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D. Daniel Sokol

University of Florida Levin College of Law, sokold@law.ufl.edu

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TENSIONS BETWEEN ANTITRUST AND INDUSTRIAL POLICY

*D. Daniel Sokol**

INTRODUCTION

Sound antitrust law and policy is in tension with industrial policy. Antitrust promotes consumer welfare whereas industrial policy promotes government intervention for privileged groups or industries. Unfortunately, industrial policy seems to be alive and well both within antitrust law and policy and within a broader competition policy worldwide. This Article identifies how industrial policy impacts both antitrust and competition policy. It provides examples from the United States, Europe, and China of how industrial policy has been used in antitrust. However, this Article also makes a broader claim that the overt or subtle use of industrial policy in antitrust and competition policy is a global phenomenon. The United States' experience teaches that industrial policy can be pushed to the margins in antitrust (and the failure to push industrial policy to the margins produces economic inefficiencies). Further, successful competition advocacy can reduce the competitive distortions that industrial policy may have on competition policy more broadly.

This Article first identifies the relationship between antitrust and industrial policy, providing examples of industrial policy from the antitrust experiences of the United States, Europe, and China. Second, it explores how a lack of procedural fairness in antitrust may be abused by inefficient competitors as a way to push industrial-policy goals. Third, this Article demonstrates how industrial policy hurts a broader competition policy and suggests potential competition-advocacy interventions on the part of antitrust authorities to limit the anticompetitive effects of such policy. The Article concludes with the suggestion that industrial policy is fundamentally in tension with promoting consumer welfare and fostering long-term economic growth and should be both explicitly and implicitly extracted from the antitrust enterprise. Further, antitrust agencies should implement more competition-advocacy interventions to stop the spread of industrial policy in antitrust globally.

* Professor of Law, University of Florida and Senior Of Counsel, Wilson, Sonsini, Goodrich & Rosati. I have represented Google, although all the writing and assumptions in this article are my own.

I. THE RELATIONSHIP OF ANTITRUST AND INDUSTRIAL POLICY

Industrial policy threatens consumer welfare.¹ Yet, determining the scope of industrial policy may sometimes prove to be a challenge because industrial policy has multiple meanings.² For purposes of this Article, industrial policy means political interference either within antitrust or from outside of antitrust (such as through the political process or sector regulation), in which economic analysis that is not based on antitrust economics may shape antitrust enforcement. Optimal antitrust enforcement requires that political factors not play a part of antitrust and that a technocratic antitrust³—characterized by economically justified outcomes, predictability, administrability, and respect for due process and transparency—be the driving forces of enforcement. Additionally, antitrust should try to limit the political impulse based on interest group capture in other parts of government as part of a broader competition policy to improve national competitiveness.⁴

Across the world, industrial policy asserts a more central position in antitrust enforcement than in the United States.⁵ Such situations allow for implicit intrusions of industrial policy, as agencies may be able to strategically pick and choose the economics that they adopt based on the outcome, reverse engineering a decision.⁶ In other situations, industrial policy sneaks in more subtly, due to case law that supports agencies with aggressive enforcement because such case law was based in part on industrial-policy goals.⁷ In some systems, competitor effects still have some significance in

¹ See John Fingleton, *Competition Policy and Competitiveness in Europe*, in COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 300, 301-04 (Abel M. Mateus & Teresa Moreira eds., 2010) [hereinafter COMPETITION LAW AND ECONOMICS]; Lawrence J. White, *Antitrust Policy and Industrial Policy: A View from the U.S.*, in COMPETITION LAW AND ECONOMICS, *supra*, at 320, 328.

² See generally Thomas K. Cheng, Ioannis Lianos & D. Daniel Sokol, *Introduction to COMPETITION AND THE STATE* 1, 1-12 (Thomas K. Cheng, Ioannis Lianos & D. Daniel Sokol eds., 2014) [hereinafter COMPETITION AND THE STATE] (providing a series of viewpoints on antitrust and industrial policy broadly defined).

³ Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1163 (2008).

⁴ Australia's Hilmer Report provides such an example. See Deborah Healey, *Australian Experience with Competition Law: The State as a Market Actor*, in COMPETITION AND THE STATE, *supra* note 2, at 205, 209-11. Another example is the competition-advocacy work of the FTC. See Todd J. Zywicki & James C. Cooper, *The US Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 351, 356-61 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

⁵ See White, *supra* note 1, at 320.

⁶ D. Daniel Sokol, *What Drives Merger Control? How Government Sets the Rules and Play*, in COMPETITION AND THE STATE, *supra* note 2, at 89, 92.

⁷ Mats A. Bergman et al., *Merger Control in the European Union and the United States: Just the Facts*, 7 EUR. COMPETITION J. 89, 119-21 (2011) (comparing US and European merger enforcement and

antitrust analysis.⁸ At some level, this focus on *competitors* rather than on *competition* is a form of industrial policy because it may favor outcomes inconsistent with consumer welfare.⁹

A. *Industrial Policy Within Antitrust and as an Outside Pressure of a Broader Competition Policy*

Government may intervene in the economy both within an antitrust system and outside of it.¹⁰ An antitrust regime that makes economic analysis of competitive effects the sole method for analyzing consumer harm removes political factors from the analysis, shifting discretion from antitrust authorities to the market.¹¹ That is, the market will determine winners and losers rather than antitrust policy. From a normative standpoint, this is more desirable because the incorporation of fairness-related concerns may lead to results that hurt consumers.¹² This is true in part because “fairness” is a highly variable concept.¹³

Professors Phillip Areeda and Donald Turner identified fairness as “a vagrant claim applied to any value that one happens to favor.”¹⁴ Fairness in antitrust can be misapplied by less efficient competitors to promote their own goals at the expense of consumers.¹⁵ These special interests can capture

finding more aggressive enforcement in Europe, perhaps because economists traditionally played a less pivotal role until the 2000s in Europe).

⁸ See Malcolm B. Coate & Andrew N. Kleit, *Art of the Deal: The Merger Settlement Process at the Federal Trade Commission*, 70 S. ECON. J. 977, 995 (2004) (discussing the inefficiencies of competitor complaints and noting that “[t]he FTC’s preferences, although somewhat difficult to establish, indicate that when it has the opportunity, the Commission is more likely to prefer that efficient acquisitions be abandoned rather than move forward with a compromise settlement. This result is compatible with a capture theory of the bureaucracy and perhaps suggests that the FTC should be more critical of competitor complaints”).

⁹ See, e.g., Competition Act, R.S.C. 1985, c. C-34, s. 1.1 (Can.); Competition Act 89 of 1998 § 2 (S. Afr.), amended by Competition Second Amendment Act 39 of 2000; Wal-Mart Stores Inc. & Massmart Holdings Ltd., Case No. 73/LM/Nov10 (S. Afr. Competition Trib. May 31, 2011) (providing an application in the merger setting).

¹⁰ See Thomas W. Ross, *Recent Canadian Policy Towards Industry: Competition Policy, Industrial Policy and National Champions*, in COMPETITION LAW AND ECONOMICS, *supra* note 1, at 332, 332-36; White, *supra* note 1, at 320-21.

¹¹ See Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2529 (2013) [hereinafter Blair & Sokol, *Welfare Standards*].

¹² See *id.* at 2510.

¹³ See Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in THE GOALS OF COMPETITIVE LAW 3, 5 & n.4 (Daniel Zimmer ed., 2012).

¹⁴ 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPALS AND THEIR APPLICATION ¶ 111d (4th ed. 2015); see also Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 969-70 (2001).

¹⁵ See Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2505-06.

the antitrust system and antitrust enforcers, whom such competitors can misuse for their personal aims to extort protection.¹⁶

Antitrust is not an effective mechanism for these sorts of fairness trade-offs.¹⁷ Other areas of regulation are better suited to addressing such trade-offs than antitrust.¹⁸ Embracing antitrust economics promotes greater predictability and outcomes that are less likely to be hijacked by overtly political concerns not based on competition economics, which allows for better predictability in antitrust and a narrow focus on what antitrust does best—promote consumer welfare.

Some of the introduction of industrial policy in antitrust is due to the particular language of the enacting legislation that provides for multiple and sometimes competing goals for antitrust.¹⁹ The original statutory schemes of many antitrust regimes contained multiple goals.²⁰ These goals may create a path dependency in the case law, which then favors antitrust intervention even when such behavior may be economically justified on efficiency grounds.²¹ The good news is that most jurisdictions have adopted an anti-trust-economics-driven goal (most often consumer welfare) as the sole criterion for antitrust analysis, with other goals falling by the wayside.²² Yet, even when industrial policy is not explicitly used (or no longer used) in antitrust law, in practice, its implicit use regularly occurs in many jurisdictions around the world due to this path dependency in the case law because bad old cases remain good case law until they are overturned.²³

¹⁶ See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 250 (1985).

¹⁷ See Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2505-06.

¹⁸ *Id.*

¹⁹ See Unilateral Conduct Working Grp., Int'l Competition Network [ICN], *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, at 38 (May 2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

²⁰ See *id.* at 89.

²¹ See *infra* notes 23-30.

²² See Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2506-09 (detailing this occurrence in the United States); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 472-73 (2012).

²³ See Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2501-02 (explaining the path dependency in Europe). The US Supreme Court recently articulated how antitrust jurisprudence can be fixed over time. Justice Kagan explained:

This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms."

1. US Experience of Industrial Policy in Antitrust

Much of US antitrust enforcement from the 1950s and 1960s is an embarrassment by today's standards.²⁴ Back then, big was bad,²⁵ merger efficiencies were ignored,²⁶ vertical restraints were per se illegal,²⁷ there was tightening of rules for refusals to deal,²⁸ intellectual property was subject to the nine no-nos,²⁹ horizontal restraints were unnecessarily applied,³⁰ and the Robinson-Patman Act³¹ was aggressively enforced.³² In all of these cases, industrial policy that favored inefficient competitors was both a fundamental part of case law and government-enforcement priorities.³³ Such econom-

Kimble v. Marvel Entertainment, LLC, No. 13-720, slip op. at 14 (U.S. June 22, 2015) (citations omitted).

²⁴ Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases.").

²⁵ See *United States v. Von's Grocery Co.*, 384 U.S. 270, 278-79 (1966); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371-72 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 345-46 (1962); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) ("[G]reat industrial consolidations are inherently undesirable, regardless of their economic results.").

²⁶ *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

²⁷ See *Albrecht v. Herald Co.*, 390 U.S. 145, 151-54 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967).

²⁸ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

²⁹ Bruce B. Wilson, Special Assistant to the Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions (Nov. 6, 1970), in *ANTITRUST PRIMER: PATENTS, FRANCHISING, TREBLE DAMAGE SUITS* 11, 12-14 (Sara-Ann Sanders ed., 1970).

³⁰ See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972).

³¹ Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (2012).

³² See Roger D. Blair & Christina DePasquale, "*Antitrust's Least Glorious Hour*": *The Robinson-Patman Act*, 57 J.L. & ECON. 201, 205-07 (2014); Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427, 433 (1978); D. Daniel Sokol, *Analyzing Robinson Patman*, GEO. WASH. L. REV. (forthcoming 2015) (manuscript at 12-13) (on file with author).

³³ This entrenched industrial policy negatively impacted antitrust coherence and welfare. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 110 (3d ed. 2006) ("The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare. . . . [P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms. . . . [I]njection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily recognized or proved.").

ically misguided and aggressive enforcement hurt American competitiveness and contributed to America's economic malaise.³⁴

This approach in US case law began to change in the late 1970s, although the change in merger case law lagged behind the abolition of per se rules regarding conduct.³⁵ Overt political antitrust considerations (i.e., those not based on antitrust economics) are no longer part of the current antitrust policy discourse within the case law or agency practices. In the United States, antitrust liability has narrowed due to a better understanding of economics,³⁶ and antitrust analysis is now driven by economic analysis.³⁷ As Leah Brannon and Judge Douglas Ginsburg have noted regarding this development:

Even in such cases where there is no consensus among economists, there is, nevertheless, virtually universal agreement among antitrust economists and lawyers alike, that the Court should answer questions of antitrust law with reference to economic competition—matters of consumer welfare and economic efficiency—rather than make political judgments about such economically irrelevant matters as the “freedom of traders,” or “the desirability of retaining ‘local control’ over industry and the protection of small businesses.”³⁸

This transformation in case law has rendered anachronistic certain doctrines that were not based on a modern economic understanding.³⁹

³⁴ See Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 *FORDHAM L. REV.* 2175, 2185 (2013) (“The old rules each likely deterred more anticompetitive conduct than the corresponding modern rules do now. But in general, the rules were modified for a good reason: they chilled cost reductions and other efficiency-enhancing conduct.”).

³⁵ See Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 *IOWA L. REV.* 2039, 2050-51 (2015).

³⁶ See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *J. ECON. PERSP.* 43, 53-55 (2000).

³⁷ See Liran Einav & Jonathan Levin, *Empirical Industrial Organization: A Progress Report*, 24 *J. ECON. PERSP.* 145, 152 (2010) (“Thirty years ago, it was common for antitrust arguments to rest on simple summary measures of industry structure such as concentration ratios and Herfindahl-Hirschman indices. Nowadays, the Department of Justice and the Federal Trade Commission, which are tasked with reviewing proposed mergers, commonly undertake sophisticated econometric studies to define industry boundaries and to assess the likelihood of price increases or collusive behavior following a merger. These exercises often draw on academic research, and in turn have motivated the development of new empirical models.”); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 *J. COMPETITION L. & ECON.* 733, 773-74 (2011) (finding evidence of structural shifts to economic analysis across mergers and conduct cases); Barak Orbach & D. Daniel Sokol, *Symposium: 100 Years of Standard Oil Antitrust Energy*, 85 *S. CAL. L. REV.* 429, 439 (2012) (“The evolution of antitrust has been shaped by changing lines of economic thinking and ideologies.”); Sokol, *supra* note 32 (manuscript at 42-43) (finding a structural shift in Robinson-Patman enforcement based on the use of economic analysis in the predatory-pricing context).

³⁸ Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 *COMPETITION POL’Y INT’L*, no. 2, 2007, at 22 (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 151 (1968); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 (1962)).

³⁹ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (overturning per se prohibition of minimum resale price maintenance (RPM)); *State Oil*

Changes in priorities became embedded not merely in case law but also in agency practice with the rise in the importance of economics (and economists) in agency analysis.⁴⁰ In terms of how incentives impact the role of industrial policy in antitrust, discretion in the hands of lawyers will play out differently than in those of economists because discretion influences how centrally economic analysis will factor into case selection.⁴¹ Professor Luke Froeb and his colleagues explain that “[e]conomic methodology is particularly well suited for predicting the causal effects of business practices and for determining the effects of counterfactual scenarios that are used to determine liability and damages.”⁴² If economic analysis forms the basis of enforcement decisionmaking, effects become the focus.⁴³ In this sense, overt political control can be removed from case analysis because economic inquiry is guided more by empirics.⁴⁴ Lawyers, as part of an investigative team, may be less driven by the empirics of economics.⁴⁵ As a result, more overt political goals might factor into their analyses.⁴⁶

This is not to say that economists are not subject to political motivation.⁴⁷ However, economists exercise it less than lawyers because populism was never part of industrial organization’s mantra.⁴⁸ The greater institutionalization of economics as the central motivation for antitrust may have been a causal factor that changed the role of nonantitrust government intervention in antitrust.⁴⁹ In particular, one can see this change in merger control

Co. v. Khan, 522 U.S. 3, 18-19 (1997) (overturning per se prohibition of maximum RPM); Cont’l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-58 (1977) (overturning per se prohibition of vertical non-price restraints).

⁴⁰ Malcolm B. Coate, *A Test of Political Control of the Bureaucracy: The Case of Mergers*, 14 *ECON. & POL.* 1, 7-10 (2002) [hereinafter Coate, *Test*]; William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 *GEO. MASON L. REV.* 1157, 1167-68 (2015); Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 *ECON. POL’Y* 741, 760, 780 (2006).

⁴¹ Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 *ANTITRUST L.J.* 569, 573-74 (2009).

⁴² *Id.* at 573.

⁴³ See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *COLUM. BUS. L. REV.* 1, 35 (2007) [hereinafter Kovacic, *Intellectual DNA*].

⁴⁴ See Joshua D. Wright, Comm’r, Fed. Trade Comm’n, Evidence-Based Antitrust Enforcement in the Technology Sector, Prepared Remarks at the Competition Law Center in Beijing, China 2-5 (Feb. 23, 2013), [https://www.ftc.gov/about-ftc/biographies/joshua-d-wright/speeches-articles-testimonies?field_date_value\[value\]\[date\]=2013&field_public_statement_type_tid=All&page=1](https://www.ftc.gov/about-ftc/biographies/joshua-d-wright/speeches-articles-testimonies?field_date_value[value][date]=2013&field_public_statement_type_tid=All&page=1).

⁴⁵ Fred S. McChesney et al., *Competition Policy in Public Choice Perspective*, in 1 *THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS* 156, 159 (Roger D. Blair & D. Daniel Sokol eds., 2015).

⁴⁶ *Id.* at 157-58.

⁴⁷ *Id.* at 156.

⁴⁸ See Crane, *supra* note 3, at 1211-20.

⁴⁹ Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2507 (“The more recent focus on economics has reduced the areas of per se illegality and increased the areas where the rule of reason operates

and the shift in the United States from hostility to eventual embrace of efficiencies in both the Merger Guidelines⁵⁰ and case-law analysis.⁵¹

The US experience is worth noting as an example for other jurisdictions, even those with significantly different institutional designs, largely because of the important changes that the United States implemented. One notable change was the creation of a distinct group of economists within the antitrust agencies, including a chief economist and staff, who are not subordinate to agency lawyers.⁵² This institutional design allows for a distinct economic voice to influence case selection and analysis, helping to ensure that there is an economic basis for enforcement decisions.⁵³

Empirical work suggests that overt politics not driven by antitrust economics has, for the most part, become a nonissue in US merger enforcement in recent decades.⁵⁴ As one economist notes, “[p]opulism was forced to a fringe position.”⁵⁵ Earlier studies of US merger control examining the 1980s suggested that there were noneconomic factors at play in merger control.⁵⁶ The same work also found that the recommendations of economists carried less weight than those of agency lawyers.⁵⁷ A greater role for economists merely shifts “political” antitrust from noneconomic politics (such as industrial policy) to “politics” within economics (i.e., how to decide the difficult cases “on the margins” based on economic theory and empirics that may not always be clear).⁵⁸

2. Industrial Policy in European Antitrust

In Europe, path dependency based on multiple goals of antitrust remains a fundamental characteristic of European case law,⁵⁹ with more of an

because of procompetitive justifications for the business behavior. A similar move has been underway in the merger control area.” (footnote omitted).

⁵⁰ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10 (2010), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

⁵¹ See Greene & Sokol, *supra* note 35, at 2044-49.

⁵² Froeb et al., *supra* note 41, at 569-70.

⁵³ Lawrence J. White, *Economics, Economists, and Antitrust: A Tale of Growing Influence*, in BETTER LIVING THROUGH ECONOMICS 232 (John J. Siegfried ed., 2010).

⁵⁴ See *id.* at 232-33.

⁵⁵ Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission 19 (Sept. 29, 2009) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314924.

⁵⁶ E.g., Coate, *Test*, *supra* note 40, at 15.

⁵⁷ *Id.* at 12.

⁵⁸ See McChesney et al., *supra* note 45, at 156-58.

⁵⁹ See, e.g., BEN VAN ROMPUY, ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTITRUST POLICY? NON-EFFICIENCY CONSIDERATIONS UNDER ARTICLE 101 TFEU 16 (2012); Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisa-*

interventionist flavor than in the United States.⁶⁰ This is due to the multiple goals of European Commission (“EC”) competition law on the books, including industrial-policy concerns.⁶¹ Even if the Directorate-General of Competition (“DG Comp”) states that its sole goal is consumer welfare,⁶² European case law remains far more favorable for a finding of competition-law infringement than in the United States, where the shift to a singular goal of antitrust and the primacy of economic analysis has led to more rule-of-reason analysis and less intervention.⁶³ In Europe, the strong-interventionist case law and enforcement also operate in the shadow of the law—serving as leverage to be used against firms that are under investigation, in order to extract greater concessions in consent agreements.

An examination of European cases explains why European antitrust is more prone to industrial policy. The European Court of Justice first used the term “consumer welfare” in 2012, in *Post Danmark A/S v. Konkurrencerådet*.⁶⁴ Far more common are European cases under the Treaty on the Functioning of the European Union (“TFEU”) Articles 101⁶⁵ and 102⁶⁶ that have multiple goals as the basis for their analyses.⁶⁷ In the TFEU 101 context, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse*

tion of Article 82 EC, 3 EUR. COMPETITION J. 329, 329 (2007); Alberto Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, 4 EUR. COMPETITION J. 127, 131-33 (2008); Heike Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 119, 138-39 (Claus-Dieter Ehlermann & Mel Marquis eds., 2008).

⁶⁰ See generally FRANCESCO RUSSO ET AL., EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES 113-97 (2010) (analyzing and classifying all European Commission decisions from 1962 through 2009).

⁶¹ See DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY 8-9 (2015).

⁶² See Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2513.

⁶³ See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464 (2003).

⁶⁴ Case C-209/10, *Post Danmark v. Konkurrencerådet*, ¶ 42 (Mar. 27, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=121061&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=65759> (“[I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and *consumer welfare* in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.” (emphasis added)).

⁶⁵ Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 47.

⁶⁶ *Id.* art. 102.

⁶⁷ Raimundas Moisejevas & Ana Novosad, *Some Thoughts Concerning the Main Goals of Competition Law*, 20 JURISPRUDENCE 627, 634-35 (2013) (“Analysis of the practice of the Court of Justice and the Commission does not allow identifying clearly the one main, dominating goal of the competition law. In most cases, courts mention goals such as protection of the effective competition, protection of the competitors and protection of the consumers.”).

*Mededingsautoriteit*⁶⁸ explains that “[TFEU 101], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”⁶⁹ Similar language appears in the TFEU 102 context.⁷⁰ Until this case law is cleaned up in a manner similar to the shift in the United States from the mid-1970s to the present,⁷¹ European enforcement will implicitly have an industrial-policy flavor to it. This type of case-law path dependency that is a part of antitrust enforcement in Europe also threatens the economic growth of more dynamic economies in South and East Asia, as these jurisdictions rely upon European case law for guidance in their respective competition systems.⁷²

Historical factors and path dependency explain the EC’s greater orientation toward industrial policy in merger control.⁷³ The core purpose of European competition law was to further market integration over other factors such as efficiency.⁷⁴ This meant that efficiency played a lesser role in the original formulation of European competition law.⁷⁵ One might suggest that a reading of *Aerospatiale-Alenia/de Havilland*⁷⁶ (a merger case arising soon after the 1989 merger rules on the failing-firm defense were established) expressed the tension between industrial policy and competition policy—at least within the failing-firm-defense context.⁷⁷

Because lawyers played a significant role in merger enforcement, while economists historically played a minor role, the EC’s decisions to challenge mergers may have lacked a rigorous economic justification.⁷⁸ This too has changed due to the institutionalization of greater economic analysis, including the creation of a chief economist and an economics staff

⁶⁸ Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009 E.C.R. I-04529.

⁶⁹ *Id.* ¶ 38; *see also* Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2009 E.C.R. I-09291, ¶¶ 62-64.

⁷⁰ *See* Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 E.C.R. I-00527, ¶¶ 22-23; Case C-280/08 P, *Deutsche Telekom v. Comm’n*, 2010 E.C.R. I-09555, ¶ 176; Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE v. GlaxoSmithKline AVE Farmakeftikon Proionton*, 2008 E.C.R. I-07139, ¶¶ 68-69; C-95/04 P, *British Airways plc v. Comm’n*, 2007 E.C.R. I-02331, ¶ 106.

⁷¹ *See* Kovacic & Shapiro, *supra* note 36, at 52-55.

⁷² *See, e.g.*, Steve Harris & Akira Inoue, *Japan*, in *GLOBAL ANTITRUST COMPLIANCE HANDBOOK* 440, 452 (D. Daniel Sokol, Daniel Crane & Ariel Ezrachi eds., 2014).

⁷³ GIFFORD & KUDRLE, *supra* note 61, at 8-21.

⁷⁴ Blair & Sokol, *Welfare Standards*, *supra* note 11, at 2502.

⁷⁵ *See id.*

⁷⁶ Commission Decision 91/619, Case No. IV/M.053, 1991 O.J. (L 334) 42 (EC).

⁷⁷ *Id.* at 58-59. The first time the failing-firm defense was used in European law was in *Kali und Salz/MdK/Treuhand* in 1993. *See* Commission Decision 94/449, Case No. IV/M.308, 1994 O.J. (L 186) 38, 49 (EC).

⁷⁸ *See* GIFFORD & KUDRLE, *supra* note 61, at 20-21 (noting that while the importance of economic analysis and number of economists in the European Union are increasing, court reliance on previous case law continues to limit the role of economic reasoning in EU merger cases).

not subordinate to lawyers, as well as a series of cases that reversed EC challenges based on insufficient economic analysis.⁷⁹

The earlier case law and institutional approaches have impacted the current structure and nature of European merger and conduct enforcement in terms of state intervention.⁸⁰ Quantitative research supports that, at present, Europe more strictly enforces merger regulation than the United States.⁸¹ Path dependency and earlier nonefficiency legacy may play some role in this orientation towards greater enforcement.⁸² One could frame Europe's wariness regarding vertical restraints (including vertical mergers) as an expression of this same sort of legacy.⁸³ Thus, more aggressive European challenges to vertical mergers may be as much political (based on a concern for the competitive process)⁸⁴ as economic—and represent a key difference with the United States on competition law and economics.⁸⁵

Another cause of the development of noneconomic factors in European merger control was what some claimed to be anti-American bias.⁸⁶ Empirical work analyzing the period of the 1990s found that there was protectionism involved in European merger control.⁸⁷ DG Comp had a higher probability of intervening against non-European firms when there were European competitors in the same market.⁸⁸ Professor Nihat Aktas and his colleagues examined if foreign acquiring firms were subject to greater anti-trust intervention than domestic acquiring firms when local competitor firms were harmed, observing distinct cases from 1990 to 2000.⁸⁹ They

⁷⁹ RUSSO ET AL., *supra* note 60, at 4-5 & n.11.

⁸⁰ See GIFFORD & KUDRLE, *supra* note 61, at 17-21.

⁸¹ See Bergman et al., *supra* note 7, at 89.

⁸² See GIFFORD & KUDRLE, *supra* note 61, at 51-62.

⁸³ See James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 661 (2005).

⁸⁴ Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457, 461-64 (2002).

⁸⁵ James Cooper et al., *A Critique of Professor Church's Report on the Impact of Vertical and Conglomerate Mergers on Competition*, 1 J. COMPETITION L. & ECON. 785, 791-92 & n.27 (2005).

⁸⁶ See George L. Priest & Franco Romani, Commentary, *The GE/Honeywell Precedent*, WALL ST. J., June 20, 2001, at A18, <http://www.wsj.com/articles/SB992994589433979465> ("When the European Commission states that politics will be irrelevant to its decision, it means the political efforts of the U.S. and other countries wanting economic progress, not the politics of Rolls-Royces and Thales, which hope for regulatory action to save them from the effects of aggressive competition.").

⁸⁷ Nihat Aktas et al., *Is European M&A Regulation Protectionist?*, 117 ECON. J. 1096, 1109-11 (2007) [hereinafter Aktas et al., *European M&A Regulation*]; Nihat Aktas et al., *Market Response to European Regulation of Business Combinations*, 39 J. FIN. & QUANTITATIVE ANALYSIS 731, 755-56 (2004); I. Serdar Dinc & Isil Erel, *Economic Nationalism in Mergers and Acquisitions*, 68 J. FIN. 2471, 2473 (2013); Tomaso Duso et al., *The Political Economy of European Merger Control: Evidence Using Stock Market Data*, 50 J.L. & ECON. 455, 470 (2007). On the use of stock-market-return event studies in competition policy, see Tomaso Duso et al., *Is the Event Study Methodology Useful for Merger Analysis? A Comparison of Stock Market and Accounting Data*, 30 INT'L REV. L. & ECON. 186, 191 (2010).

⁸⁸ See Aktas et al., *European M&A Regulation*, *supra* note 87, at 1110-12.

⁸⁹ *Id.* at 1100, 1109.

found that the joint effect of a given bidder's nationality (foreign versus domestic European) and whether there were European competitors involved led to abnormal stock returns.⁹⁰ They concluded that, "[f]aced with the empirical facts, a cynical observer might doubt the good intentions of European regulators."⁹¹

Similarly, Professors Serdar Dinc and Isil Erel analyzed the largest twenty-five merger targets (measured by market capitalization of the respective target firms) from the first fifteen EU member states during the period from 1997 to 2006.⁹² They found that, "instead of staying neutral, governments of countries where the target firms are located tend to oppose foreign merger attempts while supporting domestic ones that create so-called national champions, or companies that are deemed to be too big to be acquired."⁹³ This legacy of European industrial policy has troubling implications for robust antitrust enforcement.

3. Industrial Policy in Chinese Antitrust

A number of authors claim that industrial policy plays a role in Chinese antitrust.⁹⁴ Previous empirical work on Chinese antitrust in the merger context demonstrates how political Chinese merger control can be.⁹⁵ The most important finding has to do with the direct intervention of other parts of government within the Ministry of Commerce of the People's Republic of China ("MOFCOM") merger review process.⁹⁶ In short, other government ministries need to sign off on merger approval.⁹⁷ Negotiations between MOFCOM and these other parts of the Chinese government can span many months (sometimes with the knowledge of the merging parties—but not always).⁹⁸ These other parts of government can wield significant influence by placing certain conditions on the merger approval and may ask questions or force concessions by the merging parties that have nothing to do with competitive effects.⁹⁹

⁹⁰ *Id.* at 1111.

⁹¹ *Id.* at 1118.

⁹² Dinc & Erel, *supra* note 87, at 2472.

⁹³ *Id.* at 2504.

⁹⁴ *E.g.*, Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 696 (2015); Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L.J. 671, 706 (2014).

⁹⁵ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J.L. & BUS. 1, 3, 35 (2013).

⁹⁶ *Id.* at 20-26, 35.

⁹⁷ *Id.* at 33, 35.

⁹⁸ *Id.*

⁹⁹ *Id.*

Another important finding is the significance of third-party-competitor complaints.¹⁰⁰ If there is a Chinese company (particularly an SOE, or state-owned enterprise) that competes within the same relevant market, or may merely be thinking of entering the market, the merger notification receives significantly more scrutiny.¹⁰¹ This is the case even if the competitive effects are negligible, while in other merger systems, the deal would fall within a presumptive safe harbor because the market shares of the merging parties might be under 25 percent.¹⁰² As a result of these pressures, some of MOFCOM's decisions have been attempts to frame political concerns within the language of economic analysis, even when the economic analysis undertaken is more rudimentary than what one might find in Western Europe or North America.¹⁰³

Industrial policy in China is the concern of a more recent practitioner analysis published by the United States Chamber of Commerce ("USCC").¹⁰⁴ This report suggests that there is industrial policy at play in both merger and conduct cases in Chinese antitrust with regard to merger remedies and intellectual property and antitrust issues, among other areas.¹⁰⁵ Similar reports by the US-China Business Council ("USCBC")¹⁰⁶ and the European Union Chamber of Commerce in China ("EUCCC")¹⁰⁷ echo these concerns.

II. LACK OF PROCEDURAL FAIRNESS AS A WAY TO PUSH INDUSTRIAL POLICY IN ANTITRUST

The global pressure points in industrial policy include competitors misusing antitrust and taking advantage of the lack of due process across antitrust authorities. Agencies sometimes find out about potential anticompetitive behavior through competitor complaints.¹⁰⁸ However, competitors also have the incentive to use complaints to get an investigation started

¹⁰⁰ *Id.* at 26-27, 35.

¹⁰¹ Sokol, *supra* note 95, at 21-26, 35.

¹⁰² *Id.* at 35.

¹⁰³ *Id.* at 23-25, 35.

¹⁰⁴ U.S. CHAMBER OF COMMERCE, COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA'S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY (2014), <https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application>.

¹⁰⁵ *Id.* at 13-27.

¹⁰⁶ U.S.-CHINA BUS. COUNCIL, COMPETITION POLICY AND ENFORCEMENT IN CHINA 5 (2014), <https://www.uschina.org/reports/competition-policy-and-enforcement-china>.

¹⁰⁷ Press Release, European Union Chamber of Commerce in China, European Chamber Releases Statement on China AML-Related Investigations (Aug. 13, 2014) [hereinafter, EUCCC, Statement on China Investigations], <http://www.europeanchamber.com.cn/en/press-releases/2132>.

¹⁰⁸ See D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 693 (2012).

even when the conduct in question is not anticompetitive.¹⁰⁹ When government can be made to expend its own resources in bringing a case, inefficient competitors can misuse antitrust law.¹¹⁰ Procedural problems that do not allow firms targeted for investigation to know the nature of the complaints against them aid in this misuse.

This Part explains the importance of transparency and due process in antitrust. Without a robust procedural-fairness regime, antitrust can develop an implicit industrial policy that favors inefficient competitors rather than an antitrust policy that promotes consumer welfare. Systems with limited procedural fairness are ripe for abuse by third parties who might use antitrust strategically. A number of companies may front local firms to raise concerns to antitrust authorities as a way to punish more efficient rivals around the world, raising these more efficient firms' costs.¹¹¹

Procedural fairness is an important issue for the rule of law and for effective antitrust regulation.¹¹² In her keynote speech at the American Bar Association's "Antitrust in Asia: China" conference in May 2014, Federal Trade Commission ("FTC") Chairwoman Edith Ramirez explained: "Good process leads to effective decisions and bolsters the legitimacy of competition enforcement. In contrast, deficient process contributes to suboptimal decisions and breeds disrespect for competition law and for competition agencies."¹¹³ She then articulated four aspects of procedural fairness that are central to the practice of transparency and due process in the United States:

[Procedural fairness permits] legal representation for the parties under investigation, including allowing the participation of local and international counsel; notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies; facilitating direct and meaningful engagement between the parties and the investigative staff and decision-makers; and ensuring internal checks and balances on decision-making within the agency.¹¹⁴

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 696-97.

¹¹¹ *See id.*

¹¹² Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address at the ABA's Antitrust in Asia Conference 2 (May 22, 2014), http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

¹¹³ *Id.*

¹¹⁴ *Id.* at 2-3. Procedural fairness has been a significant issue for both U.S. agencies. *See* Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Procedural Fairness, Address at the 13th Annual Competition Conference of the International Bar Association 1 (Sept. 12, 2009), <http://www.justice.gov/atr/public/speeches/249974.htm> ("Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.")

Concerns regarding the need for procedural fairness in antitrust (whether pertaining to mergers, cartels, or other conduct) are not unique to the US experience.¹¹⁵ Indeed, various international antitrust organizations have echoed these concerns, including the Organization for Economic Cooperation and Development (“OECD”) Competition Committee and the International Competition Network (“ICN”).¹¹⁶ The business community has also pushed for increased procedural fairness. The International Chamber of Commerce (“ICC”) issued a recommended framework for international best practices in competition law enforcement proceedings, highlighting seven different themes for best practices.¹¹⁷ More recently, the ICN established an Investigative Process Project, coheaded by the FTC and DG Comp.¹¹⁸ Further, a number of free-trade agreements include procedural fairness among the provisions in their competition-policy chapters.¹¹⁹

A recent survey conducted by the USCC found that, globally, there were some problems regarding transparency and due process.¹²⁰ Roughly two-thirds of the respondents identified that competition authorities were either inconsistent in providing due process or failed to provide sufficient procedural safeguards.¹²¹ Similarly, practitioners expressed concerns as to why certain information remains confidential, as well as consistency and timeliness regarding transparency.¹²²

At times, procedural concerns have emerged in the United States¹²³ and Europe.¹²⁴ However, issues of procedural fairness and transparency have

¹¹⁵ See Ramirez, *supra* note 112, at 2.

¹¹⁶ Sokol, *supra* note 95, at 29.

¹¹⁷ Comm’n on Competition, Int’l Chamber of Commerce [ICC], *Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings*, at 1-8, ICC Doc. 225/666 (Mar. 8, 2010) [hereinafter, ICC, *Recommended Framework*], <http://www.iccwbo.org/Data/Policies/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings/>.

¹¹⁸ ICN, *Investigative Process Project: Issues Paper and Mandate*, at 1 (2012), <http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf>.

¹¹⁹ See, e.g., United States-Chile Free Trade Agreement, U.S.-Chile, art. 16.1.2, June 6, 2003, Temp. State Dep’t No. 04-35, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf. For a coding of these agreements in terms of their content, see D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 285 (2008).

¹²⁰ SEAN HEATHER ET AL., U.S. CHAMBER OF COMMERCE, *THE TREATMENT OF CONFIDENTIAL INFORMATION IN COMPETITION/ANTITRUST ADMINISTRATIVE PROCEEDINGS: A PRACTITIONER’S SURVEY* 3-4 (2014), https://www.uschamber.com/sites/default/files/A%20Practitioner%E2%80%99s%20Survey%20on%20the%20Use%20of%20Confidential%20Information%20in%20Competition%20Proceedings%20-%20April%202014_1.pdf.

¹²¹ *Id.* at 5, 42-43.

¹²² *Id.* at 3, 11-12.

¹²³ See, e.g., D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1134-35 (2010); J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Reflections on Procedure at the Federal Trade Commission, Remarks at the ABA Antitrust Masters Course IV*, at 5 (Sept. 25, 2008), <http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf>.

emerged most noticeably in reports regarding Chinese antitrust by the USCC¹²⁵ and USCBC,¹²⁶ as well as in a statement by the EUCCC.¹²⁷ These documents raised concerns about due process in Chinese antitrust regulation.¹²⁸ These concerns relate to the lack of effective representation, the use of industrial policy by third parties, and procedural tools that do not allow for the most effective advocacy to achieve efficient outcomes.¹²⁹

While Chinese antitrust law serves as a prominent example for the need to improve due process (and its potential abuse for industrial-policy purposes),¹³⁰ what has been less public (but just as alarming) is that many of these concerns are not unique to China.¹³¹ As other authorities increase their enforcement activity, taking ever-complex and high-profile cases, the often-inadequate procedural safeguards and lack of due process come into sharper focus.¹³² For example, high-profile cases with procedural-fairness issues

¹²⁴ See, e.g., David Anderson & Rachel Cuff, *Cartels in the European Union: Procedural Fairness for Defendants and Claimants*, 34 *FORDHAM INT'L L.J.* 385, 386 (2011); Jaime Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to a Fair Hearing*, 7 *COMPETITION L. REV.* 53, 53 (2010); Kyriakos Fountoukakos & Camille Puech-Baron, *What Happens in Luxembourg Stays in Luxembourg: Confidentiality Issues in Competition Law Proceedings Before the EU Courts*, 5 *J. EUR. COMPETITION L. & PRAC.* 331, 332 (2014).

¹²⁵ JEREMIE WATERMAN & SEAN HEATHER, U.S. CHAMBER OF COMMERCE, *COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA'S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY* 47-53 (2014), https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.

¹²⁶ U.S.-CHINA BUS. COUNCIL, *supra* note 106, at 14-15.

¹²⁷ See EUCCC, *Statement on China Investigations*, *supra* note 107.

¹²⁸ *Id.*; WATERMAN & HEATHER, *supra* note 125, at 49.

¹²⁹ EUCCC, *Statement on China Investigations*, *supra* note 107; WATERMAN & HEATHER, *supra* note 125, at ii.

¹³⁰ See Sokol, *supra* note 95, at 35.

¹³¹ See, e.g., Shuya Hayashi, *A Study on the 2013 Amendment to the Antimonopoly Act of Japan—Procedural Fairness Under the Japanese Antimonopoly Act*, 7 *Y.B. ANTITRUST & REG. STUD.*, no. 10, 2014, at 85, 87-88 (examining the procedural concerns with the 2013 Amendment to the Japanese Antimonopoly Act).

¹³² Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, *Antitrust Enforcement In China—What Next?*, Remarks at the Second Annual GCR Live Conference 3 (Sept. 16, 2014), https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf.

have arisen in other jurisdictions, including Europe,¹³³ Korea,¹³⁴ and Japan.¹³⁵

An absence of effective procedural fairness impairs effective competition law and policy.¹³⁶ It also makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement.¹³⁷ Yet, in addition to the lack of procedural fairness hurting economic performance and efficiency, it also hurts antitrust authorities.

Procedural fairness should not be conceptualized as merely preventing downside risk for an antitrust authority. Rather, there are tangible benefits to antitrust authorities fully embracing procedural fairness, including better information gained from evidence gathered as a result of improved procedural fairness. Such information can assist an antitrust authority in better shaping its competition policy and enforcement prioritization. This better information gathering in turn allows cases to move more smoothly through the pipeline, with more predictability on timing and key stages for both merger and conduct cases. It also gives firms under investigation a sense of how to both respond effectively to agency requests for information and help agencies in their decisionmaking.

III. BAD INDUSTRIAL POLICY LEADS TO BAD COMPETITION POLICY

A concern about the mixing of economic and noneconomic goals of regulation is that this mixture more readily allows for regulatory capture by the sector regulator.¹³⁸ The extensive literature on public choice provides both theoretical and empirical support to the thesis of regulatory capture by sector regulators.¹³⁹ Regulatory capture by sector regulators may be more

¹³³ See Comm'n on Competition, ICC, *Due Process In EU Antitrust Proceedings: Comments on and Analysis of the European Commission's and EU Courts' Antitrust Proceedings*, at 1, ICC Doc. 225/717 (Apr. 15, 2014), <http://www.iccindiaonline.org/policy-statement/may2014/DueProcesPaper.pdf>; Maciej Bernatt, *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights 12-13* (2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447884.

¹³⁴ See ICC, *Recommended Framework*, *supra* note 117, at 2. For attempts by the KFTC to improve due process concerns, see Jae-Chan Jeong, *Korea: Korea Fair Trade Commission*, GLOBAL COMPETITION REV., <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2755/korea-korea-fair-trade-commission/> (last visited July 21, 2015).

¹³⁵ See Hayashi, *supra* note 131, at 95 & n.35.

¹³⁶ See Ohlhausen, *supra* note 132, at 2 (“[F]or a competition authority, predictability, transparency, and fairness translate into five actionable agency goals . . .”).

¹³⁷ See *id.* at 2-3.

¹³⁸ D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 133-135 (2009) [hereinafter Sokol, *Limiting Interventions*].

¹³⁹ See generally DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

severe than by antitrust enforcers for two reasons. The first is that sector regulators have more concentrated interest groups, which makes capture more likely.¹⁴⁰ The multiple missions (including noneconomic ones) of sector regulators also create additional political pressure points for the executive or legislative branches of government to use in order to leverage non-competition concerns.¹⁴¹ This may impact the outcome of particular cases. Competition advocacy—the ability of agencies to sway other parts of government based on economic arguments on the merits of competition¹⁴²—serves as a way to reduce the competitive harms of such regulation.¹⁴³

The second factor that compounds the capture is the pursuit of “public interest,” or even the veneer of public interest.¹⁴⁴ Whereas some notion of efficiency may be (at least in practice) the only factor that determines outcomes in many antitrust systems, sector agencies may need to balance efficiency concerns with the preservation of competitors who may provide consumer choice and diversity.¹⁴⁵ Sometimes these concerns may be valid, but other times they are the result of rent seeking.¹⁴⁶ The point is not to distinguish between the two but merely to note that sector regulation has divergent interests from antitrust that are not based on efficiency analysis.¹⁴⁷ In Europe, there are a number of areas where sector regulation seems to be leading to outcomes that do not necessarily promote consumer welfare.¹⁴⁸ These areas include data privacy¹⁴⁹ and merger remedies not based on anti-competitive concerns.¹⁵⁰ Both are areas in which there is pressure from oth-

¹⁴⁰ Sokol, *Limiting Interventions*, *supra* note 138, at 133.

¹⁴¹ *See id.* at 142.

¹⁴² James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1091 (2005) (“Competition advocacy, broadly, is the use of . . . expertise in competition, economics, and consumer protection to persuade governmental actors at all levels of the political system and in all branches of government to design policies that further competition and consumer choice.”).

¹⁴³ Eleanor M. Fox & Deborah Healey, *When the State Harms Competition—The Role for Competition Law*, 79 ANTITRUST L.J. 769, 775-76 (2014).

¹⁴⁴ McChesney et al., *supra* note 45, at 157.

¹⁴⁵ *See* Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 394 (2006).

¹⁴⁶ *See* McChesney et al., *supra* note 45, at 162.

¹⁴⁷ David L. Meyer, *We Should Not Let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust*, 15 GEO. MASON L. REV. 1175, 1189 (2008).

¹⁴⁸ *See* ROGER VAN DEN BERGH & PETER CAMESASCA, EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE 134-36 (2006).

¹⁴⁹ Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 91 (2012) (“For a preview of just how chilling that effect might be, consider the fact that the right to be forgotten can be asserted not only against the publisher of content (such as Facebook or a newspaper) but against search engines like Google and Yahoo that link to the content.”).

¹⁵⁰ Nicolas Petit, *State-Created Barriers to Exit? The Example of the Acquisition of Alstom by General Electric* 23 (Feb. 17, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2521378.

er parts of government to have a competition-law “solution” for what is not a competition problem.¹⁵¹

This behavior abroad contrasts with the US experience. Antitrust policy has become so technocratic in the United States that, in recent administrations, presidential statements on antitrust policy have been sparse.¹⁵² Consequently, it is quite telling that President Barack Obama recently called out the European Union for infusing industrial policy in the competition policy and consumer protection arenas.¹⁵³ In an interview, President Obama explained:

“[S]ometimes their vendors—their service providers—who can’t compete with ours, are essentially trying to set up some roadblocks for our companies to operate effectively there. We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways they can’t compete. And oftentimes what is portrayed as high-minded positions on issues sometimes is designed to carve out their commercial interests.”¹⁵⁴

European competition law and policy will continue to suffer from industrial-policy intrusions so long as Europe fails to clean up its case law and take a more active stance in its competition advocacy. Consumer welfare decreases as a result. The same goes for other jurisdictions.¹⁵⁵

CONCLUSION

This Article proposes a broader competition-policy system that is neutral towards other policy areas—or, in other words, it recommends the adoption of an antitrust standard based exclusively on consumer welfare rooted in economic efficiency.¹⁵⁶ Antitrust law and policy should become completely technocratic, so that antitrust concerns are the only ones that are taken into account.¹⁵⁷ Any concerns regarding industrial policy, national

¹⁵¹ For a recent formulation of antitrust, consumer protection, and data protection, see Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy*, ANTITRUST L.J. (forthcoming 2015) (manuscript at 4), <http://ssrn.com/abstract=2561563>.

¹⁵² Crane, *supra* note 3, at 1160-61.

¹⁵³ Liz Gannes, *Obama Says Europe’s Aggressiveness Toward Google Comes From Protecting Lesser Competitors*, RECODE (Feb. 13, 2015), <http://recode.net/2015/02/13/obama-says-europes-aggressiveness-towards-google-comes-from-protecting-lesser-competitors/> (“Obama said the European companies were sore losers and were using their governments to gain footing against American rivals.”).

¹⁵⁴ *Id.*

¹⁵⁵ Yong Huang et al., *Essential Facilities Doctrine and Its Application in Intellectual Property Space Under China’s Anti-Monopoly Law*, 22 GEO. MASON L. REV. 1103, 1104 (2015).

¹⁵⁶ While the Author has previously argued for a total-welfare standard, here, the broader point is that the sole standard for antitrust should be the political choice between antitrust-specific welfare standards, not between antitrust economics and other nonantitrust-economics considerations. The easier standard to adopt globally based on administrability concerns is consumer welfare.

¹⁵⁷ Randolph W. Tritell, *Meeting the Challenges of the Evolving International Antitrust Landscape*, 22 GEO. MASON L. REV. 1269, 1275 (2015) (“Convergence around principles of sound economic analy-

security, and other policy areas should be addressed outside of the antitrust-law context. This will allow antitrust law to become nonpolitical and more technocratic. It will also confine noncompetition economic considerations to those arenas that are more prone to public choice concerns, such as sector regulation, the legislative process, or executive fiat. These spheres are better equipped than antitrust law to deal with political trade-offs.

With regard to these types of trade-offs that effect a broader competition policy, antitrust can robustly aid in reducing the economic distortions that interest-group trade-offs create.¹⁵⁸ Areas such as consumer protection and data privacy,¹⁵⁹ disruptive technologies in the transportation sector (e.g., Uber),¹⁶⁰ and professional regulation¹⁶¹ particularly need the support of greater competition advocacy.

The stubborn legacy of industrial policy within antitrust case law can be removed, in part, with more (and better) economic analysis, via an iterative process that improves over time.¹⁶² As the sophistication of antitrust agencies' economic analysis and the application of such analysis to cases improve, more efficient outcomes will follow.¹⁶³ Privileging overt state intervention within antitrust through the explicit inclusion of noneconomic concerns would hinder antitrust law and policy in many jurisdictions and decrease consumer welfare.¹⁶⁴ Refining case law to reflect economic principles and putting economists on equal footing with lawyers within agencies are other ways to provide a check on industrial policy's implicit creep into antitrust.

As great as the industrial-policy problem is in traditional antitrust cases, its impact is even more pronounced in case law and agency action in the dynamic economic setting—particularly in fast-moving markets where intervention tends to reduce consumer welfare even more. These markets are typified by rapid technological change and innovation.¹⁶⁵ The innovation

sis and maximizing consumer welfare enables agencies to implement competition laws in a way that promotes economic growth and development, facilitates cooperation among competition agencies, and fosters a predictable legal environment for businesses.”)

¹⁵⁸ See Cooper, Pautler & Zywicki, *supra* note 142, at 1100.

¹⁵⁹ James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1582 (2010).

¹⁶⁰ Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, IOWA L. REV. (forthcoming 2015) (manuscript at 4), <http://ssrn.com/abstract=2566436>.

¹⁶¹ Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1135 (2014).

¹⁶² See Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 14 (2012).

¹⁶³ See Kovacic, *Intellectual DNA*, *supra* note 43, at 79.

¹⁶⁴ See, e.g., Healey, *supra* note 4, at 219-20.

¹⁶⁵ J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 585 (2009); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 166 (2010).

can be in new products, services, or platforms.¹⁶⁶ And, because high-tech markets change rapidly, market power may be transient.¹⁶⁷ In the high-tech setting, agencies must be particularly careful when analyzing the market and the facts to ensure that merger control does not reduce firms' incentives to innovate or chill other investment decisions that would otherwise lead to enhanced innovation.¹⁶⁸

The concept of the ephemeral nature of market power originates from Professor Joseph Schumpeter's views on creative destruction.¹⁶⁹ Due to the nature of technological change, firms compete for a market through innovation and other strategies that are highly disruptive to existing markets.¹⁷⁰ This is competition for the market rather than competition in the market.¹⁷¹ In these circumstances, prediction is more complex and difficult.¹⁷² If there is no clear theory of harm and no facts to support a determination of harm, aggressive intervention risks chilling procompetitive innovation.¹⁷³ In some cases, the best remedy may be no remedy at all, as evidenced in a number of cases across the United States,¹⁷⁴ Europe,¹⁷⁵ and other leading jurisdictions.¹⁷⁶

¹⁶⁶ See Sidak & Teece, *supra* note 165, at 582.

¹⁶⁷ Renata B. Hesse, Deputy Assistant Attorney Gen. for Criminal & Civil Operations, U.S. Dep't of Justice, At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement, Remarks as Prepared for the Conference on Competition & IP Policy in High-Tech. Indus. 5 (Jan. 22, 2014), <http://www.justice.gov/atr/public/speeches/303152.pdf>.

¹⁶⁸ Professor Thomas Cotter summarizes the potential trade off as "[t]he obvious problem, once we accept the principle that any conduct that threatens some harm to innovation or creativity (no matter how speculative) properly could give rise to antitrust liability, is knowing where to stop." Thomas F. Cotter, *Innovation and Antitrust Policy*, in 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 132, 146 (Roger D. Blair & D. Daniel Sokol eds., 2015).

¹⁶⁹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950). See also Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 587 (2007) ("As a general rule, competition does not just lead firms to produce more and charge less; it encourages them to innovate as well.").

¹⁷⁰ See WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 227-29 (2007).

¹⁷¹ See Baker, *supra* note 169, at 577; Michael A. Carrier, *Two Puzzles Resolved: Of the Schumpeter-Arrow Stalemate and Pharmaceutical Innovation Markets*, 93 IOWA L. REV. 393, 396 (2008).

¹⁷² See Baker, *supra* note 169, at 575 & n.1.

¹⁷³ See PAGE & LOPATKA, *supra* note 170, at 244; William H. Page & Seldon J. Childers, *Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. & TECH. L. REV. 77, 82 (2007).

¹⁷⁴ Statement of the Fed. Trade Comm'n, In re Google, Inc., No. 111-0163, at 3 (F.T.C. Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtftcomm.pdf ("Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers. Reasonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google's product design decisions in this case would require the Commission—or

Despite the focus of many antitrust agencies and international organizations on antitrust issues in China,¹⁷⁷ it is important to note that industrial policy in antitrust is not just a China problem.¹⁷⁸ Focusing solely on China at the exclusion of other countries in Asia, Europe, and the Americas allows competition authorities in other regions to slide under the radar and perpetuates the intrusion of industrial policy into antitrust—harming consumer welfare.

a court—to second-guess a firm’s product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.”).

¹⁷⁵ Case T-79/12, *Cisco Systems Inc. v. Comm’n*, ¶ 76 (Dec. 11, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=145461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=44480>.

¹⁷⁶ See David S. Evans & Vanessa Yanhua Zhang, *Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court*, COMPETITION POL’Y INT’L ASIA COLUMN, Oct. 21, 2014, at 2, <https://www.competitionpolicyinternational.com/assets/Uploads/AsiaOctober214.pdf>.

¹⁷⁷ See, e.g., FED. TRADE COMM’N OFFICE OF INT’L AFF., FY2013 TECHNICAL ASSISTANCE REPORT 3 (2013), https://www.ftc.gov/system/files/attachments/international-technical-assistance-program/ftc_office_of_international_affairs_fy2013_technical_assistance_report_1.pdf.

¹⁷⁸ See WOLF SAUTER, COMPETITION LAW AND INDUSTRIAL POLICY IN THE EU 56 (1997); Jonathan Galloway, *The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy*, 28 EUR. COMPETITION L. REV. 172, 172 (2007).