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Troubled Waters Between U.S. and European Antitrust

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TROUBLED WATERS BETWEEN U.S. AND EUROPEAN ANTITRUST

*D. Daniel Sokol**

THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY. By *Daniel J. Gifford* and *Robert T. Kudrle*. Chicago and London: The University of Chicago Press. 2015. P. 216. \$65.

INTRODUCTION

Antitrust is an important area of law and policy for most companies in the world. Having divergent rules across antitrust systems means that identical economic behavior may be treated differently depending on the jurisdiction. This leads to disparate outcomes, with one jurisdiction finding illegal behavior (that the other does not) when the underlying behavior may be pro-competitive. For example, one of the U.S. antitrust agencies, the U.S. Federal Trade Commission (the other is the Department of Justice Antitrust Division, or “DOJ Antitrust”) unanimously voted to close its investigation into Google in 2013 after concluding that the company’s behavior was not anticompetitive.¹ Yet, in spite of this outcome, more recently the European Commission’s Competition Commissioner and its antitrust agency equivalent, the Directorate-General for Competition (“DG Competition”), issued a statement of objections against Google in a case that remains ongoing.² This is but one example of how an antitrust divide continues to exist across the Atlantic.

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1. Statement of the Federal Trade Commission Regarding Google’s Search Practices at 3–4, Google Inc., FTC File No. 111-0163 (F.T.C. Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf [<https://perma.cc/H4TF-DVBX>]. The FTC warned, “[c]hallenging Google’s product design decisions in this case would require the Commission—or 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.” *Id.*; see also Michael A. Salinger & Robert J. Levinson, *Economics and the FTC’s Google Investigation*, 46 REV. INDUS. ORG. 25 (2015) (providing an analysis of the issues and arguments in the FTC’s investigation).

2. European Commission Press Release IP/15/4780, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service; Opens Separate Formal Investigation on Android (Apr. 15, 2015) (articulating the Commission’s first Statement of Objections).

This disparate set of outcomes creates a world in which the most stringent antitrust system may produce the global standard.³ As a result, if the antitrust rules applied are too rigid, they threaten to hurt consumers not merely in the jurisdiction where they are applied but globally as well.⁴ The stakes are high, not merely in the tech sector, but more generally. Other jurisdictions look to both the United States and Europe for guidance for antitrust jurisprudence.⁵

Though antitrust law and economics has transformed across both the United States and Europe in the past forty years, institutional differences may explain, in part, these divergent outcomes. Starting in the 1970s, the United States went through an antitrust revolution as it moved from multiple public interest goals to a singular goal based on economic analysis.⁶ The end result of that revolution is that antitrust in the United States has some variation of economic efficiency as its sole goal (based on a welfare standard of either total welfare or consumer welfare).⁷ The United States was the first jurisdiction to give economic analysis primacy in antitrust law, although other jurisdictions have since moved in this direction.⁸

Given that economic thinking continues to develop, case law plays a particularly important role in antitrust. The Supreme Court recently explained in *Kimble v. Marvel Entertainment, LLC*:

3. See, e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497, 2531–32 (2013).

4. See *id.* at 2516; Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 *ANTITRUST L.J.* 423, 462–63 (2005).

5. See Blair & Sokol, *supra* note 3, at 2503.

6. See Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 *J. COMPETITION L. & ECON.* 733, 773–74 (2011) (finding evidence of structural shifts in enforcement in the 1970s); D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 *GEO. MASON L. REV.* 1247, 1251–52 (2015) (“Much of US antitrust enforcement from the 1950s and 1960s is an embarrassment by today’s standards. . . . This approach in US case law began to change in the late 1970s In the United States, antitrust liability has narrowed due to a better understanding of economics, and antitrust analysis is now driven by economic analysis.”).

7. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–57 (1977). Of course, a debate within the academy—and to a lesser extent before the Supreme Court—still exists as to whether “total welfare,” “consumer welfare,” or a completely different standard is the proper formulation of economic efficiency. Compare Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, *COMPETITION POL’Y INT’L*, Autumn 2006, at 3 (concluding that the consumer surplus standard has some strengths), and John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425 (2013) (arguing for a consumer welfare standard), with Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 *FORDHAM L. REV.* 2197 (2013) (arguing for a new “trade-off” model), and Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253 (2013) (arguing that competition should be the primary goal).

8. See Blair & Sokol, *supra* note 3, at 2508–09, 2513–15.

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.⁹

In Europe, by contrast, the shift to greater economic analysis in antitrust (or as they call it, competition law) started in earnest only in the early 2000s—though as this Review will illustrate, economic analysis has not permeated as far in European competition law cases as it has in the United States, even if the language used by the European Commission's Competition Commissioner and DG Competition is that of consumer welfare.¹⁰

In their book *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy*, Daniel Gifford and Robert Kudrle¹¹ analyze a distinct set of cases across a number of different substantive areas in the two jurisdictions. In doing so, they also discuss the potential for both convergence and divergence (Chapter Ten). Their comparative analysis makes an important and well-informed contribution to the literature, even if parts of the book might have limitations.

Gifford and Kudrle begin their book by examining the different historical and institutional perspectives in U.S. and European antitrust (Chapter One), providing important context for the development of the analysis of the cases that follow in subsequent chapters. They then articulate the various economic standards for antitrust harm across both systems in the context of judicial review (Chapter Two). Next, they examine merger policy and how the two systems treat merger efficiencies (Chapter Three). The subsequent chapters discuss particular types of conduct—price discrimination (Chapter Four), predatory pricing (Chapter Five), exclusive supply contracts (Chapter Six), both single product (Chapter Seven) and bundled discounts (Chapter Eight), and the comparative *Microsoft* antitrust cases (Chapter Nine)—as a way of framing a broader discussion of antitrust in high technology and in the area of antitrust–IP interface issues.

This Review first explores the developments of the goals of antitrust (and how these goals shape enforcement) and the particular insights and shortcomings of Gifford and Kudrle's investigation into comparative antitrust—in particular, the area of greatest cross-Atlantic discord: cases involving single firm conduct, especially in markets characterized by high technology and innovation. Second, this Review explores cartel law and policy, a topic that Gifford and Kudrle overlook entirely. This is a surprising

9. 135 S. Ct. 2401, 2412–13 (2015) (citation omitted).

10. Blair & Sokol, *supra* note 3, at 2513–15, 2530. For a catalog of EU cases, see generally ARIEL EZRACHI, *EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES* (4th ed. 2014).

11. Daniel J. Gifford is the Robins Kaplan Professor of Law at the University of Minnesota Law School. Robert T. Kudrle is the Orville and Jane Freeman Chair in International Trade and Investment Policy at the University of Minnesota Humphrey School of Public Affairs, as well as an adjunct faculty member with the University of Minnesota Law School.

omission given that cartel activity is the highest enforcement priority in the area of nonmerger conduct in both the United States and Europe (at the EC level) in terms of the number of cases.¹² Moreover, it is an area in which the law and policy is in flux on both sides of the Atlantic.¹³

I. DIVERGENT GOALS

In the comparative context, Gifford and Kudrle effectively point out that, while upon first glance, judicial review looks the same across the two jurisdictions (p. 37), in practice cases come out differently. This is because of different sets of considerations, goals, and institutional design issues in the two systems, including noneconomic goals, which are more significantly embedded in the European case law,¹⁴ and significant deference by European courts to DG Competition in the conduct context.¹⁵

Path dependency based on multiple overarching goals remains a fundamental characteristic of European antitrust case law.¹⁶ Europe also has more of an interventionist flavor than the United States,¹⁷ which, as Gifford and Kudrle discuss, is a result of having those multiple goals embedded in the competition law on the books.¹⁸ These goals include fairness, European integration, and the protection of rivals (pp. 12–13). Even if DG Competition states that its sole goal is consumer welfare,¹⁹ Europe remains a far more favorable jurisdiction for a finding of a competition law infringement than 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

12. See U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 2006–2015, at 1 (2015), <https://www.justice.gov/atr/file/788426/download> [<https://perma.cc/PT5U-HBML>]; Alexander Italianer, *European Union: Directorate General for Competition*, EUROPEAN ANTITRUST REVIEW 2016, <http://globalcompetitionreview.com/reviews/72/sections/239/chapters/2891/european-union-directorate-general-competition> (on file with the *Michigan Law Review*).

13. See, e.g., LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING 69–100 (2013); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405–09 (2011); William H. Page, *Objective and Subjective Theories of Concerted Action*, 79 ANTITRUST L.J. 215, 216–22 (2013).

14. See pp. 8–14.

15. See, e.g., pp. 34–38.

16. BEN VAN ROMPUY, ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTI-TRUST POLICY? § 3.02, at 124–28 (2012); see also Liza Lovdahl Gormsen, *The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3 EUR. COMPETITION J. 329, 332–42 (2007).

17. See generally FRANCESCO RUSSO ET AL., EUROPEAN COMMISSION DECISIONS ON COMPETITION 113–97 (2010) (analyzing and classifying all European Commission decisions from 1962 through 2009).

18. See pp. 8–17. For recent formulations in the courts on these goals, see, for example, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009 E.C.R. I-4529, and Joined Cases C-468/06 to C-478/06, *Sot. Léelos kai Sia EE v. GlaxoSmithKline AVE Farmakeftikon Proionton*, 2008 E.C.R. I-7139.

19. Blair & Sokol, *supra* note 3, at 2513.

intervention.²⁰ In Europe, however, having multiple goals, even in modern case law, tends to push antitrust law into more aggressive enforcement of behavior than may be efficient. As such, case analysis by the European courts sometimes leads to outcomes that are not efficiency based (p. 34). In the language of European competition law: too much European case law is subject to too many practices that are categorized by “object”²¹ (where economic analysis is not required) rather than “effect”²² (which requires economic analysis).²³ The move to economic analysis has been proceeding since the 1990s. But, perhaps surprisingly, the first time the term “consumer welfare” was mentioned meaningfully in a decided case by the European Court of Justice (ECJ) was 2012 in *Post Danmark A/S v. Konkurrencerådet*.²⁴ When there are multiple goals used in the underlying analyses of cases, it makes planning of pro-competitive business behavior more difficult because a firm that legitimately competes on the merits may be punished for its success.

The strong-interventionist case law and enforcement in Europe also operates in the shadow of the law, serving as leverage to extract greater concessions in commitment decisions from firms that are under investigation. These firms end up settling because they do not think that a win before the highly deferential courts is likely.²⁵

One area where European courts have pushed back against overly restrictive competitive effects analysis is mergers (pp. 35–36). This pushback is

20. See generally William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003) (describing the U.S. enforcement agencies’ hesitance to bring antitrust claims).

21. *T-Mobile Netherlands BV*, 2009 E.C.R. I-4529 ¶ 43 (providing a rationale for “object” analysis).

22. Pinar Akman, *The Tests of Illegality Under Articles 101 and 102 TFEU*, 61 ANTITRUST BULL. 84, 86 (2016).

23. Pinar Akman, *The Reform of the Application of Article 102 TFEU: Mission Accomplished?*, 81 ANTITRUST L.J. 145, 151–52, 203–04 (2016).

24. Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, 2012 E.C.R., ¶ 42 (delivered March 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=565095> [<https://perma.cc/D5AL-XHQ5>]. The use of the term “consumer welfare” had become institutionalized within DG Competition earlier with the establishment of an economics group and a Chief Economist. The embrace of economic analysis (at least on paper) within DG Competition occurred in both the Merger Guidelines, EUROPEAN COMM’N, EU COMPETITION LAW: RULES APPLICABLE TO MERGER CONTROL 184 (2010) (quoting *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 5, ¶ 61), http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf [<https://perma.cc/3U4D-PFKV>], and the Article 82 Guidance, *Communication from the Commission—Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, ¶ 19 [hereinafter Guidance Paper].

25. Niamh Dunne, *Commitment Decisions in EU Competition Law*, 10 J. COMPETITION L. & ECON. 399, 405, 425 (2014); Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures After Alrosa: The Dangers of Abandoning the “Struggle for Competition Law”*, 49 COMMON MKT. L. REV. 929, 966–67 (2012).

significant because in merger law the courts have reversed the European Commission, where there had been errors in accuracy of information assessment and in economic analysis (pp. 36–37). Significant judicial oversight of DG Competition means that the agency is less likely to bring merger cases where its analysis and the underlying economics are weaker. Contrast this with dominance cases, where the courts had the ability to create similar limiting principles for DG Competition in the *Microsoft* case but where the General Court remained deferential to the Commission.²⁶ Perhaps for this reason, scholars, including Gifford and Kudrle, have been far more critical of DG Competition’s conduct cases rather than its merger cases.²⁷

II. SINGLE FIRM CONDUCT

Single-firm conduct addresses that part of antitrust where a monopolist exercises its power to raise prices and/or exclude its competitors.²⁸ Enforcement agencies must determine how to best limit the unlawful exercise of monopoly power while avoiding overenforcement, using resources efficiently, and incentivizing innovation. It is perhaps the most complex part of antitrust analysis. Gifford and Kudrle spend a number of chapters addressing various forms of conduct in their book and areas of ambiguity or difficulty in case law. This Part addresses some of the ambiguities of how single firm conduct issues play out comparatively.

Since its inception, antitrust has fixated on the behavior of dominant firms.²⁹ Such cases involve exclusion³⁰ or predation.³¹ In both scenarios, the Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”³² Due to the procedural and substantive tightening on antitrust doctrine that has occurred since the U.S. antitrust revolution in the 1970s, there are fewer exclusion cases now than in the prior era.³³ For the most part, U.S. case law has been scrubbed of its earlier excesses. In Europe, however, such

26. Pp. 37–38 (“[T]he deference accorded by the General Court to the Commission’s *Microsoft* decision seems without parallel in the US case law on judicial review because of the magnitude of the policy issues involved.”).

27. See, e.g., pp. 37–38.

28. See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 94–99 (4th ed. 2005).

29. See, e.g., p. 4; Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

30. A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1248 (2005) (“[C]onduct by a firm or group of firms that weakens rivals or excludes them from the market and can thereby enable the firm or firms engaging in the conduct to gain market power.” (footnote omitted)).

31. See generally 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 722–49 (4th ed. 2015).

32. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

33. Pp. 85–86; John E. Kwoka, Jr. & Lawrence J. White, *Introduction*, in *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* 2–6 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014); see also Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School*

anachronistic cases remain on the books, and recent cases repeat noneconomic formulations of the goals of competition law, which lead to results that may chill pro-competitive business behavior (pp. 92–94, 98–100). Further, in conduct cases under Articles 101 and 102 TEFU (the rough equivalent of the United States’ Sherman Act sections 1 and 2), the European courts have not created limiting principles with regard to economic analysis as the same courts have in the merger context.³⁴ Although Article 102 was “modernized” with a Guidance Paper to help push Europe to more of an effects-based approach centered on economic analysis,³⁵ attempts to modernize case law and practice remain a work in progress. Sometimes economic analysis guides decisions, but in other cases the Commission takes a more formalistic approach.³⁶ Worse, as this Review discusses herein in the chapters on conduct (pp. 63–196), unlike in the area of mergers, the European courts have not limited DG Competition’s rulings because of faulty, or even a lack of, economic analysis.³⁷ The lack of limiting principles means a more aggressive Commission with regard to dominance cases (even when the behavior may not have anticompetitive effect), which leads to greater uncertainty for business decisions that require complex antitrust analysis and to findings of infringement of European competition law when the behavior in question is not anticompetitive. It also creates incentives to bring cases even if the cases settle because any such settlement is a “win” for purposes of bureaucratic politics.³⁸

One such example of the difficulty of modernizing practice is *Intel*,³⁹ a case to which Gifford and Kudrle devote a portion of Chapter Seven. In *Intel*, one of the earliest post-Guidance Paper cases, the Commission found that Intel had infringed Article 102 TEFU—even without providing anticompetitive effects.⁴⁰ More specifically, the Commission argued that there

Drives Recent U.S. Supreme Court Decisions?, COMPETITION POL’Y INT’L, Autumn 2007, at 59, 68–70 (discussing one predatory buying case that had “no Supreme Court precedent”).

34. See p. 98. Angela Zhang suggests that the motivation to overturn a Commission decision in the area of conduct may not be benign. She notes, “As members and staff of the Court of Justice do not want their dockets flooded with appeals from the General Court, they are likely to be less inclined to annul the Commission’s decisions.” Angela Huyue Zhang, *The Faceless Court*, 38 U. PA. J. INT’L L. 71, 118–24 (2016).

35. Guidance Paper, *supra* note 24, para. 19.

36. See Akman, *supra* note 23, at 149–50; see also Pinar Akman, *The European Commission’s Guidance on Article 102 TFEU: From Inferno to Paradiso?*, 73 MOD. L. REV. 605, 624 (2010) (suggesting the Commission has taken a more formalistic approach at times, rather than a consumer welfare standard).

37. See *supra* note 34 and accompanying text; see also Akman, *supra* note 22.

38. See David A. Hyman & William E. Kovacic, *Can’t Anyone Here Play This Game? Judging the FTC’s Critics*, 83 GEO. WASH. L. REV. 1948, 1973–74 (2015).

39. Commission Decision Summary No. 2009/C 227/07 (*Intel*), 2009 O.J. (C 227) 13.

40. *Id.* at 17.

was no requirement to show actual foreclosure because a 102 TFEU violation could be found merely from “object” practices by a dominant firm.⁴¹ On appeal, the General Court upheld the European Commission’s decision,⁴² stating that there was no need to show competitive effects that harm consumers once an anticompetitive object has been found.⁴³ Though there was some economic analysis in the case, there was no discussion of a counterfactual to Intel’s behavior, precisely the *opposite* of the Guidance Paper’s test for such behavior.⁴⁴ *Intel* has not been an isolated case of discussing conduct by its object when the discussion should be by the conduct’s effect. Similar analysis can be found in contemporary cases such as *Michelin II*⁴⁵ and *AstraZeneca*⁴⁶ (both in the decisions of the General Court and European Court of Justice). Overall, across chapters in the book, Gifford and Kudrle show the divide between the economics-based effects approach set forth in the Guidance Paper and case law.⁴⁷ This lack of coherence chills pro-competitive behavior. Advocate General Wahl’s recent *Intel* opinion (post publication of the book), offers hope that the European case law is moving in the right direction towards greater economic analysis.⁴⁸

Nevertheless, while the European academic opinion is clearly trending in favor of more economic analysis in doctrine,⁴⁹ some European case law, in dicta, even goes so far as to suggest hostility to the economics-based effects approach. In the *Post Danmark II* case, Advocate General Kokott wrote:

It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case, . . . the Court should not allow itself to be influenced so much by current thinking (‘Zeitgeist’) or ephemeral trends,

41. Commission Decision No. 2009/C 227/07 (*Intel*), slip op. ¶¶ 919, 923 (May 13, 2009), http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf [<https://perma.cc/X93S-9XYW>].

42. Case T-286/09, *Intel Corp. v. Comm’n*, 2014 E.C.R., ¶¶ 198–206 (delivered June 12, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009TJ0286&from=EN> [<https://perma.cc/6CJK-BHVT>].

43. *See id.* ¶ 145.

44. Akman, *supra* note 23, at 186–87.

45. *See* Case T-203/01, *Manufacture française des pneumatiques Michelin v. Comm’n* (*Michelin II*), 2003 E.C.R. II-4071, ¶¶ 241–42.

46. *See* Case C-457/10 P, *AstraZeneca AB v. Comm’n*, 2012 E.C.R., ¶ 165 (delivered Dec. 6, 2012), [http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0457&lang1=en&type=TEXT&ancre=\[https://perma.cc/8K8Y-2AC4\];](http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0457&lang1=en&type=TEXT&ancre=[https://perma.cc/8K8Y-2AC4];) Case T-321/05, *AstraZeneca AB v. Comm’n*, 2010 E.C.R. II-2805, ¶ 902.

47. *See, e.g.*, pp. 134–35.

48. *See* Case C-413/14 P, *Intel Corp. v. Comm’n* (Oct. 20, 2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CC0413> [<https://perma.cc/B5UD-PZUZ>].

49. *See* Pablo Ibáñez Colomo, *Beyond the “More Economics-Based Approach”: A Legal Perspective on Article 102 TFEU Case Law*, 53 COMMON MKT. L. REV. 709, 710–11 (2016); Nicolas Petit, *Intel, Leveraging Rebates and the Goals of Article 102 TFEU*, 11 EUR. COMPETITION J. 26, 67 (2015) (“[T]he case-law analysis provided by the *Intel* court in support of its reasoning is on the whole very weak and riddled with disconcerting inconsistencies.”).

but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.⁵⁰

She later added further skepticism, noting, “the added value of expensive economic analyses is not always apparent.”⁵¹ Across the different chapters that otherwise do a good job in analyzing particular areas of antitrust law, Gifford and Kudrle do not capture as precisely as they should how critical this struggle within European competition policy is in terms of the goals of competition policy leading to doctrinal changes. While Gifford and Kudrle provide excellent analysis of the cases they cover, by not emphasizing how the battle for goals remains an issue in conduct cases, they underplay the impediments to more economically reasonable cases in Europe and, ultimately, to prosecutorial discretion for such cases. Without European courts more critical of non-effects-based analysis, there is the potential for pro-competitive behavior to be chilled.

In a case like *Intel* in the United States, by contrast, a plaintiff would have to demonstrate anticompetitive harm through an analysis of competitive effects.⁵² To my knowledge, the emphasis on economic analysis is embedded in the judiciary. In their opinions, judges in the United States do not tend to question the analytical basis of economic analysis in antitrust jurisprudence. This is because of the uniformity of Supreme Court cases since the mid-1970s in shaping how lower courts use economic analysis in antitrust cases.⁵³

One area of increasing divergence across the Atlantic is in markets characterized by high technology and dynamic innovation. Conduct issues ranging from online search,⁵⁴ online resale price maintenance, and online most-

50. Case C-23/14, *Post Danmark A/S v Konkurrencerådet (Post Danmark II)* ¶ 4 (May 21, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164331&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=534256> [https://perma.cc/J29U-XMDZ].

51. *Id.* ¶ 66.

52. For some of the approaches to discounts, see, for example, Daniel A. Crane, *Bargaining Over Loyalty*, 92 TEX. L. REV. 253 (2013); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009); and Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841.

53. See, e.g., 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, 218 (2010) (“Starting in the 1970s, the Supreme Court began systematically reworking antitrust doctrine in order to bring it into alignment with the modern economic understanding of competition.”).

54. See Aaron S. Edlin & Robert G. Harris, *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*, 15 YALE J.L. & TECH. 169 (2013); Florian Wagner-Von Papp, *Should Google’s Secret Sauce Be Organic?*, 16 MELBOURNE J. INT’L L. 609 (2015).

avored-nation clauses;⁵⁵ pharmaceutical reverse payments;⁵⁶ and FRAND licensing,⁵⁷ among other issues, are hotly contested. Europe seems to be the more aggressive enforcer in areas where the stakes are high, the issues complex, the likelihood of mistaken enforcement may be high, and the industrial policy broadly defined may be influencing European competition policy.⁵⁸

One complaint of industrial policy in European antitrust came from no less than the then President of the United States. President Obama suggested that some European antitrust enforcement targeting U.S. tech companies might be essentially an element of European industrial policy. President Obama explained in an interview with Kara Swisher: “We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways [that inefficient European competitors] can’t compete [with]. And oftentimes what is portrayed as high-minded positions on issues sometimes is designed to carve out their commercial interests.”⁵⁹

President Obama’s comment is relevant to a larger issue involving single firm conduct: case law involving high technology cuts across antitrust. Given how few decided cases there are before the courts involving high technology, much of the “action” occurs in the shadow of the law. Gifford and Kudrle emphasize the easiest comparison of high-tech issues—the Microsoft saga that remains important to the present. Gifford and Kudrle discuss how antitrust addresses technology and innovation in the U.S. and European *Microsoft* cases (Chapter Nine). These cases were seminal in understanding how antitrust addressed new economy issues in both jurisdictions. Since that time, technology has played an increased role in terms of both merger cases and conduct cases (pp. 191–94). Unfortunately, however, Gifford and Kudrle do not discuss these more recent cases in detail, nor do they discuss tech markets, antitrust, and the difference between merger and dominance cases

55. See Pinar Akman & D. Daniel Sokol, *Online RPM and MFN Under Antitrust Law and Economics*, 50 REV. INDUST. ORG. 133 (2017); Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11 EUR. COMPETITION J. 488 (2015); John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1 (2014).

56. See Michael A. Carrier, *Why a “Large and Unjustified” Payment Threshold Is Not Consistent with Actavis*, 91 WASH. L. REV. 109 (2016); Michael Clancy et al., *Reverse-Payment Patent Settlements in the Pharmaceutical Industry: An Analysis of U.S. Antitrust Law and EU Competition Law*, 59 ANTITRUST BULL. 153 (2014).

57. See Damien Geradin, *The Meaning of “Fair and Reasonable” in the Context of Third-Party Determination of FRAND Terms*, 21 GEO. MASON L. REV. 919 (2014); Daryl Lim, *Standard Essential Patents, Trolls, and the Smartphone Wars: Triangulating the End Game*, 119 PA. ST. L. REV. 1 (2014).

58. Sokol, *supra* note 6, at 1254–58.

59. Kurt Wagner, *Kara Swisher Interviews President Barack Obama on Cyber Security, Privacy and His Relationship with Silicon Valley (Video)*, RECODE (Feb. 13, 2015, 4:39 PM), <http://www.recode.net/2015/2/13/11559018/barack-obama-recode-kara-swisher-video> [https://perma.cc/8CVC-27FQ]. On the misuse of antitrust by competitors, see William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 250 (1985), and D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 693 (2012).

(at least in Europe where the differences in case law between the two are significant) outside of the *Microsoft* cases.

Though there is no need for new antitrust rules specifically for markets characterized by innovation,⁶⁰ particular care must be given in such markets where some of the assumptions of how competition works may differ from those of more traditional markets.⁶¹ In such technology-driven markets there is rapid technological transformation and innovation across a number of different paths, including products, services, and platforms.

Because of the rapid transformation of tech-based markets, the traditional structural presumption of market power may be transient.⁶² Markets move quickly across different platforms from general search to more specialized search, and from social networks to apps. The concept of fast-changing markets in antitrust emerges from Joseph Schumpeter's views on creative destruction.⁶³ The method of competition in these markets is such that traditional markets can be subject to significant disruption.⁶⁴ In a number of circumstances, firms compete *for* the market rather than *in* the market.⁶⁵ As a result, prediction for mergers is more difficult, as is understanding the competitive effects in conduct cases, because the innovation in question may not be linked to a preexisting market. This is not to argue that antitrust has no role to play in fast-moving markets. Rather, as with other areas of antitrust, the problem with antitrust intervention is that without a clear theory

60. It is worth keeping in mind, however, the recent populist attempts at reasserting “big is bad” in the tech world. See ANDREA RENDA, *SEARCHING FOR HARM OR HARMING SEARCH? A LOOK AT THE EUROPEAN COMMISSION’S ANTITRUST INVESTIGATION AGAINST GOOGLE* (2015), <https://www.ceps.eu/system/files/AR%20Antitrust%20Investigation%20Google.pdf> [https://perma.cc/M3XE-MEEG] (acknowledging this tendency in Europe); Senator Elizabeth Warren, Keynote Remarks at New America’s Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [https://perma.cc/W8VP-L8W6] (exemplifying a similar populist tendency in the United States). Such populism is not new (although its impulses remain underdeveloped in Gifford and Kudrle) to antitrust. See Barak Orbach & D. Daniel Sokol, *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.”). But such thinking lacks economic sophistication and understanding of how markets work. See Liran Einav & Jonathan Levin, *Empirical Industrial Organization: A Progress Report*, J. ECON. PERSP., Spring 2010, at 145, 152–56.

61. See chapter 9.

62. Renata B. Hesse, Deputy Assistant Att’y Gen. for Criminal & Civil Operations, U.S. Dep’t of Justice, Remarks as Prepared for the Conference on Competition and IP Policy in High-Technology Industries: At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement 5 (Jan. 22, 2014), <http://www.justice.gov/atr/public/speeches/303152.pdf> [https://perma.cc/F7AL-7HXV].

63. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82–83 (3d ed. 1950); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 578 (2007).

64. See generally CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* (1997).

65. See J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 615 (2009).

of harm linked to facts that match up with economic theory, aggressive anti-trust enforcement creates the negative potential of chilling pro-competitive innovation.

Gifford and Kudrle's chapter on *Microsoft* could have served as a springboard to discuss two-sided market analysis in tech markets. According to the economics literature, double-sided markets occur when firms or platforms have the ability to bring together distinct types of economic actors (e.g., online auctions such as eBay, dating services such as Tinder, search engines such as Google, or social network sites such as Facebook).⁶⁶ In such markets, services on one side of the market often may be free for users, and firms may make money from advertising.

This market structure complicates traditional antitrust analysis. A first step in antitrust analysis is market definition. In one-sided markets, an increase in price or decrease in output provides guidance on how to undertake the subsequent analysis.⁶⁷ In two-sided markets in which one side is free, however, a traditional market share calculation is inadequate because one side of the market may serve to subsidize the other.⁶⁸

This limitation to market definition in high-tech cases involving two-sided markets is just part of what is increasingly a convergence across the Atlantic of the limits of the use of market definition, particularly in merger analysis. This discussion of how high technology works in the merger context, particularly in Europe where there is case law (in contrast to the conduct area), suggests that European antitrust is capable of understanding tech issues and gives hope that DG Competition and the courts can do better going forward in tech-related antitrust conduct cases.

In the area of U.S. mergers, there has been a move away from market share in the 2010 Merger Guidelines.⁶⁹ Though the European merger guidelines have not been revised so recently, European merger cases suggest that a high market share is not fatal with regard to market power. This includes

66. See Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N. 990, 990 (2003). For an overview of the multisided market literature, see David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404 (Roger D. Blair & D. Daniel Sokol eds., 2015).

67. See, e.g., *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

68. *United States v. Am. Express Co.*, 838 F.3d 179, 185–86 (2d Cir. 2016); Elena Argentesi & Lapo Filistrucchi, *Estimating Market Power in a Two-Sided Market: The Case of Newspapers*, 22 J. APPLIED ECONOMETRICS 1247, 1247–48 (2007).

69. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [<https://perma.cc/997Z-SGBM>]. This can also be seen in Professor Kaplow's compelling writing. See Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

cases such as *Microsoft/Skype*,⁷⁰ *Alcatel/Telettra*,⁷¹ *Canon/Iris*,⁷² and *ARM/Giesecke & Devrient/Gemalto*.⁷³ Similarly, in the United States, the majority of merger closing statement cases at both DOJ Antitrust and the FTC do not turn on issues of market concentration but on competitive effects.⁷⁴ In contrast, the structural presumption plays a larger role in litigated merger cases in the United States due to a lack of modern analysis by the Supreme Court, which last reviewed antitrust merger jurisprudence in the 1970s and for which the structural presumption weighs heavily in the case law of the 1960s.⁷⁵

Contrast the lack of focus on effects in some abuse of dominance cases to how the courts have discussed effects in merger cases involving technology in Europe. In a series of cases, both DG Competition and the European courts have recognized that the dynamics of online markets may, at times, be different than those of traditional markets. For example, in Microsoft's merger with Skype, the General Court noted that network effects (the effects of a good or service to others who may use that good or service) do not necessarily create barriers to entry.⁷⁶ Rather, the court recognized that "the existence of network effects does not necessarily procure a competitive advantage for the new entity."⁷⁷ The reason for this is that direct network effects may not necessarily apply in certain high-tech markets. To distinguish further between two types of network effects, there are direct (more people on the network allows for scale, such as with Skype) and indirect network effects (complementary goods are produced, such as with an ATM network). This distinction between direct versus indirect network effects is particularly

70. Case T-79/12, *Cisco Sys. Inc. v. Comm'n*, 2013 E.C.R., ¶ 9, 138 (delivered Dec. 11, 2013), [http://curia.europa.eu/juris/celex.jsf?celex=62012TJ0079&lang1=en&type=TEXT&ancre=\[https://perma.cc/L4CW-GPX7\]](http://curia.europa.eu/juris/celex.jsf?celex=62012TJ0079&lang1=en&type=TEXT&ancre=[https://perma.cc/L4CW-GPX7]) (dismissing the case despite finding a market share of 80 to 90 percent).

71. Commission Decision No. 91/251/EEC (*Alcatel/Telettra*), 1991 O.J. (L 122) 48, 53 (finding a combined market share of over 80 percent).

72. Commission Decision No. 2013/C 111/05 (*Canon/Iris*), slip op. tbl. 3 (Feb. 18, 2013), cited in 2013 O.J. (C111) 3, <http://eur-lex.europa.eu/legal-content/EN/TEXT/?qid=1479163708089&uri=CELEX:32013M6773> [<https://perma.cc/Q3Z2-RVRC>] (showing market share of up to 100 percent).

73. Commission Decision No. 2012/C 368/04 (*ARM/Giesecke & Devrient/Gemalto/JV*), slip op. ¶ 65 (Nov. 6, 2012), cited in 2012 O.J. (C 368) 9, http://ec.europa.eu/competition/mergers/cases/decisions/m6564_20121106_2012_2779342_EN.pdf [<https://perma.cc/SJ37-9ATG>] (finding market share of 80 percent).

74. Michael G. Cowie & Paul T. Denis, *The Fall of Structural Evidence in FTC and DOJ Merger Review*, ANTITRUST SOURCE, Feb. 2013, at 1, 8.

75. See J. Robert Robertson, *Editor's Note: Philadelphia National Bank at 50*, 80 ANTITRUST L.J. 189 (2015) (discussing the structural presumption in an introduction to a special issue on the topic); see also, e.g., *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 343-44 (1962).

76. Case T-79/12, *Cisco Sys. Inc. v. Comm'n*, 2013 E.C.R., ¶ 76 (delivered Dec. 11, 2013), [http://curia.europa.eu/juris/celex.jsf?celex=62012TJ0079&lang1=en&type=TEXT&ancre=\[https://perma.cc/L4CW-GPX7\]](http://curia.europa.eu/juris/celex.jsf?celex=62012TJ0079&lang1=en&type=TEXT&ancre=[https://perma.cc/L4CW-GPX7]).

77. *Id.*

important given the discussion that Gifford and Kudrle have in their *Microsoft* chapter on the tying claim in that case, in which Microsoft's tying of the internet explorer to its operating system played such an important role in the case of direct network effect to the theory of harm (pp. 170–71). With regard to mergers, because of the speed of change in online markets, the European Commission similarly found in the *Facebook/WhatsApp* merger that because of fast-moving markets, “any leading market position even if assisted by network effects is unlikely to be incontestable.”⁷⁸

Not only are online markets fast moving and therefore potentially have low barriers to entry, arguments have emerged in such contexts to provide a duty to deal for less efficient competitors. Gifford and Kudrle correctly provide an analysis of the significant limitations on the duty to deal and also provide context for these limitations in high-tech antitrust (pp. 162–66). They note that the European case law more readily accepts refusals to supply and refusals to deal than U.S. case law (although the duty is not broad).⁷⁹ Something Gifford and Kudrle fail to mention, however, is that, importantly, in addition to the limits on the European case law, the Guidance Paper also shows deep reluctance to create blanket obligations for rivals.⁸⁰

The context for refusals to deal is different in Europe where, unlike the United States, there is a history of state-owned enterprises.⁸¹ In what is perhaps still the leading economic policy book of European competition law, the most recent former chief economist of DG Competition, in his prior academic writing, also shows great reluctance to undertake an aggressive approach with regard to refusals to deal.⁸² But the impulse for broader use of such an approach by the more populist elements within other parts of the European Union structure suggest the potential for mischief in EU competition law on this topic.⁸³

Thus far, insights that have found their way into European merger law with regard to high technology and economic analysis have not yet found their way into European abuse-of-dominance case law. Such a revisiting is in order with European antitrust concern over the companies that have been

78. Commission Decision No. 2014/C 417/02 (*Facebook/WhatsApp*), slip op. ¶ 132 (Oct. 3, 2014), cited in 2014 O.J. (C 417) 4, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf [<https://perma.cc/A7FU-UPZV>].

79. See p. 166.

80. Guidance Paper, *supra* note 24, para. 75.

81. See *Commission Roundtable on the Application of Antitrust Law to State-Owned Enterprises* (Oct. 20, 2009), <http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf> [<https://perma.cc/BWG5-A6C4>] (discussing the prevalence of state-owned enterprises and the application of antitrust law to these enterprises).

82. MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 89 (2004) (“Competition laws and their enforcement should therefore ensure that firms will be able to enjoy the rewards for their investments. I have therefore argued that any expropriation of firms’ assets (whether material or immaterial) should be avoided. As a consequence, resorting to the essential facilities doctrine (granting assets of crucial assets to competitors), to price controls, or even more drastic structural remedies must be carried out only in truly exceptional circumstances.”).

83. See, e.g., RENDA, *supra* note 60, at 39–40.

termed “GAFA” (Google, Apple, Facebook, and Amazon).⁸⁴ Perhaps part of the aggressiveness of DG Competition and EU Member State prosecution at the national level is due to the fact the European courts have not yet limited the abuse of dominance law the way that they have limited the Commission’s merger jurisprudence to economic effects in a series of cases, including *Airtours/First Choice*,⁸⁵ *Schneider/Legrand*,⁸⁶ and *Tetra Laval/Sidel*.⁸⁷ As Gifford and Kudrle correctly note, the European *Microsoft* decision was the chance to extend this thinking to dominance cases, but the General Court did not (pp. 36–37). As a result, as Gifford and Kudrle explain, “the deference accorded by the General Court to the Commission’s *Microsoft* decision seems without parallel in the US case law on judicial review because of the magnitude of the policy issues involved” (p. 38). Perhaps a similar pushback by the General Court and the European Court of Justice is needed in dominance to keep DG Competition “honest” in its jurisprudence and to focus more on an effects-based economic analysis.

III. CARTEL POLICY

At a basic level, there is consensus that cartels (companies or individuals who collude through an illegal contract, typically to raise prices) are a problem of major concern in antitrust. In the United States, active cartel enforcement has long been a hallmark antitrust enforcement—even if the design of that enforcement has been suboptimal due to problems of both insufficient detection and punishment.⁸⁸ Over time, through case law and policy, fines have ratcheted up.⁸⁹ Government emphasis on cartel prosecutions has been a priority across presidential administrations. Further, the Supreme Court has observed that cartels are “the supreme evil of antitrust.”⁹⁰

Though both the United States and Europe are now active cartel enforcers, this was not always the case. Further, in terms of the structure of the

84. Sam Schechner, *Europe Targets U.S. Web Firms: French, German Officials Call for Greater Power to Regulate Internet Companies*, WALL STREET J. (Nov. 27, 2014, 6:39 PM), <http://www.wsj.com/articles/French-german-officials-call-for-fresh-look-at-internet-giants-1417110508> (on file with the *Michigan Law Review*).

85. Commission Decision No. 2000/276/EC (*Airtours/First Choice*), 2000 O.J. (L 93) 1, *overruled by* Case T-342/99, *Airtours plc v. Comm’n*, 2004 E.C.R. II-1790.

86. Commission Decision No. 2004/276/EC (*Schneider/Legrand*), 2004 O.J. (L 101) 1, *overruled by* Case T-310/01, *Schneider Electric SA v. Comm’n*, 2002 E.C.R. II-4075.

87. Commission Decision No. 2004/124/EC (*Tetra Laval/Sidel*), 2004 O.J. (L 43) 13, *overruled by* Case T-5/02, *Tetra Laval BV v. Comm’n*, 2002 E.C.R. II-4389; Commission Decision No. 2004/103/EC (*Tetra Laval/Sidel*), 2004 O.J. (L 38) 1, *overruled by* Case T-80/02, *Tetra Laval BV v. Comm’n*, 2002 E.C.R. II-4521.

88. See Vivek Ghosal & D. Daniel Sokol, *Policy Innovations, Political Preferences, and Cartel Prosecutions*, 48 REV. INDUS. ORG. 405, 409 (2016) [hereinafter Ghosal & Sokol, *Policy Innovations*]; Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, 57 J.L. & ECON. 51, 51–54 (2014).

89. See Ghosal & Sokol, *Policy Innovations*, *supra* note 88, at 414–15.

90. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

cartel policies and the enforcement tools, the two jurisdictions differ. Most importantly, the United States imposes criminal penalties for collusion while the European Union does not.⁹¹ And, in a recent shift, the United States, in contrast to the European Union, now recognizes that a robust compliance program may lead to a penalty reduction.⁹² Finally, European case law and enforcement on information sharing is more aggressive than the United States.⁹³ These differences lead to potentially disparate policy outcomes, as the discussion below will explore.

To understand current U.S. cartel policy, it helps to understand the shifts that have occurred over time—namely, increasingly severe punishments for both corporations and individuals. In the past, criminal cartel enforcement significantly underdeterred both firms and individuals. For example, imprisonment was rarely used (there was a gap between 1921 and 1959 in which there were no cartel-related incarcerations) and when it was, jail time was minimal.⁹⁴ Indeed, a Sherman Act section 1 crime did not become a felony until 1974.⁹⁵

It was not until the Reagan presidency that the total number of cartel prosecutions increased dramatically—although these prosecutions were targeted primarily at small domestic cartels.⁹⁶ Modern prosecutions against global cartels did not begin until the Clinton Administration; the prosecutions began then only because of the policy innovation of a revised leniency program. The revised program encouraged a firm to defect from the cartel with the promise of no criminal penalties and single damages if it cooperated fully with the prosecuting authorities.⁹⁷ Although there have been fewer cartels prosecuted since the 1990s, both the number of days in jail for individuals and the number of foreign nationals in jail have increased considerably, as have the level of fines for companies and individuals.⁹⁸ These changes in part reflect further changes in the statutory limits for fines and incarceration.

The figures below offer some descriptive statistics that illustrate these shifts in cartel prosecutions over time.

91. See Ghosal & Sokol, *Policy Innovations*, *supra* note 88, at 409–11, 425–427.

92. See *id.* at 411.

93. See Maarten Pieter Schinkel, *Effective Cartel Enforcement in Europe*, 30 *WORLD COMPETITION* 539, 540–44 (2007).

94. See Ghosal & Sokol, *Policy Innovations*, *supra* note 88, at 410–11.

95. *Id.* at 409.

96. See *id.* at 423–25.

97. *Id.* at 410–11.

98. *Id.* at 417.

FIGURE 1. FINE PER CORPORATION (REAL 2009 DOLLAR '000s)⁹⁹

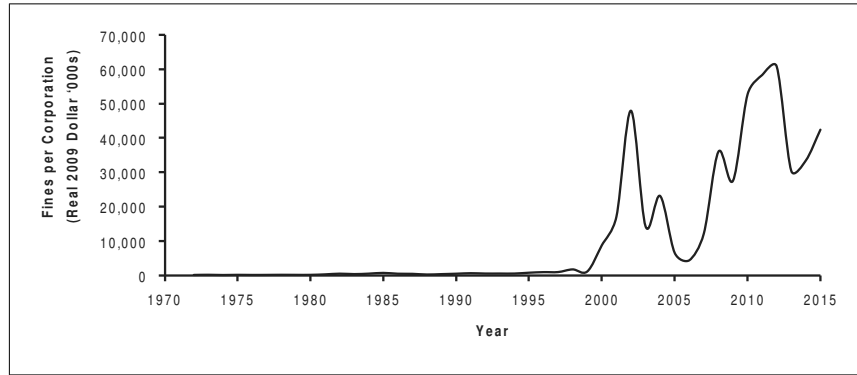
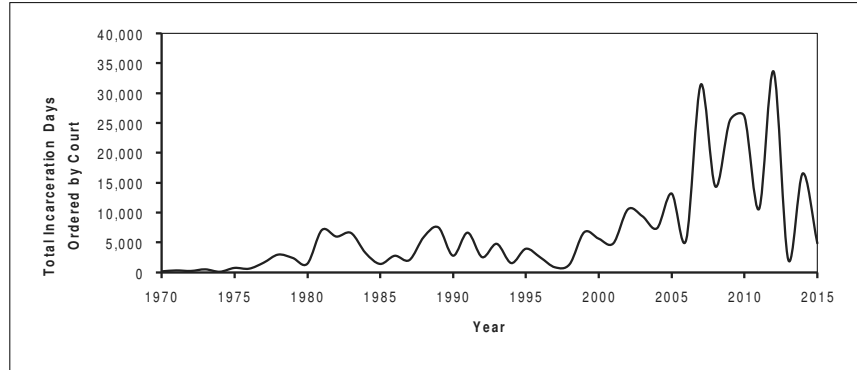


Figure 1 offers a time-series view of the increasing amount of fines imposed on firms that have pled guilty to collusion under section 1 of the Sherman Act. The trend is toward increasingly higher fines, particularly since the emphasis on the detection and prosecution of large international cartels, the revision of the leniency program, and statutory increases to the financial penalties and the maximum period of incarceration.

FIGURE 2. TOTAL INCARCERATION DAYS ORDERED BY COURT¹⁰⁰



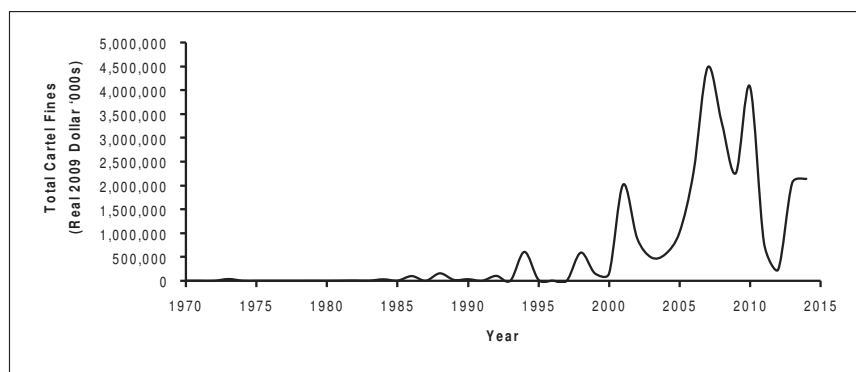
99. Based on total corporate fines divided by the GDP Deflator. Total corporate fines are based on statistics from *Workload Statistics*, U.S. DEP'T OF JUSTICE: ANTITRUST DIVISION, <https://www.justice.gov/atr/division-operations> [<https://perma.cc/J5KS-9K89>]. Real GDP Deflator, which is Nominal GDP divided by Real GDP in Chained 2009 Dollars, is based on statistics from *National Economic Accounts: Gross Domestic Product (GDP)*, U.S. DEP'T OF COMMERCE: BUREAU OF ECON. ANALYSIS, <http://www.bea.gov/national/index.htm#gdp> [<https://perma.cc/4P5V-4ZSA>].

100. Based on the average days of incarceration ordered multiplied by number of individuals sentenced to incarceration. Both variables are based on statistics from *Workload Statistics*, U.S. DEP'T OF JUSTICE: ANTITRUST DIVISION, <https://www.justice.gov/atr/division-operations> [<https://perma.cc/J5KS-9K89>].

As Figure 2 illustrates, individual sanctions for cartel participation in terms of total number of days in jail have also increased over time in the United States. The increased time of incarceration mirrors the ratcheting up of financial penalties.

Europe was slower to fight against cartels than the United States. Indeed, cartel promotion and facilitation were a part of European industrial policy for a considerable period of the European integration project.¹⁰¹ It was not until the introduction of a leniency program in 1996 by DG Competition that cartel prosecution in Europe began in earnest.¹⁰² The 1990s and early 2000s saw further tweaks to the system, including changes to leniency and fines.¹⁰³ More recently, DG Competition introduced a settlement notice with a 10 percent discount that accrued to participating firms.¹⁰⁴ It also moved to decentralize cartel enforcement to the national competition authorities.¹⁰⁵ Then, in 2014 and 2015 the European Parliament and the Council of the European Commission tweaked immunity to limit liability in private follow-on actions for damages¹⁰⁶ and to ensure that leniency statements and settlement submissions by the parties would not be used in follow-on actions.¹⁰⁷

FIGURE 3. TOTAL CARTEL FINES (REAL 2009 DOLLAR '000s)¹⁰⁸



101. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 354–56 (1998).

102. Ghosal & Sokol, *Policy Innovations*, *supra* note 88, at 425–27.

103. See Martin Carree et al., *European Antitrust Policy 1957–2004: An Analysis of Commission Decisions*, 36 *REV. INDUS. ORG.* 97, 103 (2010).

104. *Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in Cartel Cases*, 2008 O.J. (C 167) 1, 5.

105. See *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003*, 2006 O.J. (C 210) 2.

106. Parliament and Council Directive 2014/104/EU, art. 11(4), 2014 O.J. (L 349) 1, 15.

107. *Id.* arts. 6(6), 7(1); Commission Regulation 773/2004, art. 16, 2004 O.J. (L 123) 18, 22, *amended by* Commission Regulation 2015/1348, 2015 O.J. (L 208) 3.

108. Based on data from EUROPEAN COMM'N, *CARTELSTATISTICS* (2016), <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [<https://perma.cc/CF5Y-DKBA>], Maarten Pieter Schinkel, *Effective Cartel Enforcement in Europe* (Amsterdam Ctr. for Law & Econ., Working

Figure 3 shows that, like in the United States, average fines in Europe have increased over time due to the increases in penalties and cartel detection.

The introduction of leniency and the use of higher penalties in both jurisdictions suggest convergence on cartel enforcement between the United States and Europe.¹⁰⁹ Yet, differences remain. And in some cases, differences across the two jurisdictions are increasing due to Europe's poor understanding of how best to structure incentives to increase cartel detection.¹¹⁰

The idea of agency costs is well known in the economics and finance literatures.¹¹¹ These costs arise because agents within an organization may have different incentives than do the organization's principals. In antitrust, where there are rogue employees involved in collusion, the agency costs may be significant. Further, the system externalizes punishment for individuals, and, due to overly weak punishments and low detection, the incentives for wrongdoing between individuals and management often align—whether in the form of collusion or management turning a blind eye—because of higher stock returns due to the non-detection of the collusion.¹¹²

DOJ Antitrust has recently worked to create two incentives that increase the agency costs between firms and individuals such that firms will no longer tolerate cosmetic compliance that shields them from the illegal behavior of managers who collude. (This, of course, has the paradoxical effect of increasing agency costs from when they were aligned for wrongdoing and reducing agency costs to align incentives for pro-compliance behavior.) The prior DOJ Antitrust approach was to conceptualize every cartel case as a case of failed compliance and to give no inducement for a robust compliance system.¹¹³ This approach was out of touch with entity-liability theory. In the area of entity liability, Arlen and Kraakman theorized that a composite regime that blends elements of both negligence and strict liability would lead to an optimal outcome because it better aligns incentives.¹¹⁴ This composite-

Paper No. 2006-14, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=948641 [<https://perma.cc/75AM-E5ZB>], and *Cartels Cases*, EUROPEAN COMM'N, <http://ec.europa.eu/competition/cartels/cases/cases.html> [<https://perma.cc/WYQ5-U3K9>]. Currency calculations are from *US Dollar (USD)*, EUROPEAN CENT. BANK, <https://www.ecb.europa.eu/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html> [<https://perma.cc/G3QY-7XMT>].

109. D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785 (2013).

110. See Keith N. Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 IOWA L. REV. 2069, 2070 (2015); Sokol, *supra* note 109, at 791–92.

111. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

112. See Paolo Buccirossi & Giancarlo Spagnolo, *Corporate Governance and Collusive Behavior*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1219, 1224–25 (Wayne Dale Collins et al. eds., 2008); Sokol, *supra* note 109, at 788.

113. See Sokol, *supra* note 109, at 818.

114. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692–94 (1997).

liability approach has been followed by other antitrust agencies.¹¹⁵ DG Competition, however, has yet to follow this composite approach, even though some national competition authorities within Europe do. Rather, DG Competition believes in strict liability for firms and does not offer any credit for robust compliance programs.

DOJ Antitrust has provided penalty mitigation on the basis of a robust compliance program in two circumstances: *Kayaba Industry Co., Ltd.*¹¹⁶ and *Barclays*.¹¹⁷ In *Kayaba*, DOJ Antitrust provided a roadmap of the elements a robust compliance program should have: support for compliance among top management, the use of an anonymous antitrust “hotline,” antitrust compliance training, monitoring of employees who are high risk for antitrust, and the company’s willingness to discipline antitrust violators.¹¹⁸ These changes echo policy changes across antitrust agencies in other jurisdictions. Some agencies have even created antitrust compliance guidelines.¹¹⁹

In *Barclays*, DOJ Antitrust issued its first-ever award of credit against a fine so that the cartel member could implement a robust compliance program that met the criteria of the U.S. Sentencing Guidelines for penalty mitigation for compliance programs. Of significance was that Barclays implemented a compliance program after it had pleaded guilty to price fixing in the LIBOR cartel.¹²⁰ When it was found to have participated in the FOREX cartel, Barclays received a penalty reduction based on its compliance program while the other banks that pleaded guilty that day did not.¹²¹ These two cases show that DOJ Antitrust has begun a process of aligning incentives of firms with more robust compliance by rewarding them when they comply and by punishing individuals when they veer from firm interests.

DG Competition remains the one major global holdout to using modern tools to increase firms’ incentives to invest in greater compliance. Worse,

115. See, e.g., AUTORITÉ DE LA CONCURRENCE, FRAMEWORK-DOCUMENT OF 10 FEBRUARY 2012 ON ANTITRUST COMPLIANCE PROGRAMMES 7 (2012), www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf [<https://perma.cc/7GPF-U3VY>]; COMPETITION BUREAU CANADA, BULLETIN: CORPORATE COMPLIANCE PROGRAMS 5 (2015), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf) [<https://perma.cc/Q4PX-BCH4>]; OFFICE OF FAIR TRADING, HOW YOUR BUSINESS CAN ACHIEVE COMPLIANCE WITH COMPETITION LAW 31–32 (2011), www.oft.gov.uk/shared_of/ca-and-cartels/competition-awareness-compliance/oft1341.pdf [<https://perma.cc/ULX2-H4KV>].

116. United States Sentencing Memorandum and Motion for a Downward Departure Pursuant to United States Sentencing Guidelines § 8C4.1 at 6–8, *United States v. Kayaba Indus. Co.*, No. 1:15-CR-00098 (S.D. Ohio Oct. 5, 2015), 2015 WL 6164705 [hereinafter *Kayaba Sentencing Memorandum*].

117. Plea Agreement at 11–12, 15–16, *United States v. Barclays PLC*, No. 3:15-CR-77 (D. Conn. May 20, 2015).

118. *Kayaba Sentencing Memorandum*, *supra* note 116, at 7–8.

119. See, e.g., Anne Riley & D. Daniel Sokol, *Rethinking Compliance*, 3 J. ANTITRUST ENFORCEMENT 31, 48–49 (2015).

120. See Plea Agreement, *supra* note 117, at 9.

121. *Id.* at 11–12, 15–16.

there is case law to suggest that DG Competition will use a company's compliance program against it.¹²² Compounding the problem is the fact that in Europe there is parental liability for subsidiaries when the two share a compliance program.¹²³

A shift from strict liability to composite liability for entities is not the only innovation where DOJ Antitrust and DG Competition have diverged. In the area of individual sanctions, DOJ Antitrust continues to tweak its criminal antitrust program by creating better incentives with regard to individual accountability and wrongdoing. This emphasis on individual sanctions has become more pronounced recently due to the September 2015 DOJ "Yates Memo."¹²⁴ The Yates Memo is a DOJ-wide document that has put increased focus on DOJ prosecutions and policy guidance.¹²⁵ It emphasizes the need for DOJ prosecutions to focus on individuals.¹²⁶ Though the Yates Memo is relatively recent and its full effects are as yet unclear, the increase in individual penalties (and the corresponding incentives to defect from a cartel by providing information to DOJ) might indeed lead to better detection of cartels.

Speeches by the top DOJ Antitrust criminal enforcer have similarly emphasized the importance of individual prosecutions.¹²⁷ The push toward greater individual accountability in a criminal antitrust setting predates the Yates Memo, with the DOJ Antitrust leadership focusing on increased corporate responsibility to take action against individuals in their organizations who have been active in cartel conduct.¹²⁸ Further, increased criminal incarceration in the United States for antitrust violations must also be viewed hand in hand with more aggressive incarceration of foreign defendants,

122. See Commission Decision No. 1999/210/EC (*British Sugar*), 1999 O.J. (L 76) 1, 43–44.

123. Case T-76/08, *EI DuPont de Nemours & Co. v. Comm'n*, 2012 E.C.R., ¶ 47 (delivered Feb. 2, 2012), http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=119007&occ=first&dir=&cid=400226 [<https://perma.cc/4HNV-G28Q>].

124. Memorandum from the U.S. Dep't of Justice to the Assistant Att'y Gens. and U.S. Att'ys (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download> [<https://perma.cc/G2J8-YGXN>].

125. *Id.*

126. *Id.* at 1–2.

127. See, e.g., Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Yale Global Antitrust Enforcement Conference: Individual Accountability for Antitrust Crimes (Feb. 19, 2016), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust> [<https://perma.cc/PJD5-P92N>].

128. See, e.g., Bill Baer, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Remarks for the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 8 (Sept. 10, 2014), <https://www.justice.gov/atr/file/517741/download> [<https://perma.cc/8A3F-4EJE>] ("It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable.").

including the use of extradition of foreign nationals.¹²⁹ Each of these steps has brought U.S. cartel enforcement closer to the optimum.

Compliance is the preventive part of cartel enforcement. Cartel enforcement also extends to breaking up cartels and to ensuring that legal tacit collusion (based on parallel behavior)¹³⁰ does not cross into illegal tacit agreement.¹³¹ “Information exchange” is the area of antitrust that deals with determining when a firm has crossed over from tacit collusion to tacit agreement.¹³²

Information exchange generally is a necessary part of a well-functioning market to achieve legal and legitimate business purposes: for example, joint research and development, or lower costs for production. In the United States, because of the potential pro-competitive effects, information exchanges fall within the rule of reason. The Joint DOJ/FTC Guidelines for Collaboration Among Competitors provide more guidance in this area.¹³³ EU enforcement in the area of information exchange is also more aggressive than its U.S. counterpart; the European Union treats information exchange as object infringement and therefore as a hard-core violation of antitrust.¹³⁴ The requirement for such a hard-core offense may be satisfied if information exchanged is “strategic,” defined broadly.¹³⁵ This critical difference between

129. See Snyder, *supra* note 127 (stating that “culpable foreign nationals, just like U.S. co-conspirators, serve significant prison sentences for violating the antitrust laws of the United States”).

130. Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL., 143, 179 (1993) (“[A]ntitrust law clarified that the idea of an agreement describes a process that firms engage in, not merely the outcome that they reach. Not every parallel pricing outcome constitutes an agreement because not every such outcome was reached through the process to which the law objects: a negotiation that concludes when the firms convey mutual assurances that the understanding they reached will be carried out.”).

131. William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, ANTITRUST L.J. (forthcoming 2017) (manuscript at 11–12) (on file with the *Michigan Law Review*).

132. *Id.* (manuscript at 49–51).

133. FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 12 (2000), <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf> [<https://perma.cc/WT3X-Z4KU>].

134. See BRIAN SHER & BARBARA SICALIDES, PRACTICAL LAW COMPANY, COMPETITOR COLLABORATIONS: NEW EU GUIDELINES AND US LAW COMPARED (2011), http://www.nabarro.com/Downloads/Competitor_collaborations_new_EU_guidelines_and_US_law_compared.pdf [<https://perma.cc/3UT2-NUU3>]; see also, e.g., Case T-588/08, *Dole Food Co. v. Comm’n (Dole Food)*, 2013 E.C.R., ¶ 62 (delivered Mar. 14, 2013), http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=134981&occ=first&dir=&cid=399963 [<https://perma.cc/4SVK-4HEE>].

135. *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2011 O.J. (C 11) 1, 19 [hereinafter *Commission Applicability Guidelines*]; see also Howard Rosenblatt & Tomas Nilsson, *Analyst Calls and Price Signaling Under EU Law*, ANTITRUST SOURCE, June 2012, at 1, 4 (“At a time when advancements in economic analysis typically favor more nuanced competitive assessments over bright line tests, the Guidelines contend that one kind of information exchange is ‘by its very nature’ likely to restrict competition: ‘Information exchanges between competitors

U.S. and EU approaches suggests that there are more cases in Europe that are being captured with prosecution than may actually be cases of collusive conduct, as opposed to tacit collusion.¹³⁶ One recent EU case involving Dole Food (in which banana importers exchanged information regarding banana price-setting factors, leading to banana importer liability) suggests aggressive enforcement in this area.¹³⁷ This difference across U.S. and European information-exchange enforcement remains unresolved. But in practice, the European approach is stricter; companies who want a global approach to compliance will need to follow the European model.

CONCLUSION

The United States and Europe seem divided in a number of areas as to antitrust as a matter of policy and case law. Gifford and Kudrle provide the basis for this explanation: With its steadfast economic focus, antitrust in the United States has a clear goal. In Europe, however, the goals remain muddled as the continent attempts to modernize the jurisprudence to a more effects-based economic approach. Two major factors contribute to this posture: First, there remain vestiges of noneconomic goals in the case law. And, second, the European Commission may use the case law to aggressively bring actions that it might otherwise not pursue, were the courts less deferential in conduct cases than in merger cases. This divergence between the United States and Europe is particularly pronounced with regard to single-firm conduct and technology markets in particular. Europe remains the more aggressive antitrust enforcer, possibly reflecting a larger anti-tech bias stemming from concern over privacy, the lack of European tech champions, and an overall dearth of support for the market relative to the United States.

In the area of cartels, despite agreement on the need for enforcement, the United States and Europe disagree on how best to tweak the leniency system to get closer to optimal deterrence. Further, the law on information exchanges in Europe remains more aggressive than in the United States.

Unfortunately, divergence has negative global repercussions with regard to business planning, which hurts consumers worldwide. While Gifford and Kudrle are hopeful that future convergence is possible, that outcome is only desirable if it is built around a framework for the two jurisdictions that supports an economics-based approach centered on actual competitive effects.

of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.” (quoting *Commission Applicability Guidelines*, *supra*, at 16)).

136. See Federico Ghezzi & Mariateresa Maggiolino, *Bridging EU Concerted Practices with U.S. Concerted Actions*, 10 J. COMPETITION L. & ECON. 647, 649 (2014) (“In the European Union, a concerted practice to fix prices may exist even regardless of firms’ market practices, simply because firms have exchanged information as to their future prices and strategies. At least, this is the principle that EU antitrust enforcers affirmed while dealing with the most recent cases of blatant cartel activity. Conversely, in the United States, a leap on the basis of these preconditions does not exist.”).

137. *Dole Food*, 2013 E.C.R. (delivered March 14, 2013).