NEW CHALLENGES FOR 21ST CENTURY COMPETITION AUTHORITIES

Nicolas PETIT*

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. 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. New Enforcement Challenges

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

* Nicolas Petit is Professor of Law at the University of Liège in Belgium (ULg) and Director of the Global Competition Law Centre of the College of Europe (GCCLC). The author is grateful to Norman Neyrinck for his help on the statistical review and on the footnotes of this paper. This paper is based on a presentation delivered in Hong-Kong on 19 October 2012 by CCH Hong Kong Limited, Wolters Kluwer.

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. 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”. And while, in the US, “business review letters” are issued with less parsimony, they remain rare. 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.

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

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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.

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’ \emph{ex ante} compliance efforts, which, in turn, will limit the need, and costs, of \emph{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 “\emph{guidance desert}” in 21\textsuperscript{st} century competition law. If they like to look tough, agencies also like to look cool. This explains the mushrooming of advocacy “\emph{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 “\emph{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 “\emph{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, \emph{Be the first to tell - a film about leniency}, 3 March 2010 (available at: \url{http://www.youtube.com/watch?v=r99qzC8aHA&feature=related}); Dutch Competition Authority, \emph{Leniency in cartel cases}, 9 June 2008 (available at: \url{http://www.youtube.com/watch?v=5dIiFAaJdwe1}); Federal Trade Commission, \emph{The Mall}, (available at: \url{http://www.ftc.gov/bcp/edu/microsites/youarehere/site.html#/first-time-here}); Italian Competition Authority, \emph{La Breve Storia di Borgo Allegro} (available at: \url{http://www.agcm.it/trasp-statistiche/doc_download/2453-progscuolaborgoallegro2.html}); Italian Competition Authority, \emph{Una Brutta Sorpresa} (available at: \url{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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This “Settle ’Em All” approach is, in our view, 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. 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.

Moreover, summary settlement decisions exacerbate the “guidance desert” problem mentioned earlier.

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

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\(^{19}\) 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](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.  

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. 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.

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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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.

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\textsuperscript{23} has shown that these markets are often “combinatorial”.\textsuperscript{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.\textsuperscript{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,\textsuperscript{26} or of the current predicaments of mobile handsets makers such as Nokia and RIM.\textsuperscript{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.

\section*{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

\begin{footnotesize}
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\item Ibid., p. 7.
\item 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).
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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. Economists talk of a trade-off. On the one hand, a generous disclosure policy is likely to deter leniency applications, hence jeopardizing detection. 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”. 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; agencies may allow the disclosure of certain type of information, but not of others; disclosure can be limited if the leniency applicant is placed in a worse situation than the other conspirators; the damages borne by the leniency applicant may be transferred to its conspirators.

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.
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.
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”\textsuperscript{35}. A compliance programme can be defined as “\textit{a company’s internal policy, established to ensure its complete compliance with competition rules in all its business actions}”\textsuperscript{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.\textsuperscript{37} Other agencies, like the French competition authority, only reward compliance programmes in certain types of cases, \textit{i.e.} vertical agreements and abuse.\textsuperscript{38} Finally, others authorities are agnostic or are yet to take a stance. The European Commission, for instance, is agnostic.\textsuperscript{39}


\textsuperscript{36} See European Commission, \textit{Glossary of terms used in EU competition policy Antitrust and control of concentrations}, July 2002, p. 11 (available at: \url{http://ec.europa.eu/competition/publications/glossary_en.pdf}). “\textit{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}.”

\textsuperscript{37} See OFT, \textit{OFT’s guidance as to the appropriate amount of a penalty}, September 2012, OFT423 (available at: \url{http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of423.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”


\textsuperscript{39} See Competition Commissioner ALMUNIA, \textit{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. \textbf{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.\footnote{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: \url{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: \url{www.ssrn.com}).} 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, “\textit{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.
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. 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.). 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. Another group of scholars argues that “consumer choice” is the DNA of competition law. And finally, others ascribe additional public policy goals to competition

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

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


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. 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.

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. This means that antitrust cases are no longer ruled by “slogan”. 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”. 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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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

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instance, in *Airtours plc v. Commission*, 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.

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. Their decisions are based on intuitions, heuristics, biases, etc.

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

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“recoupment” criterion in predatory pricing cases (at least under US antitrust law). 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.

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”. 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.

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 – agencies go through this preliminary analytical step. As POSNER and LANDÉ 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”.

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

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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”.
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 1980’s. To name a few of them only, they include the net Upward Pricing Pressure index of Farrell and Shapiro66 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

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merger regulatory framework.\textsuperscript{70} This legislative reform had been prompted by the intense criticisms that had followed the GE/Honeywell prohibition decision.\textsuperscript{71}

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

However, the controversy has resurfaced in two recent cases. In \textit{Ryan Air/Aer Lingus},\textsuperscript{73} and later in \textit{Deutsche Börse/NYSE},\textsuperscript{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 \textit{TNT/UPS} merger,\textsuperscript{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 \textit{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

\textsuperscript{70} See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, \textit{OJ}, 5 February 2004, C 31/5, para. 76 and ff.\
\textsuperscript{72} See Commission Decision of 14 May 2008, Case No COMP/M.4854 – TOMTOM/ TELE ATLAS.\
\textsuperscript{73} See Commission Decision of 27 June 2007, Case No COMP/M.4439 – Ryanair / Aer Lingus\
\textsuperscript{74} See Commission Decision of 1 February 2012, Case No COMP/M.6166 - DEUTSCHE BÖRSE / NYSE EURONEXT.\
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”.

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 21\(^{st}\) 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 conduct (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.

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

![Graph showing sector attention](image1.png)

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

![Graph showing substantive law issues](image2.png)