DEPARTMENT OF JUSTICE

Competition Law and Policy Modernization: Lessons from the U.S. Common-Law Experience

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Good morning and thank you for inviting me to Lisbon. Today, I will discuss the modernization of competition law with a particular focus on single-firm-conduct issues.[1]

As you may know, in 2002, the U.S. Congress created the Antitrust Modernization Commission ("AMC") and charged it with studying the state of antitrust law in the United States.[2] The 12-member, bipartisan commission spent three years conducting public hearings and studying a wide range of antitrust issues. In one of their principal recommendations, they concluded that the core U.S. antitrust laws (*i.e.*, Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act) do not require any fundamental change in their substantive provisions.[3]

You might reasonably ask how the AMC could have reached such a conclusion. The substantive provisions in those statutes have been the same since 1914. Since that time, there have been dramatic advances in economic and legal analysis of competition issues and almost unimaginable changes in the size and complexity of the economy generally. How could substantial revisions not be

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[1] I thank Joseph Matelis for his help in preparing these remarks.

[2] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002).

[3] Their recommendations went to repealing certain outdated provisions (*e.g.*, they cited the Robinson-Patman Act on price discrimination and exemptions generally from antitrust scrutiny, as well as process issues, such as private litigation).

warranted? The answer, I submit, is two-fold. First, the U.S. antitrust laws set forth general principles that do not seek to define in detail actions that violate the law. Rather, the courts are charged with interpreting the relatively general statutes as applied to specific facts in particular cases. Second, the courts have approached their task of interpretation under a system of federal common law that enables the incorporation of new learning and new interpretations over time. Viewed in this light, the AMC's recommendation is no surprise—we have been modernizing the U.S. antitrust laws on a continuous basis.

I will explain my proposition more fully in the context of single-firm conduct evaluated under Section 2 of the Sherman Act—roughly the equivalent of Article 82 here in the European Union.

I. Section 2.

In its April 2007 report, the AMC told Congress that "[s]tandards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate."[4] The key elements of those standards are as follows:

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[4] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 83 (2007), http://www.amc.gov/report_recommendation/amc_final_report.pdf.

- the law does not prohibit the existence of monopoly power; only the acquisition or maintenance of monopoly power through improper means is prohibited;

- the law protects consumer welfare by protecting competition, not individual competitors; and

- the law considers the impact on incentives and static and dynamic efficiency in assessing potential violations.

I share the AMC's view that U.S. monopolization law currently is on the right track. It was not always so. In the next part of my comments, I will explore two exemplary outcomes of the incremental common-law process that has formed that law: the integral role of economics in antitrust analysis and, relatedly, the focus on protecting the competitive process, as opposed to competitors. I will conclude my remarks with a caveat that the U.S. experience has taught about connections among different parts of antitrust and the tendency of mistakes in one area to have ripple effects in other areas.

II. The U.S. Common-Law Process.

I'll begin by describing briefly the process that formed our monopolization law. In 1890, our Congress enacted the Sherman Act. The core of our monopolization law is set forth in Section 2 of that statute, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of . . . trade or commerce."[5] Congress did not define the crucial verb used in Section 2—"monopolize"—let alone establish rules explaining how specific forms of potentially harmful single-firm conduct like predatory pricing, tying, or exclusive dealing should be treated. As one of the speakers on the next panel, Professor Herbert Hovenkamp, put it, Section 2 "created a new federal offense but provided only the vaguest guidelines as to its meaning or the particular acts that would constitute a violation."[6]

Instead, Congress left it up to the courts to develop and clarify the scope of the law. In the words of our Supreme Court,

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[7]

In keeping with Congress's intent, courts developed our monopolization law, and indeed all our antitrust law, through decisions resolving disputes between adversaries seeking to present the best arguments for their view of what the law should be. Details of the law evolved over time through decisions based on

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[5] 15 U.S.C. § 2.

[6] Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1036 (2000).

[7] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

specific instances of applying law to facts. Because courts typically decide only what is necessary to resolve the specific controversy before them, each decision usually represents no more than a small step in a new direction. Useful ways of looking at issues emerge in one area and are adopted in others, while dead ends are abandoned. And as new cases arise, opportunities to reconsider issues present themselves. As Hew Pate, my predecessor at the Antitrust Division, once put it, our system takes "an incremental approach" marked by "adaptability," allowing us to incorporate new and better thinking as it becomes available.[8]

III. Two Examples of the Benefit of the Common-Law Process.

I will explore two examples of the way in which our common-law process has improved U.S. antitrust law. The first is the diffusion of economics throughout U.S. antitrust law. The second is the recognition that antitrust law should protect only competition and not individual competitors.

A. Economics.

Over the years, our courts have increasingly turned to economic principles to guide their interpretation of the antitrust laws. Consider, for instance, *Continental*

[8] R. Hewitt Pate, Assistant Attorney Gen., U.S. Dep't of Justice, The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct, Remarks at the Thirtieth Annual Conference on International Antitrust Law and Policy 7 (Oct. 23, 2003), http://www.usdoj.gov/atr/public/speeches/202724.pdf.

T. V., where the Court overruled a per se prohibition of non-price vertical restraints in view of "substantial scholarly and judicial authority supporting their economic utility,"[9] and *State Oil*, where the Court overruled a per se prohibition of maximum resale price maintenance in light of the "insufficient economic justification for *per se* invalidation."[10] Economic reasoning was also central to the recent *Weyerhaeuser* decision concerning predatory bidding.[11] Similarly, in *Leegin*, the recent decision holding that minimum resale price maintenance is no longer per se illegal, the Court cited ten works of economists.[12]

By way of contrast, the two secondary sources cited in *Dr. Miles*, the 1911 decision overruled in *Leegin*, were legal treatises, including Sir Edward Coke's commentary on Sir Thomas Littleton's treatise on English common law[13]—which, as the *Leegin* Court pointed out, was originally published in 1628 and had little to say about modern business practices or their economic effects.[14] That citation pattern was typical at one time; in general, explicit judicial reliance on the work of

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[9]Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58 (1977).

[10]State Oil Co. v. Khan, 522 U.S. 3, 18 (1997).

[11]Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

[12]Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[13]Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-05 (1911).

[14]127 S. Ct. at 2709.

economists was rare in the early days of our antitrust laws. Indeed, courts sometimes invoked overtly non-economic principles in the early days of our antitrust laws: Judge Hand's discussion of the "indirect social and moral effect" of monopoly in *Alcoa* is but one example.[15]

Although a lack of economic citations does not necessarily demonstrate a lack of economic reasoning,[16] it is fair to say that our courts routinely rely on economic scholarship far more extensively now than in the past. Indeed, it would not be an exaggeration to say that current debates in antitrust are not so much about whether the teachings of economics are relevant but about what economics has to tell us. Relying on economic scholarship is now routine for U.S. courts in the antitrust arena—a salutary development helping our courts make sound decisions.

Of course, court decisions are not the only place where economics informs U.S. antitrust today. Another area where economics has a profound impact is within the Antitrust Division, which plays a significant role in antitrust's common-law development through its selection of cases to prosecute, the theories under which it litigates, the submission of friend-of-the-court briefs in significant

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[15]United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).

[16]*See, e.g.*, Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 259-66.

litigation to which it is not a party, and policy statements. For some time now, economic analysis has been at the core of the Division's thinking and analysis.

This was not always the case. The Division hired its first economist in 1936, roughly 45 years after the Sherman Act's enactment.[17] For many years, the role of economists within the Division was limited; Oliver Williamson, who served as an economic assistant to the Assistant Attorney General in the 1960s, has said that during that period the Division's relatively few economists "had come to understand [their] function to be that of litigation support."[18] More colorfully, Judge Richard Posner once characterized the Division's economists as "handmaidens to the lawyers, and rather neglected ones at that."[19]

The role of economists within the Antitrust Division has since evolved drastically, both reflecting and influencing the ascent of economics within antitrust. After becoming Assistant Attorney General in 1965, Donald Turner, who himself was an economist, created the role of Special Economic Assistant and filled it with an economist who reported directly to the AAG. Professor Williamson was the

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[17]1936 ATT'Y GEN. ANN. REP. 22.

[18]Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, 17 ANTITRUST, Spring 2003, at 61, 62.

[19]Richard A. Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, 532 (1971).

second Special Economic Assistant, and he correctly notes that creating that post "signaled that economic analysis would . . . be featured more prominently in the decision to bring cases and in the manner in which the cases were argued."[20]

The Division's next significant institutional change occurred in 1973 with the formation of the Economic Policy Office, which is now called the Economic Analysis Group. Tom Kauper, the Assistant Attorney General who made that change, explained that he created the group because "[a] greater capacity for economic analysis was needed both in terms of the development of specific cases . . . and in the development of an overall program that made economic sense."[21]

By the end of its first year, the group had five economists.[22] Its size and role has grown steadily since. Today, the Division employs roughly 60 Ph.D. economists, at least one of whom is assigned to every civil investigation. That works out to about one economist for every six lawyers, up from a one to ten ratio in 1980. Today, our economists work together with our lawyers, but they also provide their own independent analyses of issues and report to, and through, senior

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[20]Williamson, *supra* note 18, at 63.

[21]Thomas E. Kauper, *The Role of Economic Analysis in the Antitrust Division Before and After the Establishment of the Economic Policy Office: A Lawyer's View*, 29 ANTITRUST BULL. 111, 119 (1984).

[22]Williamson, *supra* note 18, at 63.

economists who supervise their work. Successfully carrying out the Division's job of enforcing the antitrust laws requires sound economic analysis—indeed, economic questions are very often the crucial issues in our investigations today. EAG helps supply that economic analysis by undertaking intensive economic studies during investigations, conducting research that expands our understanding of antitrust economics, and engaging in outreach to other governmental bodies and the public. EAG also helps train and educate Division lawyers, helping ensure that economic principles are used throughout the Division.

It is also worth noting that the Antitrust Division has had the great fortune to be at least a temporary home for some true giants of the economics profession. From George Hay, the first head of the Division's Economic Policy Office, to current Deputy Assistant Attorney General Dennis Carlton, extraordinary economic talent has graced our halls. Among other virtues, the presence of talented economists at the Division draws other talented economists—a feedback loop redounding to the Division's benefit. Attracting good economists has been, and continues to be, a cornerstone of effective antitrust enforcement at the Division, and I recommend it as a priority for antitrust enforcers around the world.

I'll conclude my thoughts on the evolving role of economics within U.S. antitrust by again quoting Judge Posner. Explaining one difference between the

1976 and 2001 editions of his influential *Antitrust Law* treatise, Judge Posner said that he dropped the first edition's subtitle—"An Economic Perspective"—because "the other perspectives have largely fallen away."[23] I agree and view the central role of economics that the U.S. courts have given to antitrust analysis as a triumph of our common law system.

B. Protecting Only the Competitive Process.

A second laudatory result of the common-law evolution of our antitrust law—and one related closely to the ascent of the economic approach to antitrust—is our emphasis on the protection of competition, not competitors. This too was not always so. In one early decision, for instance, the Supreme Court suggested that business practices might be illegal if they resulted in lower prices, thereby "driving out of business the small dealers and worthy men . . . who might be unable to readjust themselves to their altered surroundings."[24]

Gradually, with the help of economic insights, the mistaken notion that harm to a competitor should by itself be an antitrust concern has been abandoned. Today's focus on harm to competition was woven from many overlapping threads, several emanating from the Supreme Court's famous statement in its 1962 *Brown*

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[23] RICHARD A. POSNER, ANTITRUST LAW vii (2d ed. 2001).

[24] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

Shoe decision that the legislative history of the Clayton Act "illuminates congressional concern with the protection of *competition*, not *competitors*."[25]

That statement was a passing observation in the merger dispute in which it was made. But it blossomed and proved to have pronounced long-term effects. Fifteen years later, the Supreme Court relied on it in reversing an award of lost profits to firms alleging that they had been injured by a competitor's acquisition and reinvigoration of failing businesses. As the Court put it:

> At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of *competition*, not *competitors*." It is inimical to the purposes of these laws to award damages for the type of injury claimed here.[26]

The focus on protecting competition, not competitors, kept expanding into other areas,[27] and it eventually migrated to our monopolization jurisprudence as

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[25]Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[26]Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320) (citation omitted).

[27]For other incremental steps, see Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (stating that the legislative history of the Sherman Act "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription'"(quoting ROBERT H. BORK, ANTITRUST PARADOX 66 (1978))) and NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) (stating that "Congress designed the Sherman Act as a 'consumer welfare prescription'" (quoting BORK, *supra*, at 66)).

well. For instance, in *Brooke Group*, the Court's landmark decision concerning predatory pricing, the Court relied on *Brown Shoe* to explain why below-cost pricing violates our antitrust laws only if there is a likelihood that the predator will be able to recoup its losses through future price increases. As the Court explained:

> That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for "the protection of *competition*, not *competitors*."[28]

In short, the distinction between harm to a rival and harm to competition has disseminated throughout our antitrust law—another triumph of the common law.

One practical result stemming from that triumph is the healthy skepticism U.S. courts and antitrust enforcers now have when confronting claims from firms alleging that a larger rival has harmed them. One firm's lost profits do not by themselves show that competition has suffered—indeed, one firm's inability to garner sales typically indicates no more than the superiority of other firms' products and the greater value captured by consumers who choose to buy them. We do well to remember

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[28] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting *Brown Shoe*, 370 U.S. at 320).

that when antitrust laws are used to undo the results of the competitive process, it is consumers who ultimately lose.[29]

IV. A Lesson Based on the U.S. Experience.

Of course, the path of our common law has had its wrong turns, which almost invariably have had ripple effects in other areas. Take, for instance, minimum resale price maintenance. In its 1911 *Dr. Miles* decision, the Court condemned agreements between a manufacturer and dealers governing the price at which a product could be resold, a decision understood to create a per se prohibition against that practice.

It took our Supreme Court 90 years to acknowledge that the underlying economic judgment informing *Dr. Miles* was unsound. In the interim, that mistake created problems in other parts of our antitrust world. For example, some courts were concerned about imposing per se liability for efforts to maintain resale prices that seemed plausibly to be efficient in some circumstances. This concern, it has been argued, led our courts to develop a convoluted jurisprudence regarding what does and does not constitute an

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[29] *See, e.g.*, Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 553 (1991) (observing that "the mere filing of poor quality claims and even the threat to file such claims may impose substantial costs on particular competitors and on competition in general").

agreement to fix resale prices.[30] Developing and applying these principles created uncertainty in the business community, consumed court and litigant expenses, and complicated other areas of the law that also used the concept of agreement.[31] Further, the rule created an incentive for firms to substitute less efficient business practices to avoid per se condemnation. Now that *Dr. Miles* has been overruled in *Leegin*, my hope is that the courts will clarify this area of the law and reduce the uncertainty and inefficiencies with which we have had to deal for so many years.

My final example of interconnections within the antitrust system arises from the Supreme Court's recent *Twombly* decision.[32] The decision addresses when an antitrust complaint should be dismissed before plaintiffs are allowed to impose costly discovery on defendants, such as demands for documents and depositions. This topic should be of particular interest here as Europe contemplates the evolving role of private litigation under its

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[30] *See, e.g.*, 1 ABA SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 139 (6th ed. 2007) ("A much-litigated issue in Section 1 jurisprudence is whether a manufacturer, by unduly aggressive tactics, can be said to have coerced the distributor's adherence to a favored pricing policy and thereby engaged in a form of collective action that satisfies Section 1's plurality requirement.").

[31] *See, e.g.*, 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1630d (2d ed. 2004); Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 29-34 (1998).

[32] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

competition laws. Meritorious private litigation plays a key role in U.S. antitrust enforcement. But meritless cases do not; to the contrary, they create inefficiency, chill procompetitive conduct, and drain the economy by forcing defendants either to expend substantial resources defending themselves or to settle frivolous claims.

In *Twombly*, the Court clarified our pleading standards in the context of private plaintiffs alleging that U.S. telecommunications firms had illegally conspired not to compete to provide certain services in each other's territories and to make it difficult for other companies to offer those services in their own territories. Any such agreement, if it existed, almost certainly would have violated Section 1 of the Sherman Act. The scope of the case was extraordinary. The plaintiffs sought to represent a class of purchasers of those telecommunications services that included virtually every person and entity in the United States. The time and expense of discovery and otherwise litigating such a case to judgment would be difficult to overestimate.

The issue before the Supreme Court arose because the plaintiffs did not allege any facts directly establishing the existence of an agreement. Rather, the plaintiffs sought to infer the existence of an agreement from the allegations of parallel non-entry in each other's territories and allegations of parallel actions to impede competition within their respective territories. Plaintiffs contended that the alleged parallel conduct was consistent with an agreement and warranted proceeding to discovery. They relied in part on the Court's statement in a 1957 decision that "a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[33]

The *Twombly* Court concluded, however, that this no-set-of-facts standard had "earned its retirement," emphasizing the link between lax pleading standards and "the problem of discovery abuse."[34] As the Court explained, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."[35] Citing the potential for "the threat of discovery abuse [to] push cost-conscious defendants to settle even anemic cases," the Court required plaintiffs to meet a "requirement of plausibility" before obtaining discovery.[36]

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[33]Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[34]*Twombly*, 127 S. Ct. at 1969, 1967.

[35]*Id.* at 1966-67.

[36]*Id.* at 1967, 1968.

The Court went on to hold that the plaintiffs had not satisfied that threshold because their parallel-conduct allegations did not cross the line separating the merely "conceivable" from the "plausible."[37] For example, the Court observed that independently determined parallel conduct was particularly likely under the circumstances at issue. As the Court put it, "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same."[38]

Although it is too early to measure the full impact of the decision, it promises to yield benefits in two respects. First, it will enhance the ability of district court judges to dismiss a complaint and avoid costly litigation burdens where the plaintiff is engaged in little more than a fishing expedition based on the speculative hope that something will turn up in discovery or based on the hope that the defendants will feel sufficient pressure to settle even an "anemic" claim for significant amounts. Second, improving the procedural mechanisms for controlling and dismissing meritless claims will reduce the pressure on courts to alter substantive standards to protect against

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[37] *Id.* at 1974.

[38] *Id.* at 1972.

those same evils. The result should be substantive antitrust standards that are better calibrated to condemn conduct harmful to competition and consumer welfare.

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Having explored some of the ways in which U.S. competition law has modernized itself, I leave you with this thought: Competition enforcement at its best is a dynamic exercise. We need continuously to educate ourselves about developments in economic and legal analysis and to incorporate that learning into our law and our enforcement decisions.

Thank you for the opportunity to speak today.