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U.S. Anti-Trust Law and the Convergence of Competition Laws

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Competition Law

This report treats the law of a single system, the antitrust law of the United States. To that extent it follows the traditional form of national reports submitted to international comparative law congresses. Yet it also diverges from the typical format. It is explicitly comparative, because the assignment is to view national competition law from the perspective of "harmonization," and this requires a comparative approach not only in the general report, but also in the national reports. The report thus focuses on the law of the U.S. *as it relates to this harmonization process*. The scope, structure and methods of the report reflect this perspective.

The report differs from other national reports prepared for this topic, because it assumes basic knowledge of the economic and political context within which the U.S. antitrust laws operate. In reporting on the operations of a competition law system, it is undoubtedly important to include basic information about its economy and government where this information is not widely known. In the case of the United States, however, such information is common knowledge, and thus I will not include it here.

I. Introduction

A. *Harmonization: Concept and Importance*

The concept of harmonization is ambiguous, but at its core is the "convergence" of competition law systems — the idea that they are becoming increasingly similar.[1] The term is sometimes also used in a broader sense to refer to various kinds of interactions among competition law systems, but I use it here in the more commonly used "convergence" sense — i.e., to refer to decisions intended, at least in part, to increase similarity among competition law systems.

The harmonization of competition law systems is important because it may help to resolve two major problems in global economic and legal relations. One involves conflicts and the costs and uncertainty associated with them. The increasingly global character of

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1. For discussion of related terminology, see Gerber, "The U.S. - European Conflict Over The Globalization Of Antitrust Law: A Legal Experience Perspective," 34 *New Eng. L. Rev.* 123, 131(1999).

much economic activity creates potential conflicts among the prescriptive claims and enforcement prerogatives of competition law systems. The same conduct may, for example, be subject to different standards prescribed by different legal systems. Such conflicts lead to uncertainty and costs for economic decisionmakers as they seek to conform their conduct to inconsistent requirements. The other concern involves the capacity of public officials to deter conduct that harms the competitive process. The increasing mobility of resources, data and personnel tends to reduce that capacity for all systems, because it encourages economic actors to structure their anticompetitive activities to avoid the jurisdictional reach of particular jurisdictions.

Reducing differences among competition law systems tends to reduce both harms. To the extent that such differences are reduced, conflicts between the prescriptive and enforcement claims of individual systems are also likely to be reduced. Similarly, reducing those differences reduces the incentives they create for firms to engage in anticompetitive conduct and to arrange their activities to gain advantage from those differences. One important task for legal scholarship is thus to understand the dimensions and dynamics of competition law harmonization.

I will not here treat the historical development and context of antitrust harmonization, because this is done in the general report. I emphasize, however, that the harmonization process is framed by specific historical circumstances and should be seen against that background. In particular, the role of U.S. antitrust law is conditioned not only by the specific characteristics of U.S. antitrust law, but also by the position of the U.S. in global political and economic relations.

B. *Harmonization and U.S. Law: What We Need to Know*

Assessing U.S. law from a harmonization perspective calls for three separate, but interrelated forms of analysis. One identifies the differences and similarities between U.S. antitrust law and other competition law systems; another looks at the obstacles to accurate perception of the operations and outcomes of U.S. law; and a third looks at the interests that influence harmonization-related decisions involving the U.S. antitrust system.

The most basic level of analysis involves mapping the similarities and differences between U.S. antitrust law and other competition laws. It is fundamental to understanding and assessing harmonization issues, because decisions to move toward other systems depend on accurate knowledge of what the differences actually are — what kind of decisional space must be traversed to achieve the desired convergence.

This raises, however, a difficult set of issues that is typically avoided in the context of harmonization — i.e., what do we mean by "law" for these purposes? Harmonization discussions often rest on the assumption that the relevant "unit" of comparison is positive substantive law — authoritative statements of substantive legal norms. In this view, convergence refers merely to increasing similarity among substantive norms.

In the context of competition law, however, this is analytically inadequate, even if it might be desirable from a political perspective. There are many competition law systems in which the written law has little or no impact on conduct, because the law is neither enforced nor respected. The authoritative legal norms reveal little about what actually happens in such systems, and thus harmonizing them may have little, if any, significance. If harmonization is to be meaningful, it must take into account the actual operations and dynamics of the competition law systems involved.

In this report, therefore, I will examine not only substantive law, but system dynamics as well. For our purposes, authoritative claims of substantive law must be seen as factors that influence decisions within a competition law system. Their roles should be understood in their institutional and systemic contexts — the context of how the system operates.[2]

A second type of analysis involves what I call "cognitive access" to the operations of the system — the capacity of those outside the system to acquire accurate knowledge of it. If a decisionmaker wishes to make a harmonization decision, she needs to know what "the law" is toward which she wishes to move, and she will usually encounter obstacles in making that determination. These obstacles may result from factors that are internal to the system — e.g., the uncertainty of the law relating to a particular type of conduct. They may also be "trans-system" in the sense that they are produced by the lenses that she uses in viewing and interpreting information about the system.

The third kind of analysis focuses on the interests that affect harmonization decisions — how knowledge is used. Harmonization decisions are influenced not only by information about and images of foreign systems, but also by the interests of the decisionmakers that make them. A thorough study of harmonization issues must seek to identify these interests and their relationship to knowledge. We need to know which incentives favor harmonization and which impede such decisions.

These factors are interrelated. For example, the extent and characteristics of differences between systems tend to influence cognitive

2. For further discussion, see Gerber, "System Dynamics: Toward a Language of Comparative Law," 46 *Am. J. Comp. L.* 719 (1998).

access. In general, the greater the differences between two systems, the more difficult it will be for a decisionmaker in one system to perceive accurately the operations of another. Cognitive access may, in turn, affect the incentive structures facing decisionmakers. If, for example, decisionmakers lack confidence in the knowledge they acquire about a foreign system, they are likely to be hesitant to make decisions to move toward that system.

I here use the term "harmonization potential" to refer to this combination of factors. To the extent that such factors increase the probability of harmonization decisions, they increase harmonization potential. Conversely, factors that impede harmonization decisions reduce harmonization potential.

C. *Objectives and Plan*

My objective in this report is to assess U.S. antitrust law from this harmonization perspective — to develop a sense of its harmonization potential. Space limitations preclude thorough analysis from any one of the perspectives outlined above. I will focus on the first — the geography of difference, with occasional comments on the other two.

I first look at the dynamics of the U.S. system — the way it operates, because this forms the basis for all effective comparison. I then examine three basic types of competitive restraints. For each, I look briefly at the basic problem. I then identify key norms, concepts and classifications used in treating the problem. Finally, I discuss the application of these concepts to specific forms of conduct within the general problem category. In a concluding section, I draw some of these threads together and offer some thoughts on their potential implications for current policy issues relating to competition law harmonization.

D. *Scope*

The scope of this report is limited. It does not purport to be a full-scale analysis of the issues. It is rather an essay of interpretation that presents some of the basic elements of U.S. antitrust law from a particular perspective — that of harmonization. It is also limited in another sense. It treats only U.S. federal law. Individual states of the United States have antitrust laws, but they generally play a limited role in economic life.

II. The Historical Dimension

Neither the current state of U.S. antitrust law nor its relation to the harmonization process can be assessed adequately without at least a brief excursion into the development of the U.S. system. I

here touch on several aspects of that development that are important from a harmonization perspective. U.S. antitrust law experience differs in often dramatic ways from that of other competition law systems; it is a "special case" that is often difficult to relate to the competition law experiences of other countries.

A. *The "Father" of Competition Law*

A central U.S. factor in competition law experience has been its location in the overall narrative of competition law development. When the first U.S. antitrust statute was enacted in 1890, it was almost the first modern competition law, and it was certainly the first such competition law to become a significant factor in legal and economic life.[3] As a result, U.S. antitrust law is often seen as the progenitor (usually, "father") of antitrust law.

For our purposes, this position in the story has had three main consequences. First, it means that U.S. antitrust was conceived without the benefit of experience from other competition law systems. Unlike most modern competition laws, it did not develop amidst numerous other competition laws, and thus those who created it had neither models nor bases for comparative analysis. It was, to some extent, a "shot in the dark," and in some ways the system continues to bear that mark.

Second, this "father" image has shaped perceptions of the system, both within and outside the system. For those viewing U.S. antitrust law from the outside, this image has often enhanced the status of U.S. antitrust law and fostered the belief that it is a valuable and important source of guidance. Among members of the U.S. antitrust community, it has helped to generate an image of U.S. antitrust law as superior — simply better than others. Until after the Second World War, it was the only significant competition law, and thus others have always been expected to look to and learn from U.S. antitrust law and experience. The idea that U.S. antitrust law can learn from others remains little developed.[4]

A third consequence of this temporal primacy is the duration and extent of U.S. antitrust experience. The accumulated experience of the U.S. antitrust system is far more extensive than that of any other competition law system. Courts have produced a large number of judicial opinions, and scholars have produced a vast literature analyz-

3. A Canadian statute had been enacted the prior year, but it was to play a decidedly secondary role in the subsequent story of competition law development. See An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, ch. 41 (Can.).

4. This attitude has been fostered by the theoretical developments associated with the law and economics movement, which have imbued many U.S. antitrust scholars with a belief that a system that features this type of analysis is necessarily superior.

ing antitrust issues from a variety of theoretical perspectives. As a result, U.S. antitrust law is far better known on a worldwide basis than is any other competition law.

B. *Creating the System*

The creation of the system has played an unusually important role in U.S. antitrust law experience. The Sherman Act has been often referred to in constitutional terms — as a foundational act of great importance for the society.[5] In the minds of many, it has achieved a kind of mythic status that has helped to preclude significant changes in the text. This has combined with the ambiguity of its statutory language to induce frequent controversies of how this foundational act should be interpreted — what it should mean for contemporary decisionmakers. The original intent of the Sherman Act remains a topic of heated debate.[6]

For our purposes, it suffices to note that the statute was enacted in response to widespread resentment at the ways that the giant "trusts" owned by the industrial magnates of the late nineteenth century used their power. There was much popular dissatisfaction and anger at the capacity of these enterprises to force out rivals and to raise prices to consumers, and this translated into pressure to do something legislatively. The Sherman Act was not the product of careful study and dispassionate consideration of its potential impact on the economy and society. It was instead a hastily contrived political act rather than a technocratic, regulatory development. As a consequence, the language of the act was sparse and so ambiguous as to open an exceptionally broad scope for interpretation.

C. *Phases of Development*

We can identify three phases in the development of U.S. antitrust law.[7] The first was a period of defining, often tentatively, what the role of the system was and how its vague terms should be construed, and then developing a legal apparatus for applying its statutory norms. During this initial period, enforcement was episodic, and *the effectiveness of the system was often questioned. At the end of* the New Deal in the 1930s there were efforts to breaths fresh life into the system, but it was not until after the Second World War that the role and significance of the antitrust system expanded rapidly.

5. 15 U.S.C. § 1 (2001).

6. See, e.g., Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (1978).

7. For leading discussions of the development of U.S. antitrust laws, see William Letwin, *Law and Economic Policy in America : the Evolution of the Sherman Antitrust Act* (1981) ; Herbert Hovenkamp & Geoffery Hosking, *Enterprise and American Law, 1836-1937* (1991); and Rudolph Peritz, *Competition Policy in America, 1888-1992* (1996).

The second period, which lasted for some three decades after the close of the Second World War, saw antitrust achieve exceptional levels of influence and importance. During this period, there was some new auxiliary legislation, but the primary factors in the expanded role of antitrust were the willingness of courts to extend interpretations of existing statutes and the willingness of law enforcement personnel to pursue and implement such developments. These developments reflected shifting social and political values, but they were seldom informed by sustained theoretical analysis. They were also related: the likelihood of success in the courts encouraged increased attention to antitrust enforcement. As a result of these changes, antitrust law became a major factor in much business decisionmaking.

The ascendancy of antitrust law was fostered by the international economic and political situation. During this period, U.S. dominance of the non-socialist world was accompanied by an expensive dollar that fostered U.S. investment abroad and discouraged foreign investment in the U.S. The domestic market was still largely protected from foreign economic pressures and international competition. This meant that in many situations anticompetitive conduct could be deterred only by either domestic economic competition or U.S. domestic laws. As U.S. corporations grew in size and power, public officials and the courts sought to use the antitrust laws to achieve that deterrence.

In the 1970s, however, the economic and political conditions in the U.S. and in the world were changing. As the U.S. economy was exposed to increased international competition, judges and enforcement officials became more willing to assume that the competitive forces of the market would deter anticompetitive conduct.

This change in perspective was given theoretical expression in the law and economics "revolution."[8] This refers to the reorientation of antitrust thought that was generated by a group of legal academics who sought to base antitrust doctrine more squarely on economic analysis. They scrutinized the case law of the preceding period and attacked it for its lack of analytical rigor. In effect, they began to reshape the meaning of the antitrust laws, replacing the prevailing mixture of case law analysis and social and political values with analytical tools based on economic models.

D. *Themes*

From a harmonization perspective, several themes have been prominent throughout this story. First, the U.S. antitrust law system has operated and continues to operate with little significant in-

8. See Richard A. Posner, *Economic Analysis of Law* (5th ed. 1998; pblc. ed. 2001).

fluence on its activities from outside its borders. At least until very recently, members of the U.S. antitrust community have paid little attention to antitrust developments elsewhere.

Second, U.S. antitrust has occupied the center of the competition law universe. It is the competition law to which others have looked and about which others have generally known more than they have known about other competition law systems. Although I have shown elsewhere that its influence has not always been as direct and straightforward as many have assumed,[9] it has frequently played a "model" role for decisionmakers in other systems.

Third, U.S. antitrust law has been driven throughout its history by a tension between concern for the harms caused by private economic power and those generated by governmental intervention in market activities. In itself, this tension is not unusual. It is probably endemic to developed competition law systems. In the U.S., however, both sides of this conflict have particularly powerful support in political ideology. The image of competition's value and power is deeply rooted and prominently displayed in U.S. political discourse, but so is the image of the potential harms of "big government." The intensity of both images has accompanied the development of U.S. antitrust law.

Fourth, case law has been the central operational device of conceptual development in the system. In contrast to most other competition law systems, the U.S. system has relied on the courts to adapt and develop the substantive principles of antitrust law. The Sherman Act, as noted, is still the primary source of authority for antitrust law, but its text tells us virtually nothing about what the law is. There have been a few additions to the legislative framework, but the original provisions of the Sherman Act remain at the center of U.S. antitrust law. As a result, case law has generated, reflected and refracted ideas and determined the extent of their influence on outcomes.

Finally, the frequent changes not only in the direction of U.S. antitrust law, but also in its rhetoric and in the outcomes it produces have generated an image of antitrust law as an uncertain and malleable legal instrument. While many competition law systems, particularly in Europe, stress the need for consistency and reliability in language and outcomes, U.S. antitrust law is often seen as a changeable, malleable unstable form of law. This has many consequences. For those outside the system, it often generates the assumption that U.S. antitrust law is so discretionary and politically driven that its legal character is questionable. For those within the system, it leads

9. David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998); pbk ed. 2001.

often to the assumption that other competition law must be at least as malleable and open to outside influences as is U.S. antitrust law.

III. Antitrust Law Dynamics

The dynamics of the U.S. antitrust system — how it works — should be the basis for any assessment of it harmonization potential. There are enormous disparities in the operations of antitrust systems, and understanding them is critical to achieving effective harmonization. Many competition laws that appear significant on paper are either not enforced or enforced in ways that have little to do with the official statements of the law. A harmonization process that does not take those differences into account has dim prospects for progress.

A. Contexts

As noted above, the basic facts about U.S. government and the U.S. economy are so well-known that there is little point in recounting them here. Nevertheless, several features of the context in which the U.S. antitrust law system operates deserve note because of the degree to which they condition those operations.

The first relates to the U.S. market. U.S. antitrust law operates in a large, rich, and generally open national market. Together, these factors assure that there is generally significant competition on U.S. markets. The size and wealth of the market attracts entry from foreign firms, and the government seldom deters such entry.

Second, the powerful rhetoric of competition noted above conflicts in important ways with the structures and practices of the U.S. federal government. The image of competition — the market — as "savior" requires that politicians render obeisance to it. On the other hand, the U.S. government is in many ways particularly susceptible to the influence of business interests, particularly big business interests. The high cost of political campaigns and the diminished strength of political parties mean that politicians need large sums of money, and businesses and their owners represent the major sources of such funds. Moreover, many who hold important government positions have been lawyers in private practice and expect to return to private practice or business after relatively brief stints in government. The interplay of these two forces often makes predictions regarding enforcement decisions difficult.

Third, the lack of conscious interaction between the antitrust system and U.S. economic policy distinguishes U.S. antitrust from antitrust in many foreign countries. U.S. antitrust law represents a separate, virtually autonomous body of law. It is not conceived as part of a policy package in which the individual pieces are expected to function together. Decisionmaking within the antitrust system does

not directly take into account decisions in other economic policy areas, and vice versa.

Finally, the operations of the antitrust system are unusually dependent on the forms and procedures of the legal system generally. In contrast to many legal systems in which the competition law system consists of an institution or set of institutions specifically designed for the implementation of antitrust measures, non-specialized institutions play central roles in the development and application of antitrust law. The Department of Justice, for example, must seek to enforce antitrust norms by filing suit in the regular courts, where it must follow the ordinary procedures of private litigation. This means that the roles, status and characteristics of that larger system are particularly important in assessing the operations of the competition law system.

B. *The Objectives of U.S. Antitrust Law*

The objectives that decisionmakers pursue (or are supposed to pursue) in making antitrust decisions are critical to the operation of the system. These objectives have varied over time in U.S. antitrust law, and we need to touch on those variations. Here both authoritative statements of objectives (what the courts say) and patterns of decisional outcomes (what they do) are important.

The goals of the U.S. antitrust laws are not well-defined in the relevant legislation. Moreover, because the base statute is well over a century old, judicial decisions provide the authoritative articulations of those objectives. These articulations have shifted with changing circumstances and perceptions of the problems, and as a result, they are often imprecise and contradictory.

At one level, of course, the antitrust laws are designed to protect the process of competition. That is their central reason for being. The issue is what that means — how to give conceptual shape and content to that goal so that it can be used to guide legal and business decisions.

For most of the history of the system, the objectives of the antitrust laws were stated primarily in terms of conceptions of the kind of society the courts believed was desirable. Economic, social and political values were accumulated into a composite substrate from which courts drew in fashioning and justifying their decisions. At various times, concerns for fairness (particularly for small and medium-sized firms), the stability of communities, equality of opportunity, and economic liberty have been included in this substrate, each with its own rhetorical anchor.

The law-and-economics reorientation has narrowed these objectives. Economic criteria have largely displaced these broader social and political values. There is now general consensus among judges

and members of the antitrust community that antitrust's goals are to be defined exclusively or almost exclusively in economic terms. This does not mean that there is general agreement on specific goals, however, because economic science is not always precise and unequivocal. There are a variety of analytical structures within economics, and they compete for acceptance within the U.S. antitrust community.

C. Scope

The scope of application of U.S. antitrust law can be important in analyzing harmonization potentials. Not only is it necessary for developing an adequate picture of the operation and impact of the system, but adjusting the scope of competition law norms also provides a potentially attractive means of increasing harmonization. In some ways, the scope of U.S. antitrust is broader than many other antitrust systems, while in other ways it is narrower.

1. Substantive scope

In general, U.S. antitrust law is not concerned with whether and how governmental units seek to influence markets. In contrast to EU competition law, for example, it does not include provisions relating to state aids — i.e., issues of whether a government may provide financial support to private economic enterprises. It aims to protect market processes from economic, not political influences. On the other hand, U.S. antitrust law does apply to governmental units when they operate as economic actors — i.e., when they act within the market. Antitrust law may, for example, apply to the commercial and sometimes even quasi-regulatory conduct of local governments.

The scope of U.S. antitrust also excludes disputes among competitors based solely on claims for compensation that one has harmed the other by virtue of the unfairness of its conduct. Such issues are often referred to internationally under the rubric of "unfair competition law." In some systems these private-law based claims are intermingled with antitrust issues, but not in the U.S.

2. Territorial scope

Of particular importance in looking at the harmonization picture is the extraterritorial application of U.S. antitrust law. After the Second World War, the political hegemony and economic power of the U.S. facilitated claims that U.S. antitrust law applied to conduct outside U.S. borders. The prescriptive scope of U.S. antitrust has thus come to be defined broadly. It includes conduct outside U.S. borders, provided only that such conduct have significant and direct an-

ticompetitive effects within the U.S. and that those claims do not directly conflict with the law of another state.[10]

This has had several consequences. First, it has made lawyers and businesses around the world particularly aware of U.S. antitrust law. Because of the size of the U.S. market and the political weight of the U.S., they have had to pay attention to the potential application of U.S. antitrust law. This has led many to see U.S. antitrust law as the central competition law system, one that everyone knows about, and one that can therefore serve effectively as a focal point for harmonization efforts. Others have, however, seen it as a means of imposing U.S. law and values on others and a tool for advancing U.S. economic interests.

D. Language

The language of U.S. antitrust is distinctive. It consists of a mixture of case law, theory and political rhetoric that differs — often greatly — from the largely administrative language of many antitrust systems, which typically centers on the interpretation of statutes.

Case law shapes the language of U.S. antitrust. Court opinions provide the central terms and concepts which judges, lawyers and other members of the antitrust community use to perceive and talk about antitrust issues. Cases are the primary reference points in discussions of the substantive content of antitrust law, and they are thus central to the arguments that lawyers make to judges. In contrast to most other antitrust systems, there is limited reference to the interpretation of statutory texts, except in so far as cases have interpreted them.

This has important implications for both the system's operations and perceptions of it. First, it means that U.S. substantive law discussion is imbedded in and intertwined with procedure. It is often difficult, if not impossible, to interpret the language of a U.S. antitrust case without knowing a good deal about U.S. procedure, particularly because antitrust cases are often procedurally complex. Second, it means that the concepts of U.S. antitrust are usually imbedded in factual density. U.S. appellate opinions in this area often include highly detailed accounts of the fact situation, and thus it is often difficult to isolate "legal rules" from them in a way that would be appropriate for harmonization purposes. Finally, these cases typically develop concepts in an ad hoc way that leaves their interrelationships unclear. The concepts are seldom related to each other in systematic or structural ways. Together, these factors create significant opacity in the language of U.S. antitrust law.

10. See Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

The law-and-economics reorientation of U.S. antitrust law has inserted a distinct theoretical component into the language of U.S. antitrust. Derived primarily from economic science, it plays a far larger role in academic literature than in court opinions and the usage of legal practitioners, but it sometimes plays a role there as well.[11] It includes frequent reference to economic models, sometimes even including the use of sophisticated mathematical materials.[12]

A third strand is the language of political rhetoric. Judicial opinions in the antitrust area often justify outcomes by reference to the values of the community (as the judges perceive them) and to images of the type of polity the U.S. is or aspires to be. They refer to community values such as, e.g., the importance of economic freedom not only for its own sake, but also as a support for democratic goals. This strand has weakened significantly in recent years, but it has not altogether disappeared.

E. Enforcement and Application: The Mechanisms of Antitrust

Particularly important in assessing the distinctiveness of the U.S. antitrust system are the mechanisms for applying and enforcing its substantive provisions. Here the differences between the U.S. system and others are profound and wide-ranging.

The system operates through two fundamentally different, largely independent, yet often intertwined enforcement mechanisms. The antitrust laws are applied both as a matter of public regulation and as a matter of vindicating private claims for injury resulting from anticompetitive conduct. The relative importance of these two mechanisms varies according to the area of substantive law involved. Curiously, the regular courts play a central role in both.

1. Public regulation

The first such mechanism features officials acting "in the public interest." Here antitrust is seen as a form of regulation enforced through regulatory procedures.[13] This is the type of mechanism that is used in most competition law systems, and this aspect of the U.S. system is thus "closest" to other systems.

Yet this mechanism also differs from other systems in often important ways. First, whereas most competition law systems are enforced by one agency, there are two separate institutions for the enforcement of the antitrust laws — the U.S. Department of Justice

11. For the leading discussion of this movement, see Posner, supra n. 8.

12. The language of game theory has also begun to play a role in AT law, at least in the academic discussion of it. See, e.g., Carlton, et al., "Communication Among Competitors: Game Theory and Antitrust," 5 *Geo. Mason L. Rev.* 423 (1997).

13. For discussion, see Waller, "Prosecution by Regulation: The Changing Nature of Antitrust Enforcement," 77 *Or. L. Rev.* 1383 (1998).

and the Federal Trade Commission. There is a degree of coordination between the two, but there is also overlap in their enforcement and jurisdiction prerogatives, and there are conflicts and differences in analysis and emphasis. This artifact of history makes the system more complex and less predictable, but it also reduces the concentration of regulatory power and provides a check on political influence.

A second distinctive feature is the role of the regular courts in this regulatory framework. The most prominent of the two enforcement agencies, the Justice Department, cannot act directly. It must bring suit in the federal courts to enforce the antitrust laws, and when it does so, it stands before the court as any other plaintiff. This has numerous consequences. For example, it facilitates the application of criminal sanctions in antitrust cases, which typically cannot be imposed directly by regulatory agencies.

A third factor that tends to distinguish the regulatory component of the U.S. system from many others is the lack of a developed administrative tradition. In many continental European countries, administrators are considered part of an important state-serving community with its owns customs, traditions, and values. As such, they often remain in the state bureaucracy for much if not all of their professional careers, and they often enjoy relatively high social status. These features are often lacking among U.S. administrators.

2. Private litigation

The other mechanism is based on private litigation. Private parties may file private suits to recover compensation for harms resulting from alleged violations of the antitrust laws. The availability of private suits to enforce the antitrust laws does not make the U.S. system unique. There are other antitrust systems in which such claims are permissible in certain limited areas. Unique are the prominence of such suits and the roles they play. Private actions are available, in principle, for harm caused by the violation of any substantive antitrust provision.

There are significant procedural limits on these suits, however, and these limits often go unrecognized by those viewing the U.S. system from the outside. For example, a suit will be permitted only where the alleged harm flows directly from the anticompetitive conduct and only where the injured party stands in specific kinds of relationships with those engaged in the conduct.

The role of private litigation is based to a large extent on the idea of the "private attorney general." The private suit has been developed with the explicit intention of inducing private parties harmed by anticompetitive conduct to bring legal action against those engaging in such conduct and thereby deter others from engaging in similar conduct. It thus provides incentives to potential litigants to pursue

antitrust claims. The most important of these allows the award of compensation in an amount three times the actual damages suffered by the plaintiffs (treble damages).

This means also that the U.S. system is conditioned by the particular procedural characteristics of the U.S. courts. One particularly egregious example must suffice here. U.S. pre-trial discovery mechanisms are far more extensive than those in most, if not, all other developed legal systems.[14] They allow lawyers for the litigants to demand extensive information from their opponents and sometimes also from others. As a result, there is extensive factual data available in the context of U.S. antitrust investigations and litigation that is often not available in other competition law systems.

F. Implications for Harmonization

The dynamics of U.S. antitrust law are distinctive in many ways. Its objectives are narrower; its language more layered; and its institutional and procedural components are both more complex and more dependent on mechanisms that are not specific to competition law than is typically true in other systems. That distinctiveness needs to be understood in analyzing its potential for harmonization.

III. AGREEMENTS

Agreements create rights and obligations and thereby tend to constrain the conduct of the parties to them. Since such constraints may harm the competitive process, virtually all competition law systems focus much of their attention on them. Agreements may also produce economic benefits, of course, and thus the central legal issue is how to determine which agreements are on balance sufficiently harmful to be prohibited or discouraged.

In reviewing the legal treatment of agreements, we need to distinguish between horizontal agreements (those between competitors) and vertical agreements (those between firms at different functional economic levels - e.g., between manufacturers and distributors).[15] Most competition law systems make this distinction, and from a harmonization perspective much rests on it. The harmonization potential of U.S. antitrust law is significantly higher with regard to horizontal agreements than with regard to verticals.

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14. See, e.g., Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States," 34 *Am. J. Comp. L.* 745 (1986).

15. "Manufacturer" here refers to the "upstream" seller, while "distributor" refers to the "downstream" buyer.

A. *General Conceptual Structure*

Section I of the Sherman Act prohibits agreements "in restraint of trade."[16] It does not distinguish between specific types of agreements or otherwise define the term's intended referent. One consequence of this generality of language is that the courts have used the same basic concepts in analyzing all types of agreements. Language originally directed at and applied to horizontal agreements has been used in the context of vertical agreements, arguably a very different kind of problem, and vice versa.

According to the case law, the issue in assessing both types of agreements is whether an agreement is "anticompetitive." The term is simple, but ambiguous. At its most basic level, it requires weighing an agreement's positive effects on competition against its negative effects on competition. An agreement that restricts the right or capacity to compete violates the antitrust laws unless (1) the restriction has no significant effect on the competitive process or (2) its harms are justified by its pro-competitive effects.

This focuses the legal analysis on the economic consequences of the agreement. Unlike some foreign competition law statutes, the Sherman Act does not guide this analysis by identifying particular categories of agreements or particular features of agreements that represent antitrust violations. Again, judicial opinions provide the only authoritative guides to decisions in the area.

This means, in turn, that the extent and shape of the investigation into competitive effects becomes critical. Who evaluates them? Under what circumstances? On the basis of which criteria? How extensive is the investigation? A complete investigation of the economic effects of an agreement can be expensive and time-consuming, often calling for extensive analysis of data and/or testimony by economic experts. Such investigations may not be necessary in all cases, however, and thus a central legal issue is whether and under what circumstances a truncated or abbreviated investigation may be legally sufficient.[17]

The courts have long used the distinction between "per se" and "rule of reason" analysis to differentiate those agreements that deserve full investigation from those in which a shortened analysis can be used.[18] The basic idea is that either economic theory or judicial experience may justify the presumption that agreements that have

16. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . ." 15 U.S.C. § 1 (2001).

17. For recent discussion of these issues, see Kattan, "From Indiana Dentists to California Dental: Presumptions and Competitive Effects in Antitrust Law," 68 *Antitrust Law Journal* 735 (2001).

18. See, e.g., 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: an Analysis of Antitrust Principles and Their Application*. ¶¶ 1500-1511 (1986 & Supp. 2001).

certain characteristics also have certain economic consequences. In such cases, a full investigation of a particular restraint is unnecessary; the restraint is considered "per se" illegal. All other agreements require an elaborate analysis of the circumstances surrounding the agreement — a so-called "rule of reason" analysis.

This places the issue of classification at the center of the legal inquiry. Much of the case law in the area focuses on the issue of whether an agreement falls into one of the established per se categories or is subject to the rule of reason. The potential procedural and outcome implications of a per se classification are great. In particular, it is much easier and less expensive to pursue a per se case, because the plaintiff need only prove that the agreement falls within the category and need not fully examine its economic consequences.

Over the past two decades, however, the law-and-economics reorientation of antitrust has tended to undermine the distinction between per se and rule of reason classifications in two ways. One is to narrow the category of per se violations. Types of agreements that were thought to be clearly anticompetitive and thus per se violations have sometimes been removed from that category on the grounds that their anticompetitive effects are not as self-evident as previously thought. Second, even where the per se classification is maintained, courts have increasingly looked not only at the characteristics of the agreement, but also at the circumstances surrounding its use in making the per se classification. Recently, the U.S. Supreme Court went even further, calling for a "sliding scale" of analysis in which the extent of the analysis should depend on the particular agreement and the circumstances surrounding it.[19] Taken to its logical conclusion, this would all but eliminate the value of the per se/rule of reason distinction.

B. *Horizontal Agreements*

Agreements among competitors necessarily restrain competition on one level — i.e., between the parties to the agreement. In that sense, their harm is apparent. Since the legal concept of restraint of trade does not include all instances in which competition is restrained, two additional questions are posed. The first is whether the elimination of competition between competitors actually impairs the competitive process. If the parties to the agreement are small, marginal competitors, for example, the elimination of competition between them may have no effect on price levels or other parameters of competition. U.S. antitrust has often been ambiguous in its treatment of the issue of economic power, but today it is reasonably clear that in assessing the legality of an agreement, the market shares and com-

19. California Dental Ass'n v. F.T.C., 526 U.S. 756 (1999).

petitive potential of the contracting parties must be taken into account. Only if the elimination of competition between them actually harms the competitive process, will the agreement be found unlawful.

Assuming the elimination of competition between them does have that effect, a second issue is whether it creates pro-competitive effects that outweigh those negative effects. Where two firms agree to cooperate to produce a new product or provide a new service, for example, this may have a pro-competitive effect that outweighs its negative effects, particularly where the contracting parties are not important competitors in the market.[20] Here U.S. antitrust law refers to an agreement whose anticompetitive effects may be "ancillary" to a pro-competitive purpose. If it is, it does not violate the antitrust laws. This requires a full rule of reason investigation of its economic effects.

In order to illustrate the application of this conceptual scheme, we look briefly here at three prominent per se categories. One includes agreements relating to price. These are singled out for strict treatment. Until recently, virtually any horizontal agreement that related directly to prices was considered a per se violation. Recently, however, courts have become increasingly aware of the potential pro-competitive effect of some price-related agreements. As a consequence, even agreements that relate to price may be saved from per se status where they have a pro-competitive justification. Competitor collaboration in a joint venture may, for example, involve provisions relating to price that are deemed ancillary to the purposes of the venture and thereby avoid per se treatment. In general, however, price agreements remain particularly likely to be prohibited.

Agreements dividing markets among competitors have generated almost the same level of hostility from the courts. They may directly and effectively eliminate competition on a market, and thus they are classified as per se violations. In order to assess the economic effects of such an agreement, however, it is necessary to know at least the basic characteristics of the market, in particular the market shares of the contracting parties. If the allocation is between a small number of firms with insignificant market shares, it may have no significant effect on the competitive process, and may even increase the competitive capacity of the firms involved. Such agreements may now be justified if they are ancillary to a procompetitive objective, but establishing such a pro-competitive justification is difficult.

A third traditional per se category, group boycotts, is more complicated. In such agreements two or more competitors agree not to deal with a target company, potentially allowing them to exclude the

20. For a recent analysis of these issues, see Federal Trade Commission and U.S. Dept. of Justice, Antitrust Guidelines For Collaborations Among Competitors, 6-25 (2000).

target company market. The potential anticompetitive harm of such practices has led to per se categorization, and where an agreement is used for this purpose, it will generally be found to be illegal.

Horizontal agreements that take the form of a group boycott but serve a pro-competitive aim may, however, escape per se classification. Where, for example, dealers in a particular product seek to improve quality, service or safety standards and agree among themselves to exclude from group benefits any competitor who fails to meet such standards, such agreements have been found not to constitute a group boycott for purposes of the Sherman Act.[21]

As these examples show, per se categorization in horizontal cases is no longer as straightforward as it once was. Agreements that fall within these categories are still likely to be found illegal, but the courts have recognized the possibility that such agreements may in some cases be justifiable, and they have provided a more flexible per se treatment which allows arguments of justification to be heard.

C. Vertical Agreements

The law-and-economics movement has achieved its most prominent successes in the area of vertical agreements. Attacking the economic reasoning in earlier cases, its scholars have propelled a fundamental reassessment of such agreements that has led to reclassifying most of them from per se status to rule of reason status. In their view, such agreements typically represent a means of integrating economic functions by contract rather than by merger and thus are unobjectionable. Where, for example, a manufacturer limits the range of permissible conduct of a distributor in order to provide more effective marketing or better service of the product, it is using the contractual restriction to coordinate the components of its market presentation.

1. Elements of the Analysis

For purposes of competition law analysis, such agreements differ markedly from horizontal agreements. The obvious first-order reduction in competition between competitors that is inherent in horizontal agreements is not present in vertical agreements. Until the 1970s, a similar harm was thought to occur as a result of the foreclosure of competition that often results from such agreements — i.e., the fact that others may be excluded from dealing with the contracting parties. This foreclosure concept has largely been rejected in the light of more developed economic analysis.

21. See 13 Herbert Hovenkamp, Antitrust Law: An Analysis Of Antitrust Principles and Their Application ¶¶ 2200-2203 (1999 & Supp. 2001).

If competitive harm is nevertheless established, the next step is to ask whether that harm is justified by the agreement's procompetitive effects. For example, an agreement between a supplier and a distributor that restricts the distributor's legal rights in conjunction with the sale of the product may have harmful effects, but these can only be properly assessed by looking at the specific terms of the agreement and the specific circumstances in which it is used.

This means that courts typically insist on detailed analysis of the economic consequences of the agreements and the purposes to which they are put. Certain categories of agreements are still technically referred to as per se, but it is a particularly "soft" form of per se analysis in which extensive proof of competitive effect may be required to establish the classification.

2. Types of agreements

Vertical agreements typically involve distribution relationships. The case law distinguishes sharply between two categories of relationship — those that relate to price and those that do not. The former are subject to per se analysis; the latter category is analyzed under the rule of reason. Many have argued that the economic consequences of price and nonprice restrictions are often identical, but they continue to be treated differently for these purposes.

The price restraints category until recently included the fixing of both maximum and minimum prices (known as "resale price maintenance" - RPM), but today it includes only the latter form of restraint.[22] RPM has long been treated as a per se violation of the antitrust laws, because it interferes with the pricing mechanism that is the core of the competitive process. Nevertheless, criticism of this analysis has led courts and, particularly, antitrust enforcement officials to allow pro-competitive justifications to be made as part of the process of classifying an agreement as RPM.

Nonprice vertical restraints are generally subject to rule of reason treatment. Two prominent forms of restraint in this category are territorial and customer restrictions and exclusive dealing arrangements. In both cases, a manufacturer restricts the right of its distributors to sell its products. Customer and territorial restrictions restrict those rights vis-à-vis other sellers of the same brand — i.e., they restrict intrabrand competition. Exclusive dealing arrangements may restrict both interbrand and intrabrand competition.

In applying the rule of reason to such cases, courts assess the probable impact of the restraint on market processes, particularly its effect on interbrand competition. They typically focus on two factors. The first is the market power of the party imposing the restraint.

22. See State Oil Co. v. Khan, 118 S.Ct. 275, 282 (1997).

Unless the manufacturer has significant market power, its restraints are unlikely to harm competition. Even where market power is found, courts typically take into account the procompetitive effects of the restriction. This analysis seldom yields a finding that the restrictions are anticompetitive.[23]

Tie-in agreements are a special case of nonprice restraint.[24] These are agreements in which a seller conditions the sale of one product (the tying product) on the purchase of another product (the tied product). In order to purchase the tying product, the buyer must also purchase the tied product. According to the language of the cases, such agreements continue to be per se violations, but that label reveals little about the analysis to be applied. Here again the courts have become more differentiated in their analysis, taking into account the market power of the participants and the pro-competitive justifications of the arrangements when deciding whether to apply the per se label.

Vertical agreements are today unlikely to violate the antitrust laws. Basic assumptions about the causation of competitive harm have been fundamentally revised in the light of economic scholarship. Only in cases where a firm with significant market power significantly restricts the competitive freedom of market participants without pro-competitive justification are such agreements likely to be considered violations of the antitrust laws.

D. *Harmonization Potential*

The harmonization potential of U.S. law relating to anticompetitive agreements thus depends on whether the agreements are horizontal or vertical. Whereas the harmonization potential is relatively high for horizontal agreements, it is significantly less so for vertical agreements.

1. Horizontal agreements

The high harmonization potential of horizontal agreements rests on favorable factors in each of the categories that comprise that measure. With regard to the geography of differences among systems, horizontal agreements present a relatively positive picture. They are the primary target of many systems, and there is widespread agreement about their potential harms. Moreover, the conceptual structures used to treat them seldom differ greatly. The primary issue in the area is evaluating the potential redeeming values of such agree-

23. See Ginsburg, "Vertical Restraints: De Facto Legality Under The Rule Of Reason," 60 *Antitrust L.J.* 67 (1991) and 8 Phillip E. Areeda, *Antitrust Law: An Analysis Of Antitrust Principles and Their Application* ¶¶ 1641-1645 (1989 & Supp. 2001).

24. For discussion, see Leslie, "Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement," 60 *Ohio St. L.J.* 1773 (1999).

ments. Although U.S. law relies more directly and exclusively on economic analysis than is often the case elsewhere, the concepts used in the analysis tend to be similar.

Impediments to conceptual access are relatively minor. The law is coded in rule language and is, therefore, relatively accessible. Per se categories define particular types of problem areas and frame analysis of particular types of agreements. These categories are often not as straightforward as they appear, but at least the conceptual outlines of the law are clear and accessible. Trans-system access problems are again relatively minor, not least because of the high level of uniformity in perceiving the problem and in conceptualizing the legal issues.

The third criterion — interest analysis — is also favorable to harmonizing the treatment of horizontal agreements, not least because of widespread agreement on the nature of the harm. Such agreements typically transfer wealth from consumers to producers, and this effect tends to create political support both within and outside the U.S. for developing common responses to the problem.

2. Vertical agreements

The treatment of vertical restraints is less propitious from each of these perspectives. First, the substantive law tends to diverge significantly from most other competition law systems. The harms from this category of agreement are less clear, because the perception of harm depends to a significant degree on the policy objectives of the polity whose law is involved, the characteristics of the market, and the market position of the parties. As a consequence, the concepts applied to such agreements in other competition law systems tend to diverge from the narrow economic focus presented in the U.S.

Cognitive access also tends to be more troublesome. U.S. law has become less rule-based in relation to verticals. It relies on the analysis of economic effects, and this type of analysis is often difficult to predict. Moreover, it has changed dramatically in recent years, and thus existing literature and case law are often difficult to interpret and apply to the current situation. This uncertainty is compounded from a trans-system perspective, because outside observers often have difficulty perceiving the components of the analysis.

Interest structures also create generally less impetus for harmonization in this area. U.S. law relating to verticals has consciously and confidently moved away from positions that are common in other competition law systems. Convinced that this move reflects the best analytical thinking, U.S. government representatives and academics are seldom inclined to move toward what they consider to be less rigorous analytical positions. Similarly, others have little impetus to move toward the U.S. position. Vertical restraints tend to produce

more significant harm to competition in smaller markets than they do in the very large market in the U.S. It is often argued that U.S. treatment of verticals makes sense only in the context of such a market.

IV. Dominant Firm Conduct

Competition laws typically also seek to combat anticompetitive conduct by individual firms. A firm that dominates a market may restrict competition in ways that are often similar to the impact of agreements among firms. It may, for example, be able to raise its prices above competitive levels (harming consumers directly) and impede competition from other market participants (harming consumers indirectly). Firms must, however, have the right to compete aggressively to "win" the economic battle. The analytical problem is that the harmful conduct is part of the competitor's competitive strategy, and it is often difficult to distinguish it clearly from other components of that strategy. This process of definition has often proven unsatisfying in most, perhaps all, competition law systems.

A. *The Monopolization Concept*

The drafters of the Sherman Act used the term "monopolization" to designate illegal single-firm conduct.[25] They did not, however, provide any guidance as to how that term should be interpreted. As a result, the scope and conceptual apparatus of the monopolization offense have been provided by case law. The concept itself was derived from the common law, apparently in the hope that previous common law experience would give some basis for interpreting the provision. It did not.

Efforts to develop conceptual contours for monopolization law have produced little clarity, but since the *Alcoa* case in 1945 the courts have settled on at least a general standard.[26] Accordingly, monopolization occurs where a firm possesses market power and engages in conduct intended to maintain or extend that market power. Such conduct is usually referred to as "exclusionary." In recent years, the term "abuse" has been applied to this type of conduct, but the term has no independent analytical function.

B. *Analytical Structure*

The analysis of monopolization thus requires three steps. First, it is necessary to define a market with regard to which a firm's power

25. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . . ." 15 U.S.C. § 2 (2001).

26. U.S. v. Aluminum Co. of America, 148 F.2d 416, 422-39(1945).

can be assessed. This requires designating the product or service involved and its geographical extent. This step is part of the analysis wherever competition law provisions treat single-firm conduct. Methods and concepts may vary, but the basic analytical process is fairly standard, so I will not discuss it here.

The second step is to assess the firm's power on that market. There is no simple means of assessing power, but the key factor is usually the firm's market share in relation to the market shares of its competitors. Again, the basic conceptual apparatus used by competition law systems on this issue seldom varies significantly, and discussion of differences in application are beyond the scope of this report.

For our purposes, the key issue is the identification of exclusionary conduct. This category has few conceptual contours, but two interrelated ideas are important. One distinguishes conduct on the basis of the primary intent of the decisionmakers. Where the conduct appears to be directed primarily at excluding a rival from the competitive process or hindering its capacity to compete, this evidences an exclusionary intent. This intent notion is typically tied to a second distinction: between competition "on the merits" and other forms of competition. If conduct represents better performance on the market, it will generally not be considered exclusionary.

C. Forms

I look at two central categories of "exclusionary conduct" by way of illustration. The first is so-called "predatory pricing." The basic idea is that a firm monopolizes for purposes of the statute where it sets prices below its costs. This is condemned because the only reason for selling below cost would appear to be to force out a competitor or deter the entry of potential competitors. It allows a firm to gain competitive advantage because of superior resources rather than superior performance.

The issue then is how to determine if pricing is predatory for these purposes, and here there has been much controversy.[27] The basic approach of most courts has been to use rebuttable presumptions concerning the relationship between prices and costs as primary indicia of the prohibited intent. Typically, they consider sales below average variable costs (AVC — costs that can be altered in the short run) to be presumptively unlawful. This can be rebutted by evidence that the conduct actually did serve a pro-competitive purpose. Sales above average total costs (ATC) are at the other end of the spectrum. They are generally held to be presumptively lawful. Where a price is between AVC and ATC, courts will typically look at a range of factors

27. See, e.g., Trujillo, "Predatory Pricing Standards under Recent Supreme Court Decisions and their Failure To Recognize Strategic Behavior as a Barrier to Entry," 19 *J. Corp. L.* 809 (1994).

that might evidence the basic intent of the strategy — whether it represents better performance or is a means by which a larger firm can use its "deep pockets" to exclude rivals.

A second category contains refusals to deal. The idea that a dominant firm can reduce competition simply by refusing to transact business would seem to fall squarely within the category of exclusionary conduct because it excludes competition in this direct sense. Courts typically focus, therefore, on the intent that motivated the refusal to deal in deciding whether the conduct is lawful. According to the Supreme Court, a monopolist may refuse to deal with a rival "only if there are legitimate competitive reasons for the refusal."[28] If the refusal actually reduces competition on the market, therefore, it will be considered a violation, unless a pro-competitive objective justifies it. Such refusals are subject to particularly intense scrutiny where the dominant firm also uses intellectual property rights that impede competition.

D. Harmonization Potential

Harmonization relating to single-firm conduct faces significant obstacles. If we look at the geography of difference, it is obvious that there is little agreement among systems regarding either the nature of the harms or the concepts used in addressing them. All agree that dominant firms can harm competition, but there are often few similarities with regard to identifying and assessing such harms and relating them to the costs and potential harms of legal intervention.

In addition, the conceptual distance between U.S. antitrust law and other laws in this area is great. The monopolization concepts used in the U.S. are quite different from those used in most other systems. In this area, the U.S. conceptualization of the problem has found few followers. Most foreign systems use the concept of "abuse of a dominant position" to treat these issues. While this concept is — at least in Europe — aimed broadly at the same kinds of conduct as monopolization concepts, there is seldom congruence in the analytical concepts. Both abuse and monopolization schemes require market definition and market power assessment, so that there are similarities here, but the conduct norms themselves often differ greatly.

The law in this area also presents significant cognitive access problems. The vagueness of U.S. monopolization concepts and cases make it difficult to know what the law is. The conceptual regime relies on economic analysis and contains few rule-based elements that convey information about likely outcomes. From a trans-system per-

28. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2856-59 (1985).

spective, these problems are compounded by the fact that few other systems utilize U.S. monopolization concepts.

The impetus to harmonize the law in this area is limited by several factors. Monopolization law tends to involve very large firms, often with political roles and symbolic status. Such firms have large numbers of employees, and they may be an important source of tax revenues. As a result, there is often significant pressure on governments and legal systems not to interfere with their conduct, at least not in ways that might impair their profitability. Such firms are often also in a position to expend significant resources to increase this pressure. In addition, foreign decisionmakers are unlikely to embrace harmonization efforts that might impede the competitive freedom of such firms, particularly where such efforts might increase the likelihood that the U.S. could seek to influence decisions in the area.

V. Merger Law

Merger law is often a focus of harmonization discussions. Mergers between large or well-known firms attract media and political attention. Moreover, major international conflicts over mergers — such as those involving McDonnell/Douglas and Honeywell/GE — have been highly profiled in the press in recent years, and they have also induced frequent comment and involvement by public officials and politicians. Finally, mergers have symbolic weight. They often involve large and well-known firms that are of symbolic importance to nations.

The potential value of certain forms of harmonization in this area is also obvious, and it is appealing to firms engaged in international business. More than forty legal systems now have some form of merger control, and a large merger may require approval by several of these. In addition, merger control systems often require the notification of planned mergers to competition authorities, and thus large mergers must often be notified to dozens of authorities, each with its own forms, deadlines and information requirements. Harmonization of these requirements would necessarily bring major cost savings that would inure to the benefit not only of corporations, but also of consumers.

A. *The Development of Merger Law*

The development of merger law is important to any analysis of the current situation. For our purposes, two themes are central. One is the leading role that U.S. merger law has played internationally. The second is the economics-based reorientation in the basic concepts and objectives of merger law over the past three decades.

The U.S. has typically led merger control developments. Although some forms of merger were initially attacked under § 1 of the

Sherman Act, a specific statute to prohibit certain kinds of mergers was introduced in 1913. It was rather easily evaded, however, and only after some revisions in 1950 did it become a major factor in business planning.[29]

Merger law grew dramatically in importance during the 1950s and 1960s. The U.S. Supreme Court signaled concern with the concentration of U.S. big business and the social and political power of major corporations by expanding its interpretation of the merger control statutes. In this it reflected public concerns for fairness to smaller competitors and a widespread perception that the domination of society by major corporations was harmful to U.S. society and policy. These concerns also undergirded increased enforcement intensity. By the late 1960s, a U.S. Supreme Court justice could claim, with some justification, that in merger law "the government always wins."[30] This expansion of merger law soon spawned efforts in several European countries to develop such systems.

The law and economics movement was, however, to change the direction of U.S. developments. Many of its leading figures attacked the reasoning and outcomes of the merger cases of the 1960s. The view that the Supreme Court had gone "too far" in preventing mergers was shared by many, not only in the law and economics movement, and thus these attacks gained broad support. Law and economics scholars claimed that concerns for smaller competitors and general ideas about the kind of society Americans wanted were misplaced and inappropriate, creating a merger law that was unnecessarily restrictive and unpredictable. By the late 1970s, the Supreme Court was beginning to rethink its reasoning in merger cases, and within a few years its analysis had changed in fundamental ways. It acknowledged that economic criteria should alone be dispositive in most, if not all, merger cases.

B. *Evaluating Mergers*

Merger law has two distinct components - pre-merger notification and the substantive evaluation of the potential impact of mergers. They are, of course, related, but they have different functions and objectives. We will look at the substantive issues first, and then treat pre-merger notification in describing the institutional and procedural context of merger control.

The basic test for evaluating the legality of a merger under the Clayton Act is whether "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to limit competition, or to tend to create a monopoly."(§ 7) As with the Sher-

29. See Clayton Act, 15 U.S.C. § 12 (2001).
30. U.S. v. Von's Grocery Co., 86 S.Ct.1478, 1495 (1966)(Stewart, J., dissenting).

man Act, this language is "constitutional" in breadth. The statute gives little guidance in interpreting it.

The statute refers to the probable impact of the merger on competition, and thus its application requires predictions regarding the merger's economic effects. Substantive merger law can be seen as an attempt to provide a legal structure for that predictive process.

The cases have developed a basic analytical structure for such evaluations that includes two main elements. First, a market must be identified within which such an impact can be assessed. This analysis is similar to, and often interchangeable with, the market identification procedure mentioned above in monopolization, and we will not discuss it here. The second step is to assess the impact of the merger on that specific market, and here we need to look at specific categories of merger.

C. *Application to Specific Types of Mergers*

These basic principles are applied to three fundamentally and functionally different types of mergers. Horizontal, vertical and conglomerate mergers each have different impacts on competition and pose distinct risks.

1. Horizontal mergers

Horizontal mergers are today by far the most important category within merger law. They represent the greatest potential risks to competition for the same basic reason that horizontal agreements present a particularly prominent risk to competition — they eliminate competition directly. Where there were two competitors before the merger, one firm exists after it. Because the merger is between competitors, it also increases the market share of the remaining firm and thus may create monopoly power. Finally, by increasing concentration in that market, the merger may also facilitate oligopolistic coordination of market conduct.

The primary issues in evaluating the merger are thus whether the elimination of competition between the merging firms harms the competitive process on the market and whether any resulting harm can be justified on efficiency grounds. The central factor in evaluating the likelihood of harm is the effect of the merger on concentration levels. Regulatory agencies and courts have struggled to find adequate means of conceptualizing such concentration effects, but the method that is now used and that is central to horizontal merger law today is based on the so-called Herfindahl-Hirschman Index (HHI). This relatively simple mathematical methodology takes into account not only the increase in market share that is necessarily produced by the merger of competitors, but also the shares of other major competi-

tors.[31] In general, the higher the HHI, the stricter the scrutiny the merger is likely to face and the more difficult it is to establish a procompetitive effect.

Analysis today focuses, however, not only on concentration levels, but also on the efficiencies that may be created by mergers. Where a merger can be shown to be based on the probability of greater efficiencies in the merged firm, this may rebut the presumption of competitive harm derived from increased concentration levels. Again, the issue requires careful analysis of the probable economic effects of the merger.

2. Vertical mergers

The harms that courts and commentators once saw in vertical mergers have generally come to be seen as either non-existent or of little consequence for the competitive process. Such mergers are viewed as unlikely to be undertaken except in furtherance of efficiency goals. While they may have some anticompetitive effects by virtue of "foreclosing" the merged firms from transacting business with others, their capacity to strengthen the competitive position of the firms involved is generally viewed as far more significant. As a result, vertical merger cases have been few during the last two decades, and the likelihood that such mergers will be invalidated is low.

3. Conglomerate mergers

Conglomerate mergers - those between firms that are neither competitors nor vertically related - are also unlikely to provoke response from the antitrust authorities or to be found illegal by the courts. During the expansive phase of antitrust development in the 1960s and 1970s, various theories were developed to attack such mergers. The concern was primarily that the growth of large conglomerates would necessarily distort the competitive process because such firms would be able to utilize their size and resources to gain advantages over other firms and because they would prevent or foreclose competition from actual or potential competitors.

These theories have foundered on proof requirements and on revised legal standards generated by the current economics-based perspective. From this perspective, the possibility that size might allow a firm to gain advantages over rivals has been considered unimportant in the legal evaluation of a merger, as has the possibility of foreclosure of competition. As a consequence, conglomerate mergers are today relatively safe from attack under the antitrust laws.

31. Cohen & Sullivan, "The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration," 62 *Tex. L. Rev.* 453 (1983).

D. The Merger Control System

The merger control system operates in some respects quite differently than the rest of the antitrust system. Particularly important here is its regulatory flavor. Court cases play a less prominent role in the merger area than they do elsewhere in the system. In part, this is because merger litigation by private parties is infrequent. There is often little incentive for private litigation, and thus relatively few cases are filed and pursued to judgment. In addition, the Supreme Court has accepted very few merger cases over the last twenty-five years, and thus case law guidance is limited. Moreover, the precedential value of many of the older cases has been undermined by the law-and-economics reorientation. Finally, mergers are difficult to treat "after the fact," and thus most attacks are mounted by the antitrust authorities prior to the merger, and in that context administrative policy is often of more practical significance than are judicial opinions.

The regulatory component of this system is particularly prominent in the context of pre-merger notification. The pre-merger reporting requirements of the Hart-Scott-Rodino Act (HSRA) were introduced in 1976 in an effort to improve the effectiveness of the merger control system.[32] The objective was to increase the deterrent effect of merger law by requiring firms to report mergers before consummating them. The government (and others) would be given advanced notice of the merger and have an earlier and more effective opportunity to respond to it.

HSRA requires that merging firms notify their merger plans to the government authorities where the planned merger meets certain size criteria.[33] The notification must include details about sales and asset figures of the participants as well as data about the markets that are involved. This is designed to provide officials with sufficient data to determine whether further assessment of the merger's potential harm to competition is necessary. The proposed transaction may not become legally binding until 30 days from the date of the filing of the notification (this may be extended by 30 days by either enforcement agency).

32. Hart- Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended in scattered sections of 15 U.S.C.).

33. Merging firms must file a notification if after the transaction the acquiring firm would own more than $200 million in value of the acquired firm. If the resulting values would be more than $50 million, but less than $200 million, notification is also required where either the acquired or acquiring firm has more than $10 million in either assets or sales, and the other party has more than $100 million of either assets or sales.

E. Harmonization Potential

Some areas of merger law are particularly favorable to harmonization; others present particularly difficult obstacles. Procedural elements are in the former category, while substantive elements are in the latter.

Pre-merger notification procedures have a high harmonization potential. The three main aspects of this notification procedure should be relatively easy to harmonize — form, timing and substance. Although there are differences between systems in the kinds of data required, the basic objectives of the data-gathering process are usually quite similar, and thus there are few obstacles to developing a standard basic form for information and a basic set of data requests (perhaps allowing individual systems the discretion to add to this basic form). Similarly, the waiting periods and deadlines should not be overly difficult to standardize. With regard to these issues, there are no significant cognitive obstacles. The objectives and concepts can both be readily understood across systems.

There are powerful incentives to harmonization in this area, because all competition systems have an interest in saving resources. Moreover, large firms from all countries stand to gain from such harmonization, and thus they should be in a position to exercise political pressure to accomplish it. Few (other than lawyers and accountants) benefit from the redundancy and waste in the current arrangement.

The harmonization prospects are less positive with regard to substantive merger law. There are major differences among systems in evaluating mergers. Many competition law systems consider labor and other social and political issues in evaluating mergers, and to that extent they diverge sharply from the U.S. focus on micro-economic efficiency. Even the analysis of economic issues often shows significant variations among systems.

Cognitive access obstacles are significant. As we have seen, U.S. law with regard to many types of mergers is highly uncertain, and thus it is difficult for outside observers to develop accurate knowledge about the likelihood of particular outcomes. If competition law systems (e.g., EU competition law) move toward a more thoroughly economic analysis, these difficulties should diminish, but today they remain important.

Incentives to harmonize in the area of substantive merger analysis are also limited. As with the treatment of single-firm conduct, merger law often involves political sensitivities. Political decision-makers in many states are likely to see little reason to move toward U.S. law regarding mergers. This is particularly true in smaller countries where political interests may be closely associated with the economic well-being of a small number of firms who may seek both freedom to merge and protection from some kinds of mergers.

VI. Concluding Comments

Any meaningful effort to harmonize competition law on a global level must pay careful attention to U.S. antitrust law. The size and economic importance of the U.S. market as well as the central role of the U.S. as an international political actor give particular weight to the views of both its official representatives and the lawyers and academics who describe and explain the system. That system can play important and constructive roles in the harmonization process, but its potential roles need to be carefully analyzed and considered.

One potential role for U.S. antitrust law is as a model for other systems to follow. The argument for casting U.S. antitrust law in this role goes something like this: harmonization is likely to proceed most efficiently if a single system is at the center of the process. This would allow other systems to converge toward a single point, thus providing a kind of anchor for the process — a set of concepts and institutions the sharing of which would itself generate convergence. If there is to be such a central system, the only viable candidate would be U.S. law, because it is the best known competition law system, and because this would be necessary to harness the economic significance and political role of the U.S. to the harmonization process. The strong form of the argument is that the entire U.S. system should play this role. A weaker form views the model role in relation to specific areas of competition law. The argument is bolstered by reference to the fact that the U.S. has played this kind of model role in the past and continues to do so in some countries today.

This report casts doubt on the value of ascribing such a model function to U.S. antitrust law. The U.S. system is in many respects significantly different from many other competition laws. It has developed in a very large and rich domestic market whose operations for most of this development were relatively little affected by external investment and trade flows. It has also been supported by a domestic political ideology which has valued competition exceptionally highly. Current U.S. antitrust law is based almost exclusively on a particular form of economic analysis — one that emphasizes micro-economic efficiency. Moreover, the system operates in ways that are often quite alien to those found in most other systems. In these and many other respects, U.S. antitrust law is sufficiently different from other competition law systems that it may not serve effectively as a model for others to follow.

Our analysis does suggest, however, that U.S. antitrust law can play potentially valuable roles in the harmonization process — as a source of information and insights and as a provider of political support. First, it provides a fund of data and theoretical thought that can be of great importance. U.S. case law is extensive. There are many published judicial opinions spanning more than a century of

economic and legal development. Moreover, these opinions typically include extensive analysis of the factual contexts to which the law is being applied. When coupled with a knowledge of the development of U.S. law, this set of opinions thus provides the basis for detailed study of the application of particular values, methods and perspectives. In short, it is a rich store of data that can be used to inform the development of competition law thinking. This is accompanied by a theoretical literature that is exceptionally deep and varied. This provides another potentially valuable resource for competition law decisionmakers, who can evaluate the applicability of these perspectives to the situations and problems they face in their own systems.

In order to use this information effectively, however, those who make competition law decisions need more effective intellectual tools and a deeper and richer knowledge base relating to the differences among systems and to the dynamics of the harmonization process. The tri-partite analysis I have used here may represent a step toward developing such tools and knowledge. It focuses first on a thorough understanding of the differences among systems, not just in relation to substantive law, but also in relation to the decisional processes that generate substantive law. Harmonization analysis that looks at formal rules is necessary, but we need to go beyond that. Second, it analyzes how decisionmakers know other systems — how they acquire and process information and what factors distort their knowledge. And, finally, it takes into account the interests that influence the ways in which decisionmakers use the knowledge they have acquired. This type of analysis can provide the basis for sound and informed decisions relating to harmonization. As we have seen, those decisions need to differentiate carefully among the various types of conduct to which competition law can be applied. Harmonization potential can differ widely with regard to the areas of law and procedure involved as well as with regard to the competition law systems involved.

The second role of the U.S. — as a source of political will — needs to be carefully separated from this first function. Given the size and economic and political importance of the U.S. as well as its traditional leadership in the antitrust area, it must be a key part of any successful harmonization process. This should not mean that other participants in the process must necessarily follow U.S. examples or adapt its law, institutions or theoretical perspectives. Compromise based on careful study of the type outlined above will be necessary for harmonization to be successful.

Choices about the modalities and institutions of harmonization should take both potential U.S. roles into account. Issues such as whether the World Trade Organization is the proper forum for harmonization need to be analyzed against this background. The best

institutional mechanism is likely to be one that develops the kinds of knowledge we have discussed here and makes that knowledge an important part of decision-making. It will also need broad-based political support.