Europe. *See* Damien Geradin & Ianis Girgenson, *Industrial Policy and European Merger Control—A Reassessment*, *in* FORDHAM COMPETITION LAW INSTITUTE 353 (Barry E. Hawk ed., 2011).

163. Nicholas Levy, *Evidentiary Issues in EU Merger Control*, *in* ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 81 (Barry E. Hawk ed., 2009); Orbach & Sokol, *supra* note 52, at 446.

164. Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5, 14.

165. Case IV/M.524, 2000 O.J. (L 93) 1, *overruled by* Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585.

166. Case COMP/M.2283, 2004 O.J. (L 101) 1, *overruled by* Case T-310/01, Schneider Electric SA v. Comm'n, 2002 E.C.R. II-4071.

167. Case COMP/M.2416, 2004 O.J. (L 43) 13, *overruled by* Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4381; Case COMP/M.2416, Tetra Laval/Sidel, 2004 O.J. (L 38) 1, *overruled by* Case T-80/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-4519.

168. *See* ULRICH SCHWALBE & DANIEL ZIMMER, LAW AND ECONOMICS IN EUROPEAN MERGER CONTROL (2009); Mark Leddy et al., *Transatlantic Merger Control: The Courts and the Agencies*, 43 CORNELL INT'L L.J. 25, 42 (2010); Duso et al., *supra* note 147.

169. Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569 (2009). A similar trend occurred earlier in the United States. Oliver Williamson notes, "Taken together, the creation of the position of Special Economic Assistant and the decision to staff the evaluation section with young lawyers who bought into the idea that economic reasoning should be featured more prominently in antitrust enforcement were important 'organizational innovations.' For those who were a part of this transition, these were

Since that time, the role of economics (and economists) has grown both within DG Competition and among economic experts who regularly appear before Commission staff.[170] Yet, the earlier case law and institutional approaches have impacted the current structure and nature of merger enforcement in Europe in terms of state intervention. Quantitative research supports that, at present, Europe is a stricter enforcer of merger regulation than the United States.[171]

3. Examples of Merger Divergence

It has been quite some time since the substantive merger standard has mattered across regimes. What we have seen overall is that after a period of substantive divergence in merger control as it relates (in part) to economic analysis,[172] increasingly there is convergence between the United States and the European Union as to substantive analysis of mergers.[173] Yet, a number of high profile cases regarding mergers that involved significant merger scrutiny over a decade ago demonstrated that the more stringent legal regime could have global consequences. These included most notably *Boeing/McDonnell Douglas*,[174] *General Electric/Honeywell*,[175] and *Oracle/PeopleSoft*.[176] In each of these three cases, had either the United States or the European Union blocked the merger, the deal would have had to be abandoned as a condition of closing. Of these three deals, the one that created the greatest transatlantic rift was GE/Honeywell, which the United

exciting times." Oliver E. Williamson, The Merger Guidelines of the U.S. Department of Justice—In Perspective 1 (June 4, 2002), *available at* http:// www.justice.gov/atr/hmerger/11257.pdf.

170. Neven, *supra* note 91.

171. Mats A. Bergman et al., Atlantic Divide or Gulf Stream Convergence: Merger Policies in the European Union and the United States (April 13, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=975102.

172. Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMPETITION L. & ECON. 595 (2005); Kovacic, *supra* note 28.

173. Mats Bergman et al., Merger Control in the European Union and the United States: Just the Facts (March 4, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565026; Florian Szücs, *Investigating Transatlantic Merger Policy Convergence* (Feb. 22, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773774.

174. *See* Case IV/M.877, 1997 O.J. (L 335); *see also Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation*, FTC, www.ftc.gov/opa/1997/07/boeingsta.shtm (last modified June 24, 2011).

175. *See* Case COMP/M.2220, 2001, 2004 O.J. (L 48) 1, *prohibition aff'd*, Case T-209/01, Honeywell Int'l, Inc. v. Comm'r, 2005 E.C.R. II-05527; *see also* Press Release, Dep't of Justice, Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), *available at* http://www.justice.gov/opa/pr/2001/July/303at.htm.

176. *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004); Case COMP/M.3216, Oracle/PeopleSoft, 2004, 2005 O.J. (L 218).

States approved but the European Union blocked.[177] The effect of the E.U. action was to block the deal globally.[178]

We will now review these mergers to demonstrate that a divergence in merger standards can have global results in a way that a divergence in RPM standards cannot. We begin with a short review of GE/Honeywell.[179]

The proposed GE/Honeywell deal received merger clearance in the United States but was blocked within Europe based on the theory of a bundling of GE's engines with its financial services at a price that was below what its rivals could offer. Third-party complaints drove much of the hostility of the EC but so did a path dependency based on political considerations on the view of competition in Europe. European competition policy, at the time, was far more likely to be about the preservation of competitors than that of the United States. Thus, even if there were not some overt public choice explanation for the strategic use of antitrust, institutional factors also pushed DG Competition to block the deal in Europe and, in effect, to block the deal globally.[180]

In *Oracle/PeopleSoft*, the EC approved the merger but did so using the same unilateral effects theory that the U.S. Department of Justice (DOJ) had suggested to block the deal. Unlike Boeing/McDonnell Douglas and GE/Honeywell, the Europeans agreed with the market definition employed by DOJ and yet somehow still cleared the merger after DOJ had lost its merger challenge to the deal before a district court. This is puzzling since, if DG Competition accepted the DOJ market definition, the three-to-two merger most probably should have been challenged by DG Competition based on a unilateral effects theory.

Politics seems to have played a role in the decision not to challenge the Oracle/PeopleSoft merger in Europe. Because of the very thorough opinion that would have made an appeal incredibly difficult to win, DOJ decided not to appeal the ruling. Had economic analysis been at the forefront of the European decision making, this would have created a potential problem. By challenging a deal that could proceed in the United States, the EC would only increase transatlantic tensions, just as Commissioner Monti's term was to come to a close and just as efforts on best practices in the ICN for merger control were taking shape. These political factors seem to have been in play in the EC's decision to clear Oracle/PeopleSoft. DOJ's loss in the district court provided cover for the Europeans not to challenge the deal aggressively so that Commissioner Monti would not leave a political bomb

177. Edward T. Swaine, *"Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L ECON. L. 597 (2002).

178. *Id.*

179. *See generally* Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331 (Eleanor M. Fox & Daniel A. Crane eds., 2007); Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457 (2002).

180. Daniel J. Gifford & Robert T. Kudrle, *European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?*, 48 ANTITRUST BULL. 727 (2003).

for his successor Commissioner Kroes and another potential transatlantic rift.[181]

Having described past divergence, we now examine the present and future use of efficiencies in merger law and economics and how there might be divergence between the United States and Europe. With the political issues resolved and closer day-to-day coordination between U.S. and E.U. agencies, the type of political divergence between merger deals may be a thing of the past. Consequently, we lay out a hypothetical merger based on purely economic factors that might lead to divergent outcomes.

B. U.S. Efficiencies in Merger Law

Efficiencies in mergers went through a significant transformation over a period of thirty years between the 1960s and 1990s. In the 1960s, efficiencies were treated with some hostility under U.S. case law. In *In re Foremost Dairies*,[182] a violation of section 7 of the Sherman Act would include a firm's "over-all organization [that] gives it a decisive advantage in efficiency over its smaller rivals,"[183] while in *Philadelphia National Bank*,[184] the Supreme Court noted that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[185] Technically, the Court has never renounced its earlier view on mergers efficiencies in its more modern antitrust jurisprudence, largely because there has not been a substantive merger case before the Court in over a generation.

Though efficiencies arguments began to emerge as part of the rule of reason analysis in conduct cases, its adoption in earnest within the area of mergers came later. Starting in the 1980s, the rewriting of the efficiencies analysis, as part of the 1984 Horizontal Merger Guidelines, moved efficiencies from being a defense to part of the competitive effects.[186] Certain cases along the way, such as *United States v. General Dynamics Corp.*,[187] also helped.[188]

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181. Christian Duvernoy & Sven Völcker, *Oracle in Brussels*, 5 M&A J. 1, 15 (2005), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1022&context=wilmer ("One theory is that after GE/Honeywell, the Commission was making a political decision and hiding that fact: 'Let's look different and independent, but let's also come out with the same result.'"). Commissioner Kroes soon created a number of transatlantic political crises of her own without the help of Monti.

182. 60 F.T.C. 944 (1962).

183. *Id.* at 1084.

184. 374 U.S. 321 (1963).

185. *Id.* at 371.

186. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 3.5 (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103.

187. 415 U.S. 486 (1974).

188. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 209–22 (2003).

This brief historic overview of merger efficiencies allows us to move to the present legal regime for merger analysis of efficiencies—the 2010 Merger Guidelines,[189] which for the most part adopted the 1997 version of the efficiencies section.[190] What the language of the 2010 Merger Guidelines suggests at first blush is an unambiguous support of a consumer welfare standard.

Efficiencies are treated under a "sliding scale" approach.[191] The 2010 Merger Guidelines explain:

> The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market. In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.[192]

The 2010 Merger Guidelines add that "[i]n adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers."[193] Courts have responded to this language by adopting a true consumer welfare standard with regard to efficiencies.[194] Indeed, most of the litigated cases before the courts do not rest strongly on an efficiency argument, but this has not

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189. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 10, at 29–31 (2010) [hereinafter 2010 MERGER GUIDELINES], *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

190. D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 55–56 (2011), http://www.vanderbiltlawreview.org/content/articles/2011/03/Sokol-Fishkin-Antitrust-Merger-Efficiencies-in-the-Shadow-of-the-Law-64-Vand.-L.-Rev.-En-Banc-45-20114.pdf.

191. Robert Pitofsky, *Efficiencies in Defense of Mergers: Two Years After*, 7 GEO. MASON L. REV. 485, 486 (1999) ("[T]he revisions expressly incorporated a sliding-scale approach into efficiency analysis."); *see also* Dep't of Justice & Fed. Trade Comm'n, Transcript of Merger Workshop, Day 3, at 12, 21, 100 (Feb. 19, 2004), *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf (discussing the sliding-scale analysis for evaluating efficiency claims).

192. 2010 MERGER GUIDELINES, *supra* note 189, at 30–31. For an economic analysis, see Roger D. Blair & Jessica S. Haynes, *The Efficiencies Defense in the 2010 Horizontal Guidelines*, 39 REV. INDUS. ORG. 57 (2011).

193. 2010 MERGER GUIDELINES, *supra* note 189, at 31.

194. Kolasky & Dick, *supra* note 188, at 232 ("The courts have largely adopted the analytical framework for evaluating efficiency claims that is set out in the Guidelines."); *see also* Greene, *supra* note 49 (describing the adoption of the merger guidelines by courts).

stopped various courts in dicta from reiterating the importance of consumer welfare in the efficiencies context.[195]

However, as the expression goes, the devil is in the details. In our case, that detail is footnote fifteen of the efficiencies section of the 2010 Merger Guidelines, which provides for the possibility of the use of a total welfare standard for merger efficiencies.[196] In that footnote, the 2010 Merger Guidelines explain, "The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market."[197]

This attention to detail also opens up the possibility of some ambiguity within case law as to what welfare standard might come into play regarding a case that substantively may be litigated upon efficiency grounds. To date, there has been only one case in which there was a significant discussion of efficiencies under the modern Merger Guidelines, a merger known commonly as the "baby foods case" and officially as *FTC v. H.J. Heinz Co*.[198] The case involved a proposed three-to-two merger between Heinz and Beech Nut, the number two and number three firms in the baby food market.[199] The merging parties argued that the merged company would provide efficiencies to more effectively compete with the market leader, Gerber.[200]

According to the D.C. Circuit in *Heinz*, to prove the case for accepting the efficiencies argument of the parties, given the high level of concentration of the merged firm, would require extraordinary efficiencies. However, the court did not make clear what it meant by extraordinary efficiencies. From the standpoint of welfare standards, the court was also silent as to whether extraordinary efficiencies should be measured using consumer welfare or total welfare (the district court had been similarly silent as to the standard). Unfortunately, the only guidance as to the welfare standard for extraordinary efficiencies comes in the form of dicta via a

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195. FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 153 (D.D.C. 2004) ("The existence of such efficiencies, therefore, remains relevant to an assessment of the post-merger market and the potential benefits to consumers from cost reductions and increased competition."); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 62 (D.D.C. 1998) ("[T]he FTC does not contest that the mergers will result in large-scale efficiencies, some of which will be passed on to the consumer."); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 137 (E.D.N.Y. 1997) ("In sum, to sustain an 'efficiencies defense,' the defendants must clearly demonstrate that the proposed merger itself will create a net economic benefit for the health care consumer."); FTC v. Staples, Inc., 970 F. Supp. 1066, 1090 (D.D.C. 1997) ("The Court has no doubt that a portion of any efficiencies achieved through a merger of the defendants would be passed on to customers.").

196. 2010 MERGER GUIDELINES, *supra* note 189, at 31 n.15.

197. *Id.*

198. 246 F.3d 708 (D.C. Cir. 2001).

199. *See id.* Efficiencies cases are rare around the world. *See* OECD, DYNAMIC EFFICIENCIES IN MERGER ANALYSIS 28 n.26 (2007), *available at* http://www.ftc.gov/bc/international/docs/Dynamic%20Efficiencies%20in%20Merger%20Analysis%20-%20US.pdf.

200. *H.J. Heinz Co.*, 246 F.3d at 720.

citation to *FTC v. University Health*.[201] The *Heinz* D.C. Circuit decision quoted the proposition in *University Health* that "a defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."[202] The problem with this statement is that it muddled what goal might be reached. It could be that what might benefit competition (total welfare) may be at odds in some set of cases with what might benefit consumers (consumer welfare) in the situation of extraordinary efficiencies.[203] One could imagine a hypothetical two-to-one firm merger in which prices might not fall, but the combined firm conducts research and development more efficiently.[204] Under a total welfare standard, such a merger should be allowed even though under a consumer welfare standard the outcome might be more ambiguous. In such circumstances, prices may go up for a number of years before going down many years later, if at all.[205]

C. E.U. Efficiencies in Merger Law

Whereas E.U. competition law was a part of the Treaty of Rome in 1957 with regard to conduct, merger control at the E.U. level came about relatively late in 1989 with the EC Merger Regulation (ECMR), which went into effect in 1990.[206] An amended ECMR went into effect first in 1998 and then in its current form in 2004.[207]

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201. *Id.*

202. *Id.* (quoting FTC v. Univ. Health, 938 F.2d 1206, 1223 (11th Cir. 1991)).

203. The Merger Guidelines suggest that consumers are the net beneficiaries, although this has not come up in a court context. 2010 MERGER GUIDELINES, *supra* note 189, at 30–31.

204. This hypothetical is based on the Genzyme/Novazyme merger. *See Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc.*, FTC, 6–10 (Jan. 13, 2004), http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf; *Dissenting Statement of Commissioner Mozelle W. Thompson, Genzyme Corporation's Acquisition of Novazyme Pharmaceuticals Inc.*, FTC (Jan. 13, 2004), http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf.

205. Gregory Werden et al., *The Effects of Merger Efficiencies on Consumers of Differentiated Products*, 1 EURO. COMPETITION J. 245 (2005) (discussing how to conceptualize potential pass through to consumers). We assume away the problem that it may be difficult to quantify efficiencies effectively. For this critique, see Frédéric Jenny et al., *Substantive Standards for Mergers and the Role of Efficiencies*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 301, 343 (Barry Hawk ed., 2003) ("We can't solve this. Economists, the system, auditoriums full of well-educated competition analysts, cannot actually overcome the essential unpredictability of the future."). For discussions of dynamic merger efficiencies, see Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 74 ANTITRUST L.J. 537 (2007) and Gary L. Roberts & Steven C. Salop, *Efficiencies in Dynamic Merger Analysis*, 19 WORLD COMPETITION 4 (1996).

206. Council Regulation (EC) No. 4064/89 of 21 December 1989, on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, 12.

207. Council Regulation (EC) No. 139/2004 of 20 January 2004, on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24).

The ECMR explicitly recognizes efficiencies as of the 2004 revisions. It notes, "In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned."[208] This is based upon "the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition."[209] The EC Horizontal Merger Guidelines note that an efficiencies defense will work in situations where

> the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefits of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.[210]

Furthermore, efficiencies must "benefit consumers."[211] As a result of the language from the ECMR and the Merger Guidelines, it seems to be the case that the welfare standard for an efficiencies defense in Europe is consumer welfare.

European merger cases support this view of a consumer welfare standard. In *Inco/Falconbridge*,[212] the EC rejected an efficiencies defense (although conditioned approval of the merger-based remedies proposed) because the efficiencies of the proposed merged firm would not be passed through to consumers. Similarly, regarding Ryanair/Aer Lingus, the EC rejected an efficiencies defense in part because it believed that the efficiencies would not be passed on to consumers.[213] In a more recent airlines case, *Lufthansa/SN Airholding*, the EC approved a merger but rejected the efficiencies defense because the efficiencies could not be passed through to consumers.[214]

Adding an analytical twist to the European approach is that, unlike the United States,[215] the European Union has relatively recent merger guidelines that apply in cases of conglomerate effects and vertical

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208. *Id.* ¶ 29, recital 29.

209. *Id.* art. 2(1)(b).

210. Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. 2004 No. (C 31/5) ¶ 77.

211. *Id.* ¶ 78.

212. *See* Case COMP/M.4000, Inco/Falconbridge (July. 4, 2006), http://ec.europa.eu/competition/mergers/cases/decisions/m4000_20060704_20600_en.pdf.

213. *See* Case T-342/07, Ryanair Holdings PLC v. Commission, 2010 E.C.R. II-03457.

214. Case No. COMP/M.5335, Lufthansa/SN Airholding, ¶¶ 405–31 (June 22, 2009), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m5335_20090622_20600_en.pdf.

215. DOJ, NON-HORIZONTAL MERGER GUIDELINES, *originally issued as* 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (1984), *available at* http://www.justice.gov/atr/public/guidelines/2614.pdf. For commentary, see Deborah L. Feinstein, *Are the Vertical Merger Guidelines Ripe for Revision?*, 24 ANTITRUST 5 (2010); James Langenfeld, *Non-horizontal Merger Guidelines in the United States and the European Commission: Time for the United States To Catch Up?*, 16 GEO. MASON L. REV. 851 (2009).

mergers.[216] These European nonhorizontal guidelines make clear that "the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns."[217] Efficiencies seem to take a consumer welfare approach under these guidelines as well.[218] In the *Tom Tom/Tele Atlas* case,[219] the EC took a consumer welfare approach to efficiencies in a detailed discussion of efficiencies, even though the EC found that the efficiencies were irrelevant to the decision to approve since the deal did not present anticompetitive concerns.[220]

D. Economics of Merger Efficiencies

Having discussed divergence in the case law, we move to an economic analysis of merger efficiencies and illustrate how a change in welfare standard might lead to divergent outcomes in the United States and the European Union. Efficiency that flows as a result of a merger may justify mergers and joint ventures under antitrust law. The Williamsonian tradeoff of merger specific efficiencies may lead to situations where the merged firm is able to pass on the merger specific cost savings to consumers. However, the efficiency tradeoff may result in an increase of monopoly power. In those circumstances in which the increase in market power still leads to lower prices, there is no antitrust problem regardless of the welfare standard used. There will, however, be a problem in those situations in which the efficiencies enhance total welfare but reduce consumer welfare through higher prices.

In Figure 3, the premerger price and quantity are represented as P_1 and Q_1. What determines P_1 and Q_1 are the equality of demand (represented as D) and the competitive supply, which the figures shows as $MC_1 = AC_1$. The model in the figure assumes that the industry's marginal cost (represented as MC_1) and average cost (represented as AC_1) remain constant. The merger will increase efficiency. We reflect this as the decrease in costs from $MC_1 = AC_1$ to $MC_2 = AC_2$. If market power due to the merger does not increase, the cost savings will be passed on to consumers.[221] Postmerger, the price will fall to P_2 and the quantity will rise from Q_1 to Q_2. Under this scenario, the merger should not raise competition law concerns since the

216. Guidelines in the Assessment of Non-horizontal Mergers, 2008 O.J. (C 265/6).

217. *Id.* ¶ 16.

218. *Id.* ¶ 31 ("As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the mergermay [sic], however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive.").

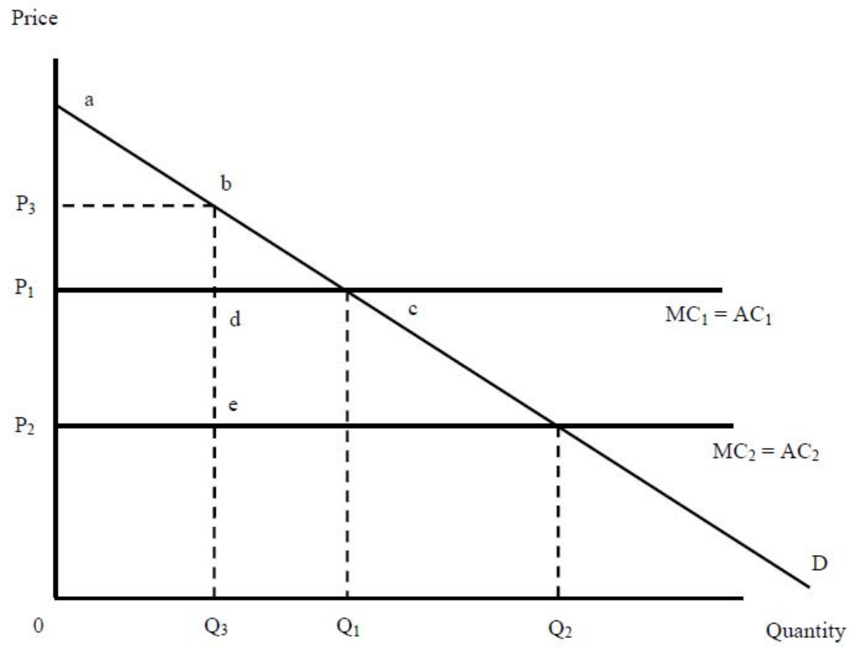
219. *See* Case No. COMP/M.4854, TomTom/Tele Atlas (May 14, 2008), http://ec.europa.eu/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf (declaring a concentration to be compatible with the common market and the EEA Agreement).

220. *Id.* ¶ 250.

221. Due to the perfectly elastic competitive supply curve, all of the cost saving is passed on to consumers when the market remains competitive. If the supply were positively sloped, not all of the cost saving would be passed on, but output would still rise and price would still fall.

welfare effects are positive—both consumer welfare and total welfare increase.[222]

Figure 3: Mergers Specific Efficiencies: the Welfare Tradeoffs



Under an alternative scenario, there is a merger in which market power *increases* as a result of an efficiency-enhancing merger. In Figure 3, let us assume that the merger leads to the same cost savings as before. However, unlike before, the exercise of the market power that results from the merger leads to an increase in price from P_1 to P_3. This leads to a corresponding decrease in quantity from Q_1 to Q_3. From a consumer welfare framework, the merger is undesirable. The consumer has experienced an increase in the price paid. Moreover, the consumer also does not appear to benefit from the cost reduction that has occurred as a result of the merger. Figure 3 measures this as the allocative inefficiency resulting from market power postmerger that causes consumer welfare to fall from area acP_1 to area abP_3. If the lawfulness of the merger under the legal regime is determined solely on the basis of consumer welfare, the result is that in this market, the merger would be unlawful.

Examining the same scenario but from the lens of total welfare, the lawfulness of the merger may be different. Two issues arise in this context.

222. For a similar result, see MOTTA, *supra* note 6, at 261–62.

First, whether total welfare rises or falls depends on the relative magnitudes of the allocative inefficiency and the cost saving. In Figure 3, we represent the allocative inefficiency by the triangular area bcd. The postmerger profit to the sellers is equal to the rectangle P_3beP_2. Part of this, area P_3bdP_1, is a transfer from consumers to producers, while rectangle P_1deP_2 represents the cost saving. Given how Figure 3 has been drawn, the cost saving as a result of the merger appears to be larger than the allocative inefficiency from the merger. When this is the result of a merger, the merger should be lawful under a system that follows a total welfare standard because the benefits of the cost saving outweigh the allocative inefficiency. Indeed, from a Kaldor-Hicks cost-benefit analysis, under this scenario the merger is efficient because the winners of the merger (the producers) would be able to compensate the losers of the merger (the consumers) and still be better off.[223]

This possible outcome is not the only one that could arise after the merger. There may be circumstances in which the allocative inefficiency will outweigh the postmerger cost saving. Under such circumstances, the merger will reduce both consumer welfare and total welfare. As a result, the joint venture will be inefficient on the Kaldor-Hicks criterion because it will not be possible for the winners of the merger (producers) to profitably compensate the losers of the merger (consumers). Under both a total welfare and consumer welfare standard the merger should be unlawful and forbidden.

Even if the welfare standard is exclusively consumer welfare, it is important to note that the cost savings of the merger described above benefit consumers generally. It is the case that these cost savings will improve the sellers' profits in this market. However, an inference that would dismiss these cost savings as inconsequential to consumers would be mistaken.[224] The costs of production that sellers face decrease as fewer of society's scarce resources are needed to produce the output being sold.[225] Consequently, these resources are available to be redeployed to produce goods and services in other markets. Even though the consumer benefits that flow from these cost savings may be diffused throughout the economy, they still exist.[226]

This economic analysis shows that it is possible for a merger to be allowed under a total welfare standard but blocked under a consumer welfare standard. If this merger is efficiency enhancing both domestically

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223. *See* RICHARD JUST ET AL., APPLIED WELFARE ECONOMICS AND PUBLIC POLICY 32–38 (1982) (discussing Kaldor-Hicks efficiency); THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 5–7 (2d ed. 2009) (same).

224. We are not counting the cost savings twice. One may dismiss them as beneficial to the sellers, but they should be considered for their benefits to consumers.

225. We are not referring to the resources not being used because output has been reduced from Q_1 to Q_3. We are instead referring to the resources now needed to produce Q_3.

226. Paul A. Pautler, The Effects of Mergers and Post-merger Integration: A Review of Business Consulting Literature (Jan. 21, 2003) (unpublished manuscript), *available at* www.ftc.gov/be/rt/businesreviewpaper.pdf (surveying the literature on efficiencies).

and globally, it could still be blocked in Europe but not in the United States, given existing case law. Thus, a merger that enhances total welfare globally may not go through (even if it is total welfare enhancing in each jurisdiction) because the welfare standards of the two antitrust powers differ with regard to merger efficiencies.

CONCLUSION

Divergence across goals of antitrust impact both antitrust law and policy. In the United States, goals of antitrust are exclusively economic ones. In Europe, there are some political noneconomic goals in addition to economic goals. Over time, E.U. case law and policy will recognize that the only goals that will impact antitrust are economic ones. This seems to be the trend within DG Competition, although the courts and legal academics have not yet followed this trend as strongly. However, the transition to exclusively economic goals across jurisdictions is not without peril. Welfare standards as between total welfare and consumer welfare are not always clear. Moreover, the choice of welfare standards might lead to divergent outcomes both within a single antitrust system and across antitrust systems. We demonstrate how such divergence plays out in the examples of RPM and merger efficiencies.

In a best-case worldwide scenario, we believe that total welfare should guide antitrust. However, when given the choice between political factors playing a role in antitrust analysis versus a standard of consumer welfare, we choose consumer welfare as a second best standard to bring economic clarity to the law and policy of antitrust globally.