

2018

## Reflections on Matsushita and Equilibrating Tendencies: Lessons for Competition Authorities

Stephen Calkins

Follow this and additional works at: <https://digitalcommons.wayne.edu/lawfrp>

 Part of the [Antitrust and Trade Regulation Commons](#)

---

REFLECTIONS ON *MATSUSHITA* AND  
“EQUILIBRATING TENDENCIES”:  
LESSONS FOR COMPETITION AUTHORITIES

STEPHEN CALKINS\*

Sometimes the simplest points are best. And it was a simple point that I made in my fraternal twin publications on “equilibrating tendencies in the antitrust system”:<sup>1</sup>

In a system of law, as in nature, changes do not occur in a vacuum. Changes to one part of a legal system may stimulate compensating adjustments elsewhere, and the equilibrium position will depend both on the initial action and on the legal system’s reaction. Attention to the initial changes alone will conceal their likely ultimate consequences.<sup>2</sup>

This article looks back on equilibrating tendencies and *Matsushita*’s<sup>3</sup> role in them and looks briefly at current developments and particularly across the pond to the European Union. It then sets forth several lessons for competition agencies arising from consideration of equilibrating tendencies.

---

\* Professor of Law, Wayne State University. This article draws on my experiences as a Member of Ireland’s Competition and Consumer Protection Commission and its predecessor institution, the Competition Authority, and as General Counsel of the U.S. Federal Trade Commission, but all views expressed herein are exclusively my own. For the avoidance of doubt—a great Irish expression—I am not speaking on behalf of any Irish or American agency, and although many of my examples will be American, the suggestions made are quite generally applicable.

<sup>1</sup> Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986) [hereinafter Calkins, *Equilibrating Tendencies*]; Stephen Calkins, *Equilibrating Tendencies in the Antitrust System, with Special Attention to Summary Judgment and to Motions to Dismiss*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 185 (Lawrence J. White ed., 1988). The two publications both derived from a paper I presented at the Georgetown project on private antitrust litigation and made largely the same points. I will refer to the law review version because it is more generally accessible. I continue to be grateful to Robert Pitofsky for his role in sponsoring my participation in such a rewarding project.

<sup>2</sup> Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1066.

<sup>3</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

## I. A LOOK BACK

My article gave concrete examples of equilibrating tendencies. For instance, a severe penal code will be mitigated by the stretching of rules to favor defendants, while, in torts, if even trivial negligence on the part of a plaintiff will bar recovery, courts will strive to avoid injustice by erecting a series of exceptions.<sup>4</sup> Then, if the stringent substantive law is relaxed, the legal system can readjust.

Or, to use a competition example, if the simple finding of a vertical agreement to maintain prices automatically results in liability, treble damages, and attorneys' fees—regardless of power, regardless of effect, regardless of justification, and regardless of growing uncertainty about just how harmful resale price maintenance (RPM) really is—do not be surprised if the legal system responds by making it incredibly hard to prove an agreement.<sup>5</sup>

As my article explained, antitrust offers a host of examples of equilibrating tendencies at work. Substantive U.S. antitrust simply *is* different because of the (un)holy trinity of treble damages, attorneys' fees, and liberal discovery (not to mention class actions and jury trials). One can see the influence not only in substantive but also in procedural law. (Consider, for instance, the challenge of proving standing and antitrust injury.<sup>6</sup>)

A. *MONSANTO*

The classic example is provided by *Monsanto Co. v. Spray-Rite Service Corp.*<sup>7</sup> It is one of American antitrust's best-known cases, but the case is worth reviewing in part to aid non-experts on U.S. law and also in part to ensure that the words "*evidence that tends to exclude the possibility*" are fully appreciated.

In 1977 the Court had relaxed the substantive rules governing vertical restraints, making all non-price restraints subject to the rule of reason while preserving the *per se* ban on vertical price agreements.<sup>8</sup> (Some Justices—and the Solicitor General—would have gone further and judged all vertical re-

---

<sup>4</sup> Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1067–71, 1075–79.

<sup>5</sup> *See id.* at 1094.

<sup>6</sup> *See id.* at 1101–04.

<sup>7</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

<sup>8</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) ("As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy."). Justice White, concurring, accurately perceived that the Court was taking a step down a slippery slope because "[i]t is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well." *Id.* at 69 (White, J., concurring). He presciently observed that "[t]he effect, if not the

straints under the rule of reason.<sup>9</sup>) This meant, according to the *Monsanto* Court, that it was “of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages.”<sup>10</sup> And it was important to prevent an RPM agreement from being inferred “from highly ambiguous evidence.”

What was the “highly ambiguous evidence” that troubled the Court? Evidence that a manufacturer terminated a large<sup>11</sup> discounting dealer<sup>12</sup> after receiving and “in response to” complaints from rival dealers.<sup>13</sup> The evidence was strong enough that a jury found that plaintiff Spray-Rite was terminated “pursuant to a conspiracy . . . with one or more of [Monsanto’s] distributors to fix, maintain or stabilize resale prices.”<sup>14</sup> It was strong enough that the Seventh Circuit Court of Appeals unanimously affirmed and rehearing en banc was denied.<sup>15</sup> That court held: “Proof of distributorship termination in response to competing distributors’ complaints about the terminated distributor’s pricing policies is sufficient to raise an inference of concerted action.”<sup>16</sup> It pointed to “numerous complaints from competing Monsanto distributors about Spray-Rite’s price-cutting practices” and testimony by a Monsanto official “that Spray-Rite was terminated because of the price complaints.”<sup>17</sup>

This was not sufficient for the Supreme Court. “Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about ‘in response to’ complaints, could deter or penalize

---

intention, of the Court’s opinion is necessarily to call into question the firmly established *per se* rule against price restraints.” *Id.* at 70.

<sup>9</sup> *See Monsanto*, 465 U.S. at 761 n.7 (“The Solicitor General (by brief only) and several other *amici* suggest that we take this opportunity to reconsider whether [agreements] . . . to fix resale prices should always be unlawful. They argue that the economic effect of resale price maintenance is little different from agreements on nonprice restrictions. They say that the economic objections to resale price maintenance that we discussed in *Sylvania*—such as that it facilitates horizontal cartels—can be met easily in the context of rule-of-reason analysis. . . . We . . . decline to reach the question, and we decide the case in the context in which it was decided below and argued here.”) (citations omitted).

<sup>10</sup> *Id.* at 763; *see also id.* at 764 (“In sum, ‘[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management’s exercise of independent business judgment and emasculate the terms of the statute.’” (alteration in original) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980))).

<sup>11</sup> “Spray-Rite was the 10th largest out of approximately 100 distributors of Monsanto’s primary corn herbicide.” *Id.* at 757.

<sup>12</sup> “Spray-Rite was a discount operation, buying in large quantities and selling at a low margin.” *Id.* at 756.

<sup>13</sup> *Id.* at 759.

<sup>14</sup> *Id.* at 758 n.2 (quoting special interrogatory).

<sup>15</sup> *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982).

<sup>16</sup> *Id.* at 1239.

<sup>17</sup> *Monsanto*, 465 U.S. at 759.

perfectly legitimate conduct.”<sup>18</sup> Complaints are common and other dealers are a prime source of information, according to the Court. “Thus, something more than evidence of complaints is needed. *There must be evidence that tends to exclude the possibility* that the manufacturer and non-terminated distributors were acting independently.”<sup>19</sup> In the end, there was such evidence—the Court reviewed evidence of Monsanto demands that discounting be ended, evidence of a distributor promising to charge list prices, and more. But the important point is that the words “evidence that tends to exclude the possibility” of unilateral action means evidence more powerful than evidence of complaints about discounting and of termination in response to those complaints.

The point bears repeating. Complaints about discounting, by rival firms, and testimony from a (former) company witness that termination was *in response* to those complaints, certainly suggest an understanding about pricing. Why would someone be terminated in response to complaints about discounting unless there was an understanding about discounting? In other words, “tends to exclude the possibility” does not just mean “suggests” or “supports”—it means something more.

#### B. *MATSUSHITA*

That set the stage for *Matsushita*; indeed, the *Matsushita* petition for certiorari was filed only three weeks after rehearing was denied in *Monsanto*.<sup>20</sup> Petitioners argued that “[a]s recently explained by this Court in *Monsanto* . . . if an inference of concerted price fixing may be drawn from ambiguous evidence, there is a considerable danger that lawful and pro-competitive conduct will be deterred or penalized.”<sup>21</sup> The Court was presented with what it and others considered a preposterous plaintiffs’ claim that had been thoroughly aired before a distinguished district court judge who had patiently considered the evidence and granted summary judgment to defendants, only to have the Third Circuit reverse. The governments of Australia, Canada, France, Japan, and the United Kingdom appeared as amici to express concern. The Solicitor General supported the defendants. The Court reversed and, in doing so, wrote

---

<sup>18</sup> *Id.* at 763.

<sup>19</sup> *Id.* at 764 (emphasis added).

<sup>20</sup> The *Monsanto* rehearing was denied May 14, 1984. See 52 U.S.L.W. 3829 (1984). The *Matsushita* petition was filed June 7, 1984. See 52 U.S.L.W. 3921 (1984). Certiorari was granted in *Matsushita* on April 1, 1985, after the Court asked for and received the Solicitor General’s (supportive) views. See 53 U.S.L.W. 3696 (1985).

<sup>21</sup> Petition for a Writ of Certiorari at 27, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004); see also Brief for the United States as Amicus Curiae [on petition for certiorari] at 17, *Matsushita*, 475 U.S. 574 (No. 83-2004) (filed Jan. 4, 1985) (“Just last Term, the Court admonished in *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 8, that permitting the inference of an anticompetitive agreement from highly ambiguous evidence ‘could deter or penalize perfectly legitimate conduct.’”).

in a way that I have suggested could be considered to be adopting wholesale the “transplantation of *Monsanto*’s principles . . . for use in all antitrust summary [judgment] proceedings.”<sup>22</sup>

And what could be seen as transplanted was a very particular, pro-defendant approach:

But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence ‘that *tends to exclude the possibility*’ that the alleged conspirators acted independently.<sup>23</sup>

Those words set out a high standard, we know, because they were lifted from *Monsanto*. Now, a high standard may have been appropriate in *Matsushita* itself, because it challenged cutting prices and, as the Court said, “mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”<sup>24</sup> But whereas *Monsanto* addressed proof of a vertical agreement that would, if found, result in per se liability, and *Matsushita* addressed what seemed to be outlandish claims seeking a big payoff for challenging price-cutting, the standards set out by the Court could not easily be so limited.

In my 1986 article, I wrote that “the equilibrating lesson of *Matsushita* will not be easily cabined. It can be expected to extend to summary judgments in other kinds of antitrust cases, and also to motions to dismiss and for directed verdicts.”<sup>25</sup> The point was obvious, so I don’t now boast, but I was right.

## II. POST-MATSUSHITA

*Matsushita* became a landmark case. More than 100,000 cases have cited it,<sup>26</sup> including 6,164 federal antitrust cases.<sup>27</sup> Twenty-five Supreme Court cases have cited it,<sup>28</sup> including 14 well-known antitrust cases, most of which quoted from it.<sup>29</sup> Indeed, seven of them quoted *Matsushita*’s colorful words,

---

<sup>22</sup> Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1125.

<sup>23</sup> *Matsushita*, 475 U.S. at 588 (quoting *Monsanto* 465 U.S. at 764) (emphasis added); *see also id.* at 593 (“In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.”).

<sup>24</sup> *Id.* at 594. This is not the place to debate the Court’s confidence that “predatory pricing schemes are rarely tried, and even more rarely successful.” *Id.* at 589.

<sup>25</sup> Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1127.

<sup>26</sup> Westlaw: 109,935 on June 8, 2017.

<sup>27</sup> Westlaw, Antitrust Practice Area, Cases, searching for “Matsushita /6 zenith”, search run June 8, 2017.

<sup>28</sup> Westlaw June 8, 2017.

<sup>29</sup> *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,

“cutting prices in order to increase business often is the very essence of competition”<sup>30</sup> and six of them quoted the warning that mistakes could “chill the very conduct the antitrust laws are designed to protect.”<sup>31</sup> And 4,802 federal courts of appeal cases have cited it, with 31 using the words “essence of competition” and 35 the words “chill the very conduct.”<sup>32</sup> Because of the frequency with which the issue arises, 146 court of appeals opinions cite *Matsushita* and use the words “tends to exclude.”<sup>33</sup> (Three Supreme Court cases—*Bell Atlantic Corp. v. Twombly* (in dissent),<sup>34</sup> *City of Columbia v. Omni Outdoor Advertising*,<sup>35</sup> and *Business Electronics v. Sharp* (in dissent)<sup>36</sup>—quote the famous words, with the last two quoting *Monsanto* directly, the first one quoting *Matsushita* quoting *Monsanto*.)

In *Equilibrating Tendencies*, I pointed to a variety of substantive and procedural aspects of competition law that could well be different because of the existence of the private treble damages remedy.<sup>37</sup> Absolute proof was unrealistic, of course, but one could see a number of ways that the law had been constrained by concern about over-deterrence. It seemed particularly clear that standing rules would have been more hospitable in a single-damages world.

---

549 U.S. 312 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 340 (1991) (Scalia, J., dissenting); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 397 (1991) (Stevens, J., dissenting); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986). *Matsushita* was also cited in *Ford Motor Co. v. Tunis Bros. Co.*, 475 U.S. 1105 (1986), which simply vacated the lower court's judgment and remanded for reconsideration.

<sup>30</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (quoted in *Linkline*, *Weyerhaeuser*, *State Oil*, *Brooke Group*, *Kodak*, *ARCO*, and *Cargill*).

<sup>31</sup> *Id.* at 594 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763–64 (1984)) (quoted in *Linkline*, *Weyerhaeuser*, *Trinko*, *Brooke Group*, *Kodak*, and *ARCO*). For an argument that *Matsushita*'s tough “tends to exclude” approach can be and/or should be limited to the evaluation of arguably procompetitive evidence, see Brief Amicus Curiae for Law Professors and Antitrust/Indus. Org. Scholars in Support of Petitioner, *Evergreen Partnering Grp., v. Pactiv Corp.*, No. 16-1148 (Apr. 21, 2017).

<sup>32</sup> Westlaw June 8, 2017.

<sup>33</sup> Westlaw June 8, 2017.

<sup>34</sup> *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting).

<sup>35</sup> *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 397 (1991) (Stevens, J., dissenting).

<sup>36</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 753 (1988) (Stevens, J., dissenting).

<sup>37</sup> Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1088–04.

Since then, the Supreme Court has continued its campaign for greater objectivity and ever-clearer standards.<sup>38</sup> Case after case has addressed the perceived problem of mistakes, which presumably are likely to be made by juries applying their judgment in situations in which reasonable persons can differ. There’s no question but that the private treble-damages remedy has shaped American antitrust.<sup>39</sup>

The issue is posed most frequently by a motion for summary judgment or judgment as a matter of law—that was *Monsanto*—or a motion to dismiss, which was addressed in *Twombly*. *Twombly* relied on *Matsushita*, *Monsanto*, and *Theatre Enterprises*<sup>40</sup> for “the requirement of plausibility and the need for something more than merely parallel behavior.”<sup>41</sup> What *Twombly* added—and one can see equilibrating tendencies at work—was its admonishment that “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery,<sup>[42]</sup> but quite another to forget that proceeding to antitrust discovery can be expensive.”<sup>43</sup> The Court depicted a world of “enormous expense of discovery” with little hope of judicial control, and responded by calling for stringent requirements for the plaintiffs to survive a motion to dismiss.

That depiction, whether or not it is correct, has made a powerful impression on subsequent decisions. Scores of examples include colorful expressions of

---

<sup>38</sup> See, e.g., *Pac. Bell Tel. Co. v. Linkline Comm’ns, Inc.*, 555 U.S. 438, 452 (2009) (“We have repeatedly emphasized the importance of clear rules in antitrust law.”); Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 ANTITRUST L.J. 327 (1994); Stephen Calkins, *The 1990–91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603 (1992). The Court’s desired clarity has been limited largely to defendant-benefiting clarity. Cf. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (reverse payment settlement agreements are subject to antitrust scrutiny but only under rule of reason); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (resale price maintenance should be judged by the rule of reason).

<sup>39</sup> See also 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, ANTITRUST LAW ¶ 330b2 (4th ed. 2014) (“Treble damages can be an embarrassment to antitrust policy. . . . [T]he availability of damages, and especially of treble damages, can limit the development of antitrust law.”). But cf. Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993) (arguing that factors such as the absence of prejudgment interest and inability of purchasers to recover for reduced output effectively reduce treble damages to single damages); ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS vi (2007) (“The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damages remedy and plaintiffs’ ability to recover attorneys’ fees. On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims.”).

<sup>40</sup> *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

<sup>41</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 (2007); see Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, ANTITRUST, Fall 2007, at 21, 23 [hereinafter Gavil, *Bookends*] (*Twombly* “is a direct descendant of *Matsushita* and *Trinko*.”).

<sup>42</sup> Cf. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962).

<sup>43</sup> *Twombly*, 550 U.S. at 558.



concern about discovery abuse.<sup>44</sup> Many opinions quote (and rely on) *Twombly*'s assertion that "antitrust discovery can be expensive." Westlaw lists 515 federal antitrust cases that cite *Twombly* and mention "discovery" and some version of "expensive" in the same paragraph.<sup>45</sup>

Equilibrating tendencies are at work.

### III. A LOOK ACROSS THE POND

It was with some embarrassment that I read my "equilibrating" article and looked in vain for commentary on European competition law. Where, I wondered, was that obviously interesting and informative comparison? Indeed, with hindsight, the comparison cried out to be made. Here was a competition enforcement system largely without criminal penalties or treble damages or one-way attorneys' fees or liberal discovery or juries, and a system without the widely disparaged American-style class actions.<sup>46</sup> If equilibrating tendencies work outside the United States—they surely work in the United Kingdom,<sup>47</sup> and it's hard to believe they don't also work in civil law systems<sup>48</sup>—one would expect to see quite different competition law.

---

<sup>44</sup> See, e.g., *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015) ("Given 'the unusually high cost of discovery in antitrust cases,' 'the limited "success of judicial supervision in checking discovery abuse[,]'" and "the threat [that] discovery expense will push cost-conscious defendants to settle even anemic cases . . .," the federal courts have been reasonably aggressive in weeding out meritless antitrust claims at the pleading stage.'" (alteration in original) (citation omitted) (quoting *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007), and *Twombly*, 550 U.S. at 558)); *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013) ("If we permit antitrust plaintiffs to overcome a motion to dismiss simply by alleging parallel conduct, we risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." (citing *Twombly*)); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010) ("*Twombly* . . . is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand. When a district court . . . allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp—'that Serbonian bog . . . where armies whole have sunk' (Paradise Lost ix 592–94) . . .") (alteration in original) (affirming refusal to dismiss).

<sup>45</sup> Westlaw for "twombly and (discovery /p expens!)" filtered for topic "antitrust," run June 16, 2017.

<sup>46</sup> See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, in *THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE: LESSONS FROM AMERICA* 37 (Jürgen G. Backhaus, Alberto Cassone & Giovanni B. Ramello eds., 2012).

<sup>47</sup> See Calkins, *Equilibrating Tendencies*, *supra* note 1, at 1067–71 (example from United Kingdom).

<sup>48</sup> See Wouter P.J. Wils, *The Relationship Between Public Antitrust Enforcement and Private Actions for Damages*, 32 *WORLD COMPETITION* 3, 23–25 (2009) [hereinafter Wils, *Relationship*] (worrying about the potential impact); see also Wouter P.J. Wils, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future*, 40 *WORLD COMPETITION* 3 (2017) [hereinafter Wils, *Private Enforcement*] (same).

Most important—and although, as discussed below, this is changing—Europe had a competition system with very little private enforcement.<sup>49</sup> European private enforcement of competition law is nothing like its American counterpart. In the United States, antitrust largely *is* private antitrust; in Europe, competition enforcement *is* public enforcement. As the European Commission has stated, “[T]o date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered.”<sup>50</sup>

The lack of private enforcement is not because compensation is opposed in theory. As the Court of Justice declared in 2001, “The full effectiveness of Article [101] . . . would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”<sup>51</sup> But “various legal and procedural hurdles in the Member States’ rules governing actions for antitrust damages before national courts”<sup>52</sup> have resulted in a singularly ineffective damages remedy.<sup>53</sup>

Just as the system of law enforcement is very different, the law itself remains quite different. As someone who has enforced competition law on both sides of the Atlantic, I am struck by how different the legal standards are outside of most mergers and hard-core cartels. For all the talk about “convergence” between the United States and the European Union,<sup>54</sup> there are still

---

<sup>49</sup> See, e.g., RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 312 (8th ed. 2015) (“Historically within the EU public enforcement of competition law has been much more important than private enforcement.”); Wils, *Private Enforcement*, *supra* note 48 (short history of private enforcement).

<sup>50</sup> Eur. Comm’n, Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union, COM(2013) 404 final Explanatory Memorandum at 4; see Eur. Comm’n, DG Competition, *Actions for Damages > Overview*, ec.europa.eu/competition/antitrust/actionsdamages/#steps (“[I]n practice most victims, particularly SMEs and consumers, rarely obtain compensation.”); Alison Jones, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, in HARMONISING EU COMPETITION LITIGATION: THE NEW DIRECTIVE AND BEYOND 15 (Maria Bergström, Marios Iacovides & Magnus Strand eds., 2016) [hereinafter Jones, *Private Enforcement*] (noting slight increase).

<sup>51</sup> Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6314, ¶ 26. For an overview see WHISH & BAILEY, *supra* note 49, at 312–28. Of course, concerns about private enforcement have been raised by various commentators. See, e.g., Sebastian Peyser, *Cartel Members Only—Revisiting Private Antitrust Policy in Europe*, 60 INT’L & COMPARATIVE L.Q. 627 (2011) (urging a focus on hard-core cartels); Wils, *Relationship*, *supra* note 48 (emphasizing compensatory role).

<sup>52</sup> Eur. Comm’n, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final § 1.1 (Apr. 2, 2008); see also Explanatory Memorandum, *supra* note 50, at 4.

<sup>53</sup> The barriers to private litigation in the European Union are nicely catalogued in Alison Jones, *Private Enforcement*, *supra* note 50, at 26–33.

<sup>54</sup> See, e.g., Margaret Bloom, *The U.S. and EU Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement*, ANTITRUST, Summer 2005, at 18; Thomas K. Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of*

striking differences in the parts of the law where U.S. private enforcement dominates. A 2013 critical analysis found significant or substantial convergence only with respect to assessment of mergers, leniency programs, and the “mode” of regulation of cartels (ex ante or ex post)<sup>55</sup>—all situations where U.S. enforcement is almost exclusively governmental, so there is much less role for equilibrating tendencies. In contrast, there was “insignificant convergence” in assessment of abuse of dominant positions. Eleanor Fox revisited monopoly/abuse law and found that 25 years had yielded little convergence, especially at the court level.<sup>56</sup>

In a way, the extent of difference is surprising. Powerful forces are behind the drive for convergence. Law firms practice on both sides of the Atlantic, as do economic consulting firms. Europeans regularly attend and participate in U.S. conferences, and vice versa.<sup>57</sup> The ICN and the OECD work tirelessly to resolve tensions and encourage adoption of “best practices.” Enforcers regularly work closely together on a host of matters. Merger guidelines have become a common language of competition policy<sup>58</sup> and inevitably drive toward common approaches to market definition, market power, entry, and efficiencies—all concepts that resonate throughout competition enforcement.

But in a way the difference is not surprising. In part this is because the European Commission has a market integration purpose that is missing in the United States.<sup>59</sup> Also important is history, in particular Europe’s larger num-

---

*Global Competition Law*, 12 CHI. J. INT’L L. 433 (2012); Yann Davie, *EU and US Antitrust: Converging Approaches to Monopolies?*, LE PETIT JURISTE (Mar. 11, 2014); see also Ioannis Kokkoris, *Introduction: EU and U.S. Competition Enforcement—Convergence or Divergence*, 59 ANTITRUST BULL. 1 (2014).

<sup>55</sup> Dzmityr Bartalevich, *EU Competitive Policy Since 1990: How Substantial Is Convergence Towards U.S. Antitrust?*, 6 J. CENTRUM CATHEDRA 273 (2013).

<sup>56</sup> Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129, 150 (2014).

<sup>57</sup> More than a quarter of the 3233 attendees at the 2017 ABA Antitrust Section Spring Meeting came from the 65 foreign countries that were represented. Email to Stephen Calkins from Margaret Stafford (June 9, 2017) (on file with author).

<sup>58</sup> For the third annual Baxt lecture at the University of Melbourne, I reviewed 13 merger guidelines (ACCC 2008; Brazil 2001; Canada 2011; EC 2004; Finland 2004; France 2009; Germany 2012; Ireland 2002; Japan 2010; New Zealand 2003; Tanzania 2011; UK 2010; and U.S. 2010) and found that all but one (Germany) used the SSNIP; all but one (Tanzania) used the words “close substitutes” and the “timely/likely/sufficient” wording for entry; all but three (Brazil, New Zealand, and Tanzania) the HHI; and, amazingly enough, all but two (Brazil and Japan) the very American word “maverick.” Stephen Calkins, Dir. of Mergers Div., The Competition Authority Ireland, *The Third Annual Baxt Lecture (Melbourne Law Sch.): The Global Conversation About Merger Review and Powerful Buyers* (Oct. 23, 2012) (on file with author); see also *Annual Baxt Lecture*, Melbourne Law School, The University of Melbourne, law.unimelb.edu.au/centres/clen/engagement/annual-baxt-lecture.

<sup>59</sup> Eur. Comm’n, *Guidelines on Vertical Restraints*, 2010 O.J. (C 130) 1, ¶ 7 (“Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. . . . Companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished.”).

ber of formerly state-owned dominant firms.<sup>60</sup> But in part this is because of equilibrating tendencies.

Consider the concept of “false positives,” or incorrect findings of antitrust liability. This was the concept to which the *Matsushita* Court was referring when it cautioned that “mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”<sup>61</sup> The term was first used in this manner in the famous *Microsoft* opinion in 2001.<sup>62</sup> The Supreme Court used it for the first time in *Trinko* in 2004,<sup>63</sup> and again in *Twombly* in 2007.<sup>64</sup> Since *Twombly*, U.S. courts have used it 95 times in antitrust cases, or almost 10 times a year.<sup>65</sup>

In contrast, searching all EU case law on Westlaw<sup>66</sup> yielded only five uses of “false positive” and only three—all Advocate General opinions—referring to possibly erroneous case outcomes.<sup>67</sup> There is less of what in the United

---

<sup>60</sup> Lars-Hendrik Röller, *Exploitative Abuses*, in *EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 525* (Claus-Dieter Ehlermann & Mel Marquis eds., 2008).

<sup>61</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

<sup>62</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 87 (D.C. Cir. 2001) (en banc) (“Recognizing the potential benefits from tying, see *Jefferson Parish*, 466 U.S. at 21 n.33, the Court in *Jefferson Parish* forged a separate-products test that, like those of market power and substantial foreclosure, attempts to screen out false positives under per se analysis.”).

<sup>63</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“The cost of *false positives* counsels against an undue expansion of § 2 liability. One *false-positive* risk is that an incumbent LEC’s failure to provide a service with sufficient alacrity might have nothing to do with exclusion . . . [e]ven if the problem of *false positives* did not exist . . .”) (emphasis added).

<sup>64</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (“The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, e.g., AEI–Brookings Joint Center for Regulatory Studies, Richard Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06–08, pp. 3–4 (2006) (discussing problem of ‘false positives’ in § 1 suits).”).

<sup>65</sup> Westlaw “all federal” database, limited to case “topic antitrust,” search for “false positive.” Calculation for May 22, 2007 (post-*Twombly*), to March 22, 2017.

<sup>66</sup> “European Union Cases” (“Court of Justice: begins with 1954; Court of First Instance: begins with 1989; C Series of the Official Journal: begins with 1985”), checked June 9, 2017.

<sup>67</sup> Case C-177/16, Opinion of AG Wahl ¶ 42, Biedrība ‘Autortiesību un komunikācijas konsultāciju aģentūra—Latvijas Autoru apvienība’ v Konkurences padome (Apr. 6, 2017) (“[A]ntitrust authorities and economists generally agree that the exercise consisting of determining the benchmark price in a case of possible excessive pricing carries a high risk of producing both type I errors (or false positives: a price is mistakenly considered to be above the competitive price) and type II errors (or false negatives: a price is mistakenly considered not to be above the competitive price.)” (citation omitted); *id.* ¶ 103 (“[I]t has been correctly argued that type I errors in competition decisions concerning unilateral conduct involve a much larger cost for the society than type II errors.”); Case C-8/08, Opinion of AG Kokott, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit ¶ 45 n.33 (2009) (“Although the national court does not explicitly mention a rule of presumption, it stresses the need to prevent ‘false positive outcomes.’”); Case C-202/07P, Opinion of AG Mazák, France Télécom SA v.

States is a common concern. In a world with relatively little important private litigation, and with (traditionally) a respected agency making many of the enforcement decisions, there is much less fear of “false positives,” and the consequences of mistakes may not be as great. If an agency will look fairly and objectively at actual competitive effects before bringing any case, there is less risk in having what in the United States might seem to be an over-inclusive per se (or “object”) rule or excessively pro-enforcement presumptions.

This can be seen in a variety of competition issues. European enforcers intervene to address concerns about oligopolistic signaling and potential signaling<sup>68</sup> whereas U.S. enforcers, constrained by Section 1 law, narrowed by equilibrating tendencies, would hesitate to proceed.<sup>69</sup> There is no European equivalent to the *Monsanto/Matsushita* requirement of evidence that “tends to exclude” the possibility of unilateral action. *Monsanto* said it was “of considerable importance” to limit findings of resale price maintenance agreements *because* such agreements “are subject to per se treatment and treble dam-

---

Comm’n, ECLI:EU:C:2008:520, ¶ 73 n.52 (2008) (citing an article arguing that “requiring proof of possibility of recoupment would in principle be beneficial to alleviate the cost of errors (especially false positives) in alleged predatory pricing cases”). It is noteworthy that two of the cases involved national enforcement agencies rather than the Commission.

<sup>68</sup> See, e.g., Press Release, Eur. Comm’n, Antitrust: Commission Accepts Commitments by Container Liner Shipping Companies on Price Transparency (July 7, 2016) (IP-16-2446) (commitments “to increase price transparency for customers and to reduce the likelihood of coordinating prices”); Press Release, Authority for Consumers & Markets (ACM), Commitments to ACM Improve Competition in Ready-Mix Concrete Sector (June 29, 2016) (even without evidence of a violation, the Dutch agency extracted commitments to ease entry and end collaborations among substantial firms); Press Release, Hellenic Competition Comm’n (Apr. 14, 2016) (acceptance of commitments by the three largest Greek steel producers and their trade association that would “change the terms and conditions of their ongoing cooperation within their trade association” so that information exchanges do “not increase the prospects of [their] coordinating”—even though there was “insufficient evidence” to show collusion or abuse of dominance); see also Mark Briggs, *Greece Irons Out Commitments with Steel Companies*, GLOBAL COMPETITION REV. (Apr. 15, 2016) (“The commitments prevent the companies and association from requesting commercially sensitive data; distributing recommendations based on data the association forwards on to them from statistical organisations; and clarify the structure of the association to ensure there is no personnel spillover between it and the companies.”).

<sup>69</sup> For discussion of signaling under U.S. law, see William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393 (2011); William H. Page, *Signaling and Agreement in Antitrust Law* (Apr. 5, 2017) (unpublished manuscript), dx.doi.org/10.2139/ssrn.2620786. In theory, the FTC should be able to use Section 5—which cannot be privately enforced—to reach conduct not subject to the Sherman Act. See Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 893 (2010) (“There are good reasons for the Commission to use § 5 of the FTC Act to reach more broadly than the Sherman Act has reached . . .”); see also Rambus, Inc., FTC Docket No. 9302 (2006) (concurring opinion of Comm’r Leibowitz) (“Because of these relatively mild consequences, Section 5 can fairly extend more broadly than the antitrust laws.”), *rev’d*, 522 F.3d 456 (D.C. Cir. 2008). Although the FTC has occasionally used Section 5 to reach beyond the Sherman Act—in recent years, typically in “invitations to collude” cases, e.g., U-Haul Int’l, Inc., 150 F.T.C. 1 (2010) (consent order)—the modern FTC has proceeded only with considerable caution. Cf. FED. TRADE COMM’N, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (2015).

ages”<sup>70</sup>—treble damages that can be sought by a host of unhappy individuals and entities (and class actions) with no particular interest in promoting competition. But it is of much *less* “considerable importance” to draw such distinctions if a challenge would be brought only by an enforcer charged with promoting the general welfare.

*Leegin* abandoned the per se rule for RPM in part because of the “problem . . . that a jury might conclude [that a seller’s] unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability.”<sup>71</sup> In contrast, were penalties smaller and challenges possible only if a sophisticated enforcer concluded that one was justified, it could be more appropriate to regard RPM as a “hard-core” restriction with the “object” of restricting competition.<sup>72</sup> Similarly, for predatory pricing cases, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* imposed a separate requirement of proving recoupment, in addition to below-cost pricing, because “the costs of an erroneous finding of liability are high.”<sup>73</sup> Again, such a finding could be by a jury in a case brought by a private entity with no duty to serve the public interest. Where a case could be brought only by a public-interest-minded enforcer, there may be less need for such a strict two-part test, and in Europe recoupment is not required.<sup>74</sup> Excessive pricing is simply not an antitrust issue in the United States,<sup>75</sup> whereas the possible offense is very much alive in Europe.<sup>76</sup> Or, for the last example, U.S. courts tend to use bright-line tests for the *absence* of monopoly power, such that “courts rarely find monopoly

---

<sup>70</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

<sup>71</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 903 (2007) (citing *Monsanto*, 465 U.S. 752, and *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 728 (1988)), where the Court expressed concern that with too-easy proof of RPM, “[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties”). The claimed threat of criminal liability was entirely theoretical, but the Court still mentioned it.

<sup>72</sup> WHISH & BAILEY, *supra* note 49, at 129–30, 703–04.

<sup>73</sup> 509 U.S. 209, 226 (1993).

<sup>74</sup> WHISH & BAILEY, *supra* note 49, at 786–87; *see* Case C-202/07P, *France Télécom SA v. Comm’n*, 2009 E.C.R. I-02369, ¶ 110.

<sup>75</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

<sup>76</sup> *See, e.g.*, Press Release, Eur. Comm’n, Antitrust: Commission Opens Formal Investigation into Aspen Pharma’s Pricing Practices for Cancer Medicines (May 15, 2017) (IP/17/1323); Case CE/9742-13, Decision of the Competition and Markets Authority, Unfair Pricing in Respect of the Supply of Phenytoin Sodium Capsules in the UK (Dec. 7, 2016) (pricing excessive and unfair) (non-confidential decision). It is worth noting that the original Areeda-Turner call for allowing equitable challenges to “persistent and not-inevitable monopoly” was limited to government proceedings. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 638 (4th ed. 2015) (reprinting the 1978 subchapter accompanied by a partial disavowal by Hovenkamp).

power when market share is less than about 50 percent,”<sup>77</sup> whereas the European Court of Justice *presumes* dominance from a 50 percent share and has found dominance below that level.<sup>78</sup> U.S. courts seem to be motivated to seek easy ways to dispense with private treble damage cases.

#### IV. A LOOK ACROSS THE POND AND INTO THE FUTURE

To some extent the future in Europe is already here. What had traditionally been an enforcement system almost exclusively focused on a single elite agency is in the process of being replaced by a different model, with more and more decisions being taken by national enforcers and national courts addressing private litigation. Regulation 1/2003<sup>79</sup> “empowered Member States’ competition authorities (NCAs) and national courts to apply all aspects of the EU competition rules . . . .”<sup>80</sup> From May 2004 to December 2013, the European Commission issued 122 enforcement decisions and the NCAs 665,<sup>81</sup> with NCAs’ increasing their output over time.<sup>82</sup>

This is a very different world. During the 8 1/2 years studied, the United Kingdom took only 16 decisions and Poland only 12, but France took 90, Germany 84, Italy 82, and Spain 73 (compared to the Commission’s 88).<sup>83</sup> And whereas 63 percent of the Commission’s decisions addressed cartels or other horizontal restraints, only 46 percent of NCA decisions did.<sup>84</sup> Fully 27 percent of NCA decisions addressed vertical agreements, compared to only 9 percent of Commission decisions.<sup>85</sup> Heroic efforts to coordinate enforcement approaches cannot prevent divergences and inconsistencies. And whereas a single enforcer can simply choose not to bring certain kinds of cases and thus slowly reduce or end some kinds of enforcement (Americans can think about how the FTC gradually just stopped bringing Robinson-Patman cases), that

<sup>77</sup> 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 231 (8th ed. 2017); *cf. id.* at 338 (attempted monopolization “claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious”) (quoting *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1993)). Although monopoly power may be proven by direct evidence, such evidence “is not frequently available.” *Id.* at 226.

<sup>78</sup> WHISH & BAILEY, *supra* note 49, at 192–93.

<sup>79</sup> Council Regulation No. 1/2003, 2003 O.J. (L 1) 1 (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty).

<sup>80</sup> Eur. Comm’n, *Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement Under Regulation 1/2003: Achievements and Future Perspectives*, COM (2014) 453 final, ¶ 1 (July 9, 2014).

<sup>81</sup> *Id.* ¶ 8.

<sup>82</sup> Wouter P.J. Wils, *Ten Years of Regulation 1/2003—A Retrospective*, 4 J. EUR. COMPETITION L. & PRAC. 293, 296 (2013).

<sup>83</sup> *Id.*

<sup>84</sup> Eur. Comm’n, *Communication from the Commission*, *supra* note 80, ¶¶ 11–13.

<sup>85</sup> *Id.* ¶¶ 12–13.

kind of quiet flexibility is unavailing when a couple of dozen government entities can charge on without the support of the central authority.

Also changing is private litigation. The Directive on Antitrust Damages Actions entered into force on December 26, 2014, with Member States to implement by December 27, 2016.<sup>86</sup> (Implementation “is ongoing,” with some Member States still engaged in consultation but with 25 communicating full transposition.<sup>87</sup>) A Commission Recommendation on “collective redress” (class actions) invited Member States to introduce these mechanisms by July 26, 2015, and promised to assess the Recommendation’s implementation by July 26, 2017.<sup>88</sup>

The extent and desirability of change is not without debate. Procedural changes won’t be made uniformly or with instant results.<sup>89</sup> Noted observer/participant Wouter Wils has expressed relief that the “basic orientation is most unlikely to change in the foreseeable future.”<sup>90</sup>

My sense—expressed with caution since it is expressed from afar—is that significant change is inevitable. Private damages actions are becoming and will continue to become more common. The steady drumbeat of firsts—first final ruling in a Competition Appeals Tribunal (CAT) competition law damages case, first fast-track competition claim before the CAT under new rules, first antitrust class action launched<sup>91</sup>—creates momentum. The United Kingdom has adopted real, opt-in collective actions.<sup>92</sup> The legal press now regularly reports on new claims filed against MasterCard and Visa.<sup>93</sup> Litigation

---

<sup>86</sup> Directive 2014/104/EU, of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1.

<sup>87</sup> Eur. Comm’n, Directorate for Competition, *Actions for Damages > Directive on Antitrust Damages Actions*, ec.europa.eu/competition/antitrust/actionsdamages/directive\_en.html (updated as of Nov. 13, 2017).

<sup>88</sup> Eur. Comm’n, Directorate for Competition, *Actions for Damages > Overview*, ec.europa.eu/competition/antitrust/actionsdamages/index.html.

<sup>89</sup> Challenges to change are reviewed in Jones, *Private Enforcement*, *supra* note 50, and Sebastian Peyer, *Compensation and the Damages Directive* (Ctr. for Competition Policy Working Paper 15-10, 2015).

<sup>90</sup> Wils, *Private Enforcement*, *supra* note 48, at 39.

<sup>91</sup> *European Competition Law Newsletter—August 2016*, MCGUIREWOODS (Aug. 17, 2016) [hereinafter MCGUIREWOODS, *Newsletter*]; Matthew Reynolds, *In on the Act: First Antitrust Class Action Launched in the UK*, CLASS ACTION COUNTERMEASURES (June 27, 2016); see also Nicholas Heaton, *The Introduction of Class Actions for Competition Claims in the UK*, ANTI-TRUST SOURCE (Feb. 2016), [www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/feb16\\_heaton\\_2\\_12f.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb16_heaton_2_12f.pdf). The Brexit vote makes it important to mention that Germany and the Netherlands have also become known as desirable venues for filing competition cases.

<sup>92</sup> Heaton, *supra* note 91.

<sup>93</sup> E.g., Melissa Lipman, *Visa, MasterCard Hit with More UK Swipe Fee Antitrust Claims*, LAW360 (June 14, 2017).



funding is a growing business.<sup>94</sup> Plaintiff-oriented law firms regularly report on “developments [that] provide ever greater opportunities for private enforcement.”<sup>95</sup> Even establishment law firms are flirting with promoting private enforcement: “Private competition law litigation in the UK continues to develop apace. Companies of any size (including small and medium-sized enterprises, or SMEs) should consider its availability when evaluating options for responding to the activities of third parties, including suppliers and competitors.”<sup>96</sup> Conferences and workshops advertise its availability.<sup>97</sup> And with plaintiffs’ competition practices becoming established,<sup>98</sup> private enforcement can build on private enforcement. At first, cases will be mostly “follow-on” proceedings, but even that can change the dynamic.

With enforcement increasingly by a diversity of entities, and particularly by private parties, change will come. There will be equilibrating tendencies. Particularly in such a changing environment (but elsewhere as well), agencies should take account of lessons from those tendencies.

## V. LESSONS FOR ENFORCEMENT AGENCIES

The basic lesson is to understand and appreciate the role of equilibrating tendencies. Actions will have reactions. Agencies experiencing or working to cause change must think through the likely indirect consequences of any change.

### A. ANTICIPATE EQUILIBRATING TENDENCIES

European enforcers, in particular, can expect to see challenges continue to increase in response to the changing nature of enforcement. Already, for instance, the enforcement of vertical restraints law has largely devolved to national enforcers.<sup>99</sup> It is one thing to have a presumption of illegality secure in the knowledge that it will be exercised with expertise, judgment, and restraint—but can one presume that enforcers in all of 28 countries will exercise

---

<sup>94</sup> Ben Hancock, *Who Rules the World of Litigation Funding?*, AM. LAW. (Mar. 30, 2017).

<sup>95</sup> Article: *EC Competition Law: Latest Developments Provide Ever Greater Opportunities for Private Enforcement*, QUINN EMANUEL TRIAL LAWYERS (Jan. 2015); see also *Significant Developments in Private Enforcement of Competition Law*, HAUSFELD (May 5, 2014).

<sup>96</sup> MCGUIREWOODS, *Newsletter*, supra note 91; see also Helen Kelly, *Competition Law Damages Actions—Rules Make Ireland an Attractive Venue for Competition Litigation*, MATHESON (Feb. 28, 2017).

<sup>97</sup> See, e.g., *Private Enforcement of Competition Law*, COMPETITION LAW, law.knect365.com/private-enforcement/.

<sup>98</sup> Scott Flaherty, *U.S. Plaintiffs Firms Eye Antitrust Litigation in Europe*, AM. LAW. (Sept. 28, 2015). Hausfeld, for instance, boasts 45 lawyers in four European offices. See *Our People*, HAUSFELD (2017).

<sup>99</sup> Filippo Amato, *RPM in the European Union: Any Developments Since Leegin?*, CPI ANTI-TRUST CHRON., Winter 2013, at 1, 5.

it this way? (As the Commission has delicately recognized, “[a] number of authorities struggle with insufficient human and financial resources.”<sup>100</sup>)

Agencies, which are regularly provided with opportunities to influence the system of competition enforcement,<sup>101</sup> should remember that major changes require particular attention to likely reactions. Thus, the line of U.S. cases applying a relaxed standard to proof of damages in competition cases,<sup>102</sup> which might have seemed a boon to plaintiffs, helped trigger the more demanding approach applied to the fact of damages<sup>103</sup> and the requirement that the plaintiff prove “antitrust injury.”<sup>104</sup> U.S. plaintiffs may benefit from treble damages, liberal discovery, and relaxed pleading, but those same factors serve to motivate judges to work to make substantive law more demanding.<sup>105</sup>

Consider, for instance, criminal penalties, which in my view are appropriate for hard-core cartel activities.<sup>106</sup> Criminal penalties make sense in part because they send a message of how seriously a country takes cartel enforcement. But introducing criminal penalties is very different from establishing an effective criminal enforcement regime. The seriousness of the penalties automatically makes entities more likely to resist their imposition while at the same time making liability harder to impose.<sup>107</sup> The United Kingdom has had

---

<sup>100</sup> Eur. Comm’n, DG Competition, *Inception Impact Assessment: Enhancing Competition in the EU for the Benefit of Businesses and Consumers—Reinforcement of the Application of EU Competition Law by National Competition Authorities* at 2 (Nov. 2015). NCAs “suffer from low staffing levels or limited financial resources compared to other NCAs” in Austria, Belgium, Latvia, Luxemburg, Malta, and Slovenia. Eur. Comm’n, *Commission Staff Working Document: Enhancing Competition Enforcement by the Member States’ Competition Authorities: Institutional and Procedural Issues*, SWD(2014) 231 final, ¶ 36 (July 9, 2014).

<sup>101</sup> Of course, they do this every day, by bringing cases, taking appeals, accepting commitments/settlements, hiring staff, you name it. And some of these actions turn out to have lasting impact. How different competition law would be, for instance, without merger guidelines and effective leniency programs.

<sup>102</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

<sup>103</sup> *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

<sup>104</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>105</sup> *Cf. SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 444 (4th Cir. 2015) (Wilkinson, J., concurring in part and dissenting in part) (“[W]hat we confront in antitrust law is a perfect storm of treble damages, large discovery costs, and relaxed pleading standards.”).

<sup>106</sup> Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties*, 60 L. & CONTEMP. PROBS. 127 (1997); see CARON BEATON-WELLS & ARIEL EZRACHI, CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT (2011); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL’Y INT’L, Autumn 2010, at 3 (criminal debarment).

<sup>107</sup> See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978) (“Congress has recently increased the criminal penalties for violation of the Sherman Act. Individual violations are now treated as felonies punishable by a fine not to exceed \$100,000, or by imprisonment for up to three years, or both. Corporate violators are subject to a \$1 million fine. 15 U.S.C. § 1 (1976 ed.). The severity of these sanctions provides further support for our conclusion that the

famously difficult experiences imposing criminal penalties.<sup>108</sup> Ireland boasts that it secured the first European criminal cartel conviction, and so long as one counts by individual defendant rather than by proceeding, can say that it has “succeeded in obtaining thirty-three convictions on indictment.”<sup>109</sup> But no one has yet been sent to prison.<sup>110</sup> Australia and Canada also still await that first big step.<sup>111</sup>

It can be politically popular to increase penalties for competition violations. The United States has done this a number of times, as have many other countries.<sup>112</sup> In 2012 Ireland doubled maximum prison sentences, from five years to ten, with the minister in charge saying that this was “sending out a very strong signal to cartelists that competition offences are regarded as serious offences by the legislature . . . .”<sup>113</sup> Australia boldly established criminal penalties and hiked fines<sup>114</sup> But by increasing penalties, countries also in-

---

Sherman Act should not be construed as creating strict-liability crimes. *Cf.* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) (strict liability generally inappropriate when offense punishable by imprisonment).”

<sup>108</sup> See Norton Rose Fulbright, *The Criminal Cartel Offence Around the World*, COMPETITION WORLD, Quarter 2 2016, at 6, 8, [www.nortonrosefulbright.com/files/competition-world—q2-2016-141176.pdf](http://www.nortonrosefulbright.com/files/competition-world—q2-2016-141176.pdf) (“Despite the gradual proliferation of the criminal cartel offence around the world, the reality is that custodial sentences have been imposed only rarely outside the US.”) (describing how one UK prosecution “collapsed spectacularly,” and only one unusual case succeeded, but adding that a revised offense, not requiring proof of “dishonesty,” went into effect Apr. 1, 2014).

<sup>109</sup> PHILIP ANDREWS, PAUL GORECKI & DAVID MCFADDEN, *MODERN IRISH COMPETITION LAW* § 2.01[B] (2015); see also Patrick Massey, *Criminalising Competition Law Offences: A Review of Irish Experience*, 3 NEW J. EUR. CRIM. L. 154 (2012).

<sup>110</sup> Philip Andrews, *Hard-Core Cartel Offender Gets €7,500 Fine & Suspended Sentence*, MCCANN FITZGERALD (June 2, 2017); ANDREWS ET AL., *MODERN IRISH COMPETITION LAW*, *supra* note 109, at § 2.01[B].

<sup>111</sup> Pallavi Guniganti, *Australia and Canada Still Await Jail for Cartelists*, GLOBAL COMPETITION REV., Feb. 5, 2016, at 47.

<sup>112</sup> See, e.g., Press Release, Auth. for Consumers Mkts., *ACM Is Now Able to Impose Higher Fines* (July 1, 2016); Tom Azzopardi, *Chile Hikes Fines, Jail Time for Collusion*, BNA Antitrust & Trade Reg. Rep. (July 15, 2016) (reintroducing prison sentences of between five and ten years; maximum fine increased from current 16.5 billion Chilean pesos to twice the estimated benefit or 30% of sales in the relevant market over the relevant period); Press Release, Eur. Comm’n, *Competition: Commission Revises Guidelines for Setting Fines in Antitrust Cases* (June 28, 2006) (IP/06/857).

<sup>113</sup> See *Competition and Consumer Law Nutshell—Penalties*, MINTERELLISON (Feb. 15, 2013), [www.minterellison.com/articles/competition-and-consumer-law-nutshell-penalties](http://www.minterellison.com/articles/competition-and-consumer-law-nutshell-penalties) (“Under the 2009 amendments, corporate civil pecuniary penalties were increased from a maximum of A\$10 million per offence to the greater of A\$10 million, three times the gain from the contravention and, where that gain cannot be ascertained, 10% of group turnover.”); see also Press Release, MerrionStreet (Ir.), *Maximum Prison Sentence for Competition Offences Doubled to Ten Years—Minister Bruton; Competition [Amendment] Act 2012 Commenced* (July 3, 2012). (Yet, as noted, no one has served a day in prison.)

<sup>114</sup> See Graeme Samuel, *Cartel Reform and Compliance with the Trade Practices Act*, Speech at Austl. Corp. Lawyers Ass’n Nat’l Conference (Nov. 13, 2009), [www.accc.gov.au/speech/cartel-reform-and-compliance-with-the-trade-practices-act](http://www.accc.gov.au/speech/cartel-reform-and-compliance-with-the-trade-practices-act); see also *First Criminal Cartel Fine: \$25 million*, AUSTRALIAN COMPETITION LAW: BLOG (Aug. 3, 2017), [australiancompetitionlaw.org/](http://australiancompetitionlaw.org/)

crease the cost of false positives and the challenge of bringing successful cases.<sup>115</sup>

Of course, the goal should not be to have government enforcers and other plaintiffs win as many cases as easily—and with as large penalties and recoveries—as possible. But before an agency supports some significant change, it should work through the indirect adjustments that are likely to follow. All the platitudes are true—there is no such thing as a free lunch; if something seems too good to be true it probably is; moderation in all things.

#### B. PARTICIPATE IN THE COMPETITION CONVERSATION

Competition law is made by legislatures, enforcement agencies, and courts, and each has a role in shaping it. Critical roles are played by lawyers who interact with these players and with clients, and seek to influence the former and guide the latter. All of this takes place in the context of an increasingly robust debate among all of these, plus academics, other experts, and the general and specialized media.

Competition agencies should participate in this debate through press releases, speeches, workshops, publications, and, to the extent permitted by the relevant legal system, amicus briefs.<sup>116</sup> Agencies and the competition they seek to preserve and increase will benefit from or be harmed by actions taken by other players in the system (and by subsequent reactions), and agencies owe it to the public to try to influence those actions. For many years it has been recognized as sound policy for agencies to use a wide array of tools.<sup>117</sup> It makes sense to use them not only with respect to agency enforcement actions, but also more generally.

---

blog/2017/08/03/first-criminal-cartel-fine-25-million/; Press Release, Austl. Competition & Consumer Comm’n, Australia’s First Criminal Cartel Charge Laid Against NYK (July 18, 2016).

<sup>115</sup> See Robert Connolly, *Thomas Farmer Acquitted in Puerto Rico Shipping Price Fixing Trial*, CARTEL CAPERS (May 11, 2015) (“[M]y opinion is that today cases go to trial because the sentencing guidelines are so severe . . . that the ‘last man standing,’ . . . has little to lose by going to trial.”).

<sup>116</sup> For instance, the FTC and the DOJ Antitrust Division both have websites devoted to their multifaceted work in health care. See *Competition in the Health Care Marketplace*, FED. TRADE COMM’N; *Health Care Competition*, FED. TRADE COMM’N; *Health Care*, U.S. DEP’T OF JUSTICE. The FTC also has a website specifically devoted to its long-standing work on pay-for-delay settlements. *Pay For Delay*, FED. TRADE COMM’N.

<sup>117</sup> AM. BAR ASS’N, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL COMMISSION 19–20 (1989) (“The FTC’s strengths are best employed in cases that challenge conduct in an industry in which the FTC has gained experience by using its full panoply of powers, by publishing studies and by giving guidance in various forms. Resources are conserved, quality is improved, and consistency is increased by agency specialization.”) (I served as counsel to the committee).

Amicus briefs are particularly important because of the opportunity to contribute to court opinions when an enforcement agency is not a party.<sup>118</sup> Given the role of equilibrating tendencies, amici need to remind courts of the context that lay behind a decision. Consider *Matsushita*. Defendants-petitioners' brief unsurprisingly cited *Monsanto* five times and quoted the "tends to exclude the possibility of independent action" line twice.<sup>119</sup> The Solicitor General, in an amicus brief filed three days after petitioners, cited *Monsanto* only once, not quoting the "tends to exclude" line, but observing that summary judgment can be especially important "in a case such as this one, where it is alleged that defendants have violated the antitrust laws by charging prices that are too low."<sup>120</sup> Missing was any caution about limiting the aggressive approach to summary judgment to vertical per se cases, or to those cases and to predatory pricing cases. Although plaintiffs-respondents devoted a paragraph

---

<sup>118</sup> Stephen Calkins, *The Antitrust Conversation (Continued)*, in EUROPEAN COMPETITION LAW ANNUAL 2013 at 231 (Philip Lowe, Mel Marquis & Giorgio Monti eds., 2016); Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001). This is not just an American activity. The European Commission has submitted written observations to national courts at least two or three times a year since 2009. For observations authorized by the relevant national court to be reported, see Eur. Comm'n, *Commission Observations to National Courts (Amicus curiae observations, Article 15(3))*, ec.europa.eu/competition/court/antitrust\_amicus\_curiae.html.

A powerful recent example is *Woodman's Food Market, Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016). The district court denied a motion to dismiss a challenge to Clorox's decision to provide large-size packages only to warehouse clubs, relying particularly on FTC guidelines and on two very old (1940 and 1956) opinions. *Woodman's Food Mkt., Inc. v. Clorox Co.*, 2015 WL 420296 (W.D. Wis. Feb. 2, 2015). The court of appeals reversed in an opinion that gave great weight to an FTC amicus brief disowning the old opinions and clarifying the guidelines. See Brief of Fed. Trade Comm'n as Amicus Curiae Supporting Defendants-Appellants and Reversal, *Woodman's Food Market*, 833 F.3d 743 (No. 15-3001). The court explained that the Commission's "reasoned opinions deserve our respectful consideration." *Woodman's Food Market*, 833 F.3d at 749.

<sup>119</sup> Brief for Petitioners at 13, 18, 20–21, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (No. 83-2004); see also Reply Brief for Petitioners at 3–5, 9–10, *Matsushita*, 475 U.S. 574 (No. 83-2004) (11 cites to *Monsanto*, with one reference to excluding the possibility of independent action).

<sup>120</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 9–10, *Matsushita*, 475 U.S. 574 (No. 83-2004).

In *First National Bank v. Cities Service Co.* . . . this Court ruled that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy on the basis of circumstantial evidence in the form of parallel conduct can defeat summary judgment only by showing that the evidence is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. . . . The *Cities Service* rule safeguards against the possibility that parallel behavior manifesting only the workings of a competitive market might be deemed illegal, an outcome that "could deter or penalize perfectly legitimate conduct." *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 8. It is particularly important that courts adhere strictly to that rule in a case such as this one, where it is alleged that defendants have violated the antitrust laws by charging prices that are too low. Application of the *Cities Service* principle in such circumstances avoids the imposition of penalties on independent, unilateral conduct that is reducing prices, increasing competition, and thereby directly benefiting consumers.

*Id.*

to *Monsanto*, in which they explained the distributor-termination background of the case, they never disagreed with the appropriateness of the *Monsanto* wording. Ironically, it was only the petitioners, in their reply brief, that suggested (indirectly) limiting *Monsanto*:

Indeed, the decision in *Monsanto* expressly recognizes that courts must be particularly vigilant against speculative antitrust conspiracy claims in a case such as this, in which there is a threat that pro-competitive conduct (i.e., the promotion of interbrand competition in *Monsanto*, and the charging of ‘low’ prices here) may be penalized and deterred.<sup>121</sup>

The Supreme Court failed to set out in clear language any such limitation.

Judges do not operate in a vacuum, so even with respect to judicial thinking, multiple avenues should be pursued.<sup>122</sup> And even apart from an interest in influencing judges, it makes sense to nurture a culture of competition. Competition advocacy has a well-earned reputation for providing a cost-effective way to enhance competition.<sup>123</sup> The sometimes-unexpected results that can flow from equilibrating tendencies make it important regularly to be promoting competition values.

### C. NURTURE THE SYSTEM OF COMPETITION LAW

Agencies serve as guardians of the system of competition law. No other entities have the incentive and ability to preserve what is good and lessen the harm caused by what is bad. If the competition system is working well, consumers will benefit, but agencies themselves will also benefit.

One easy example is FTC administrative adjudication. As a matter of basic good government the agency wants this process to be efficient and fair, and seen as such. Of course, it wants that. But the agency also wants this because of the costs imposed by alternative perceptions. For instance, it is routine for defendants to claim that lengthy administrative trials are an important factor

---

<sup>121</sup> Reply Brief for Petitioners, *supra* note 118, at 9.

<sup>122</sup> As Andrew Gavil has written based on his review of internal Supreme Court papers, “Perhaps the most significant revelation, however—and potentially the most worthy of continued attention and debate—is the commanding role played by the economic intuitions of the Justices and their seeming discretion to indulge those intuitions.” Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN’S L. REV. 553, 621 (2005).

<sup>123</sup> See *Advocacy*, FED. TRADE COMM’N, [www.ftc.gov/policy/advocacy](http://www.ftc.gov/policy/advocacy); *Competition Advocacy Papers*, DEP’T OF JUSTICE (June 30, 2015), [www.justice.gov/atr/competition-advocacy-papers](http://www.justice.gov/atr/competition-advocacy-papers); see also *Advocacy*, CANADIAN COMPETITION BUREAU (Nov. 5, 2015), [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_03557.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03557.html). The UK Competition and Markets Authority gives more pointed advice to markets, for instance for grocery promotions to be clearer. See Press Release, Competition and Mkts. Auth., Groceries Promotions to Be Clearer for Shoppers (Apr. 27, 2016); see also *Markets*, Gov.UK, [www.gov.uk/topic/competition/markets](http://www.gov.uk/topic/competition/markets).

that counsels against enjoining a merger pending such a trial.<sup>124</sup> The agency has to want administrative adjudication to work efficiently if only to lessen the impact of such arguments. Critics of the FTC's merger regime have also emphasized "the specter of additional years-long administrative litigation" as part of an argument for changing the merger rules under which the FTC operates.<sup>125</sup> Thus, the Commission has responded to such critics by pointing to rule revisions "to streamline the administrative process in response to concerns that process was too protracted."<sup>126</sup> And, indeed, the Commission has periodically revised its rules "to streamline the adjudicative review process" and "illustrate the agency's ongoing commitment to reviewing the Rules to ensure the agency hearing process is as efficient as possible."<sup>127</sup>

Similarly the European Commission's Directorate-General for Competition has patiently listened to global (including American) complaints about alleged due process failings.<sup>128</sup> The administrative enforcement system has been criti-

---

<sup>124</sup> See *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1227–28 & n.8 (W.D. Mo. 1995) ("If the Court issues an injunction, it is likely that Oak Hill will no longer be in business by the time the FTC gets around to conducting a hearing on the merits of this dispute.") (claiming an average of three years between complaint and initial decision), *aff'd*, 69 F.3d 260 (8th Cir. 1995).

<sup>125</sup> *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on S. 2102 Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, S. Comm. on the Judiciary*, 114th Cong. 8 (2015) (testimony of Abbott B. Lipsky, Jr.). The "SMARTER" Act, H.R. 2745 (companion to S. 2102), passed the House March 23, 2016, but failed to advance. In 2017 it (now H.R. 659) has been voted out of committee (Apr. 5, 2017). See *H.R. 659—Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017*, CONGRESS.GOV, [www.congress.gov/bill/115th-congress/house-bill/659](http://www.congress.gov/bill/115th-congress/house-bill/659). This time the (acting) chair of the FTC supports the legislation. See Maureen K. Ohlhausen, *The Federal Trade Commission's Path Ahead*, 2 CRITERION J. ON INNOVATION 31, 38 (2017). And Mr. Lipsky was recently acting director of the Bureau of Competition.

<sup>126</sup> *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on S. 2102 Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Edith Ramirez, Chairwoman of the Fed. Trade Comm'n).

<sup>127</sup> Press Release, Fed. Trade Comm'n, *FTC Modifies Part 3 of Agency's Rules of Practice* (Aug. 12, 2011); see also Press Release, Fed. Trade Comm'n, *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice* (Apr. 27, 2009) (announcing changes that "expedite the prehearing, hearing, and appeal phases; streamline discovery and motion practice; and ensure that the FTC can apply its substantive expertise, as appropriate, earlier in the process."). See generally D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 321–22 (2003) (reviewing earlier reforms).

<sup>128</sup> See IVO VAN BAEL, *DUE PROCESS IN EU COMPETITION PROCEEDINGS* (2011); Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817 (2009); Douglas H. Ginsburg & Taylor M. Owings, *Due Process in Competition Proceedings*, 11 COMPETITION L. INT'L 39 (Apr. 2015); Christopher B. Hockett, *From the [ABA Antitrust] Section Chair: Antitrust and Due Process*, ANTITRUST, Spring 2014, at 3; Anne MacGregor & Bogdan Gecic, *Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings*, 3 J. EUR. COMPETITION L. & PRAC. 425 (2012).

cized as lacking fundamental hallmarks of fairness.<sup>129</sup> The European Commission has responded by repeatedly expanding the powers and functions of the Hearing Officer, issuing “best practice” guidance documents, and taking other steps to address concerns.<sup>130</sup> Since perception matters as well as reality, the Commission has also forcefully defended its administrative system as “arguably one of the most transparent competition enforcement systems in the world.”<sup>131</sup>

Since courts will engage in equilibrating activities stimulated by private as well as public enforcement, government agencies have a vested interest in a competition enforcement system that functions well for both. In part this is simply a recognition that case law made in private litigation, perhaps even in response to private-litigation issues, impacts government enforcers. This is obviously true in the United States, where outside of mergers and criminal enforcement, antitrust pretty much *is* private antitrust.<sup>132</sup> As only one sharp example, *Twombly* is a private case motivated by concerns about private litigation, but it provides the standard under which the Antitrust Division must operate as well.<sup>133</sup>

---

<sup>129</sup> See WILLIAM E. KOVACIC & MARIO MARINIELLO, COMPETITION AGENCY DESIGN IN GLOBALISED MARKETS 7 (2016).

<sup>130</sup> See, e.g., Wouter P.J. Wils, *The Role of the Hearing Officer in Competition Proceedings Before the European Commission*, 35 WORLD COMPETITION 431 (2012); Wouter P.J. Wils, *The Oral Hearing in Competition Proceedings Before the European Commission*, 35 WORLD COMPETITION 397 (2012); Press Release, Eur. Comm’n, Competition: Commission Improves Rules for Access to the File in Merger and Antitrust Procedures (Dec. 13, 2005) (IP/05/1581).

<sup>131</sup> Philip Lowe, Dir. Gen. DG Competition, Eur. Comm’n, Remarks at CRA Conference on Economic Developments in Competition Law: Due Process in Antitrust 7 (Dec. 9, 2009), [ec.europa.eu/competition/speeches/text/sp2009\\_19\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2009_19_en.pdf); see also Alexander Italianer, Dir. Gen. DG Competition, Eur. Comm’n, Remarks at the Annual Conference on International Antitrust Law and Policy: Safeguarding Due Process in Antitrust Proceedings (Sept. 23, 2010), [ec.europa.eu/competition/speeches/text/sp2010\\_06\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf) (reviewing improvements).

<sup>132</sup> During the past decade, the United States was the plaintiff in only 2.1% of antitrust suits filed in federal district courts. See Table C-2, *U.S. District Courts—Civil Cases Filed, by Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, [2007–16]*, UNITED STATES COURTS, [www.uscourts.gov/data-table-numbers/c-2](http://www.uscourts.gov/data-table-numbers/c-2). The proof of agreement Supreme Court cases discussed herein are private lawsuits, as are the key cases on: predatory pricing—*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); boycott—*NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); refusal to deal—*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); resale price maintenance—*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); price fixing—*Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); tying—*Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); market division—*Palmer v. BRG of Georgia*, 498 U.S. 46 (1990); price discrimination—*Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); and more.

<sup>133</sup> See, e.g., *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 672–74 (E.D. Mich. 2011) (DOJ allegations “plausible” under *Twombly*); Plaintiffs’ Response to Defendant’s Partial Motion to Dismiss or, in the Alternative, for a More Definite Statement at 3 n.2, *United States v. Dean Foods Co.*, No. 2:10-cv-00059 (E.D. Wis. Mar. 11, 2010) (arguing that *Twombly* preserved notice pleading).



If a consensus develops that private plaintiffs' lawyers are bringing frivolous or vexatious cases, this can harm the standing of competition law. If "everyone knows" that plaintiffs' lawyers bring weak class actions and settle them cheaply but with significant attorneys' fees, courts will be more likely to turn a jaundiced eye on such class actions as come before them.<sup>134</sup> The notorious "coupon settlements"<sup>135</sup> did real harm to private antitrust enforcement.

The Federal Trade Commission began getting involved in class action policy issues, filing amicus briefs opposing settlements it regarded as problematic.<sup>136</sup> Former Commissioner Leary explained that the FTC had an interest in keeping costs down and helping real consumers, and also in making law "appear[ ] to be both sensible and fair."<sup>137</sup> This is not an abstract notion, but rather one of considerable importance to the development of substantive competition law. If participants in the antitrust system are abusing that system, the resultant disrespect will prove harmful to government and private enforcers alike.

Competition agencies benefit from a healthy system of private enforcement. Weak cases are harmful—but strong cases are beneficial. Although the principal benefits of private enforcement are compensation and deterrence,<sup>138</sup> good private cases also can help develop sound and sometimes innovative

---

<sup>134</sup> "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting). *American Express* was one of a series of cases celebrating arbitration as a preferred remedy in part because of "the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

<sup>135</sup> *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 950 (9th Cir. 2015). The [Senate Judiciary Committee] report cites and criticizes coupon settlement awards that provide class members with "\$30 to \$40 discounts" on a future cruise, "a \$5 to \$10 voucher good for future purchases of particular computer hardware or software products," "\$1 off every subsequent \$5 purchase" at a chain of restaurants, "a 30 percent discount on selected products" during a one-week time period, \$55 to use on a purchase of a new crib from a defendant crib producer accused of making defective cribs, "\$1.25 off a \$25 dollar [video] game", and so on.

*Id.* (second alteration in original) (citing S. REP. NO. 109-14, at 15-17 (2005)).

<sup>136</sup> *E.g., Federal Trade Commission's Memorandum of Law as Amicus Curiae, Moore v. Verizon Commc'ns Inc.*, 2013 WL 4610764 (N.D. Cal. Aug. 28, 2013) (No. CV 09-1823); *see* Thomas B. Leary, Former Comm'r, Fed. Trade Comm'n, Remarks Before the Class Action Litigation Summit (June 26, 2003); *Cf.* Press Release, Fed. Trade Comm'n, FTC Files Amicus Brief in U.S. District Court Opposing Proposed Class Action Settlement with Debt Buyer Midland Funding LLC (June 23, 2011) (consumer protection case); Fed. Trade Comm'n's Memorandum of Points and Authorities in Support of Motion to Intervene for the Limited Purpose of Opposing Class Counsel's Fee Application or, in the Alternative, to Participate as Amicus Curiae, *In re: First Databank Antitrust Litig.*, 96 F. Supp. 2d 96 (2002) (No. 1:01-cv-00870) (opposing allegedly excessive fees).

<sup>137</sup> Leary, *supra* note 136.

<sup>138</sup> Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 8 (2013).

competition law.<sup>139</sup> Lawyers involved in private litigation, on either side, may end up joining an enforcement agency. Expert witnesses working for private clients might later work for the government. It is so much healthier to have two sides of issues that pay, not just one. And the realistic option of private litigation means that government enforcers can decline to pursue a matter and know that the complainants have a real alternative.

Agency interest in a healthy enforcement system provides an incentive to get involved—through amicus filings, of course, but also through research, testimony, speeches, conferences, and press releases. Thus, the agencies properly weigh in on whether arbitration clauses improperly eliminate private rights, because “[p]rivate actions are an important supplement to the government’s civil enforcement efforts under federal competition laws . . . .”<sup>140</sup> And when there is a risk of private standing being improperly denied, the agencies should get involved: “The United States and the Federal Trade Commission . . . have a strong interest in the substantive and procedural aspects of those [antitrust] laws.”<sup>141</sup>

It is of considerable importance to the European Commission and national competition authorities, thus, that the transition to a more robust system of private enforcement work well. It would be well worth investing resources in monitoring developments and promoting sensible rules, procedures, and decisions.

#### D. CORRECT MISPERCEPTIONS AND MISUNDERSTANDINGS

What matters is not just the reality of the competition system, but also the perception of the reality. If it is generally perceived that discovery is out of control, that private litigation does little good, that FTC administrative adjudi-

---

<sup>139</sup> Competition law has benefited from plaintiff “wins” in *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990) (per curiam); *NCAA v. Board of Regents of University of Georgia*, 468 U.S. 85 (1984); *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980); and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), but also from innovative lower-court cases, such as *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (importance of “slots” in predatory pricing success), and many more. The Solicitor General relied on successful private pay-for-delay cases to persuade the Supreme Court that a circuit split called for granting the petition that resulted in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), see Petition for a Writ of Certiorari, *FTC v. Watson Pharm., Inc.*, No. 12-416, at 13 (citing *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 214–18 (3d Cir. 2012), *vacated*, *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co.*, 570 U.S. 913 (2013) (remanded for further consideration in light of *Actavis*)); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 905–09 (6th Cir. 2003); and *Andrx Pharms., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 806–15 (D.C. Cir. 2001)). And even private plaintiff defeats clarify the law.

<sup>140</sup> Brief for the United States [with the FTC] as Amicus Curiae Supporting Respondents at 1, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (No. 12-133) (Jan. 2013).

<sup>141</sup> Brief for the United States and the Fed. Trade Comm’n as Amici Curiae in Support of Appellee at 1, *Ritz Camera & Image, LLC v. Sandisk Corp.*, 700 F.3d 503 (Fed. Cir. 2012) (No. 12-1183) (supporting standing to challenge fraudulently-procured patent monopoly).

cation is unfair and takes too long, that due process is lacking, that politically favored entities are unfairly favored, and so on, those perceptions are likely to have consequences.<sup>142</sup> When the perceptions are incorrect, it behooves an enforcement agency to try to correct them.

Correcting misperceptions is not always easy, especially when the misperceptions benefit defendants and likely defendants. Major law firms tend, as a general matter, to represent corporate clients that are much more likely to be antitrust defendants than plaintiffs. The immensely talented lawyers at those firms engage in honest commentary when writing or blogging or speaking or working on bar association activities—but they have to know, in the back of their minds, that the setting forth of positions likely to please defendants is more likely to please clients and potential clients.<sup>143</sup> Even academics may well be serving as “of counsel” to a major law firm—again, writing and speaking the truth as they see it but inevitably knowing that the firm’s clients might be more pleased with some efforts than with others.<sup>144</sup> Any advocate tasked with developing and advancing pro-defendant arguments is likely to work creatively to identify and explicate arguments that are persuasive—often to the advocate as well as the audience. Thus, there is a ready group of commentators who might seem prone to emphasizing a more pro-defendant point of view. Indeed, my European friends have noted that in the United States, the “revolving door” tends to connect agencies and major law firms.<sup>145</sup> Lawyers from a few more plaintiff-oriented firms have joined the discussion, as

---

<sup>142</sup> See Gavil, *Bookends*, *supra* note 41, at 24 (lamenting “the Court’s repeated indulgence of its now running, yet very debatable narrative, about abuses of the private right of action and the limited uses of antitrust”).

<sup>143</sup> Knowledgeable observers can quickly think of examples where major law firms are retained to promote agency intervention or even to bring lawsuits. As a general matter, however, law firms are more likely to represent class action defendants than a class; to earn more substantial fees representing merging parties than representing objectors; to defend rather than to bring monopolization/abuse of dominance cases; etc.

<sup>144</sup> Service as “of counsel” can benefit the competition system by improving academics’ understanding of the practice of law, by helping law firm clients better understand their obligations, and by allowing academic expertise to improve advocacy, so, to be clear, I do not criticize the practice (and indeed in the past have served as “of counsel” to a global law firm).

<sup>145</sup> Of the 13 former Assistant Attorney Generals (including Acting) listed on the Division web page, 10 went to major law firms: William J. Baer (Arnold & Porter); Thomas O. Barnett (Covington); Deborah A. Garza (Covington); A. Douglas Melamed (WilmerHale, then Intel, and then Stanford faculty); John M. Nannes (Skadden); Leslie C. Overton (Alston & Bird); Sharis A. Pozen (Skadden, then General Electric); R. Hewitt Pate (Hunton & Williams, then Chevron); Christine A. Varney (Cravath); and Joseph F. Wayland (Simpson Thacher). Three went directly to corporations: Anne K. Bingaman (LCI International Corp., a long-distance carrier, then other corporations); Charles A. James (Chevron); and Joel Klein (Bertelsmann, then Chancellor of New York City Schools, then News Corp.). See *Speeches by Former Assistant and Deputy Assistant Attorneys General*, DEP’T OF JUSTICE (June 16, 2017). None went to firms known for doing plaintiffs’ work, public interest organizations, or directly to academia.

have some public interest organizations,<sup>146</sup> but the scales are not evenly balanced.

An agency can only try its best, using the full set of tools: speeches, articles, press releases, testimony, amicus briefs, and other publications. But it should always be on the lookout for opportunities.<sup>147</sup> Commissioner Maureen Ohlhausen provided a particularly laudable example by responding to criticism of FTC administrative adjudication by publishing a detailed study and defense of the practice.<sup>148</sup>

A favorite personal example involves Judge Richard Posner’s opinion in *Blue Cross & Blue Shield United v. Marshfield Clinic*.<sup>149</sup> As originally issued, the opinion contained somewhat exuberant praise for most favored nations clauses.<sup>150</sup> The FTC filed an amicus brief that succeeded in persuading the court to qualify that praise. Twenty years later, the Second Circuit quoted that corrected language as part of the important Justice Department win against Apple.<sup>151</sup>

#### E. INVEST IN RESEARCH

Competition enforcement—and competition enforcement agencies—benefit from better understanding of the competition enforcement system. The payoff may not be immediate, but it is very real.<sup>152</sup> Research can be conducted internally or, even better when properly arranged, by external experts.<sup>153</sup>

The FTC offers a number of good examples, including Commissioner Ohlhausen’s example referenced above. The Commission’s multi-decade-long campaign against anticompetitive “pay for delay” settlements was in-

---

<sup>146</sup> Examples include the AMERICAN ANTITRUST INSTITUTE, [www.antitrustinstitute.org](http://www.antitrustinstitute.org) (disclosure: I serve on the advisory board); CONSUMERS UNION, [consumersunion.org/](http://consumersunion.org/); and CONSUMER FEDERATION OF AMERICA, [consumerfed.org/](http://consumerfed.org/).

<sup>147</sup> For a then-agency-official putting in a good word for litigation, see Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN’S L. REV. 1 (1998).

<sup>148</sup> Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016).

<sup>149</sup> *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995).

<sup>150</sup> For the full account, see Calkins, *The Antitrust Conversation*, *supra* note 118, at 625.

<sup>151</sup> *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015) (“[W]e are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be ‘misused to anticompetitive ends in some cases.’”) (quoting *Marshfield Clinic*, 65 F.3d at 1415).

<sup>152</sup> See William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295 (2016); AM. BAR ASS’N, REPORT, *supra* note 117, at 87–91 (importance of research).

<sup>153</sup> For a good example, see AMELIA FLETCHER & BRUCE LYONS, GEOGRAPHIC MARKET DEFINITION IN EUROPEAN COMMISSION MERGER CONTROL (2016).

formed by two significant studies.<sup>154</sup> Among the most powerful examples of research paying dividends is the FTC's retrospective studies of hospital mergers.<sup>155</sup> An FTC-DOJ losing streak in challenging hospital mergers prompted the FTC to use its investigatory powers to revisit hospital merger decisions. The results both reinvigorated and refocused the agency's efforts, and re-armed them with a persuasive story to tell.<sup>156</sup>

Research needs are not limited to areas of specific agency enforcement. It matters if judges perceive antitrust as "a perfect storm of treble damages, large discovery costs, and relaxed pleading standards,"<sup>157</sup> and certainly one can find assertions to that effect.<sup>158</sup> But is that "perfect storm" a reality? Antitrust enforcement would benefit from additional good, reliable evidence.<sup>159</sup>

How accurate is *Twombly*'s assertion that antitrust discovery is expensive? As support for the proposition, *Twombly* quotes a 20 year old case (*Associated General Contractors*) referring to "a potentially massive factual controversy" and a Seventh Circuit opinion referring to the "costs of modern federal antitrust litigation."<sup>160</sup> But the latter refers principally to the former, and the former merely said that "[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."<sup>161</sup> *Twombly* also cites a student law review note and the Manual for Complex Litigation, which states that some antitrust litigation—not all—is appropriate for treatment as

---

<sup>154</sup> FED. TRADE COMM'N, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (2010); FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002); see, e.g., *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 408 (2012) (relying on FTC study); *King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 404 n.21 (3d Cir. 2015) (same).

<sup>155</sup> See Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Remarks at George Washington University School of Law, ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium: Retrospectives at the FTC: Promoting an Antitrust Agenda (June 28, 2013); Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, Remarks at AAI Healthcare Roundtable: Competition and Healthcare—Enforcement and Policy Priorities: To Know Where You're Going, Look at Where You've Been (Feb. 22, 2017).

<sup>156</sup> See, e.g., *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn. State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016).

<sup>157</sup> *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 444 (4th Cir. 2015) (Wilkinson, J., concurring in part and dissenting in part).

<sup>158</sup> See, e.g., Daniel A. Crane, *Optimizing Private Enforcement*, 63 VAND. L. REV. 675 (2010).

<sup>159</sup> For an impressive effort generally supportive of the benefits of private enforcement see Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269 (2013).

<sup>160</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

<sup>161</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

complex litigation.<sup>162</sup> Finally, it cites a Memorandum from the chair of the Advisory Committee on Civil Rules, which reported that in cases (not just antitrust cases) “where discovery is actively employed” it can represent “as much as 90% of the litigation costs.”<sup>163</sup> Certainly this suggests there are issues, but it is far from proving the point. And what is the point, anyway? A major, complicated antitrust case may require more discovery—than what? Than another major, complicated case? If all that one is saying is that *some* antitrust cases are major and complicated, then that is not justification for being demanding about complaints in all antitrust cases.

#### F. PROMOTE DESIRABLE EQUILIBRATION

Another self-evident point is that (re)adjustments can benefit consumers (and make life easier for enforcement agencies), and there is no reason not to highlight and promote such adjustments. *Monsanto* and *Business Electronics* were directly responsive to the Court’s concern about false positives flowing from the per se rule for resale price maintenance. Courts were very demanding of proof of a resale price agreement. But, of course, the per se rule for resale price maintenance ended in 2007.<sup>164</sup>

Courts will adjust to that change. In 1984—more than 30 years ago—the Court wrote that it was “of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages.”<sup>165</sup> That distinction is now obviously less important.<sup>166</sup> Once an agreement is the beginning, rather than the end, of analysis, courts are and should be more willing to find an agreement.<sup>167</sup> The competition agencies can speed up an adjustment by highlighting

---

<sup>162</sup> *Twombly*, 550 U.S. at 558–59 (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)).

<sup>163</sup> *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Honorable Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure, 192 F.R.D. 354, 357 (1999)).

<sup>164</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>165</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

<sup>166</sup> For an energetic assertion that *Leegin* presents the opportunity to excise the “tends to exclude” approach from vertical agreement cases—by the winning lawyer in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)—see M. Laurence Popofsky, *Does Leegin Liberate the Law Governing Horizontal Conspiracies from Its Vertical Contamination?*, 78 ANTITRUST L.J. 23 (2012); see also Louis Kaplow, *The Meaning of Vertical Agreement and the Structure of Competition Law*, 80 ANTITRUST L.J. 563, 617 (2016) (“[B]ecause all vertical restraints are now subject to the rule of reason, the Supreme Court may for that reason . . . be inclined to reverse *Colgate* and *Monsanto*.”).

<sup>167</sup> The point is well presented in Herbert J. Hovenkamp, *Leegin, The Rule of Reason, and Vertical Agreement* 6 (U. Iowa Legal Stud. Res., Paper No. 10-40, 2010); see also 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1623a (4th ed. 2017).

this in speeches, publications, amicus briefs, and enforcement actions. They can both take actions that serve to push back against excesses of *Monsanto* and its adoption in *Matsushita*, and to highlight the changed circumstances when doing so. (In the struggle over the proof required for an agreement, recognition should also go to *Broadcast Music, Inc. v. CBS, Inc.*'s<sup>168</sup> holding that some agreements on price are not price-fixing and to *California Dental Association v. FTC*'s<sup>169</sup> caution about allowing “quick look” analysis of questionable agreements.)<sup>170</sup>

The FTC provided a recent example in *In re Fortiline*.<sup>171</sup> This was an “invitation to collude” case involving a distributor communicating to a manufacturer engaged in dual distribution—some selling to end customers, some selling to distributors (including the respondent). Commissioner Ohlhausen dissented, writing that she found the evidence “ambiguous” and was “concerned that imposing liability in such equivocal factual circumstances may chill procompetitive vertical conduct in markets with dual distribution.”<sup>172</sup> Although the secrecy with which the actual evidence is protected makes a confident judgment difficult, the majority probably has the better of the argument. (There was no opinion for the Commission, but there was a thoughtful Analysis to Aid Public Comment.) That would make a good case for pushing back against the excesses of *Monsanto*. It would have been better, however, had the Analysis to Aid Public Comment noted the new post-*Leegin* day when it cited *Monsanto* as part of its discussion.<sup>173</sup>

For another example of a possible opportunity to promote readjustment, consider the recent dramatic changes in the rules governing discovery. The Federal Rules of Civil Procedure were amended effective December 1, 2015, in substantial part to make discovery less burdensome. Now discovery must be “proportional;” gone is the plaintiff-beloved wording, “reasonably calculated to lead to the discovery of admissible evidence.”<sup>174</sup> The revised rules

---

<sup>168</sup> 441 U.S. 1 (1979).

<sup>169</sup> *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

<sup>170</sup> The struggle over proof of agreement is effectively highlighted by the contrast between the majority and minority opinions in *Valspar Corp. v. E.I. du Pont de Nemours & Co.*, 873 F.3d 185 (3d Cir. 2017), with the latter arguing for reading *Matsushita* in context and the former applying it broadly.

<sup>171</sup> Agreement Containing Consent Order to Cease and Desist, *Fortiline, LLC*, FTC No. 151-0000 (Aug. 9, 2016).

<sup>172</sup> Dissenting Statement of Maureen K. Ohlhausen, *Fortiline*, FTC No. 151-0000.

<sup>173</sup> *Fortiline, LLC*; Analysis to Aid Public Comment, 81 Fed. Reg. 54,085, 54,088 n.9 (Aug. 15, 2016) (“Certainly, market and price-related communications between a manufacturer and its distributor can be appropriate and procompetitive.”) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764–65 (1984)).

<sup>174</sup> Rule 26(b)(1):

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is rele-

govern “in all proceedings in civil cases thereafter commenced and, insofar as practicable, all proceedings then pending.”<sup>175</sup> Critics from the plaintiff-oriented perspective have harshly attacked the changes as doing serious harm to basic discovery rights;<sup>176</sup> supporters disagree;<sup>177</sup> everyone recognizes the potential for change. The new rules are a “game changer” and a “paradigm shift.”<sup>178</sup>

To the extent that the change *makes* a real change<sup>179</sup>—and does so with respect to competition cases—the legal system should adjust and be a bit less keen to dismiss competition cases out of fear of the risk of discovery.<sup>180</sup> The competition agencies can hasten this adjustment by monitoring the issue and, as appropriate, seeking opportunities to highlight any changes.

## VI. CONCLUSION

Equilibrating tendencies matter. The U.S. competition law system is different because the substantive law evolved in response to the context in which it is applied: treble damages, attorneys’ fees, liberal discovery, class actions, and (in theory) jury trials. Equilibrating tendencies can help explain why Euro-

---

vant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

See Memorandum from Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Chair, Standing Comm. on Rules of Practice and Procedure (June 14, 2014); see also David Crump, *Goodbye, “Reasonably Calculated”; You’re Replaced by “Proportionality”: Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093 (2016); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015).

<sup>175</sup> See Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure, [www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

<sup>176</sup> See Richard Briles Moriarty, *And Now for Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward into a “Dark” Age?*, 39 AM. J. TRIAL ADVOCACY 227 (2015); Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1088–54 (2015).

<sup>177</sup> George Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465 (2016).

<sup>178</sup> Kenneth R. Berman, *Reinventing Discovery Under the New Federal Rules*, LITIG., Spring 2016, at 22.

<sup>179</sup> For a suggestion that the changes may not be sufficient—but also a suggestion that courts (perhaps encouraged by the Justice Department?) could make a difference, see Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1 (2017).

<sup>180</sup> Similarly, to the extent that class actions become a less prominent part of the U.S. system of competition enforcement because of mandatory arbitration, see, for example, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), or because standards become more demanding, see for example, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (Scalia, J.), substantive law should adjust.



pean competition law continues to differ from U.S. law, despite considerable influences pushing towards harmonization.

Now change is coming in Europe. National authorities have become important enforcers, and private enforcement is becoming a reality. The path of change is uneven but it appears to be inevitable. Change builds on change. With these important changes, equilibrating tendencies can be expected. The lessons for enforcement agencies: anticipate equilibrating tendencies; participate in the competition conversation; nurture the system of competition law; correct misperceptions and misunderstandings; invest in research; and promote desirable equilibration.