The Globalization of Antitrust: History and Prospects

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ABSTRACT

The United States stood virtually alone when it enacted its first antitrust statute in 1890. Today, almost all nations have adopted competition laws (the term used in most other nations), and US antitrust agencies interact with foreign enforcers on a daily basis. This globalization of antitrust is becoming increasingly important to the economic welfare of many nations, because major businesses (in particular, massive digital platforms like Google and Facebook) face growing antitrust scrutiny by multiple enforcement regimes worldwide. As such, the United States should take the lead in encouraging adoption of antitrust policies, here and abroad, that are conducive to economic growth and innovation. Antitrust policies centered on promoting consumer welfare would be best suited to advancing these desirable aims. Thus, the United States should oppose recent efforts to turn antitrust into a regulatory system that seeks to advance many objectives beyond consumer welfare. American antitrust enforcers should also work with like-minded agencies—and within multilateral organizations such as the International Competition Network and the Organisation for Economic Cooperation and Development—to promote procedural fairness and the rule of law in antitrust enforcement.

JEL codes: O10, N00, N40, L51, L38, F15, D02, F00, F01, K33, F60, K00, K21, L00, L40

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The United States stood virtually alone when it enacted its first antitrust statute in 1890, the Sherman Antitrust Act.[1] Today, almost all nations have adopted competition laws[2] (the term used in most other jurisdictions), and US antitrust agencies interact with foreign enforcers on a daily basis. This globalization of antitrust is becoming increasingly important to the economic welfare of many nations, because major businesses (in particular, massive digital platforms like Google and Facebook) face growing antitrust scrutiny by multiple enforcement regimes worldwide. As such, the United States should take the lead in encouraging adoption of antitrust policies, here and abroad, that are conducive to economic growth and innovation. Antitrust policies centered on promoting consumer welfare would be best suited to advancing these desirable aims.

US ANTITRUST LAW IN BRIEF

In the late 19th century, public concerns about the harmful effects on the American economy and society of large, new concentrations of economic power exercised by big industry-dominating companies helped drive the enactment of the federal antitrust laws. Publicity directed to harmful business combinations (reflected in cartelization and trust formation) and at the practices that they spawned (such as discriminatory and predatory pricing) was key to achieving support for legislation.

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1. The oldest comprehensive antitrust statute is the Competition Act of Canada, enacted in 1889, one year before the Sherman Antitrust Act. See Yves Bériault and Oliver Borgers, "Canada: Overview," in *Global Competition Review: The Antitrust Review of the Americas 2009*, https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/the-antitrust-review-of-the-americas-2009/article/canada-overview.
2. The term *competition law* is sometimes deemed to encompass both laws directed at preventing anticompetitive private business behavior and, more broadly, legal principles and policies aimed generally at enhancing competition within an economy (such as through regulatory reform).

US antitrust laws, broadly speaking, aim to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies.[3] These laws proscribe certain mergers and business practices in general terms, leaving courts to decide in specific terms which mergers and practices are illegal on the basis of the facts of each case. For well over a century, antitrust law has been the primary American legal institution concerned with the oversight of free markets. In 1958, in *Northern Pacific Railway Co. v. United States*, the US Supreme Court referred to antitrust as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."

There are three principal antitrust statutes: the Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Antitrust Act of 1914. The US Department of Justice (DOJ) enforces the Sherman Antitrust Act, the Federal Trade Commission enforces the Federal Trade Commission Act, and both agencies enforce the Clayton Act. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman Antitrust Act or the Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future. In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general and private plaintiffs.

Section 1 of the Sherman Antitrust Act outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." In 1911, in *Standard Oil Co. v. United States*, the US Supreme Court decided that the Sherman Antitrust Act does not prohibit every restraint of trade, only those that are "unreasonable."

Section 2 of the Sherman Antitrust Act bars any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." That provision has long been construed by the courts as not condemning monopolies themselves, but as barring only "exclusionary" conduct (specific business behavior that is designed to discipline or exclude rivals and that creates, enhances, or protects monopoly power).

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices," and it creates an expert administrative agency, the Federal Trade Commission (FTC), to oversee its provisions. The

3. This brief overview of US antitrust laws draws heavily upon Alden F. Abbott, "US Antitrust Laws: A Primer" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2021). Additional information on the history and enforcement of the US antitrust laws is found in this policy brief.

Supreme Court has said that all violations of the Sherman Antitrust Act also violate the Federal Trade Commission Act.

The Clayton Act addresses specific practices that the Sherman Antitrust Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). The Clayton Act has been amended various times over the past century. Today, it is the law generally applied to challenge proposed mergers that enforcers believe may substantially lessen competition.

American antitrust law does not apply to all commercial activity. Antitrust exemptions have been granted to certain federally favored industry sectors (for example, union collective bargaining and certain agricultural agreements) and to activities that are specifically authorized by state laws and are subject to active state supervision. These antitrust exceptions have been subjected to substantial scholarly criticism over the years, and their boundaries occasionally have been narrowed through judicial interpretations.

Since the first half of the 20th century, American enforcers have criminally prosecuted—and courts have automatically struck down (as "per se" illegal)—"hard-core" collusion involving agreements among direct competitors to fix the prices of the goods and services they sell, to divide up the territories in which they compete, or to rig bids for public contracts.

The treatment of other allegedly restrictive forms of conduct has varied widely over the years, however. During the first half century of antitrust law, enforcement waxed and waned, reflecting shifts in policy emphasis and applied economic thinking. After World War II, however, antitrust enforcement became far more aggressive. This approach reflected new economic research on the supposed harm of industrial concentration (the concern that industries with a few large firms were insufficiently competitive) and a revival of the notion that antitrust was designed to protect small competitors from the depredations of big firms ("big is bad").

From the late 1940s through the 1960s, court decisions extended per se condemnation beyond hard-core collusion to new forms of conduct such as tying (that is, the act of one firm tying the sale of one product to the purchase of another product) and nonprice vertical restraints (that is, manufacturer limitations on the terms of marketing a product by downstream distributors). A 1950 amendment that tightened the Clayton Act's limitation on mergers led to increased and often successful government lawsuits against mergers along horizontal, vertical, and conglomerate dimensions (that is, among direct competitors, among firms at different levels of distribution, and among firms in different industries, respectively).

Judicial condemnation of horizontal mergers among competitors was almost automatic, even in industries that had numerous firms with small market shares.

Published research by leading scholars in the 1970s, however, debunked studies that viewed industrial concentration as invariably harmful to competition. It also explained how many business arrangements that were being summarily condemned by courts actually promoted economic efficiency and benefited consumers. This "Chicago School" research was supplemented by other new scholarship that (though it differed in some particulars) agreed about the importance of focusing on the actual economic effects of noncollusive business restraints on a case-by-case basis.

Antitrust enforcers accepted this new scholarly approach, coming to rely heavily on academically trained economists in adopting enforcement policy guidance for businesses. Courts acceded to it as well, moving away from automatic condemnation of categories of conduct toward case-specific economic analysis of the facts presented about the matter before them. Courts came to apply a structured "rule of reason," under which the competitive harm of a particular business restraint was weighed against its procompetitive efficiencies. By the mid-1990s, there was a bipartisan consensus that consumer welfare was the lodestar of antitrust. Under this *consumer welfare* standard, aggressive competition on the merits that efficiently promoted expansion of output was acceptable, and harm to less-efficient competitors was of no legal consequence.

The US courts have avoided defining consumer welfare, and the term has been susceptible to varying interpretations.[4] As a practical matter, what is needed is an understanding of consumer welfare that comports with judicial antitrust decisions and that is readily applicable to a wide variety of market settings. Fortunately, such a practical approach recently has been advanced. In 2020, the leading US antitrust treatise writer, Professor Herbert Hovenkamp, proposed a flexible definition that encompasses both dynamic and static effects, that covers monopsony as well as monopoly, and that centers on a broad categorization of benefits flowing to consumers:

> A . . . [good] way to think of consumer welfare is to focus exclusively on consumers, and then to define welfare in terms of output.

4. Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals," *Fordham Law Review* 81, no. 5 (2013): 2471–96; Christine S. Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get" (Luncheon Keynote Address, George Mason Law Review 22nd Annual Antitrust Symposium, "Antitrust at the Crossroads?," Arlington, VA, February 15, 2019), accessed May 5, 2020, https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

> The goal of the antitrust laws should be maximum output that is consistent with sustainable competition. Output includes quantity, quality, and improvements in innovation. As an aside, it is worth noting that high output favors suppliers, including labor, as well as consumers because job opportunities increase when output is higher. Subject to some exceptions, it also favors small business, dealers, and other intermediaries in the distribution system.[5]

Such an output-centered analysis, imperfect though it may be (due to inevitable error costs in application), provides a consistent administrable framework for legal analysis of the full spectrum of competitive restraints. Although precise measurement of output effects may be infeasible, a restraint's tendency to raise or diminish output (broadly understood) can generally be ascertained. Accordingly, this paper adopts the Hovenkamp approach to the consumer welfare standard.

Beginning around 2016, new arguments for highly interventionist antitrust policy—and against the consumer welfare standard—began to emerge. These arguments claim that current antitrust enforcement is ineffective and needs to be totally revamped. In particular, critics assert that the American economy is suffering from overly high market concentration and diminished competitive vigor; that giant firms are monopolizing key economic sectors (a revival of "big is bad"); and that public policy concerns other than consumer welfare need to be weighed in enforcement decisions, including fairness, democracy, labor rights, and environmental problems.

Congressional and research institute reports echoing these concerns were released in 2020, sparking 2021 congressional hearings into possible changes in the antitrust laws. Some legislative proposals would impede or prohibit a wide variety of business transactions by large firms, without regard to business efficiency. Other proposals being floated include the structural breakup or government regulation of disfavored large firms, especially big digital platforms. If adopted, proposals along these lines would in effect displace the consumer welfare standard and mark an unfortunate sea change in antitrust policy.

Calls for abandonment of the consumer welfare–based antitrust policy consensus are ill conceived. Concerns about rising concentration and diminished competition that underlie *reform* proposals (perhaps better characterized as *deform* proposals) are based on flawed analysis and are critiqued and debunked

5. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 6th ed. (St. Paul, MN: West Academic, 2020), 102.

by scholars[6] and by the 2020 *Economic Report of the President*.[7] Size-based restrictions on mergers or other big business arrangements, regulation, or structural breakups would do substantial economic harm. They would arbitrarily undo or prevent the achievement of major business efficiencies and disincentivize market participants from seeking market-improving opportunities. Furthermore, requirements that a wide variety of amorphous factors in addition to consumer welfare be weighed by enforcers would spawn confusion in the private sector and promote arbitrariness in enforcement decisions. Continued reliance by enforcers on consumer welfare asssessments would maintain a consistent, focused, and administrable standard that avoids these ambiguities.

In sum, modern US antitrust enforcement under the economics-based consumer welfare standard has done a good job overall of promoting competitive and efficient markets. Recent arguments to the contrary are unsound. Problematic proposals for replacing the consumer welfare standard with a far more interventionist approach, however, have injected some uncertainty into the prospects for continued sound antitrust enforcement policy in the United States.

THE GROWTH OF FOREIGN COMPETITION LAW

At the end of World War II, antitrust law was still primarily a US legal institution. In the post-War period, however, the United States took steps to promote the acceptance of antitrust law principles abroad as part of its effort to spur economic growth and institutional reform. In 1947, during the US post-War occupation, Japan adopted a detailed competition statute (which included establishment of a Japan Fair Trade Commission) that was designed in particular to combat cartel-like economic restrictions.[8] The United States also supported creation of an International Trade Organization (ITO) that, in addition to governing world trade, was to include a competition policy chapter.[9] Although the ITO was never established, the principles of freer trade and competitive markets it embodied proved to be influential in the second half of the 20th century.

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6. See Joshua D. Wright et al., "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," *Arizona State Law Journal* 51, no. 1 (2019): 293–369.
7. White House, *Economic Report of the President*, February 2020, 199–226.
8. See Charles A. Brill and Brian A. Carlson, "U.S. and Japanese Antimonopoly Policy and the Extraterritorial Enforcement of Competition Laws," *International Lawyer* 33, no. 1 (1999): 80–82.
9. Diane P. Wood, "The Internationalization of Antitrust Law: Options for the Future" (DePaul Law Review Symposium, "Cultural Conceptions of Competititon: Antitrust in the 1990s," Chicago, February 3, 1995), https://www.justice.gov/atr/speech/internationalization-antitrust-law-options-future.

European Competition Law

In the late 1940s and the 1950s, the United States played a direct role in the establishment of a European competition law regime as part of European economic reconstruction.[10] This process began with the enactment of competition laws in occupied Germany, at American insistence, with the primary goal of banning cartels and splitting up German monopolies. In 1951, thanks to strong US pressure, competition provisions were included in the treaty creating the new European Coal and Steel Community (ECSC, originally comprising Belgium, France, Germany, Italy, Luxembourg, and the Netherlands).

The ECSC, which applied only to coal and steel, was limited to promoting competition and economic development in key European industries. It was soon superseded by the far more ambitious European Economic Community Treaty (Treaty of Rome) of 1957, which was designed to establish a common market for the free flow of goods and workers within Europe. In 1967, the ECSC was merged into the European Economic Community in the Merger Treaty (Brussels Treaty).

Subsequent accords led to the Treaty of European Union in 1993. Further supplemental agreements continued to advance a policy of European integration, through provisions promoting the free movement of goods, services, labor, and capital; the coordination and alignment of national economic and foreign policies; the adoption of a common currency, the euro (for qualifying countries); the harmonization of a wide range of regulatory policies; and a common competition law system in the European Union (EU). EU law is administered by an executive body, the European Commission (EC), and EU law is adjudicated in EU lower and appeals courts. Today, there are 27 EU member countries (the United Kingdom left the EU at the end of 2020 and has entered into an EU-UK Trade and Cooperation Agreement).

EU competition law is enforced by the EC's Directorate General for Competition (DG Comp), whose actions may lead to decisions by the EC (through its College of Commissioners) to fine or order termination of conduct that violates EU treaty competition provisions. EU member state governments may also enforce EU competition law and may establish their own national antitrust rules, which must be consistent with EU rules. Furthermore, EU competition law *modernization* protocols have begun to encourage private enforcement of EU and

10. The discussion of European competition law draws upon Barry E. Hawk, *Antitrust and Competition Laws* (Huntington, NY: Juris Publishing, 2020), 183–258. See also Eleanor M. Fox and Damien Gerard, *EU Competition Law: Cases, Texts, and Context* (Northampton, MA: Edward Elgar Publishing, 2017).

European nation-state antitrust rules in national courts—a nod toward a long-established US practice.

With respect to substance, EU competition law resembles US antitrust law in certain key respects. Simply put, like US statutes, EU rules prohibit anticompetitive agreements, abuses of dominance (vaguely analogous to Sherman Antitrust Act monopolization), and anticompetitive mergers. Also, whereas EU antitrust tended to be extremely formalistic in its first few decades (focusing on specific rules and exemptions to guide enforcement decisions), over the past 20 years it has moved toward the US emphasis on case-by-case evaluation of economic effects and a concern for consumer welfare. As explained later in this paper, however, very recent signs indicate that EU policy may be moving once again in a more interventionist, less economics-based direction.

Notably, EU competition law provisions go well beyond US law in challenging anticompetitive government actions. EU rules do this in two important ways. First, they authorize DG Comp to require EU member state governments to withdraw anticompetitive public subsidies that favor national businesses. By contrast, individual US states generally may grant financial subsidies to favored companies without any second guessing. Second, they generally subject businesses owned or granted special privileges by member states to the same competition principles applicable to normal companies. This is not the case in the United States. Thus, for example, whereas the EC fined the German Postal Service for anticompetitive commercial conduct,[11] the US Postal Service enjoys antitrust immunity.[12]

Three other differences between US and EU competition law regimes merit highlighting. First, and most fundamentally, US antitrust law is a common law system, under which allegations of legal violations are adjudicated. Antitrust principles are tested and revised over time through case law interpretation of very general statutory provisions. The evolution of judicial antitrust interpretation is aided by independent scholarly analysis and by government enforcement decisions and guidelines. EU antitrust is a civil law administrative system that is also influenced by scholarship and under which an enforcement bureaucracy applies established principles in adopting automatically binding decisions.

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11. See "It's Official: Deutsche Post, Germany's Postal Operator, Is an Abusive Monopolist Guilty of Predatory Pricing and Anti-Competitive Practices," *Post & Parcel*, March 27, 2001, https://postandparcel.info/2389/news/its-official-deutsche-post-germanys-postal-operator-is-an-abusivemonopolist-guilty-of-predatory-pricing-and-anti-competitive-practices/.
12. The U.S. Supreme Court has specifically held that the US Postal Service is part of the US government and, as such, is not subject to antitrust liability. See United States Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736 (2004).

Those decisions generally are accorded great weight if they are appealed to EU tribunals (although EU courts have not hesitated to overturn EC determinations that the judges deemed problematic).[13]

Second, although (like their US counterparts) DG Comp officials have stated their support for the consumer welfare standard and an *economic approach* to enforcement, additional principles clearly have a significant effect on DG Comp policy. A leading EU law expert has noted that, as compared to the United States, "the EU defines competition more as a process or rivalry that in turn encourages sensitivity to 'equal opportunity' for competitors."[14] Thus, business restraints impinging on "economic freedom of action" for competitors may give rise to competition law violations, thereby reflecting a concern for competitor welfare, not just for consumers.

Third, especially with respect to big digital platforms such as Google, very recent enforcement decisions suggest that DG Comp officials are adopting a *precautionary antitrust* philosophy.[15] This approach, based on the *precautionary principle*,[16] seeks to prevent potential monopoly abuses in their incipiency by sanctioning business conduct without showing that it is causing any actual or likely consumer harm.

In other words, precautionary antitrust attempts to block a dominant firm's novel business arrangements that are not yet understood, merely because they might in the future enhance that company's market power. As such, precautionary antitrust departs from an economic approach that centers on consumer welfare. It thereby disincentivizes the search for market opportunities that drive

13. Specifically, although EU courts do not defer to the EC on pure points of law, they provide a substantial *margin of appreciation* for the EC's factual determinations and mixed questions of fact and law.
14. Hawk, *Antitrust*, 205.
15. See Aurelien Portuese, "European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust," in *The Global Antitrust Institute Report on the Digital Economy*, ed. Joshua D. Wright and Douglas H. Ginsburg (Arlington, VA: George Mason University, 2020), 597–651. As Professor Portuese demonstrates (620–30), the European Commission's 2019 report on *Competition Policy for the Digital Era* manifests a precautionary antitrust philosophy. Specifically, for example, it no longer requires a showing of consumer harm to sanction particular business conduct, and it places the burden of proof on dominant platforms to justify normal commercial practices. See Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *Competition Policy for the Digital Era* (Brussels: European Union, 2019).
16. The precautionary principle calls for government regulatory intervention, even when there is a lack of actual or foreseeable harm, in the face of uncertainty. It requires the private actor to prove an absence of harm in order to avoid government action. See Portuese, "European Competition Enforcement," 598 (By "mandating regulation in the absence of evidenced market failures, the precautionary principle stifles innovation."). See also Aurelien Portuese and Julien Pillot, "The Case for an Innovation Principle: A Comparative Law and Economics Analysis," *Manchester Journal of International Economic Law* 15, no. 2 (2018): 237.

innovation. Over time, reduced innovation means lower consumer welfare and slower economic growth. Up to now, US antitrust enforcers commendably have eschewed precautionary antitrust. US adoption of recent misbegotten antitrust *reform* proposals that undermine the consumer welfare standard would, however, result in the acceptance of precautionary antitrust principles.

In sum, although European competition law addresses the same sorts of private sector anticompetitive behavior as does US antitrust, there are some notable differences. US antitrust largely evolves through common law judicial decisions, while EU competition rules develop within a civil law system that centers on administrative decision-making. US law currently focuses on advancing consumer welfare through economics-based case-by-case enforcement, rather than on the fate of individual competitors. Although EU competition law has moved significantly closer to the consumer welfare approach (which has been cited favorably by European officials), it remains somewhat concerned about protecting the interests of competing firms. The EU recently has adopted a more interventionist (and anti-innovation) stance by challenging dominant firm business initiatives without any showing of likely consumer harm. Regrettably, calls for a major overhaul of US antitrust law could move US antitrust enforcement in that direction as well. Finally, on the positive side, EU law goes significantly beyond US antitrust law in attacking broader categories of competitively harmful government behavior.

Non-EU Competition Laws

Over the past three decades, almost all nations of the world have adopted their own competition law regimes.[17] Many of the new laws have adopted administrative enforcement systems similar to that of the EU and have looked to specific EU competition law provisions for inspiration. This approach is likely due to the fact that the majority of these nations, like the EU, have civil laws systems. It may also reflect the relatively greater ease of quickly taking binding enforcement actions through administrative processes that enjoy great deference. One way a new agency may raise its visibility and advance its future prospects is by creating an activist profile.

17. Today, for example, such diverse countries as Argentina, China, Egypt, Honduras, Japan, Kenya, Morocco, Pakistan, Russia, South Africa, and South Korea have competition laws. For a more detailed account of how competition law developed worldwide after 1990, see Hawk, *Antitrust,* 259–99. According to Hawk, 134 countries, four subnational groups, and seven regional organizations had adopted competition law regimes by 2016. Hawk, 259.

As it did in Europe after World War II, the United States played a major role in supporting the proliferation of these laws. In the wake of the 1989–1991 demise of communist regimes in Eastern Europe and of the former Soviet Union, the United States saw competition law as a means of fostering a market-oriented culture conducive to economic growth in former communist countries and in developing nations in general.

The provision of technical support for newly minted competition regimes proceeded along various fronts.[18] The US government, with the direct involvement of the FTC and the DOJ, organized training and assistance programs for new competition regimes (including involvement by European experts as well). Multilateral economic institutions, in particular the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development, and the World Bank, also provided expert advice and development assistance to fledgling agencies. In 2001, largely at the behest of the United States and Europe, the International Competition Network (ICN)[19] was established to serve as a forum for technical cooperation among competition agencies.

The ICN is unique in several respects. It has a broad membership: 139 agencies from 126 jurisdictions (as of January 2021), including almost all of the world's competition agencies (with the glaring exception of China's agency, the State Administration for Market Regulation[20]). It works exclusively on competition issues; focuses on discrete projects aimed at procedural and substantive convergence through the development of consensual, nonbinding "best practices" recommendations and reports; and provides a significant role for nongovernmental advisers from the business, legal, economic, consumer, and academic communities, as well as for experts from other international organizations.[21]

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18. For a good overview of bilateral and multilateral cooperative efforts in the competition field, see Randolph Tritell and Elizabeth Kraus, "The Federal Trade Commission's International Antitrust Program," Federal Trade Commission (October 2019), accessed April 1, 2021, https://www.ftc.gov/system/files/attachments/international-competition/ftc_international_antitrust_program_october_2019.pdf.

19. Detailed information about the ICN (including links to ICN work products) may be found at https://www.internationalcompetitionnetwork.org/about/.

20. Up to now, China has elected not to join the ICN. China has a robust competition regime, which is replete with detailed enforcement guidelines, active public merger and nonmerger enforcement, highly trained enforcement officials, and private litigation. For a general overview of current Chinese competition law initiatives, see, for example, "Antitrust in China—2020 Year in Review," *Gibson Dunn,* March 4, 2021, https://www.gibsondunn.com/antitrust-in-china-2020-year-in-review/.

21. Although nongovernmental advisers and experts from other organizations are frequently asked to contribute to and participate in ICN activities, they have no role in ICN decision-making.

Unlike in most international organizations, ICN competition agency members organize and conduct the work directly rather than through a permanent secretariat. Separate ICN working groups address agency effectiveness, cartels, competition advocacy (promoting procompetitive government laws and regulations), mergers, and unilateral conduct (actions by monopolies and dominant firms). The staffs from ICN member agencies are encouraged to communicate with each other about the fundamentals of investigations and evaluations and to use ICN-generated documents and podcasts to support training. The application of economic analysis to case-specific facts has been highlighted in ICN work product.

The ICN also focuses on current trending topics that concern its members. Thus the ICN has launched a new project about the interface between competition, data privacy, and consumer protection enforcement and policies in light of emerging digital economy issues. And in April 2020, the FTC led the drafting of the ICN's advice to competition agencies about the challenges of the COVID-19 pandemic and its economic consequences.

Perhaps most significant, the ICN has supported a number of voluntary initiatives to foster due process in competition enforcement, culminating with the adoption in 2019 of the ICN Framework for Competition Agency Procedures (CAP), which is open for signature by individual competition agencies.[22] The ICN CAP features an annex of fundamental, consensus principles for sound agency procedures and dedicated implementation tools—a "cooperation process" and a "review process"—to help promote use of the principles. As of January 2021, more than 70 agencies had provided due process templates for public review under the ICN CAP.[23]

One particularly positive economic development in international antitrust has been the strong support for competition advocacy by three key organizations—the OECD, the World Bank, and the ICN. Such advocacy involves having a competition agency work with its nation's legislators and regulators to bring about a more competitive environment, including through the repeal, reform, or nonenactment of national laws, regulations, and policies that harm the competitive process. The World Bank has issued studies that document the high economic costs imposed by anticompetitive government regulations, thereby building international support for reform.[24] Moreover, the World Bank and the

22. See James F. Rill and Jana I. Seidl, "ICN Due Process Initiatives over the Decades and the CAP's Promise of Accountability," *The Antitrust Source* 20, no. 5 (April 2021): 1–8.
23. See Tritell and Kraus, "The Federal Trade," 8.
24. See "Markets and Competition Policy," World Bank, accessed April 1, 2021, https://www.worldbank.org/en/topic/competition-policy.

ICN promote an annual competition advocacy contest (showcased at the annual ICN conference), which allows individual agencies to highlight procompetitive government policy changes brought about as a result of their advocacy efforts.[25]

Perhaps most significant, in 2011 the ICN produced a two-part Advocacy Toolkit that was "aimed at providing an overview of the competition advocacy process and the range of tools available, in order to share and disseminate alternative approaches to advocacy across competition agencies and provide a useful, practical guide to competition agencies looking to amend or refresh their current approach."[26] While the ICN toolkit assists competition agencies in understanding the process of advocacy, the OECD's Competition Assessment Toolkit (supplemented by national case studies) focuses on the economic analysis needed to assess the economic effects of harmful government competitive constraints.[27]

In short, through their cooperative efforts, the ICN, the OECD, and the World Bank provide national competition agencies (both new and well established) with the means to advocate effectively for procompetitive, economically beneficial government policies—if the agencies are so inclined. This factor is highly significant, because government-imposed anticompetitive restraints are impervious to elimination through market competition and, thus, are especially pernicious.

The existence of international cooperative and technical assistance efforts aimed at promoting a competition culture, while beneficial, has not brought about substantive uniformity among competition law regimes. This insufficiency is not surprising, given differences among jurisdictions in economic development, political organization, economic philosophy, history, and cultural heritage—all of which may help generate a multiplicity of policy goals.[28] In addition to consumer welfare, different jurisdictions' competition laws seek to advance such diverse objectives as economic efficiency, fairness for small and medium-sized businesses, fairness and equality, market integration, consumer choice,

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25. See, for example, "2019–2020 ICN/WBG Competition Advocacy Contest," International Competition Network, September 22, 2020, accessed April 1, 2021, https://www.internationalcompetitionnetwork.org/featured/2019-2020-icn-wbg-competition-advocacy-contest/.
26. International Competition Network Advocacy Working Group, "Competition Culture Project Report" (14th ICN Annual Conference, Sydney, April 29–May 1, 2015), 4 (citation omitted), accessed April 1, 2021, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_CompetitionCultureReport2015.pdf.
27. The OECD's toolkit "helps governments eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives." "Competition Assessment Toolkit," OECD, accessed April 1, 2021, https://www.oecd.org/competition/assessment-toolkit.htm.
28. See Hawk, *Antitrust,* 285–86.

international competitiveness, miscellaneous public interest factors, development of a socialist market economy (China), empowerment of historically disadvantaged persons (South Africa), employment, elimination of wealth inequality, and various other goals.[29] These many goals may not take center stage in the evaluation of most proposed mergers or restrictive business arrangements, but they may affect the handling of particular matters that raise national sensitivities tied to these goals.[30]

Notwithstanding remaining differences among competition laws, however, a fair degree of convergence has been achieved. Given the influence of the EU administrative model, except with regard to cartel enforcement, "there are considerable similarities in institutions and procedures outside the U.S."[31] In addition, with respect to cartels, "there is considerable global convergence; important elements of the U.S. law enforcement model . . . appear in many jurisdictions around the world."[32] Furthermore, "[a]s to substantive rules, adoption of the core triad of laws (restrictive agreements, dominant firm conduct, and merger control) and the common use of economic concepts and methodologies generate considerable global convergence, despite the diversity of competition and noncompetition policies seen above."[33]

Brief Summary

In sum, the United States and Europe have been largely successful in encouraging the enactment of competition laws around the world and in supporting institutions that have worked to assist jurisdictions in the adoption of competition law enforcement mechanisms. Moreover, despite remaining differences among national laws, American efforts to support competition law convergence have borne fruit. The substantive economic effect of the globalization of competition law is, however, a separate question, to which we now turn.

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29. See Hawk, 269–70.
30. Thus, for example, South Africa's Competition Act requires that in an evaluation of a proposed merger, consideration be given to how the merger would affect "the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive" and "the ability of small and medium businesses controlled by historically disadvantaged persons to participate and expand within a market." Anthony Crane, "South Africa: The Importance of Public Interest Factors in South African Merger Control," *Mondaq*, August 13, 2019, https://www.mondaq.com/southafrica/antitrust-eu-competition-/823916/the-importance-of-public-interest-factors-in-south-african-merger-control.
31. Hawk, *Antitrust*, 278.
32. Hawk, 278.
33. Hawk, 278.

POLICY IMPLICATIONS OF COMPETITION LAW GLOBALIZATION

Has the spread of competition law worldwide been an economic policy success? Addressing this question requires consideration of multiple factors.

On the plus side of the ledger, the proliferation of competition law regimes in recent decades has generated certain significant tangible benefits. The implementation of competition laws clearly has generated support for the concept of free markets as a key element of economic development (a competition culture). International economic institutions, the ICN in particular, have created a bond among competition officials worldwide, thereby laying the groundwork for future cooperation. Large hard-core cartels, which clearly harm consumer welfare, have been successfully ferreted out and prosecuted throughout the world (with technical assistance from the ICN and growing cooperation among jurisdictions[34]), whereas half a century ago they were broadly tolerated. This transition is a gain for consumers and for the global economy. Multinational institutions' support for competition advocacy has borne some fruit in elimination of certain harmful government barriers to competition. That removal too is a source of clear economic welfare benefits.

There are, however, six other factors that raise questions about the efficacy and costliness of globalized competition law. These factors apply independently of the mode of competition analysis (consumer welfare–centric, multifactor, or something else) adopted by a jurisdiction.

First, competition laws cannot be viewed in isolation. The mere creation of a new competition law is not sufficient to foster a welfare-enhancing competitive process. Indeed, far more fundamentally, in nations (often, but not exclusively, developing nations) where the rule of law is weak and private property is not well protected, economic development will be stymied,[35] whether or not competition rules are on the books.[36] In that vein, according to one scholar, "[a]

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34. See "Antitrust Division Applauds New International Leniency Guidelines," US Department of Justice, July 10, 2020, https://www.justice.gov/opa/pr/antitrust-division-applauds-new-international-leniency-guidelines.

35. See, generally, Ed Dolan, "Quality of Government, Not Size, Is the Key to Freedom and Prosperity," *Niskanen Center*, April 27, 2017, https://www.niskanencenter.org/quality-government-not-size-key-freedom-prosperity/; Gerald P. O'Driscoll Jr. and Lee Hoskins, "Property Rights: The Key to Economic Development," *Cato Policy Analysis* No. 482 (August 7, 2003), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa482.pdf.

36. As a leading economist has explained, "Antitrust law in poor countries adopts the language of Western models, but frequently reflects little understanding of the economic objectives of modern Western antitrust enforcement policy. The effectiveness of such laws relies almost entirely on the presence of well-trained enforcement bureaucracies, which, if they exist at all, typically are under-

corrupt judiciary or a corrupt administrative structure makes a mockery of any notion that antitrust will instill economically efficient incentives in the private sector. . . . No economic policy that relies on the judicial system for enforcement, or even appellate review of administrative regulation, can affect economic behavior in a country beset by lawlessness."[37]

In other words, the degree of success of competition law in fostering welfare-enhancing economic activity depends upon robust government institutions that protect the rule of law. According to this author's personal experience at the ICN, many member agencies are working diligently to apply their new competition statutes fairly and lawfully. Nevertheless, one cannot readily estimate the degree to which new competition laws actually have enhanced consumer welfare and strengthened market forces.[38]

Second, all competition law enforcement is fraught with error, even when advancing consumer welfare is the only objective being pursued.[39] The extent to which antitrust enforcement promotes consumer welfare (if it does so at all) depends upon the degree and nature of enforcement error. Thus, for example, mistaken prosecution of a restrictive business arrangement that is actually welfare enhancing imposes economic harm measured by the sum of (a) the reduced economic benefits to society stemming from the blocking of that transaction, (b) the unnecessary private and public sector costs attributable to prosecution of that transaction, and (c) the economic welfare losses owing to similar beneficial transactions not carried out in the future because of legal risk avoidance spawned by the initial incorrect prosecution. (In contrast, of course, correct prosecution of a welfare-reducing business restraint may yield significant benefits by the deterrence of future anticompetitive behavior.) When policy considerations other than consumer welfare that are used by many agencies are added to the

staffed and subject to severe political constraints. Moreover, few poor countries have a legal system capable of establishing a set of reliable expectations as to the legal status of particular economic transactions, practices, or property claims. The absence of the rule of law as a reliable institution is a significant impediment to economic development—one that greatly transcends mere antitrust concerns." Bruce M. Owen, "Competition Policy in Emerging Economies" (SIEPR Discussion Paper No. 04-10, Stanford Institute for Economic Policy Research, Stanford University, April 2005), 1, https://siepr.stanford.edu/sites/default/files/publications/04-10_0.pdf.

37. Owen, "Competition Policy," 13–15.

38. Respect for the rule of law within law enforcement (including competition law enforcement) may rise or fall within a particular jurisdiction, depending on political factors. See K. J. Cseres, "Rule of Law Challenges and the Enforcement of EU Competition Law: A Case-Study of Hungary and Its Implications for EU Law," *Competition Law Review* 14, no. 1 (2019): 75–101.

39. See, generally, Thomas A. Lambert and Alden F. Abbott, "Recognizing the Limits of Antitrust: The Roberts Court versus the Enforcement Agencies," *Journal of Competition Law and Economics* 11, no. 4 (2015): 791–853.

mix, error costs rise. Thus, estimation of the overall welfare effects of antitrust prosecutions carried out globally becomes even more difficult.

Third, competition law globalization substantially increases the costs imposed on firms that are engaging in multinational transactions.[40] Such companies must interact with multiple enforcers and are often subject to divergent procedural and substantive requirements that amplify the costs of carrying out socially beneficial deals. This set of costs should be subtracted from the overall benefits of competition law proliferation.

Fourth, differences among national competition law rules create complications for national agencies as they seek to have their laws vindicated while maintaining good cooperative relationships with peer enforcers. The FTC and the DOJ work with their counterparts in dealing with overlapping investigations and thereby endeavor to rein in costs associated with parallel enforcement.[41] Bilateral enforcement cooperation agreements, as well as voluntary cooperation through the ICN and other multilateral contacts, are helpful in this regard.

But what happens when individual agencies take divergent enforcement approaches on matters they are investigating? Policy clashes among major competition agencies have occurred in the past,[42] and substantive disagreements create costly uncertainty for companies. One possible method for avoiding controversies involves international comity, whereby one enforcer defers to another agency's handling of an investigation and elects not to take parallel, potentially inconsistent enforcement actions.[43] The problem, of course, is that a national agency may have major objections to ceding control over a high-profile investigation to a foreign agency, particularly if it believes that the foreign agency will handle the matter in an inappropriate way. Furthermore,

40. See, generally, James J. O'Connell, "Editor's Note: Antitrust and the Limits of Globalization," *Antitrust* 29, no. 2 (Spring 2015): 4–7.

41. See Tritell and Kraus, "The Federal Trade," 1–4.

42. For example, the DOJ cleared General Electric's proposed acquisition of Honeywell in May 2001, but the EC prohibited this transaction in July 2001. This situation became a major issue for a while in US–EC antitrust cooperation. See Eleanor M. Fox, "Mergers in Global Markets: GE/Honeywell and the Future of Merger Control," *University of Pennsylvania Journal of International Law* 23, no. 2 (2002): 457–68.

43. Various versions of comity have been proposed, but, currently, there is no general multilateral agreement on comity policy. See, for example, John Pecman and Antonio Di Domenico, "In Comity We Trust: Utilizing International Comity to Strengthen International Cooperation and Enforcement Convergence in Multijurisdictional Matters," Competition Policy International, March 19, 2021, https://www.competitionpolicyinternational.com/in-comity-we-trust-utilizing-international-comity-to-strengthen-international-cooperation-and-enforcement-convergence-in-multijurisdictional-matters/. Pecman is a former commissioner of the Competition Bureau of Canada.

even if comity were widely accepted, it is unclear that comity would lead to welfare-superior enforcement policy as compared to the present situation. Given the large number of contending agency players, multijurisdictional differences will breed costly uncertainty in competition enforcement at least for the foreseeable future.

Fifth, yet another source of globalization-related costs arises from the interactions among agencies and supplicant firms that endeavor to use competition law to undermine their rivals. Firms seeking to undermine a more efficient (or innovative) rival may petition a competition agency to prosecute that rival's welfare-enhancing practices, thereby falsely claiming that those practices are anticompetitive. Agency officials, who have an incentive to bring cutting-edge cases to burnish their reputation (or who may merely fall prey to accepting a "monopoly explanation" for conduct they do not understand[44]), may easily fall prey to this rent-seeking behavior by less commercially creative firms.[45] Real-world examples of lobbying behavior by rivals include, for example, support by Nokia, Oracle, and IBM for an EC antitrust case against Microsoft[46] and Apple's efforts to stir up antitrust actions against Qualcomm in multiple jurisdictions.[47]

Rent-seeking wastes resources of lobbyists and agencies, and, when successful, it incentivizes companies to substitute inefficient use of government processes for beneficial competition on the merits. The bringing of ill-considered investigations and (even worse) prosecutions based on rent-seeking not only dissipates public and private resources but also deters innovative firms from pursuing novel welfare-enhancing business strategies for fear of antitrust exposure. (Not all competitor complaints necessarily involve rent-seeking, of course; some may be legitimate.[48] Enforcers should therefore evaluate the facts underlying each specific

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44. Nobel Laureate in Economics Ronald Coase famously observed that economists tend to "[look] for a monopoly explanation" for business conduct they do not understand and that "as in this field we are very ignorant, the number of understandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent." Geoffrey Manne, "Truth on the Market on Coase," *Truth on the Market*, September 2, 2013.

45. See, generally, William J. Baumol and Janusz A. Ordover, "Use of Antitrust to Subvert Competition," *Journal of Law and Economics* 28, no. 2 (May 1985): 247–65. Both US antitrust enforcers and foreign antitrust enforcers have been the target of rent-seeking campaigns.

46. See "Lobby Group Seeks to Join Microsoft Antitrust Battle," *Irish Times*, April 7, 2005.

47. See Gene Quinn, "Qualcomm Survives Apple Manipulation, but FTC Continues Reckless Pursuit," *IP Watchdog*, May 1, 2019 ("Apple used fabricated licensing rates wholly unrelated to the Qualcomm [patent] portfolio to dupe regulators into chasing Qualcomm across the world for committing phantom antitrust violations").

48. In a seminal article, however, renowned Judge and Professor Frank Easterbrook expressed his general skepticism of competitor complaints, and he stressed that such complaints normally suggest a complained-about practice is procompetitive (because competitors dislike enhanced competition,

competitor complaint to determine how the particular business practice will affect consumer welfare.) The expansion of a rent-seeking activity that is due to competition law proliferation clearly counts against the benefits of globalization, though accurately quantifying such rent-seeking costs may be impossible.

Sixth, and finally, recent developments around the world suggest that antitrust policy directed at large digital platforms (and perhaps other dominant companies as well) may be morphing into welfare-inimical regulation. Over the past year, initiatives by the EU, France, Germany, the United Kingdom, Japan, and Australia, among others, manifest an "emerging patchwork of digital regulation [that] further amplifies existing incoherence and uneven application of competition regimes on the technology sector and digital markets across the globe."[49] Regulation of digital platforms is also under consideration in the United States.[50]

In addition to threatening divergent outcomes, the emergence of digital competition regulation in lieu of case-by-case law enforcement would likely slow digital innovation, significantly reduce consumer welfare, and harm the economy.[51]

Furthermore, regulation may lead to regulatory "capture" by regulated dominant platform firms,[52] an anticompetitive result that would impede, rather than spur, competitive entry. Through capture, a firm may entrench its dominant position by manipulating regulation to impose costs that disproportionately

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which disadvantages them). Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63, no. 1 (1984): 1–40. Although the author tends to agree with Professor Easterbrook, antitrust is based on empiricism, and a facts-based case-by-case evaluation of particular complaints, which is viewed through a consumer welfare lens, should not be avoided merely on the basis of the identity of a particular complainant.

49. Pecman and Di Domenico, "In Comity We Trust." Most notably, "[i]n the EU, two new proposed laws, the Digital Markets Act and the Digital Services Act, would allow the Commission to impose strict measures on large 'gatekeeper' digital platforms; apply monetary, behavioral, or structural remedies for non-compliance; and initiate targeted market investigations to regularly update the obligations for such 'gatekeepers.'" Pecman and Di Domenico (citation omitted).

50. See Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations,* October 6, 2020; Federal Trade Commission, "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group," press release, March 25, 2021, accessed May 5, 2021, https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

51. See, generally, Larry Downes, "How More Regulation for U.S. Tech Could Backfire," *Harvard Business Review*, February 9, 2018.

52. For a brief general overview of the problems of regulation, including capture, see Regulatory Process Working Group, "Government Regulation: The Good, the Bad, and the Ugly," released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017, https://regproject.org/paper/government-regulation-the-good-the-bad-the-ugly/.

harm its rivals.[53] This approach, of course, weakens competition—a result contrary to the goals of competition policy. Even absent the creation of new formal regulatory regimes, the rise of precautionary antitrust principles in Europe and elsewhere would transform competition agencies into de facto dominant firm regulators. Such a result would be counter to the traditional role of antitrust enforcers and would likely prove economically harmful.

In sum, one cannot state with any degree of confidence whether antitrust globalization has been "good" or "bad" in economic terms. Beneficial change has been reflected in cooperation among enforcers in pursing cartels and in coordinating antitrust reviews. Professional training assistance and information about antitrust best practices has been facilitated through multilateral and bilateral institutions and agreements. The benefits achieved through the globalization process, though tangible, must be appreciated in light of the not insignificant costs that have been identified. Negative effects arise from enforcement error, transaction costs resulting from multiple investigations, and misuse of antitrust by rent-seekers, together with a recent tendency by key enforcers to move toward costly regulation and away from a consumer welfare emphasis in enforcement. Intractable problems of measurement of these countervailing tendencies render a net welfare assessment infeasible.

CONCLUSION

The rapid globalization of competition laws over the past three decades has been a striking feature of international political economy. Whether or not this has been an economically successful multinational project, however, is difficult to say.

One cannot gainsay the economic benefits that have flowed from the spread of a competition culture that highlights the benefits of competitive private enterprise, the increased prosecution of cartels, and the growth in support for dismantling anticompetitive government impediments to competition. But the harm from new transaction costs and the mistaken agency pursuit of efficient business practices (whether due to corrupt public administration, rent-seeking, or pure error) also is apparent.

Going forward, one could hope that the United States would take the lead in promoting a consumer-centric competition policy, particularly as follows:

53. See, for example, Andrea O'Sullivan and Christian McGuire, "Why More Regulation Might Be on Facebook's Christmas List," *The Bridge*, December 4, 2018, https://www.mercatus.org/bridge/commentary/why-more-regulation-might-be-facebooks-christmas-list (discussing how Facebook could use regulation to undermine its rivals).

(a) using the ICN to build even stronger multinational support for competition advocacy and to promote a singular focus on consumer welfare promotion and cartel prevention as the core elements of competition law; (b) promoting involvement by competition agencies in participation and compliance with the ICN CAP, with an aim of strengthening due process in competition agencies; (c) using participation in international forums (for example, the OECD) to encourage the study of massive consumer benefits generated by dominant digital firms and the serious risks posed by precautionary antitrust and regulation; (d) engaging in bilateral and regional cooperation with common law jurisdictions having strong rule of law traditions to strengthen support for due process in antitrust enforcement and for reliance on the consumer welfare standard as the central focus of competition enforcement; and (e) supporting rule of law initiatives in developing countries as a useful adjunct to work on competition law itself.

In conclusion, globalized competition law is now a reality. The extent to which it will be a boon to consumers and the global economy will depend entirely on the soundness of public policy decision-making.

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