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CONVERGENCE IN THE TREATMENT OF DOMINANT FIRM CONDUCT: THE UNITED STATES, THE EUROPEAN UNION, AND THE INSTITUTIONAL EMBEDDEDNESS OF ECONOMICS

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Discussions of the competition law treatment of dominant firms often center on the issue of whether EU and U.S. law in this area are likely to converge and thereby provide a more uniform legal terrain for the activities of such firms. Curiously, however, discussions of convergence seldom pay careful attention to key issues, such as "What are the differences in the role of economics in the respective legal systems and which factors are likely to affect significantly the likelihood of convergence?" They often hover in a somewhat mystical realm in which convergence is just expected to "happen."

In this essay, I explore the role of economics in the convergence scenario. Economics plays a central role in convergence discussions because it is a key element in the conception and operation of competition law. Yet there has been little exploration in the literature of the ways in which economics is used in the legal institutions that apply the law and how its roles can influence the process of convergence.

Many believe that EU law will, should, or must evolve in ways that bring it into line with current U.S. antitrust thinking regarding the treatment of dominant firms. Such convergence could, it is argued, reduce conflicts over conduct by dominant firms, create a more uniform normative basis for transatlantic (and ultimately global) business, and increase the efficiency of markets and the effectiveness of competition law. In this scenario, an economics-based analysis such as that found in the United States could provide the platform for convergence in this area. If economics is allowed to play the same roles in Europe that it plays in the United States, it could lead to convergence of the two sys-

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tems. The central assumption underlying this view is that economics will operate the same way in the European context that it operates in the United States and that this will produce the same outcomes with the same degree of predictability and thus the same effects on business behavior and on the efficiency of markets.

The centrality of this assumption calls for more careful examination of its foundations, but there has been little systematic analysis of how procedural contexts shape antitrust decisions and the role of economics in those decisions. Institutions and procedures structure the role of economics in unilateral conduct law, as they do in other areas of antitrust law, and this means that in order to talk meaningfully about convergence it is necessary to take these factors into account. Failure to do so may distort both private strategic decisions and policy choices.

I use the concept of institutional embeddedness to explore these issues, and I apply that analysis to the specific issues of convergence between the United States and the European Union relating to unilateral conduct law.[1] I have three main objectives. One is to explore the utility of institutional embeddedness as an analytical tool in the antitrust context. A second is to apply it to the issue of convergence in the treatment of unilateral conduct in the European Union and the United States. The third is to identify some of the implications of this type of analysis for convergence claims.

I. EMBEDDEDNESS ANALYSIS AS AN ANALYTICAL TOOL

Economics as a social science seeks universally valid principles, and from this starting point it is easy to take an additional step and assume that the application of economics within institutions will always lead to the same results, in which case increased use of economics should provide a basis for convergence among those results.[2] The core concepts of neo-classical economics encourage this assumption. Economic actors are assumed to act "rationally."[3] If they do, then economic analysis

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[1] For further explanation and additional references, see David J. Gerber, *Competition Law and the Institutional Embeddedness of Economics*, *in* ECONOMIC THEORY AND COMPETITION LAW 20 (Josef Drexl, Laurence Idot & Joël Monéger eds., 2009).

[2] For general discussions of economics methodology, see, e.g., MARK BLAUG, THE METHODOLOGY OF ECONOMICS: OR HOW ECONOMISTS EXPLAIN (2d ed. 1992); LAWRENCE A. BOLAND, THE METHODOLOGY OF ECONOMIC MODEL BUILDING: METHODOLOGY AFTER SAMUELSON (2000).

[3] This rationality assumption has been subject to increasing limitations among some groups of economists, especially in recent years. It remains central, however, to the use of economics in antitrust law. For discussion of recent movements of this kind within the economics profession, see, e.g., DIANE COYLE, THE SOULFUL SCIENCE: WHAT ECONOMISTS DO AND WHY IT MATTERS (2007).

should be able to predict the consequences of conduct and assess its efficiency properties, and econometric techniques can measure them. This would seem to assure uniformity of analysis and outcomes and thus provide a sound basis for convergence.

This claim, however, overlooks an important issue—i.e., the institutional embeddedness of economics. When institutions apply economics, the scientific and thus abstract methods of economics become *embedded* in the rules and procedures of the institution that uses them, and those rules and procedures shape the way it is used. Economics becomes one decisional factor among many that influence outcomes.[4] If institutional and procedural systems embed economics differently, the outcomes they produce can be expected to differ accordingly. This means that embeddedness issues are central to convergence claims and aspirations.

This form of analysis can be applied to all substantive areas of antitrust law, but three factors make it particularly important for analyzing the prospects of convergence in the unilateral conduct area. First, unilateral conduct is the area where U.S. antitrust law and EU competition law diverge most and thus where the propensity for conflict is greatest and the potential value of convergence is highest. Second, it is the area of antitrust law where the role of economics is most contested. And third, unilateral conduct presents particularly significant challenges for both competition law and economics. It requires that the law distinguish between those components of a single firm's conduct that are considered "anticompetitive" and those that are not. This confronts competition law with difficult choices between the risks of over-inclusion and under-inclusion, and it presents economics with particularly complex and uncertain issues of prognosis and analysis. The difficulty and uncertainty of these choices increases the likelihood that institutional embeddedness factors will influence antitrust outcomes.

In assessing the effects of embeddedness in unilateral conduct law, three factors are central: the amount of data, control over data, and interpretation of data. The role and value of economics in antitrust law depends to a large degree on its capacity to evaluate data and effectively to assess and interpret facts; the amount of data available to economists is central to realizing this value. The second involves control over data. Who can get, use, and control data, under what circumstances, and subject to what kinds of constraints? But the procedural system conditions

[4] For comparative analysis of these types of differences, see David J. Gerber, *Competition*, *in* OXFORD HANDBOOK OF LEGAL STUDIES 510 (Peter Cane & Mark Tushnet eds., 2003); David J. Gerber, *Comparative Antitrust Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1193 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

the role of economics by determining the extent to which lawyers and economists can *control* components of the data set. This includes such issues as the kinds and extent of restrictions placed on economists in acquiring, evaluating, and presenting data to those who make decisions regarding the "facts" of the case. Finally, economics "interprets" data, and thus the procedural influences on that interpretive role are keys to the outcomes reached. Procedural factors can determine how economists sort and categorize data and relate specific elements of data together to form factual narratives that answer the question "what happened?" Economics can be of enormous importance in deepening, broadening, and enriching this interpretive process—i.e., the "transformation" of data into legally approved "facts." These three factors condition the use of economics in fundamental ways. I will examine some implications of these differences for the convergence hypothesis in unilateral conduct law.

II. EMBEDDEDNESS ANALYSIS, UNILATERAL CONDUCT, AND CONVERGENCE

A. CONVERGENCE: WHAT IS IT?

The concept of convergence is often used in very general ways to refer to increasing similarity among competition law systems.[5] To be more precise, I will use it here to refer to a process in which the shared characteristics of two or more systems or areas of law (here, U.S. and EU law on dominant firm conduct) increase and the non-shared characteristics are reduced. Convergence is a directional process. It implies movement toward a point (the point of convergence). In the context here, the question is, "Which system changes most in this process—i.e., toward which system is change moving?"

This focuses attention on the further question of *what exactly is converging*. The issue is often left unspecified, but it is central. Discussions of convergence typically assume that convergence refers to the "operative rules" (or normative standards) for unilateral conduct and thus to outcomes reached in applying the law. This is the form of convergence that is usually of most practical and policy importance, and it justifies expectations and policies relating to convergence. Often, however, the *evidence* for convergence refers only to formal rules—e.g., the text of a statute. This conflates two issues—convergence in formal rules and convergence in decisional outcomes or operational rules, and in competi-

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[5] For further discussion of convergence issues, see DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION (2010).

tion law that gap is often a chasm. The focus here is on convergence in decisional outcomes. Given the patterns of development in U.S. and EU law in recent years, there appears to be little likelihood that U.S. law will move toward EU law in this area. The issue thus becomes more narrowly focused on the extent to which the operational rules and analysis of European law in this area can be expected to move toward U.S. law.

B. COMPARING COMPARABLE INSTITUTIONS

In order to engage in meaningful comparison, we need to compare institutions performing similar functions. In the United States, the federal courts are the locus of antitrust litigation. They "make" U.S. antitrust law, so we focus on them, and we will compare *courts with courts*—specifically, European courts with U.S. courts. Given that the two courts of the European Union perform functions that often differ fundamentally from those of national courts, we will use European national courts for the comparison. We look at general jurisdiction courts of first instance (i.e., trial) courts, because this is where private enforcement litigation typically takes place in both the United States and the European Union. While national courts have so far played a relatively minor role in the European competition law context, private litigation in competition law has been increasing in Europe, and the European Commission is currently advocating greatly increased reliance on private enforcement in Europe.[6] Our analysis treats, therefore, the specific institutions that will be central to the convergence issue.[7]

There are, of course, significant differences among continental European procedural systems, but we can identify patterns and characteristics that are typically found in these systems. Although we will examine general jurisdiction courts, many elements of the comparison also apply to administrative courts because they rest on many of the same principles of procedural justice. We do not include the common law-based procedural systems of the United Kingdom and Ireland in this analysis because their deviations from the continental pattern are too extensive to be tractable in the space available.

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[6] European Comm'n, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF.

[7] Although the Commission's modernization plans call for increased reliance on private enforcement, many observers and officials in Europe do not share this objective. For discussion, see, e.g., Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 WORLD COMPETITION 473 (2003).

III. POINT OF CONVERGENCE: U.S. MONOPOLIZATION LAW AND THE PROMINENCE OF ECONOMICS

The institutional embeddedness of economics—in particular, the procedures of the federal courts—has provided the incentives and opportunities for economics to acquire the central role that it currently plays in U.S. unilateral conduct law. We first summarize the basics of monopolization law and then look at some of the ways in which the institutional embeddedness of economics shapes decisions in the area.

A. MONOPOLIZATION LAW AND ECONOMICS: A QUICK OVERVIEW

Prior to the law and economics "revolution" that began in the 1970s, monopolization law (Sherman Act, Section 2) in the United States developed according to traditional case law methodology. Courts found evidence of harm in a particular kind of conduct; subsequent cases were analogized to existing precedents; categories of conduct were given labels; and later courts tried to fit conduct into these categories.

Over the last three decades, however, economics has become pivotal in the analysis of unilateral conduct, as it has in all areas of U.S. antitrust law, and this has reshaped the law in the area in important ways.[8] Economics now not only interprets the data presented in unilateral conduct cases, it also provides the normative standards for such conduct. The basic issue is whether economic analysis identifies particular types of negative consequences from the conduct under investigation. The focal point of this form of antitrust analysis is the concept of consumer welfare as defined in neo-classical economics. It refers generally to the effects of conduct on prices in a defined economic market. In general, the conduct of a dominant firm is viewed as a violation of Sherman Act Section 2 if it can be shown to have caused net harm to consumer welfare.

Although some earlier court decisions continue to have relevance in shaping the way issues are presented in the area, the economic approach represents a fundamentally different way of thinking about unilateral conduct law. To succeed, a plaintiff must identify actual or potential harm to consumers. Defendants then generally have the opportunity to justify their conduct by reference to its procompetitive effects. This structuring of the substantive legal analysis is of critical importance in analyzing convergence potential. Categories of conduct play a marginal role in the analysis, as do the characteristics of the con-

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[8] For a recent overview and critique, see Einer Elhauge, *Defining Better Monopolization Standards,* 56 STAN. L. REV. 253 (2003). For insights into the context of the development, see William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking,* J. ECON. PERSP., Winter 2000, at 43.

duct itself. The decisive issues are based on economic analysis of the conduct's effects.

B. FEDERAL COURTS AS INSTITUTIONAL-PROCEDURAL CONTEXT

The central role of litigation in the U.S. antitrust law system is often misunderstood.[9] Unlike virtually all other competition law systems, U.S. antitrust law is made almost exclusively in the federal courts. Legislation plays a minimal role, and administrative decision making is far less influential than it is in most other competition law systems.[10] The law is forged primarily in private litigation, and thus the issues and concerns of private litigation are prominent in both the procedural and substantive decisions that these courts produce. Public enforcement operates through these same courts and basically the same procedures. This means that the procedures of the federal courts largely structure the analysis of antitrust cases.[11]

Several features of federal court procedure play particularly prominent roles in shaping unilateral conduct law. Foremost among them is the "discovery" procedure, which provides attorneys for each litigant with extensive authority to acquire data from other parties. This procedure occurs before the trial, and it involves minimal direct judicial involvement with the substantive issues. The standard of relevance for discovery procedures is critical: an attorney may legitimately demand from other litigants any data that can reasonably be expected to lead to evidence admissible at trial. It is not limited, as in most legal systems, to data that has been identified as likely to be directly probative of an element of the claim. The discovery procedure often produces vast amounts of data for each litigation team.

A second key feature of this procedure is the central role of the attorneys in the litigation and the limited role of the judge. Not only do the attorneys acquire and control the data, but they also structure and interpret it prior to the trial procedure and thus prior to interpretations by judge or jury. The judge has minimal responsibility to seek factual mate-

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[9] For a discussion of the role of private litigation in the U.S. antitrust system from a comparative perspective that relates U.S. experience to the situation in Europe, see David J. Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, *in* THE ENFORCEMENT OF COMPETITION LAW IN EUROPE 431 (Thomas M.J. Möllers & Andreas Heinemann eds., 2008).

[10] *See* Gerber, *Competition Law*, *supra* note 4; Gerber, *Comparative Antitrust Law*, *supra* note 4.

[11] This is not necessarily true in related areas of U.S. antitrust law. In merger law, for example, the role of administrative decision making is significantly greater. *See* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).

rial. The attorneys also have extensive control over the presentation of their data to the relevant decision maker—whether judge or jury. Attorneys prepare their own witnesses, often discussing in detail with their witnesses what to expect from the questions of opposing lawyers and so on. They also cross-examine opposing witnesses. This treatment of witnesses also applies to expert witnesses, who are hired by each side and who form part of the respective litigation teams. The judge is primarily an umpire whose role is to enforce the rules of procedure, ensure fair proceedings within those rules, and, as the case may be, decide between the factual presentations the attorneys make to the court. The judge does not develop the case independently, but relies on the attorneys for each side to present fully developed legal and factual arguments (to the judge or, if there is one, to the jury) for evaluation.

U.S. legal culture views law and litigation in ways that reflect, support, and enhance the effect of these procedural factors. In general, for example, the U.S. legal profession tends to view law's substantive norms as fact-specific and thus to some extent flexible and indeterminate. The focus on cases in U.S. legal culture emphasizes the degree to which law is made in concrete factual situations, and in antitrust cases the lack of statutory guidance further strengthens this effect. This is associated with a view of procedure which focuses on factual detail and the specifics of the case more than it does on conceptual and systematic consistency. U.S. litigators often claim that "facts win cases"—i.e., that the central issues in litigation are generally factual issues and that whoever has the most and best evidence is likely to win. The sensitivity of the procedure to the specifics of the case and to the clash of conflicting arguments is a key means of legitimating the process.

C. A Full Deployment Model of Economics Embeddedness

These procedural factors create what we can call a "full deployment model" of the role of economics in antitrust litigation. They create an open field for the application of economic methods and techniques and provide maximum opportunities and strong incentives for economists to apply economic methodology. The three embeddedness factors that we have identified above highlight key features of this model.

The large quantities of data often produced by the discovery procedure provide opportunities and incentives for economists to use their econometric and other tools to evaluate the data, and this can significantly increase the value of economic tools. In general, the more data, the more value economics can have. Large amounts of data improve statistical reliability, sharpen identification of causal connections within the data, and allow more thorough and reliable testing of theories and

models. Economists can range through this extensive data base, employing economic tools as they go, and this tends to enhance the value of their role in the litigation process.

The control that lawyers/economists have over data also supports the full deployment of economic analysis. The discovery process is in their hands (subject to controls to prevent abuse). The lawyers also decide what factual material will be presented to the decider of fact and how it will be presented. This allows economists (working with lawyers) to develop the economic analysis according to their own needs and objectives, subject only to reasonableness requirements and the cost constraints imposed by their clients. They can use the discovery process to seek information relevant to economic theories that are being considered, and subject the resulting data to econometric or other forms of economic analysis—all generally without judicial controls or other interference. They can also focus their economic analysis on the legal arguments they wish to support. They thus have incentives to explore fully all potential ramifications of the legal arguments and economic claims. Finally, the process creates opportunities for contesting economic claims and arguments. Economists as experts challenge each other both at the discovery stage and in the courtroom context. This helps to reveal the strengths and weaknesses of the economic analysis and thus should lead to more accurate and valuable factual analysis. These litigation features provide maximum opportunities and strong incentives for litigation teams to examine the data as fully and efficiently as possible.

The data interpretation process—the third of the embeddedness factors—also encourages full deployment of economic tools. The procedural system provides each litigation team with extensive incentives to use economics to interpret data in ways that support the outcome it seeks. At trial, the respective teams present their stories and the data supporting them. Neither judge nor jury interprets the data prior to hearing the interpretations presented by the litigant teams, and in that sense their interpretations are not independent of the litigant teams' interpretations.

Economists are relatively unfettered in performing their interpretive functions by the constraints that often influence factual interpretation in other systems. They perform their interpretive functions *prior to* interpretations by the judge or jury. Moreover, they are not cognitively fettered by the need to fit their interpretations within specific legal principles. They are free to pursue particular interpretations that are structured neither by the concepts of the legal system nor by existing legal precedents.

D. THE FULL DEPLOYMENT MODEL AND UNILATERAL CONDUCT ANALYSIS

This full deployment model of economic embeddedness shapes U.S. law and thought concerning unilateral conduct. The unique challenge of unilateral conduct law is to draw a line between procompetitive conduct and anticompetitive conduct in the business activities of a single enterprise. Unlike other areas of law in which a transaction marks the specific conduct whose consequences are to be assessed and focuses attention on the effects of this event, there is no such independent marker to signal the possibility that particular conduct is anticompetitive. Legal institutions and procedures must isolate and identify it. This is the "central distinction" of unilateral conduct law.

The value and effectiveness of unilateral conduct law depends on the system's capacity to perform the inherently difficult task of applying this distinction to the activities of a single firm. As a result, the key issue in this analysis is the extent to which the legal system can rely on economics to draw that line. In U.S. courts, the embeddedness factors encourage full deployment of economics, and this, in turn, generates confidence that economic tools can draw the line effectively. This has encouraged courts to abandon categories of conduct as the primary tools in determining the legality of conduct. Embeddedness factors in Europe point in the opposite direction.

1. *Maximizing the Value of Economics in Unilateral Conduct Law*

The full deployment model of economic embeddedness increases the capacity of economics to perform the central function of isolating and identifying anticompetitive conduct within the activities of a firm. The large amounts of data that are typically produced by U.S. discovery are particularly valuable for performing this function because they allow economists to examine many elements of the firm's conduct. They can employ their tools and techniques to explore potentially relevant conduct and consequences that might not initially appear to be causally related. The large data set provides economists with the material that is typically needed for effective statistical analysis of the effects of a variety of combinations of conduct elements and for the testing of theories of causation. This is particularly important in the context of dominant firm conduct because the firm's conduct is presumptively aimed at efficiency and competitive success and thus anticompetitive conduct is likely to be intertwined with other forms of conduct that are procompetitive and thus difficult to discern. The larger amounts of data increase confidence that the tools of economics can produce results that are predictable, reliable and relatively consistent from one case to another.

The extensive control of data afforded to the litigant teams by U.S. procedure further enhances the capacity of economic tools to identify exclusionary conduct effectively. Economists can look not only at the consequences of a specific transaction or arrangement, as in other areas of antitrust law, but at the broader picture of potentially relevant anticompetitive and procompetitive effects in dominant firm conduct. This allows them to pursue possible causal connections where they suspect anticompetitive conduct but do not have clear evidence of it. They can themselves shape the data set and control how it is used. Moreover, this control of data gives them incentives to undertake such exploration because, if such connections can be discovered, the lawyers and economists can develop strategies for most effectively presenting them to the trier of fact.

The opportunity to interpret data without court interference and without the need to fit interpretations within a pre-designated category is also of maximum importance in the analysis of unilateral conduct because the issues relate not to a particular transaction but to a whole range of conduct. This places a particularly high value on inventiveness and imagination in drawing together data pieces to construct convincing narratives of events and their consequences.

Each of these embeddedness factors increases the potential value of economics in performing the central task of unilateral conduct law and puts economists and courts in a better position to draw the lines between anticompetitive and procompetitive conduct of a firm. It thus generates confidence to rely on economics to perform that function and casts doubt on the role of legal categories in making such an analysis.

2. *Shaping Antitrust Norms and Principles*

Embeddedness factors have not only increased confidence in the capacity of economics to identify and isolate exclusionary conduct, but they have also reshaped the relevant substantive norms. Confidence in the value of economics has promoted the use of "consumer welfare" as the normative reference point for all antitrust law. The concept is drawn from neo-classical economics, and that discipline's methodological tools are necessary to apply it consistently and effectively. This has allowed courts to refashion the analysis of unilateral conduct in accordance with the central goal of determining when a dominant firm causes harm to consumer welfare. An economic concept is thereby transformed into a legal standard.

Acceptance of this standard has, in turn, encouraged what I call the "contrapuntal structuring" of the law in this area. By this I mean simply

that each litigant team is assigned to pursue one part of the analysis, but the concept of consumer welfare relates them to each other. The plaintiff must be able to show that the conduct has caused significant harm to competition, but in order to fully assess the impact of conduct on consumer welfare, it is necessary to allow the defendant to prove that the conduct has "procompetitive effects" that may outweigh any anticompetitive effects. The consumer welfare standard makes the two investigations commensurable—i.e., economists can measure pro- and anticompetitive effects in relation to each other.

This normative structuring is made possible and effective by the fact that federal court procedure provides opportunities and incentives for each side to pursue particular components of the analytical task. In assigning data investigation and advocacy tasks primarily to the lawyers rather than to the judges, the procedure creates the space for this division of tasks and thus for this substantive law structure. It encourages and enables the litigants to pursue evidence for both the anticompetitive and procompetitive elements. In particular, once the plaintiff has established anticompetitive effects, unilateral conduct law generally places the burden of proof or persuasion for procompetitive effects and "efficiencies" on the defendant, thus creating a clearly defined task for the defendant's lawyers and economists and giving them opportunities and incentives to perform that task effectively. This distribution of tasks tends to enhance the effectiveness of the factual analysis that is so central to unilateral conduct law.

3. *Effect on Substantive Law: Form Gets in the Way*

The embeddedness factors I have identified have induced U.S. courts and commentators to conceive of unilateral conduct law in ways that presuppose a central role for economic analysis. From this perspective, form-based rules appear inadequate and suspect. Analysis that is based solely or primarily on the form of the conduct merely gets in the way of the economic analysis and creates a risk that the antitrust rules will unintentionally be over-inclusive and impede procompetitive conduct. This full deployment model of economic embeddedness is costly, and it may reduce the incentives to enforce the law against anticompetitive conduct, but it can generate an effective means of drawing the line between the anticompetitive and procompetitive conduct of a dominant firm.

IV. UNILATERAL CONDUCT IN EUROPEAN COMPETITION LAW: CONSTRAINTS ON ECONOMICS

In continental European national courts, economics is embedded in institutions in ways that shape the conceptual and doctrinal treatment of

dominant firms very differently from the way the analysis is structured in the United States, and this may limit the potential value of economics for many purposes.[12] These differences in the institutional and procedural contexts of the use of economics must be taken into account in assessing the potential for convergence.

A. SETTING THE CONVERGENCE STAGE: ARTICLE 82 AND THE "MORE ECONOMIC APPROACH"

The evolution of unilateral conduct law in Europe differs in fundamental ways from its trajectory in the United States. The process of interpreting abstract texts has been at its center.[13] The Treaty of Rome that created the European Union (then called the European Economic Community) in 1958 contains a provision that designates abuses of a market-dominating position as a violation of the Treaty. For almost a decade after the Treaty went into effect, EU institutions and their academic and policy advisors wrestled with the meaning of Article 82. Before the European Commission began to apply it to actual cases, its officials spent years discussing the conceptual contours of key statutory terms, such as "dominance" and "abuse." By the 1970s, the Commission had defined basic concepts, and the emphasis shifted to the European-level courts—initially, the European Court of Justice (ECJ) and later also the Court of First Instance (CFI). These courts then began to develop the law in cases. It is important to note, however, that relatively few cases go to the two European courts, and their role is usually limited to reviewing the actions of the European Commission.

The concept of abuse that they developed was based on the idea that some categories of dominant firm conduct represent uses of economic power that distort the competitive process and thereby impede the ability of their competitors to compete effectively with them. The role of Article 82 is to identify these forms of conduct. For example, fidelity

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[12] For a series of articles discussing the current law under Article 82, see EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Claus-Dieter Ehlermann & Mel Marquis eds., 2008). For analysis of the debate over the future of Article 82, see David J. Gerber, *The Future of Article 82: Dissecting the Conflict*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007, *supra*, at 37. As of December 1, 2009, the Treaty of Lisbon became effective and introduced a renumbering of the articles in the Treaty Establishing the European Community. Relevant to the discussion here, Article 82 is now Article 102. However, for ease of reference, I will continue to use the prior numbering in this discussion. Treaty on the Functioning of the European Union, art. 102, May 9, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009).

[13] For detailed analysis of the evolution of Article 82, see DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 342–90 (paperback ed. 2001); David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L L.J. 1235 (2008).

rebates have been considered abuses of dominance because they have no relation to actual performance in the market and are made possible simply by the firm's dominance and/or greater size. Under this provision, the Commission and the courts even developed the idea that a dominant firm has a "special duty" not to engage in such distortive conduct.

In the late 1990s, the Commission began to move the intellectual foundations of European competition law toward a "more economic approach." This move reflected the influence of U.S. developments as well as European concerns that the form-based analysis that had prevailed might be an obstacle to European efforts to increase economic growth and to integrate post-Soviet Member States.[14] The term "more economic approach" is used loosely to refer to increased use of economics in European competition law, and much controversy remains about its content. Basically, however, it refers to the idea that economics should play an increasing role in EU competition law—not only in improving the interpretation of data, but also in shaping its norms.[15] The Commission has implemented this approach in its analysis of agreements under Article 81 and in much of its merger law. In the application of Article 82, however, this effort has met with significant resistance and doubts about how the law can and should be applied in European courts.

Differences in the antitrust analysis of dominant firm conduct have led to conflicts with the United States, the most notable of which was the litigation in which Microsoft's practices were found illegal under Article 82 after having been accepted by U.S. antitrust authorities—a conflict which became an important topic throughout Europe. Two further developments have increased the prominence of the issue. One was the introduction in 2004 of the requirement that Member States apply EU competition law in almost all competition law cases. This meant that the EU treatment of the issue was for most purposes the only relevant European legal framework, and thus national institutions would typically apply EU legal principles in unilateral conduct cases. The other has been the Commission's efforts to encourage more extensive private enforcement of competition law. Together, these developments mean that national courts in all Member States are likely to be faced with increased amounts of litigation on these issues. Many questions remain as to how economics will actually be used, especially by Member State courts, and

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[14] For a thorough analysis of the more economic approach, see ROBERT O'DONOGHUE & A. JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 82 EC (2006).

[15] For an analysis of some of the controversies concerning the use of economics in European competition law, with particular reference to distinguishing among the various uses of economics in applying Article 82, see Gerber, *The Future of Article 82*, *supra* note 12.

thus the role of economics is likely to remain a topic of concern for many years.

B. Continental Civil Procedure as Context

A brief look at some basic patterns of continental civil procedure reveals that key factors relevant to the use of economics differ significantly from those found in U.S. federal courts. For example, much less data are available for lawyers; economists (as members of a litigation team) have much less control of the data; and their opportunities to influence interpretations of the data are far fewer.

The relative paucity of factual data in continental civil procedure is a prominent distinguishing feature. There are no close analogues to U.S. discovery procedures. Litigants may bring to the litigation any data they may have acquired on their own, but the state does not provide a mechanism by which litigants themselves can obtain data from other litigants or from third parties, and the court itself usually has limited authority to demand such information.[16] Even in situations where a judge has authority to require the presentation of data, she often has few incentives to do so, because she may not have the resources in time or personnel support necessary to process or analyze complicated economic data. Moreover, the state bears the costs of such data acquisition (whereas the costs are borne by the litigants in the United States).

The data that is introduced into the litigation is dealt with very differently than it is in the United States. The basic principle of continental civil procedure is that procedural authority and responsibility are centralized: The judge controls virtually all aspects of litigation, including the data.[17] She decides whether there is enough evidence for litigation even to commence, and she thus determines whether there will be any form of evidence gathering. If she allows the claim to be pursued, she opens a file (or "dossier") that she then maintains throughout the proceeding. This file represents the official record of the proceeding, and it also forms the basis for review on appeal.

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[16] A judge can typically do so only under highly restricted conditions, such as, for example, where a party provides evidence that such data is likely to be *directly* relevant to a specific claim (i.e., directly probative of an essential element of the claim). In general, therefore, the only data typically available for the litigation is that which can be found in the public record, data that the parties themselves voluntarily bring to the case, and some limited and specific forms of data that the judge is authorized to require a party to submit to the court (e.g., a document to which a witness has referred in the proceedings).

[17] For analysis, see Gerber, *Private Enforcement of Competition Law*, *supra* note 9.

The judge's decisions thus shape the factual material and the application of legal principles to them. She determines what data are to be presented to the court, which witnesses, if any, may be heard by the court, and which questions, if any, may be posed to witnesses.[18] Throughout this process substantive and procedural issues are intertwined. The judge decides which direction the litigation will take by deciding at all stages of the proceeding which possible legal theories and claims she considers worth pursuing.

This principle of centralization of procedural authority both reflects and reinforces other central elements of continental legal systems. For example, the continental judge is typically a lifetime career civil servant who is trained specifically for the judicial role immediately after university and who generally remains a judge throughout her career, sometimes serving in "chambers" that specialize in particular types of cases. This makes feasible the requirement that the judge know the substantive law applicable in the cases she handles. Her professionalism and her knowledge of the substantive law are central legitimating features of the system. This is closely associated with the value attached to legal certainty (or "legal security") in continental legal culture.

C. The Constraint Model of Economic Embeddedness

This procedural model significantly constrains the use of economics. It provides relatively limited amounts of data for examination, few opportunities to seek, control, and explore data, and few incentives to apply economic analysis. The entire procedural structure centers on the knowledge and expertise of the judge in the relevant substantive law. The judge applies the substantive law continually to the procedural development of the case, eliminating or adding claims as she goes. This means that data analysis and interpretation are continually intermingled with the application of substantive law. The judge starts with often highly developed and specialized knowledge of the abstract principles to be applied in cases and about prior interpretations of similar data. She necessarily interprets the new data through these concepts, categories, and prior cases, and they thus shape and guide the interpretation of the

[18] Lawyers can sometimes make suggestions regarding witnesses or questions to be asked, but they typically have no control over data that the judge acquires. There is also no broad cross-examination mechanism (and often no cross-examination at all). The judge typically chooses any experts she might wish to hear, and experts are responsible only to the court. In these courts, witnesses normally provide their material in "raw form"—i.e., as a single, connected narrative rather than in response to questions from lawyers or from judges. In some systems, especially those of the French procedural tradition, "live" witness testimony plays a minor role in most litigation.

data. There is no jury, and the lawyers have limited opportunities, if any, to influence the judge's interpretations of the data.

The data set to which the tools of the economist can be applied is very limited (by comparison with the United States), and this tends to reduce the value of certain forms of economic analysis. Inevitably, whatever economic analysis is performed is "thinner," in the sense that there is less data available to support it. For example, there may not be sufficient data to perform particular kinds of econometric analysis effectively. It also means that economic theories cannot be tested to the same degree as in the United States. One important use of economics is to provide theory-based models that can inform the analysis of factual data, but where the data is insufficient to test these models, their value is correspondingly reduced. Much of the value of economics in antitrust litigation rests on its utility in analyzing complex factual situations, but in the European national court context, the limited amount of data reduces that value.

This model of economic embeddedness also provides litigation teams with far less control over the limited data that is available. In continental procedure, the judge, not the lawyers and economists, develops the factual material. Economists thus have far less opportunity to pursue lines of factual analysis they consider promising and to employ the tools of economic science to explore potentially relevant causal connections. The judge may allow the litigant teams to see data that she has gathered, but this may be of limited value to an economist seeking to use her tools to pursue the analysis of data. Without more extensive control over data, economists cannot push the interpretive limits of the available data and shape their investigations of it.

The opportunities for economists to interpret the data are also severely constrained. In continental procedure, the judge interprets the data herself, perhaps asking for aid on rare occasions. Moreover, she interprets it throughout the proceeding—often prior to any opportunity for economists to influence her interpretation. This significantly constrains the interpretive role of the economist. In contrast to the U.S. practice of allowing the parties to use economics to develop interpretations of data and then seeing which ones can be substantiated, continental procedure works the other way around. The judge's interpretations are driven by the categories and concepts of the substantive law. She decides which provisions of the law, if any, need to be supported by economic analysis of the data. The cognitive impact of this difference can be profound.

The continental model of centralized procedural authority thus constrains the role of economics. It provides less data for economists to analyze, fewer opportunities for them to do so, and limited space for economics to be used in constructing narratives on the basis of the data.

D. UNILATERAL CONDUCT AND CONSTRAINED ECONOMICS

This constraint model of economic embeddedness thus provides a fundamentally different context for assessing the conduct of dominant firms than that provided by U.S. federal courts. The embeddedness factors in European national courts constrain the uses and roles of economics in ways that impede its capacity to perform the central distinguishing function of unilateral conduct law—i.e., distinguishing between competitive and anticompetitive conduct in the business activities of a single firm. This is not to say that economics cannot be used under these constraints, but there is less basis for confidence that it can identify harm effectively, consistently, and reliably.

1. *Reduced Capacity to Perform the Central Analytical Function*

In this area of competition law, the structure of law depends on confidence in the methods used to perform that task. The legal categories and concepts that have been established in legislation and developed in prior cases are likely to continue to be used—even if not acknowledged—unless those responsible for applying the law have a high level of confidence that economics can perform this task more consistently, predictably, and efficiently than the traditional legal methods. Yet the constraint model limits opportunities to use the tools of economics and provides few incentives to try to use them, for a number of reasons. First, the far smaller data sets available for economic analysis limit the value of economics as a tool for identifying anticompetitive conduct within the extensive and complex set of materials related to the conduct of a dominant firm. They provide significantly less data for statistical analysis and for the construction of convincing economic models, which reduces their value as tools for discovering potentially relevant material. Economists have far less opportunity to explore potentially relevant causal connections that might reveal anticompetitive effects. In general, the paucity of data provides less material for the kind of in-depth economic analysis that is so necessary for economics to be useful in unilateral conduct analysis and that has become so central to this area of law in the United States.

Second, the limited control over data by the litigant teams reduces their capacity to explore potential causal connections within a complex set of data. The central challenge of unilateral conduct analysis is lo-

cated in the fact that the firm's conduct is unitary in the sense that it seeks profits and that all of its activities are in some sense intended to yield competitive success. Numerous activities are typically interrelated in overlapping business plans of various units of the firm. Unilateral conduct law must seek to identify a (presumably) small segment of this conduct and distinguish it from other components of the firm's activities. This means that the capacity to explore potentially relevant data can be a key element in uncovering important competitive effects. Control of data and the opportunity to explore within it are especially important for the defendant, who seeks to identify the procompetitive effects of conduct. These effects may not be identifiable by reference to the same data as is relevant for proving anticompetitive effects. Thus, finding the causal links requires the capacity to explore and test potentially procompetitive effects. The contrast to other areas of antitrust law, such as cartels, is particularly sharp and significant. There, the need to explore a broad range of potential effects may be much less because the issues are marked and defined by a specific transaction (e.g., the agreement).

Third, the reduced scope for influencing interpretation of the data limits the opportunities for economists to construct narratives and causal connections within large amounts of data that may be relevant to the claims. This is crucially important because individual conduct elements are interwoven, and data that may be relevant to claims of causality may be widely scattered among data sets. In the conduct of a large and dominant firm, data elements relating to both conduct and the consequences of conduct can be assembled and structured—i.e., interpreted—in a large variety of ways, and thus the freedom to explore these potential connections is particularly critical to effective unilateral conduct analysis. This freedom is severely constrained in continental procedures.

Together these factors limit confidence in the capacity of economics to identify harmful conduct in a consistent, reliable fashion. The embeddedness factors are critical because it is precisely these factors that limit confidence in the role of economics, not the capacity of economics itself.

2. *Impact on Conceptual Structure*

In addition to those factors that limit the capacity of economics to identify exclusionary conduct, the constraint model shapes the structure of the law itself. The foremost factor is that this procedural model cannot create the contrapuntal structure that U.S. procedures have helped to shape. U.S. law, as we have seen, assigns particular tasks to the defen-

dant, allowing and encouraging the defendant to rebut claims that its conduct is harmful to consumer welfare by showing that the alleged harm has not actually occurred and/or that the anticompetitive effects are offset by procompetitive effects. In European national courts, this kind of allocation is not possible except perhaps in highly truncated form. The judge is responsible for making factual determinations. She cannot assign aspects of the factual analysis to independent investigation by the lawyers and economists for the parties. In general, the parties are not given opportunities to develop on their own specific elements of economic analysis that are relevant to their cases (e.g., procompetitive effects). The judge may enlist economists to provide expert advice to the court, and she can ask them to provide analysis on particular points, but she generally has no obligation to do so. Some procedural systems allow attorneys to offer their own economists to the court, but even where this is possible, the court basically determines the extent of the roles played by the economists.

Another obstacle to structuring norms on the basis of economics in this procedural setting inheres in the combined factual-legal role that judges play in continental courts. Where a judge is responsible for developing both factual and legal claims and analysis, and attorneys have limited roles in acquiring and interpreting data and presenting it to the judge, norms cannot as easily give independent weight to particular economic issues. For example, the identification of efficiencies or procompetitive effects as an independent element of the analysis is more difficult, if not impossible, where the judge is responsible for assessing all factual and legal issues. The judge may, of course, be instructed by the law to take particular issues into account in her overall assessment of the data in the case, but these issues do not thereby become a separate and independent component of the normative analysis. They are necessarily intertwined with other factual and legal issues in the cognitive processes and procedural decisions of the judge. For example, claims that anticompetitive conduct also has procompetitive effects can have no independent status, but would have to be made, if at all, by the same judge who had just determined that there were anticompetitive consequences. This distinction may seem too fine to be of importance, but it can play a major role. It is the difference between a situation where a particular issue has a particular place in the analysis that is formally and institutionally "protected" and as to which specific kinds of claims can be made and defended, on the one hand, and a situation where the issue is one of many parts of an overall factual analysis and has no independent status or claim to attention.

On a more general level, the role of the judge in continental courts impedes her from incorporating economic analysis into the conduct norms she applies. Continental judges are required to pay close attention to the language of the statutes and other authoritative texts they apply. Their role is not to go beyond the language of the legal text they are applying as interpreted by academic commentaries and higher courts. They are trained merely to interpret and apply it according to an established methodology. In interpreting texts, higher courts, can, of course, alter and develop the law over time, but they do not view norm-creation as part of their role, and thus they are not in a position merely to choose an economic analysis over an analysis based on the statute, relevant statutory commentaries, and prior judicial opinions. In the United States, in contrast, such decisions are precisely what led to the reshaping of unilateral conduct law by the courts. U.S. courts and commentators have seldom had to pay serious attention to textual analysis in most areas of antitrust law, and this is particularly true with regard to unilateral conduct law. The law is provided by prior cases that are often ambiguous and somewhat malleable, and this has allowed courts to shape the normative structure of unilateral conduct law according to their own conceptions of sound legal method and policy. That is not possible to anywhere near the same extent in European national courts. Legislatures and other authoritative institutions like the European Commission could formulate norms in this area, but this has not proven to be an easy task at the European level, and national legislatures have not been inclined to do so.

Even if judges had more autonomy to rely on economics than they do, they may have few incentives to increase that reliance. The judge is responsible for evaluating data and for constructing a factual narrative. She is unlikely to be trained in recognizing economic issues or in interpreting the economists' references to the models and statistical tools used in that science. Reliance on economic analysis can be highly burdensome and time-consuming, and her incentives are to carry out her factual investigation quickly and to use methods in which she has expertise. The fact that the state bears virtually all of the costs of data analysis may also be relevant. Those in charge of judiciary budgets are unlikely to encourage extensive use of economics.

3. *The Impact of Legal Culture Expectations*

Legal culture expectations play a related role in limiting the potential roles of economics in unilateral conduct analysis. Continental legal systems generally place a high value on legal certainty and predictability. This serves many societal functions, but foremost among them is the

perceived need to provide guidance to those who might be subject to the law so that they can adapt their conduct to its norms. The uncertainty of economic analysis, particularly where it cannot be deployed fully, conflicts sharply with this expectation. In the United States, increased reliance on economics in analyzing unilateral conduct has been nurtured by the perception that the case law that had developed in the area was amorphous and uncertain and that economics provided greater certainty, but that basic scenario is reversed in Europe. There the categories and concepts of the statutes are thought to provide reasonable predictability and foreseeability, and greater reliance on economics appears to be a move toward increased ambiguity and uncertainty.

Taken together, these embeddedness factors impose significant obstacles on efforts to adopt an economics-centered, U.S.-style normative regime for dominant firm conduct in Europe. The factors that have impelled that change in Europe appear to have less weight in continental courts, and the practices, procedures, and values of litigation in those courts both limit the potential value of economic analysis and restrict the modalities for implementing such a regime effectively. In general, this is likely to mean that courts and legislatures have little incentive to abandon reliance on form elements in applying unilateral conduct law.

V. INSTITUTIONAL EMBEDDEDNESS AND THE POTENTIAL FOR CONVERGENCE

This analysis of economic embeddedness issues in the treatment of dominant firm conduct in the United States and Europe has important implications for claims about convergence in the legal treatment of dominant firms. It reveals the extent to which embeddedness factors differ between the two procedural systems. Economics is universal, but it is applied in very different contexts that inevitably influence the roles that economists can play in these systems. Embeddedness analysis provides a means of identifying critically important differences between the United States and Europe that often go unnoticed because the role of embeddedness factors has not been widely recognized. These factors necessarily shape decisional outcomes, and the differences thus influence the likelihood of convergence and the potential value of any convergence that does occur.

Embeddedness factors are particularly important in analyzing the antitrust liability of dominant firms because of the difficulty of distinguishing anticompetitive from procompetitive elements in the conduct of a single firm. The institutions and procedures of U.S. antitrust law have nurtured a central role for economics and economists in this area, al-

lowing them to shape its norms, concepts, and outcomes. In continental European courts, embeddedness factors generally constrain the capacity of economics and economists to perform these functions and support the use of legal categories to perform this function. These differences in the roles of economics create fundamentally different analyses of unilateral conduct.

These differences are critical for assessing the prospects of convergence. That issue revolves around the question of whether and to what extent European national courts will move toward a unilateral conduct analysis that more closely resembles U.S. analysis in this area. There is much debate in Europe about the prospect of adopting an American-style role for economics, and in this debate references to U.S. antitrust experience are common. Seldom, however, do these references take into account the kinds of differences identified here. As a result, conclusions based on inaccurate assumptions about U.S. law may be suspect. Failure to take embeddedness factors into account and to recognize differences between U.S. and European decisional contexts may lead to unfounded assumptions about how the treatment of these issues will evolve in European courts and thus distort assessments of the potential for convergence.

Finally, the use of embeddedness analysis may create a more open terrain for recognizing and discussing these issues, and this may lead to different forms of convergence that may have significantly greater potential value. For example, it might lead to policies to develop convergence around particular ways of using economic analysis in this area of law. These might represent something less than full deployment of economics but something more than the constraint model that is prevalent in Europe today. The constraints on economic analysis in European national courts are formidable, but this does not necessarily mean that economics cannot be used effectively in these systems. It does mean that economic analysis must be used differently. Given the constraints on full deployment of the tools of economic analysis, there may be value in exploring differing methods for shaping and deploying these tools. Economists and lawyers together may be able to develop sophisticated heuristic devices for drawing conclusions from fact patterns, and these could provide courts with tools for reaching sounder economic assessments without full deployment of economic methods.