NEW CHALLENGES FOR 21ST CENTURY COMPETITION AUTHORITIES

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Introduction

This paper discusses challenges for competition authorities in the 21st century. Those challenges were identified on the basis of a statistical review of the articles published since January 2011 in five major antitrust law journals.[1] The assumption underlying this literature review is that the topics that statistically attract the most the attention from contemporary antitrust scholars are those that will likely constitute the main challenges for 21st century competition authorities. A full account of this literature review can be found in Annex 1.

There is an embarrassment of riches amongst the issues likely to constitute challenges for agencies in the next decades. And all cannot be discussed at length in this paper. If most of the "*usual suspects*" are covered here, we have nonetheless left aside several conventional topics routinely debated in competition journals (such as international antitrust and emerging competition jurisdictions), in order to focus on less-well known issues (such as antitrust enforcement in high tech markets or the intricacies of providing antitrust guidance). For the sake of clarity, this paper draws a distinction between on the one hand, enforcement challenges (I) and, on the other, substantive challenges (II). It relies on European Union ("EU") competition law as a proxy, but most of the points made in this paper apply *ceteris paribus* to other legal systems.

I. <u>New Enforcement Challenges</u>

1. Providing Guidance

Antitrust watchdogs like to look tough. Accordingly, agencies across the globe predominantly apply "*negative enforcement*" techniques, through prohibition decisions, penalties and/or

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[1] We have reviewed the table of contents of the following law journals *World Competition, Competition Law Review, Antitrust Law Journal, Concurrences* and *European Competition Journal* over the period ranging from January 2011 to 10 October 2012. Those papers whose title was too abstract or general were not integrated in our dataset. Similarly, those papers providing periodical overviews of antitrust enforcement, or country specific papers were not included in the dataset.

remedies. In contrast, agencies reluctantly rely on "*positive enforcement*", which consists in issuing clearance decisions.[2] Rather, competition authorities discretely close meritless cases, dismiss unfounded complaints, or refuse to address questions from businesses. In other words, agencies refuse to tell firms when their business conduct is lawful.

In the EU, for instance, the Commission has not once used its powers to issue "*inapplicability decisions*" or "*guidance letters*".[3] And while, in the US, "*business review letters*" are issued with less parsimony, they remain rare.[4] The most glaring – and possibly grotesque – illustration of this is perhaps the *Microsoft* compliance case. For months, the Commission kept rejecting Microsoft's proposed licensing prices as too high, yet refused to tell Microsoft what price level would receive a green light. It took Microsoft several years to grope for the lawful price level.[5]

The prevalence of "*negative* over "*positive"* enforcement is, in our view, apposite. After all, the first mission of agencies is to enforce competition statutes, which enshrine prohibition rules. Moreover, prohibition decisions enable victims of infringements to claim damages in follow-on litigation.

But this is no reason to never issue reasoned, positive, decisions. Such decisions exhibit some merits, which are currently understated, and poorly understood. They may for instance have

[2] On enforcement strategies *See* P. LOWE, "Current Issues of E.U. Competition Law: The New Competition Enforcement Regime", Northwestern Journal of International Law & Business, Vol. 24, 2003-2004, p. 567; B. DEPOORTER and F. PARISI, Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition, *George Mason University School of Law, Working Paper Series*, Paper 24, 2005; N. PETIT and M. RATO, "From Hard to Soft Enforcement of EC Competition Law – A Bestiary of 'Sunshine' Enforcement Instruments," in C. GHEUR and N. PETIT (Eds.): *Alternative Enforcement Techniques in EC Competition Law: Settlements, commitments and other novel instruments*, Brussels, Bruylant, 2009 ; M. MEROLA and D. WAELBROECK, *Towards an optimal enforcement of competition rules in Europe. Time for a Review of Regulation 1/2003 ?*, Brussels, Bruylant, 2010, 502 p.; W. WILS, "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement", *World Competition: Law and Economics Review*, Vol. 34, No. 3, September 2011.

[3] *See* Recital 38 and Article 10 of Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, 4 January 2003, L1/1.

[4] 191 business review letters have been issued from 1992 to 2011. However, the rate of issuance of business review letters is declining. Only 33 business review letters have been issued during the 2002-2011 decade. For raw data on this, *see* the website of US Department of Justice at: http://www.justice.gov/atr/public/busreview/letters.html#page=page-1).

[5] Between March 2004 and October 2007, 44 months were necessary to Microsoft to reach a royalty level deemed acceptable by the Commission. *See* EU Commission, "Antitrust: Commission imposes € 899 million penalty on Microsoft for non-compliance with March 2004 Decision", Press release, 27 February 2008, IP/08/318. On this, *see* S. BARAZZA, « *Commission v Microsoft*: How to Set Reasonable Rates for Access to Interoperability Information and Evaluate their Innovative Character?", *Journal of European Competition Law & Practice*, October 2012.

the "*snowball*" effect of fueling the replication of pro-competitive business practices across the industry.[6]

In addition, once the sunk costs of investigating a – groundless – case have been incurred, the incremental cost (for the agency) of adopting a reasoned positive decision is likely to be low.[7] Pushing this further, in the mid to long term, the decision will likely assist firms' *ex ante* compliance efforts, which, in turn, will limit the need, and costs, of *ex post* enforcement by agencies. Interestingly, this is all the more useful for newly established authorities, which need to build case law rapidly, and should not waste any of their investigative work, even if this does not lead to a prohibition decision.

The concerns arising from the underuse of positive decisions should not, in our view, be taken lightly. There are, indeed, several reasons to be wary of a risk of "*guidance desert*" in 21st century competition law. If they like to look tough, agencies also like to look cool. This explains the mushrooming of advocacy "*gadgets*", such as compliance movies, brochures, video games, comic strips, etc.[8] Often, antitrust agencies present them as a source of guidance. Those instruments are, however, no surrogate for "*positive enforcement*". They do not seek to clarify the substance of antitrust law. They simply try to raise awareness to the existence of competition rules. And when they do touch upon substantive issues, they stay at helicopter level. Finally, they do not originate from real life cases, they are very abstract. So whilst certainly useful, especially for new antitrust jurisdictions where market participants must be educated, advocacy instruments do not replace positive enforcement.

And this problem is further compounded by a recent decisional evolution. Whilst reasoned prohibition decisions do exhibit a certain degree of guidance, those decisions are, as will be discussed below, growingly replaced by settlements decisions, which come in summary form. As a result of this, even negative enforcement is less and less a source of guidance. At both

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[6] In contrast, bodies of "*negative*" case-law send erroneous signals. Firms may exhibit a disproportionate degree of risk aversion and, in turn, abstain from welfare-enhancing conduct (type I errors).

[7] To be a little more accurate, it consists essentially in the hours spent putting pen to paper, drafting a decision concealing the findings of this investigation.

[8] For illustrations of this trend, *see* for instance: Swedish Competition Authority, *Be the first to tell - a film about leniency*, 3 March 2010 (available at: http://www.youtube.com/watch?v=_r99qzC8aHA&feature=related); Dutch Competition Authority, *Leniency in cartel cases*, 9 June 2008 (available at: http://www.youtube.com/watch?v=5diFAaJdweI); Federal Trade Commission, *The Mall*, (available at: http://www.ftc.gov/bcp/edu/microsites/youarehere/site.html#/first-time-here); Italian Competition Authority, *La Breve Storia di Borgo Allegro* (available at: http://www.agcm.it/trasp-statistiche/doc_download/2453-progscuolaborgoallegro2.html); Italian Competition Authority, *Una Brutta Sorpresa* (available at: http://www.agcm.it/trasp-statistiche/doc_download/2454-progscuolabruttasorpresa2.html).

levels, *i.e.* negative and positive enforcement, instruments that offered guidance are replaced by instruments with limited guiding value.

In sum, our opinion is that optimal competition compliance necessarily requires an enforcement mix that combines deterrence and guidance activities, in the following spirit : Optimal Compliance (OC) = deterrence through negative enforcement (D) + guidance through positive enforcement (G), with D > G; and D < 1 and G > 0. The exact calibration of D and G remains, however, a complex issue, which has been under-researched in modern competition scholarship and which arguably would warrant more attention from competition authorities.

2. Avoiding the "*Settle 'Em All*" Approach

Competition agencies exhibit a growing appetite for "*settlement*" decisions (labeled "*commitments*" in the EU and "*consent decrees*" in the US). Under a settlement, the authority closes proceedings in exchange of binding commitments from the parties to end the suspected infringement. Both behavioral and structural commitments can be given.

Settlements are win-win instruments. The parties avoid the stain of sin. There's no decision finding an infringement. The agency obtains a remedy. Yet it does not have to prove the infringement. And both can turn to other business quickly.

Numbed by the attractiveness of settlements, authorities increasingly abandon traditional enforcement. This is particularly true in abuse of dominance cases. In the EU, since 19 October 2008 – 5 years ago – there has been 13 commitments decisions in abuse cases, and only 2 infringement decisions.[9] But settlements are also pervasive in horizontal and vertical coordination cases.[10]

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[9] Infringement decisions: *see* Commission decision of 13 May 2009, *PO/Clearstream (Clearing and settlement)*, *OJ*, 17 July 2009, C 165/7; Commission decision of 13 May 2009, *Intel*, *OJ*, 22 September 2009, C 227/13; Commission decision of 4 July 2007, Telefonica, *OJ*, 2 April 2008, C 83/6; Commission decision of 22 June 2011, *Telekomunikacja Polska*, *OJ*, 9 November 2011, C 324/7. Commitment decisions: *see* Commission decision of 30 January 2009, *German electricity wholesale market*, *OJ*, 13 February 2009, C 36/8; Commission decision of 30 January 2009, *German electricity balancing market*, *OJ*, 13 February 2009, C 36/8; Commission decision of 12 June 2009, *RWE gas foreclosure*, *OJ*, 12 June 2009, C 133/10; Commission decision of 14 October 2009, *Ship Classification*, *OJ*, 6 January 2010, C 2,/5; Commission decision of 23 February 2010, *OJ*, 9 March 2010, C 57/13; Commission decision of 9 December 2009, *Rambus*, *OJ*, 6 February 2010, C 30/17; Commission decision of 16 December 2009, *Microsoft (Tying)*, *OJ*, 13 February 2010, C 36,/7; Commission decision of 17 March 2010, *Long term electricity contracts in France*, *OJ*, 22 May 2010, C 133/5; Commission decision of 14 April 2010, *Swedish Interconnectors*, *OJ*, 1 June 2010, C 142/28; Commission decision of 14 July 2010, *BA/AA/IB*, *OJ*, 15 October 2010, C 278/14; Commission decision of 23 December 2010, *ENI*, *OJ*, 23 December 2010, C 352/8; Commission decision of 15 November 2011, *Standard and Poor's*, *OJ*, 4 February

This "*Settle 'Em All*" approach is, in our view,[11] (and in that of many scholars),[12] problematic. First because an agency's ability to obtain a settlement hinges on the credible alternative threat of infringement proceedings. If the agency no longer has a track record of infringement cases, then firms will unlikely settle.[13] This will create an "*under enforcement*" problem. And, interestingly, this problem is more acute for newborn agencies, whose case-law is *ex hypothesi* underdeveloped. Those agencies thus cannot rely on decades of stable precedents to prompt companies to settle.[14]

Moreover, summary settlement decisions exacerbate the "*guidance desert*" problem mentioned earlier.[15]

Restraining principles thus seem necessary, to maintain a track record of prohibition decisions. A first best practice would be to exclude from settlements cases where anticompetitive conduct has lasted over time.[16] Currently, agencies do settle those cases. But settlements only change the future. They do not correct the harm done in the past (like decisions with remedies). They also fail entirely to punish (through a fine, for instance) past

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2012, C 31/8; Commission decision of 13 December 2011, *IBM - Maintenance services*, *OJ*, 21 January 2012, C 18/6.

[10] Perhaps, the only area where they are less pervasive are cartel cases. Yet, when such cases stem from leniency applications and guilty pleas, they are conceptually close from settlements. After all, like in a settlement, the authority rewards firm's cooperation with indulgence.

[11] *See* C. GHEUR AND N. PETIT (Dir.), *Alternative Enforcement Techniques in EC Competition Law: Settlements, commitments and other novel instruments*, Brussels, Bruylant, L.G.D.J., Fédération des entreprises de Belgique (FEB), 2009, 264 p.

[12] *See* F. WAGNER-VON PAPP, "Best and Even Better Practices in the European Commitment Procedure after Alrosa: The Dangers of Abandoning the 'Struggle for Competition Law'", (2012) 49 *Common Market Law Review* 929-970; W. WILS, "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003", *World Competition: Law and Economics Review*, Vol. 29, No. 3, September 2006 ; W. WILS, The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, *World Competition: Law and Economics Review*, Vol. 31, No. 3, 2008; H. SCHWEITZER, "Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law", *EUI Working Papers LAW No. 2008/22* (available at: www.ssrn.com).

[13] *See* L. DEMUYTER and N. NEYRINCK, "Une transaction en droit belge de la concurrence ?", *Revue de la Concurrence Belge*, 2012, n°2-3.

[14] A best practice for a new competition authority would be to establish a solid record of infringement cases, prior to envisioning settlements.

[15] *See* D. WAELBROECK, "Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?", *The Global Competition Law Centre Working Papers Series GCLC Working Paper 01/08* (available at: http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2001-08.pdf); I. FORRESTER, "A European Paradox : Imposing Market Reform 'voluntarily'", *Concurrences*, 2 - 2010, p. 37; I. FORRESTER, "Creating new rules or closing easy cases? Policy consequences for public enforcement of settlements under Article 9 of Regulation 1/2003", *European Competition Law Annual 2008: Antitrust Settlements Under EC Competition Law*, Oxford and Portland Oregon, Hart Publishing, 2010 (available at: http://www.eui.eu/Documents/RSCAS/Research/Competition/Forrester-2008.pdf).

[16] An Italian court has actually endorsed this approach. *See* Tribunale Amministrativo Regionale per il Lazio, Conto Tv S.r.l. contro Autorità Garante della Concorrenza e del Mercato, N. 09640/2010 REG.RIC.

anticompetitive conduct. Finally, because they do not establish an infringement, they are of no help to victims seeking redress before courts (through actions for damages, for instance).

A second restraining principle is to exclude cases raising novel legal and economic issues from settlements. Again, such cases should simply not be settled, because the agency cannot reasonably suspect an infringement short of any precedent. Moreover, agencies should give guidance to the market when new legal and economic problems arise. And settlement decisions, often in summary form, offer little of this.

3. Enforcing Competition Law on Fast Moving, Technology-Enabled Markets

High Tech markets are "*fast-moving*" markets. This is a challenge for agencies,[17] whose standard procedures are generally like a steam-powered train: slow and heavy. In the EU *Intel* case, 9 years elapsed between AMD's complaint and the prohibition decision.[18]

This explains that recently, EU Commissioner Almunia suggested to bypass the long and winding standard procedural route of standard antitrust proceedings.[19] In brief, he offered to resolve "*high tech*" cases anticipatively, before harm can be verified (put differently, as "*ex ante*" as possible); and under faster mechanisms, pushing for interim measures and/or

[17] On this issue *see* R. POSNER, "Antitrust in the New Economy", *Antitrust Law Journal*, Vol. 68 2000-2001, p. 925; D. EVANS, "Antitrust and the New Economy", *Microsoft, Antitrust and the New Economy: Selected Essays,* The Milken Institute Series on Financial Innovation and Economic Growth, Vol. 2, 2002, p. 253; D. EVANS and R. SCHMALENSEE, "Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries", in A. JAE, J. LERNER and S. STERN (Eds.), *Innovation Policy and the Economy*, Vol. II, Cambridge, MA, NBER and MIT Press, 2002. More recently *see* also J. SIDAK and D. TEECE, "Dynamic Competition in Antitrust Law", *Journal of Competition Law & Economics*, 2009, 5 (4), pp. 581-631; A. DEVLIN, "Analyzing Monopoly Power Ex Ante", *New York University Journal of Law & Business*, 2009, p. 153; G. MANNE and J. WRIGHT, "Innovation and the Limits of Antitrust", *Journal of Competition Law & Economics*, 6 (1), 2010, p. 153; D. GIFFORD* and R. KUDRLE, "Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union", *Journal of Competition Law & Economics*, 7 (3), 2011, p. 695; T. LENARD, "Introduction: Antitrust and the Dynamics of Competition in High-Tech Industries, *Review of Industrial Organization*, June 2011, Volume 38, Issue 4, pp. 311-317; R. TENNIS and A. SCHWAB, "Business Model Innovation and Antitrust Law, *Yale Journal on Regulation*, *Yale Journal on Regulation*, Summer 2012, p. 307; G. BAUER, "eMonopoly - Why Internet-Based Monopolies Have an Inherent Get-out-of-Jail-Free Card", *Brookline Law Review*, 76, 2010-2011, p .731.

[18] Advanced Micro Device ("AMD") filed a complaint on 18 October 2000. The Commission's prohibition decision was released on 13 May 2009. *See* Commission Decision of 13 May 2009, *Intel*, *OJ*, 22 September 2009, C 227/13.

[19] *See* for instance Competition Commissioner ALMUNIA, "Statement of Vice-President Almunia on the Google antitrust investigation", SPEECH/12/372, Brussels, 21 May 2012 (available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/372): "*If Google comes up with an outline of remedies which are capable of addressing our concerns, I will instruct my staff to initiate the discussions in order to finalise a remedies package. This would allow to solve our concerns by means of a commitment decision – pursuant to Article 9 of the EU Antitrust Regulation - instead of having to pursue formal proceedings with a Statement of objections and to adopt a decision imposing fines and remedies*."

settlements. This method is advantageous because there is no need to prove an infringement. But the agency can nonetheless secure remedies as extensive as in standard enforcement.

The Commissioner's proposed new approach bears resemblance to utility regulation: intervention takes place *ex ante*, (ideally) before the occurrence of actual anticompetitive effects; due process safeguards are kept to a minimum; intrusive remedies are imposed; there are no fines; etc. In other words, the Commission seems willing to take the clothes of a quasi-regulator on those markets.[20]

On cursory analysis, one could see some good sense to the Commissioner's proposed approach. After all, fast markets seem to require fast antitrust agencies. But two key features of utility regulation are missing on high-tech markets, thereby casting doubt on the adequacy of the Commissioner's proposal.

First, unlike mature utility industries, high-tech markets, and conduct on such markets, are difficult to read prospectively.[21] In such markets, firms often display the apparent traits of the bad monopolist: very high market shares, aggressive market behaviour, comfortable profit margins. Now, these elements should not be mistaken for proof of significant market power or of abuse. Large markets shares are often ephemeral; high profit margins may reward substantial risk-taking, and be due to the specificities of the cost structures in high tech markets. And what appears to be aggressive conduct may just be a wholly novel commercial strategy which does not fall neatly within existing standards of *per se* legality.[22]

All this exacerbates the vexing "*identification problem*" that exists in abuse of dominance cases. It is indeed harder in high tech markets to separate the wheat of competition on the merits from the chaff of anticompetitive behavior. In other words, technology markets may be more prone to decisional errors in the anticipative, *ex ante*, approach of the Commissioner.

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[20] *See* K. COATES, "Competition Law and Regulation of Technology Markets, Oxford University Press, Inc. New York, NY, USA, 2011; A. DEVLIN, Antitrust as Regulation, *San Diego Law Review, Forthcoming*, 17 September 2011 (available at: www.ssrn.com).

[21] And the inability to perceive the future evolution of high-tech markets also makes it difficult for government to design remedies that would accelerate competition. *See* R. CRANDALL and C. JACKSON, "Antitrust in High-Tech Industries", *Review of Industrial Organization*, Vol. 38, Iss. 4, June 2011, p. 358.

[22] On penetration pricing, *see* for instance T. SAATY and L. VARGAS, "New Product Pricing Strategy", *Models, Methods, Concepts & Applications of the Analytic Hierarchy Process. International Series in Operations Research & Management Science*, Vol. 175, 2012, pp. 159-169; R. VENKATESH, "Pricing Strategy", *Wiley International Encyclopedia of Marketing*, Wiley-Blackwell, 2010; S. WINTER and S. SUNDQVIST, "New product pricing strategies for network effects products: free products?", *International Journal of Technology Marketing*, Vol. 5, N° 3/2010, pp. 250-271.

Where things get tricky is that the consequences of getting it wrong may be far more severe than in other industries. This is so for at least two reasons. *First*, Professor Varian[23] has shown that these markets are often "*combinatorial*".[24] Hence, wrong antitrust intervention in one component – digital cameras – may have unintended consequences in one or more interdependent components - smartphones.

Second, errors in high technology markets harm the incentives to innovate of the alleged infringer but also of all innovators more generally.[25] This is because these markets by their nature usually lack legal precedents. Any decision against innovative types of conduct will become the yardstick against which other innovators will assess their strategies.

The second feature of utilities that is absent in high tech markets is entrenched barriers to entry. In those markets, barriers to entry are short-lived. Unlike in utilities, where incumbents' dominance translates into permanence, incumbents' in high tech markets are giants with feet of clay. Examples of defeated monopolists abound. Think of the demise of famous web portals such as AOL, Yahoo and MySpace,[26] or of the current predicaments of mobile handsets makers such as Nokia and RIM.[27]

All this casts doubt on the transposition of the Commissioner's quasi regulatory approach in fast moving markets. Undeniably, in the years ahead, dealing with those markets will be a grain of sand in the shoes of agencies.

4. Ensuring Optimal Detection *and* Compensation in Cartel Cases

The rise of actions for damages by victims of cartels has unintended consequences on competition agencies. In jurisdictions without discovery rules, courts turn to competition

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[23] *See* H. VARIAN, J. FARRELL and C. SHAPIRO, *The Economics of Information Technology*, Cambridge University Press, 2004, p. 5.

[24] *See* M. RATO and N. PETIT, *Abuse in Technology-enabled Markets: Established Standards Reconsidered*, *mimeo*, p. 6.

[25] *Ibid*., p. 7.

[26] An interesting infographic published by *CenturyLinkQuote* highlights that past internet giants such as AOL, Yahoo!, AltaVista, MySpace, Digg, all crashed down after meteoric growth. On average, the life cycle of a major internet firm would be 11 years before hitting bottom. *See CenturyLinkQuote*, "The Rise and Fall of Online Empires: Will Facebook survive?" (available at: http://www.centurylinkquote.com/rise-and-fall).

[27] *See* J. SCHOFIELD, "The rise and fall of an internet giant", *The Guardian*, 12 February 2008 (http://www.guardian.co.uk/technology/2008/feb/12/yahoo.genesis) ; A. TROIANOVSKI and S. GRINDBERG, "Nokia's Bad on Smartphones", *The Wall Street Journal*, 18 July 2012 (available at: http://online.wsj.com/article/SB10001424052702304388004577531002591315494.html); W. CONNORS, "Multiple Missteps Led to RIM's Fall", *The Wall Street Journal*, 28 June 2012 (available at: http://online.wsj.com/article/SB10001424052702304458604577488610583090408.html); F. GILLETTE, "The Rise and Inglorious Fall of MySpace", *BusinessWeek*, 22 June 2011 (available at: http://www.businessweek.com/magazine/content/11_27/b4235053917570.htm).

authorities, and request from them all sorts of data, including leniency-related data, such as oral statements, business secrets, etc.

Those requests place agencies in front of a dilemma.[28] Economists talk of a trade-off. On the one hand, a generous disclosure policy is likely to deter leniency applications, hence jeopardizing detection.[29] On the other hand, it helps victims in their quest for compensation, which likely encourages further actions for damages.

So where to strike the balance? In the EU, national authorities and the Commission have taken a somewhat extreme position. In a blunt joint statement, they affirmed that " *leniency materials should be protected against disclosure*".[30] And the Commission has tabled a legislative initiative on this issue, arguably seeking to dry out judicial disclosure orders through regulation.

But, there are many other ways to handle this issue. Judges, for instance, may review on a case by case basis whether the requested data is "*relevant*" to the claim;[31] agencies may allow the disclosure of certain type of information, but not of others;[32] disclosure can be limited if the leniency applicant is placed in a worse situation than the other conspirators;[33] the damages borne by the leniency applicant may be transferred to its conspirators.[34]

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[28] *See* A. MACCULLOCH and B. WARDHAUGH, *The Baby and the Bathwater. The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy*, CCP Conference, 14 June 2012 (available at: http://papers.ssrn.com/); M. FRESE, "Fines and Damages Under EU Competition Law – Implications of the Accumulation of Liability", *World Competition Law and Economics Review*, September 2011 (available at: www.ssrn.com); A. BEUMER AND A. KARPETAS, "The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality?", *European Competition Journal*, Vol. 8, N°1, April 2012, p. 123; G. GODDIN, "The Pfleiderer Judgment on Transparency: The National Sequel of the Access to Document Saga", *Journal of European Competition Law & Practice*, 3 (1), (2012), p. 40; A. KOMNINOS, *Relationship between Public and Private Enforcement: Quod Dei Deo, Quod Caesaris Caesari*, *mimeo*, June 2011 (available at: www.ssr.com); C. CAUFFMAN, "Access to Leniency Related Documents after Pfleiderer", *Maastricht Faculty of Law Working Paper No. 2012/3*, February 2012 (available at: www.ssrn.com).

[29] *See* Opinion of Mr. Advocate General MAZÁK, 16 December 2010, *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, *ECR*, 2011, para. 38 and ff.

[30] *See* Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, *Protection of leniency material in the context of civil damages actions*, p. 3 (available at: http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf).

[31] *See* English High Court, 4 April 2012, *National Grid v ABB & Others* [2012] where the High Court considered each document on a paragraph-by-paragraph basis and held that a number, but not all (32 paragraphs in total), of the redacted passages of the Commission's decision should be disclosed as well as several leniency documents.

[32] *See* G. OLIVIERA intervention, US Departement of Justice, *International Competition Policy Advisory Committee. Hearings*, Washington DC, 2 November 1998 (available at : http://www.library.unt.edu/gpo/ICPAC/2232.htm).

[33] *See* EU Commission, 2 April 2008, White paper on damages actions for breach of the EC antitrust rules, COM/2008/0165 final.

[34] Interestingly, in Hungarian competition law, the successful leniency applicant, although jointly liable, is the in principle the last target for the recovery of the damages. *See* Article 88/D of the Hungarian Competition Act.

The debate on this is thriving. And rather than adding another brick in the wall, it is submitted here that in addition to the threat of extinguishing leniency applications, the choice of a generous disclosure policy may also undermine international cooperation between agencies. It is well known that agencies across the globe exchange a lot of information, and that this is crucial to a fruitful resolution of many cases. In this context, some agencies may, in the future, refuse to transfer leniency-related documents to others, when the requesting agency has a disclosure-friendly policy or if the national law makes disclosure mandatory.

5. Finding the right Stance on Compliance Programmes

This last enforcement challenge is controversial. Firms, including a good deal of former infringers, are on the campaign trail. In essence, they advocate that agencies should reduce fines imposed on companies who have adopted a so-called "*compliance programme*"[35]. A compliance programme can be defined as "*a company's internal policy, established to ensure its complete compliance with competition rules in all its business actions*"[36].So far, antitrust lobbyists have had mixed success. In a recent document, the OFT announced that firms with a compliance programme could benefit from a 10% haircut on the fine.[37] Other agencies, like the French competition authority, only reward compliance programmes in certain types of cases, *i.e.* vertical agreements and abuse.[38] Finally, others authorities are agnostic or are yet to take a stance. The European Commission, for instance, is agnostic.[39]

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[35] *See* ABA Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors'*, ABA Publishing, Chicago, 2005, pp.25-27.

[36] *See* European Commission, *Glossary of terms used in EU competition policy Antitrust and control of concentrations*, July 2002, p. 11 (available at: http://ec.europa.eu/competition/publications/glossary_en.pdf). "*In a compliance programme the company trains its personnel on competition rules and provides them with guidance on how to avoid agreements or practices that restrict competition when they engage in commercial actions and contacts with competitors.*"

[37] *See* OFT, *OFT's guidance as to the appropriate amount of a penalty*, September 2012, OFT423 (available at: http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf), at para. 2.15: "*Mitigating factors include: [...] adequate steps having been taken with a view to ensuring compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions*", and at footnote 26: "*The starting position with regard to competition law compliance activities will be neutral but the OFT will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10 per cent*"

[38] *See* Autorité de la concurrence, *Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence*, para. 23 and ff. (available at: http://www.autoritedelaconcurrence.fr/doc/document_cadre_conformite_10_fevrier_2012.pdf).

[39] *See* Competition Commissioner ALMUNIA, *Compliance and Competition policy*, 25 October 2010, SPEECH/10/586: "*I am often asked whether companies should be rewarded for operating compliance programmes when they are found to be involved in illegal commercial practices.* ***The answer is no.*** *There should be no reduction of fines or other preferential treatment for these companies.*"

In our opinion, the case for rewarding compliance programmes with fines reduction is weak.[40] First, because it is odd to provide financial incentives to promote compliance with the law. Or to be more accurate, it would be weird to reward the initiative of trying to comply with the law (in reality, the caught firm did not comply). As soon as a legal statute is in force, which lays down obligations on private and natural persons, compliance is the rule. And firms should not complain that enforcement is too harsh. As the old saying goes, "*dura lex, sed lex*". If we push this logic further, agencies should indeed reward infringing companies if they can prove that they have hired lawyers to obtain regular competition advice. The Bar would certainly like that…

Second, compliance programmes are useful for companies at any rate, and there's no need for an additional fining stimulus to encourage them. Compliance programmes promote awareness to what constitutes an infringement within firms, and to how much it costs to commit one. Therefore, they decrease the probability of infringement in the first place. Moreover, with better trained in-house lawyers and executives, the costs of legal services outsourced to external lawyers may decrease.

Third, rewards on compliance programmes could have perverse effects. Combined with other mitigating factors, rewards for compliance programmes limit the cost of punishment. In other words, such rewards may reduce firms' risk aversion to antitrust infringements. Firms may thus adopt compliance programmes as a damage limitation mechanism, which limits the cost of punishment if they ever get caught. In other words, the reward on the existence of a compliance programme acts like an insurance policy, which in turns reduces firms risk aversion to antitrust infringements

Fourth, a well-designed compliance programme can adversely promote the risk of antitrust infringement, if clever managers understand better how to exploit the loopholes and deficiencies of the antitrust enforcement system.

[40] *See*, in the same sense, W. WILS, "Antitrust Compliance Programmes & Optimal Antitrust Enforcement", forthcoming in *Journal of Antitrust Enforcement*, Vol. 1, No. 1, April 2013, p. 23 (available at: http://ssrn.com); *See* also A. STEPHAN who pleads for empirical investigations to quantify the costs of compliance programmes: A. STEPHAN, "Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels", *CCP Working Paper 09-09*, July 2009, p. 19 (available at: www.ssrn.com).

Fifth, whilst there may be some sense to the argument that compliance programmes should attract discounts in areas where the law is murky, this argument has much less traction in areas where the law is crystal clear, such as in cartel cases.

In view of all this, why reward compliance programmes?

II. New Substantive Challenges

1. Uncovering the True Goal(S) of Competition Statutes

In general, competition rules do not expressly state their underlying purpose, or purposes. With an enduring economic crisis at the kitchen table, and pronouncements in all directions from judicial organs, studies over the goals competition law have sprouted.[41] Scholars have invested countless efforts playing mentalist, pondering over the mindset of the antitrust lawmakers, the historical context surrounding the adoption of competition rules, etc.

The divide between antitrust scholars is great. Some, in the US tradition, believe that competition law seeks to achieve welfare-enhancing outcomes, yet they disagree on their exact content (consumer welfare, total welfare, efficiency, etc.).[42] Other, influenced by German ordo-liberal theory, consider that competition protects the process of rivalry, understood as market structures with plenty of firms, even if this comes at the expense of efficiency.[43] Another group of scholars argues that "*consumer choice*" is the DNA of competition law. [44] And finally, others ascribe additional public policy goals to competition

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[41] *See* for instance B. ORBACH, "The Antitrust Consumer Welfare Paradox", *Journal of Competition Law & Economics*, 7(1), pp. 133–164 (available at: www.ssrn.com); L. GORMSEN, "The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC", *European Competition Journal, Vol. 3, N° 2,* 2007, pp. 329-344.; S. MARTIN, *The Goals of Antitrust and Competition Policy*, *Purdue CIBER Working Papers Report Number 2007-003*, July 2007, 72 p. (available at: http://docs.lib.purdue.edu/ciberwp/48/).

[42] *See* R. BORK, "The Goals of Antitrust Policy", *AM. ECON. REV.*, 57, 1967, p. 244, who stresses that "*[c]onsumer welfare is the only legitimate goal of antitrust*"; *see* also R.. POSNER, *Antitrust Law*, University Of Chicago Press, 2d ed., 2001, pp. 9–32. K. HEYER, *Welfare Standards and Merger Analysis:Why not the Best?*, March 2006 (available at: http://www.justice.gov/atr/public/eag/221880.htm).

[43] *See* D. GERBER, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, Clarendon. Press, 1998, pp. 232 and 251.

[44] *See* R. LANDE and N. AVERITT, "Consumer Choice: The Practical Reason for Both Antitrust and Conseumer Protection Law", *Loyola Consumer Law Review*, Vol. 10, No. 1, 1998; J. KIRKWOOD & R. LANDE, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency", *Notre Dame Law Review*, Vol. 84:1, 2008, pp. 191-244; S. WALLER, "Antitrust as Consumer Choice: Comments on the New Paradigm", *University of Pittsburgh Law Review*, Vol. 62, No. 535, 2001; A. SKOURTIS, *Is consumer welfare the (only) way forward? A re-appreciation of competition law objectives ante portas in both US and EU*, 10 August 2012 (available at: http://kluwercompetitionlawblog.com/); P. NIHOUL, *Freedom of choice': The*

law. In their view, competition law can and should be used as a "*swiss knife*", to pursue public policy objectives of all sorts, such as industrial policy, trade policy, employment policy, environmental policy, cultural policy, etc.[45]

Within this jungle of opinions, the International Competition Network (ICN) has initiated consultations on whether "*consumer welfare*" can be an acceptable common denominator for agencies across the world.[46]

Whilst agencies mull their options, it is submitted here that three key principles should be kept in mind. First, both the US Sherman act and the EU Treaty rules on competition, which constitute the templates for many competition regimes across the globe, were adopted to ensure low prices or, in the word of economists, allocative efficiency.[47] Other considerations, such as the protection of democracy in the US or market integration in the EU, come only as second order priorities. Moreover, one may observe that it makes no sense to distinguish market integration from allocative and productive efficiency since market integration aims at allowing buyers to benefit from the most competitive opportunities on the internal market, or put differently, to provide them with an efficient allocation of resources.

Second, leaving this issue unanswered should be no option. Agencies and/or courts, should urgently seek to assign a single explicit purpose to competition law. Like tax or criminal law, competition enforcement leads to drastic limitations on fundamental freedoms: investigations, fines, behavioural and structural remedies. This, in and of itself, pleads for delineating accurate and narrow grounds for public intervention on the basis of the competition rules.

Finally, agencies and/or courts should refrain from endorsing the "*swiss knife*" approach of competition enforcement. Otherwise, competition rules, and in particular remedies, may be tweaked to achieve outcomes which normally fall within the remit of majoritarian policies.

Emergence of a powerful Concept in European Competition Law, 5 June 2012 (available at: http://papers.ssrn.com/).

[45] *See* C. TOWNLEY, "Which Goals Count in Article 101 TFEU?: Public Policy and its Discontents", *European Competition Law Review*, Issue 9, 2011, pp. 441-448; C. TOWNLEY, Article 81 EC and Public Policy, Hart Publishing, 2009, 398 p. ; B. VAN ROMPUY, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU*, Wolters Kluwer, 2012, 504 p.; I. KOKKORIS and R. OLIVARES-CAMINAL, *Antitrust Law Amidst Financial Crises*, Cambridge University Press, 2010.

[46] *See* ICN Annual Conference, *Competition Enforcement and Consumer Welfare – Setting the Agenda*, The Hague, Netherlands, 17-20 May 2011.

[47] *See* EU Director General for Competition P. LOWE, "Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?", 13th International Conference on Competition and 14th European Competition Day Munich 27 March 2007, p. 6.

And this is a problem because agencies are unelected organs, subject to no democratic control, and only to marginal judicial review. Risks of abuses thus cannot be ruled out[48]. This later remark ties in actually well with the preoccupation of ordo-liberal theorists, who feared that competition policy risked being instrumentalised if it was inferior in legal status to other policies. Hence, the introduction of competition law into stable texts with constitutional status and their enforcement by unelected organs remote from political influence.[49]

2. Keeping Economics "*Alive and Kicking*" in Antitrust Enforcement

The adoption of a "*more economic*" approach is one of the most remarkable evolutions of antitrust law in the XXth century. But the XXIst century could mark the demise of this "*more economic*" approach. A few words of context are here in order.

The "*more economic*" approach conditions findings of infringements on proof of actual or likely anticompetitive effects, in other words on the "*verification of competitive harm*" in the market.[50] This means that antitrust cases are no longer ruled by "*slogan*".[51] *Per se* prohibition standards that inferred anticompetitive effects on the basis of an analysis of the formal features of a given course of conduct, for instance the duration or scope of an exclusivity clause, are no longer relevant. Rather, in each and every case, agencies focus on market facts, and conduct is judged in that light. The merit of the more economic approach is to limit "*error costs*", in particular type I errors – false convictions – and type II errors – false acquittals.

But the more economic approach comes with a steep price, in the form of inflated "*enforcement costs*".[52] Agencies must indeed ramp up expertise in industrial economics, and discharge a heightened burden of proof. Lawyers must seek advice with specialized economic

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[48] *See* D. GERADIN and I. GIRGENSON, "Industrial Policy and European Merger Control – A Reassessment", *TILEC Discussion Paper No. 2011-053*, October 2011, p. 29 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586).

[49] *See* C. JOERGES, "What is Left of the European Economic Constitution? A Melancholic Eulogy", *EUI Working Paper Law N° 2004/13*, 2004, 38 p.

[50] *See* N. PETIT, "From Formalism to Effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC, *World Competition: Law and Economics Review, Vol.* 32, Issue 4, 2009, pp. 486; Report by the EAGCP, *An Economic Approach to Article 82*, July 2005, at 13. (available at http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf).

[51] *See* J. SIMS, "Do We Need More Certainty In Section 2 Policy And Law?: Presentation Before The Federal Trade Commission/Department Of Justice Hearings On Single Firm Conduct", *Competition Policy International*, 8 March 2007.

[52] *See* K. HUESCHELRATH, "Is it Worth all the Trouble? The Costs and Benefits of Antitrust Enforcement", ZEW Discussion Papers, No. 08-107, 58 p. (available at: http://econstor.eu/bitstream/10419/27590/1/dp08107.pdf).

consultants, with whom they must not only discuss strategy, but also share fees. Firms must retrieve lots of data to feed agencies. Cases become bloated.

Unsurprisingly, the "*more economic*" approach has many detractors.[53] This explains why lots of simplistic caricatures have been drawn in relation the "*more economic approach*". In this context, the weakest assault against antitrust economics is that it reduces legal certainty. Because antitrust economics are elastic and fact specific, they carry "*uncertainty in outcomes*", and agencies may reach *ex post* findings distinct from assessments realized *ex ante* by firms and their counsels. Understandably, the latters had a more relaxing professional life with general prohibition standards.

But complexity should be no excuse for to justify resistance to improvements. Moreover, in our opinion, the more economic approach has actually increased legal certainty in competition law. Prior to the more economic approach, *ex post* antitrust proceedings were like Russian roulette, wholly unpredictable. Firms' conduct was assessed on the basis of indeterminate prohibition criterions, left possibly at the arbitrary discretion of the agency (for instance, fairness, equality, economic freedom, etc.). With the more economic approach, the range of prohibition criterions is shrunk to just one, "*anticompetitive effects*". In turn, this channels arguments, and mitigates risks of agency arbitrariness.

Moreover, the naysayers contend that predictable general prohibition standards no longer exist in the "*more economic*" approach. But again, this is utter sophistry. Many general standards exist under the more economic approach. But rather than focusing on a conduct's formal feature, they have enriched economic content, and focus on market conditions. For

[53] *See* for instance W. ADAMS and J. BROCK, "Antitrust Ideology and the Arabesques of Economic Theory", *University of Colombia Law Review*, Vol. 66, Iss. 257, 1996, p. 268, who argue that antitrust should focus on the SCP paradigm rather than focusing on firm's behaviors; L. ORTIZ BLANCO and A. LAMADRID DE PABLO, "EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity", in *International Antitrust Law & Policy: Fordham Competition Law 2011*, New York, Iuris Publishing, 2012, Chapter 4. On uncertainty *see* also H. FRIEDERISZICK, *The EU Development: From Legal Certainty to Economic Uncertainty? Economic analysis in EU competition cases*, European School of Management and Technology, 2nd Ascola Conference, Economic Theory and Competition Law, 8/9 December 2006 Paris, (https://www.esmt.org/fm/312/EU_Development_Certainty_to_Uncertainty.pdf); M. LANG, *Legal Uncertainty – an Effective Deterrent in Competition Law?*, *mimeo*, June 2012, 23 p (available at: http://www.cresse.info/uploadfiles/2012_CH2_3_PAP.pdf). On the limitations of economics *see* A. DEVLIN and M. JACOBS, "Anitrust Divergence and the Limits of Economics", *Northwestern University Law Review*, Vol. 104, p. 253, 2010.

instance, in *Airtours plc v. Commission*,[54] the General Court of the EU drew inspiration from game theory to craft a three pronged test for tacit collusion in merger cases.

In sum, rather than barking at the more economic approach, and throw the baby with the bathwater, critics should better contribute to the debate on the modernization of old fashioned legal standards.

3. Opening Competition Law to New Interdisciplinary Insights

Like competition law, antitrust economics are in constant motion, shaped by the evolutions in other areas such as sociology, psychology, neuroscience, marketing, etc. A key challenge for 21st century agencies will be to integrate those new insights in decision-making[55].

In particular, the once dominant neoclassical economic view that firms act rationally on the market has lost traction. Behavioral economics stresses that firms decisions are made by individuals. And those individuals do not always behave rationally, seeking to maximize profits, as industrial theorists believe. Individuals indeed have physiological, cognitive and psychological limitations. They cannot – and do not – collect, process and analyze all the information necessary to make cost-benefit analysis.[56] Their decisions are based on intuitions, heuristics, biases, etc.

Interestingly, this has consequences for antitrust law.[57] Two examples, taken from the law on monopolization, can be given. First, behavioral economics mitigates the relevance of the

[54] *See* GC, 6 June 2002, *Airtours plc v Commission*, T-342/99, *ECR*, 2002, p. II-2585.
[55] *See* A. REEVES and M. STUCKE, "Behavioral Antitrust", *Indiana Law Journal*, Vol. 86, 2011, p. 1532; J. ROSCH, "Behavioral Economics: Observations Regarding Issues That Lie Ahead", Vienna Competition Conference, Austria, June 9, 2010, p. 10 (available at: http://www.ftc.gov/speeches/rosch/100609viennaremarks.pdf).
[56] Individuals exhibit features such as "*bounded rationality*", "*bounded willpower*", and "*bounded self-interest*". The first of these terms refers to the fact that people have "*cognitive quirks that prevent them from processing information rationally*"; the second that they exhibit weakness of will; and the last refers to the fact that people "*sometimes act out of motives that do not seem explicable by self-interest*". *See* R. POSNER, "Rational Choice, Behavioral Economics, and the Law", *Stanford Law Review*, Vol. 50, No 5, 1998, 1551; M. STUCKE, "Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics", *Santa Clara Law Review*, 50, 2010, p. 101.
[57] For the most recent literature on this, *see* J. COOPER and W. KOVACIC, "Behavioral Economics and Its Meaning for Antitrust Agency Decision Making", *Journal of Law, Economics & Policy*, 8 2012, p. 779; O. BAR-GILL, "Competition and Consumer Protection: A Behavioral Economics Account", *Swedish Competion Authority, The Pros and Cons of Consumer Protection, Forthcoming NYU Law and Economics Research Paper No. 11-42*, 19 December 2011 (availablet at: www.ssrn.com); M. STUCKE, "Behavioral Antitrust and Monopolization, *Journal of Competition Law & Economics*, 8 (3), 2012, pp. 545-574; G. WERDEN, L. FROEB, and M. SHOR, "Behavioral Antitrust and Merger Control", *Journal of Institutional and Theoretical Economics*, Volume 167, Number 1, March 2011 , pp. 126-142.

"*recoupment*" criterion in predatory pricing cases (at least under US antitrust law).[58] Irrational managers of dominant firms may start price wars absent recoupment prospects, simply because they are overconfident, or by virtue of pride, vengeance, arrogance or hubris.[59]

Our second example concerns refusal to supply cases. Dominant firms often criticize antitrust enforcement because *ex post* duties to share property allegedly undermine *ex ante* incentives to invest. But behavioral economics shows that agents "*discard events of extremely low probability*".[60] In this light, one fails to see how antitrust orders to supply, which are very exceptional, can ever influence the incentives of investors, managers and shareholders.[61]

4. Other Substantive Challenges

4.1. Making a Choice on Market Definition

Market definition is a Pavlovian reflex for competition agencies. In all fields of antitrust law – possibly with the sole exception of cartel cases –[62] agencies go through this preliminary analytical step. As POSNER and LANDE once put it:

> "*The standard method of proving market power in antitrust cases involves first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough*"[63].

Since the revision in 2010 of the US Horizontal Merger Guidelines, however, there has been a rejuvenated debate on the utility of market definition. Those guidelines indeed say that "*Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market*

[58] *See* A. TOR, "Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing", *Antitrust*, Vol. 18, 2003, p. 52 (available at: http://univdocs.haifa.ac.il/he/Faculty/Tor/Publications/Antitrust03.pdf).
[59] *See* M. ARMSTRONG and S. HUCK, op. cit, p. 16. R. THALER, "Anomalies: The Ultimatum Game", *The Journal of Economic Perspectives*, 1988, Vol. 2, No. 4. p. 195
[60] *See* D. KAHNEMAN and A. TVERSKY, "Prospect theory: An analysis of decision under risk", *Econometrica*, 1979, N° 47, pp. 275 and 282 (available at: http://www.hss.caltech.edu/~camerer/Ec101/ProspectTheory.pdf).
[61] *See* N. PETIT and N. NEYRINCK, "Behavioral Economics and Abuse of Dominance: A Proposed Alternative Reading of the Article 102 TFEU Case-Law", *Austrian Competition Journal*, 2010/6, p. 208.
[62] *See* Commission Decision of 25 June 2008, COMP/39.180 – Aluminium fluoride, *OJ*, 9 February 2011, C 40/22 §48: "*[...] for the purpose of the establishment of an infringement, the definition of the market in a cartel case does not call for the degree of precision equal to that which is required when assessing infringements of Article 82 of the Treaty or in certain merger cases*".
[63] *See* M. LANDES & R. POSNER, "Market Power in Antitrust Cases", *Harvard Law Review*, 94, 1981, p. 937.

definition".[64] Professor KAPLOW even went as far as to suggest that "*the market definition / market share paradigm is incoherent*".[65]

New economic instruments would indeed entitle agencies to jump directly to the assessment of the firms' ability and incentives to raise prices, and leapfrog market definition. From an epistemological standpoint, those tools are the instrumental offspring of the literature on unilateral effects introduced in the late 1980s'. To name a few of them only, they include the net Upward Pricing Pressure index of Farrell and Shapiro[66] and the GUPP index of SALOP and MORESI.[67]

Those instruments have been fiercely debated on the other side of the Atlantic, and this debate has gained traction across the world. Now that the dust has settled, the consensus seems to be that market definition is not exclusive of other methods for proving market power, in particular on differentiated product markets (including UPP, GUPP and merger simulation). That said, market definition remains, by far and large, seen as a useful tool. The Guidelines actually recall that "*evaluation of competitive alternatives available to customers is always necessary at some point in the analysis*"[68]. More explicitly, CARTLON and ISRAEL have made the useful point that they are a screen for frivolous litigation when market shares reach low levels[69]. Its relevancy should be however mitigated, when concentration levels appear high.

4.2. Moving beyond Words on Efficiencies

Efficiencies in merger control are again in the line of fire. In 2004 in the EU, an explicit "*efficiency defense*" – although the label "*defense*" is inappropriate – was introduced in the

[64] *See* US DoJ, Horizontal Merger Guidelines, 19 August 2010.
[65] *See* L. KAPLOW, "Why (Ever) Define Markets?", *Harvard Law Review*, Vol. 124, Issue 437, 2010, p. 517.
[66] *See* J. FARELL and C. SHAPIRO, "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition", *The B.E. Journal of Theoretical Economics*, Vol. 10, Iss. 1, March 2010, 41 p.
[67] *See* S. SALOP and S. MORESI, Updating the Merger Guidelines: Comments, November 2009, (available at http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00032.pdf).
[68] US DoJ, Horizontal Merger Guidelines, 19 August 2010,
[69] *See* D. CARLTON and M. ISRAEL,,"Will the New Guidelines Clarify or Obscure Antitrust Policy?",,*Antitrust Source*, October 2010 (available at: http://www.abanet.org/antitrust/at-source/10/10/Oct10-Carlton10-21f.pdf); D. CARLTON and M. ISRAEL, "Response to Gopal Das Varma's *Market Definition, Upward Pricing Pressure, and the Role of Courts: A Response to Carlton and Israel", Antitrust Source*,, December 2010 (available at: http://faculty.chicagobooth.edu/dennis.carlton/research/Response%20to%20Gopal%20Das%20Varma.pdf)

merger regulatory framework.[70] This legislative reform had been prompted by the intense criticisms that had followed the *GE/Honeywell* prohibition decision.[71]

Until now, however, this defense has rarely played in practice. In only a few instances, for example in *Tom Tom/TeleAtlas*, the Commission accepted to consider efficiency arguments, and found them material.[72]

However, the controversy has resurfaced in two recent cases. In *Ryan Air/Aer Lingus*,[73] and later in *Deutsche Börse/NYSE*,[74] the Commission discarded the parties' efficiency defenses, suggesting that such justifications were unavailable in mergers to monopoly. In the Commission's view, the more concentrated a market, the less likely the efficiencies will outweigh the merger's adverse impact on prices. Similarly, in the ongoing review of the *TNT/UPS* merger,[75] efficiencies are again a bone of contention. The parties claim cost synergies in the ballpark of 400-550 million euros. Unimpressed, the Commission has nonetheless opened a Phase II investigation into the merger.

The prohibition decision in *Deutsche Börse/NYSE* is currently under appeal. Those proceedings reportedly focus on the delicate question on how to balance anticompetitive v. procompetitive effects. To find, in this case, that the alleged savings would not outweigh the negative price effect, the Commission relied on simplistic qualitative evidence, and paid only lip service to the parties more sophisticated quantitative arguments. The parties are thus attempting to challenge the Commission's methodology before the EU judicature. The Court's pronouncements on this issue will be interesting, given their potential to apply in other areas of competition law, where efficiency defenses can similarly be invoked.

But the Court's pronouncement will surely not exhaust the subject. If high tech, fast moving markets become a priority target for enforcement (as they currently seem to be), then the

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[70] *See* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *OJ*, 5 February 2004, C 31/5, para. 76 and ff..

[71]*See* Commission Decision of 3 July 2001, Case No COMP/M.2220 – General Electric/Honeywell, *OJ*, 18 February 2004, L48; D. EVANS and M. SLIGNER, "Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger", *Georges Mason Law Review*, 10, 2001-2002, p. 489; D. RIVERS, "General Electric/Honeywell Merger: European Commission Antitrust Decision Strikes a Sour Note", *ILSA Journal of International & Competition Law*, 9, 2002-2003, p. 525; F. ROMANO, "General Electric/Honeywell: Victory of the Commission or Failure?", *International Business Law Journal*, 2007 p. 368.

[72] *See* Commission Decision of 14 May 2008, Case No COMP/M.4854 – TOMTOM/ TELE ATLAS.

[73] *See* Commission Decision of 27 June 2007, Case No COMP/M.4439 – Ryanair / Aer Lingus

[74] *See* Commission Decision of 1 February 2012, Case No COMP/M.6166 - DEUTSCHE BÖRSE / NYSE EURONEXT.

[75] *See* Commission Decision of 20 July 2012, Case COMP/M.6570 — UPS/TNT Express, *OJ*, 28 July 2012, C 226/3.

debate will likely arise as to how to balance innovation-related efficiencies, *i.e.* long term incentives to place new products on markets, with short term anticompetitive price effects. On this, the law provides virtually no guidance. Rather, its insistence on verifiable efficiencies tends to favour short term incremental innovation over major, long term drastic innovation.[76] All the more so, given that companies that develop drastic innovation will surely be reluctant to disclose comprehensive information on their innovation process to antitrust agencies, for fear of leaks to competitors.

Conclusion

This short paper does not pursue grand academic ambitions, but simply intends to call for further research on a string of vexing issues of antitrust law and economics. Whilst some have recently talked of the "*simplicity of antitrust*",[77] our view is that there are still many fascinating unsettled topics which are open to discussion, with good arguments running in all directions. Key in those issues are, in particular, those related to the overuse of settlements and the symmetrical underuse of other guidance instruments.

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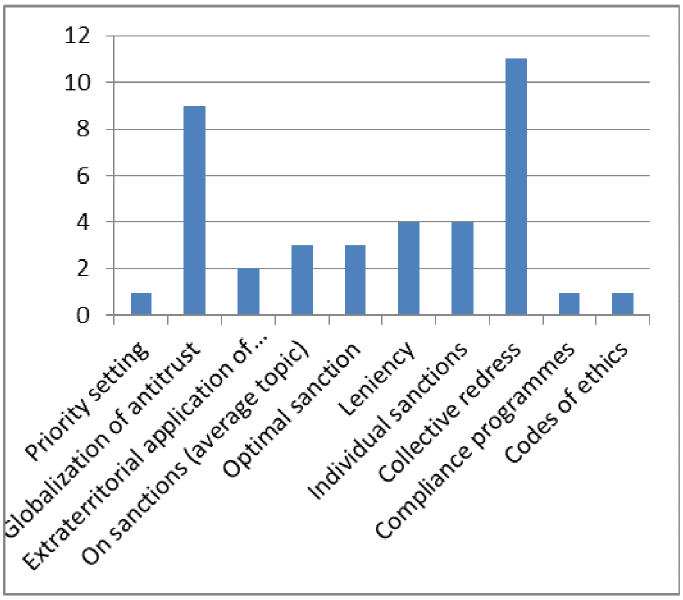
[76] *See* Guidelines on the assessment of horizontal mergers, *op. cit.*, para. 78: "*For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.*" See also OECD, "Dynamic Efficiencies in Merger Analysis", *Policy Roundtables*, 2007, DAF/COMP(2007)41, at p. 222 for EU law: "*it is also clear that the nature of dynamic efficiencies may make it harder for merging parties to live up to the standards set out in the guidelines than would be the case for static efficiencies*".

[77] R. M. STEUER, "The Simplicity of Antitrust Law", (2012) *University of Pennsylvania Journal of Business Law*, Vol. 14, No. 2, p. 543.

ANNEX: Review of the most Popular Topics in Recent Antitrust Literature

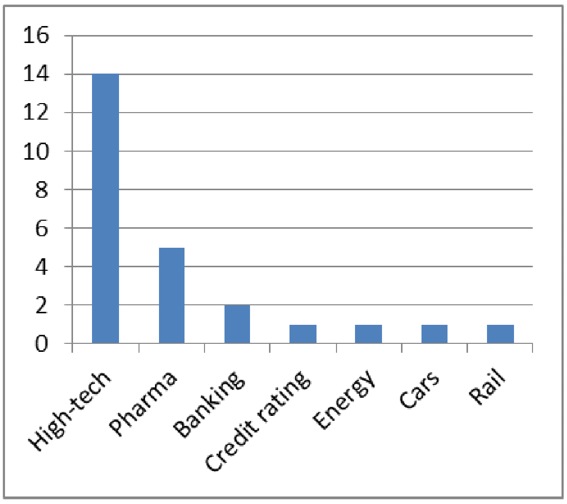
To identify the above list of challenges, we have reviewed the papers published in the main antitrust journals since January 2011.[78] The underlying assumption is that those topics that garner the most scholarly attention are those that will constitute the main challenges for the 21st century.

From this review, we reach several conclusions. First, in its writings, the legal community does not confine itself to the analysis of legal issues but also focuses on policy issues. Almost a quarter (23%) of the articles that were issued from January 2011 address enforcement policy issues or strategies adopted by competition authorities to optimize their grasp on anticompetitive conducts (*e.g.* efforts to allocate resources efficiently, to improve the territorial coverage of antitrust or to inflict more deterrent sanctions). On closer analysis, two topics have received a particular attention from the literature, *i.e.* collective redress and the development of international cooperation between competition authorities.



[78] This review was made on the basis of the table of contents of the following law journals: *World Competition, Competition Law Review, Antitrust Law Journal, Concurrences* and *European Competition Journal*. The issues published from January 2011 to 10 October 2012 were reviewed. Those articles whose title were too vague or too general to fall within a clear category were not integrated in the dataset. Similarly, those articles that offered a general overview of the antitrust law of a specific country were not listed.

If we sort our dataset per sector, we observe that so-called "innovative" markets get the main attention of the literature. In this respect, the high-tech sector is far ahead any other sectors, despite a significant interest in the doctrine for the pharmaceutical sector.



Finally turning to substantive law issues, we observe that the concept of the "relevant market" seems the most widely discussed in today's scholarship.