1-30-2013

Greater international convergence and the behavioural antitrust gambit

Maurice E. Stucke

7 Greater international convergence and the behavioural antitrust gambit

*Maurice E Stucke**

A. INTRODUCTION

Behavioural economics, the management consulting firm McKinsey & Company observed, 'is now mainstream'.[1] It is a staple in graduate economics programmes, business schools, and increasingly law schools. Best-selling books and business journals feature behavioural economics. Behavioural economics has led to subspecialties in the areas of: subjective well-being and happiness; the media, including demand-driven media bias; marketing; finance; criminal justice; sports; health care; political economy; institutional design; labour economics; industrial organisation; and of course antitrust.[2] Behavioural economics is global, in that it is not associated with a particular university or locale.

Behavioural economics is also timely. The economic crisis raises important issues of market failure, weak regulation, moral hazard, and our lack of understanding about how many markets actually operate. In 2011, the Organisation for Economic Co-operation and Development ('OECD') noted how 'the worst financial and economic crisis in our lifetime'[3] has prompted policy makers to ask: 'Are our economic theories, our economic models, and our assumptions still valid?'[4] Organisations, including the OECD, the American Bar Association's Section of Antitrust

* The author wishes to thank J Thomas Rosch and Spencer Weber Waller for their helpful comments.

1 Dan Lovallo & Olivier Sibony, 'The Case for Behavioral Strategy' (2010) McKinsey Q 30.

2 AP Reeves & ME Stucke, 'Behavioral Antitrust' (2011) 86 Indiana LJ 1527, 1528–30.

3 OECD, 'Secretary-General's Strategic Orientations for 2011 and Beyond' (Meeting of the OECD Council at Ministerial Level, May 2011) 2.

4 Ibid 2.

Law,[5] Canada's International Development Research Centre,[6] the British Institute of International and Comparative Law,[7] and the American Antitrust Institute[8] are considering behavioural economics' implications for antitrust policy. Competition authorities, including the United States Federal Trade Commission,[9] the European Commission,[10] and the United Kingdom's Office of Fair Trading[11] are all examining behavioural economics.

---

[5] 'Behavioral Economics in Antitrust and Consumer Protection Law' (60th American Bar Association Section of Antitrust Law Spring Meeting, Washington, DC, March 2011).

[6] Fifth IDRC Pre-ICN Forum on Competition and Development (Istanbul, April 2010).

[7] British Inst of Int'l and Comparative Law, <http://www.biicl.org/clf/clf meetings2009/> (hosting Competition Law Forum on behavioural economics in July 2009).

[8] '9th Annual Conference: The Next Antitrust Agenda, American Antitrust Institute' (June 2008), <http://www.antitrustinstitute.org/content/9th-annual-conference-next-antitrust-agenda> (audio recordings).

[9] JT Rosch, 'Behavioral Economics: Observations Regarding Issues that Lie Ahead' (Vienna Competition Conference, June 2010), <http://www.ftc.gov/speeches/rosch/100609viennaremarkspdf>; JT Rosch, 'Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency' (Conference on the Regulation of Consumer Financial Products, Jan 2010), <http://www.ftc.gov/speeches/rosch/100106financial-productspdf>.

[10] Emanuele Ciriolo, 'Behavioural Economics in the European Commission: Past, Present and Future' (Oxera Agenda, Jan 2011), <http://www.scp-knowledge.eu/knowledge/behavioural-economics-european-commission-past-present-and-future>; Eliana Garcés, 'The Impact of Behavioral Economics on Consumer and Competition Policies' (2010) 6 Competition Pol'y Int'l 145; European Union Comm'n for Consumers, 'Why Consumers Behave the Way They Do: Commissioner Kuneva Hosts High Level Conference on Behavioural Economics' (Press Release Nov 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1836&format=HTML&aged=0&language=EN>.

[11] Office of Fair Trading (UK), 'The Impact of Price Frames on Consumer Decision Making' (2010), <http://www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf>; Matthew Bennett, John Fingleton, Amelia Fletcher, Liz Hurley & David Ruck, 'What Does Behavioral Economics Mean for Competition Policy?' (2010) 6 Competition Pol'y Int'l 111, 118; Amelia Fletcher (Chief Economist, OFT), 'What Do Policy-Makers Need from Behavioural Economists?' (European Commission Consumer Affairs Conference, Brussels, Nov 2008), <http://ec.europa.eu/consumers/conferences/docs/AF_transcript_en.pdf>.

Behavioural economics is timely and mainstream. I discuss elsewhere some of the implications of behavioural economics on cartels,[12] mergers,[13] monopolies,[14] and competition policy generally.[15]

This chapter considers how behavioural economics affects the quest among the world's competition authorities for achieving convergence, ie the extent to which countries share similar norms of competition policy, substantive standards, and procedures and have similar levels of institutional capability. It begins by outlining convergence and its importance as a policy goal for competition agencies. To better assess how behavioural economics can affect the degree of convergence, the chapter evaluates the current extent of convergence on three antitrust issues: first, on a theory of competition; second, on the goals of competition law; and, third, on the legal standards. The chapter concludes in assessing whether behavioural economics will foster greater convergence or divergence among competition agencies.

B. IMPORTANCE OF CONVERGENCE

Competition laws and agencies have proliferated over the past decade. In its first decade, the International Competition Network ('ICN') has grown to

---

[12] Maurice E Stucke, 'Morality and Antitrust' (2006) Columbia Business L Rev 443; Stucke, 'Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels' in Caron Beaton-Wells & Ariel Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Hart Publishing 2011).

[13] Reeves & Stucke (n 2); Stucke, 'Behavioral Economists at the Gate: Antitrust in the Twenty-First Century' (2007) 38 Loyola University Chicago LJ 513.

[14] Stucke, 'Should the Government Prosecute Monopolies?' (2009) University of Illinois L Rev 497; Stucke, 'How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?' (2010) 63 SMU L Rev 1069.

[15] Stucke, 'Money, Is That What I Want? Competition Policy & the Role of Behavioral Economics' (2010) 50 Santa Clara L Rev 893; Stucke, 'Are People Self-Interested? The Implications of Behavioral Economics on Competition Policy' in Academic Society for Competition Law (ed), *More Common Ground for International Competition Law?* (Edward Elgar 2011); Stucke, 'Reconsidering Competition' (2011) 81 Mississippi LJ 107; Stucke, 'What is Competition?' in Academic Society for Competition Law (ed), *The Goals of Competition Law* (Edward Elgar 2012); Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College L Rev 551. See also Stucke, 'Antitrust 2025' CPI Antitrust Journal (Dec 2010), <http://ssrn.com/abstract=1727251>; Stucke, 'New Antitrust Realism' (Jan 2009) GCP Magazine <http://ssrn.com/abstract=1323815>.

117 competition agencies from 103 jurisdictions.[16] With so many competition laws and agencies, convergence is a hot topic. Two of the ICN's four principal goals for the next decade involve convergence: 'minimising incompatible outcomes across jurisdictions'; and 'reducing unnecessary cost and burdens from duplicative or inconsistent procedures'.[17]

Convergence: A Definition

It is helpful to define convergence, given its importance. Convergence, for the ICN, is 'the voluntary adoption of widely-accepted norms of competition policy, substantive standards, procedures and levels of institutional capability'.[18] The term implies that the norms, standards, and procedures come together from different directions and eventually rest. But convergence, the ICN recognises, is not a stable end-state. Convergence occurs after periods of experimentation (and thus divergence) with different norms and procedures.[19] During periods of divergence, jurisdictions experiment with processes and substantive standards. This divergence, as in any evolutionary process, can foster policy innovations.[20] So the ICN promotes the free flow of information about different agencies' ongoing experiments and feedback from the experiments. A positive feedback loop emerges from diffused standards and processes. As some countries experiment, others learn what processes and standards work well (and whether they are well suited for their jurisdictions) and they can voluntarily adopt those standards

---

[16] ICN, 'Operational Framework' (4 March 2011): The ICN 'is a project-oriented, consensus-based, informal network of antitrust agencies that addresses antitrust enforcement and policy issues of common interest and formulates proposals for procedural and substantive convergence through a results-oriented agenda and structure' <http://www.internationalcompetitionnetwork.org/about/operational-framework.aspx>. Its activities 'take place on a voluntary basis'. Where the ICN reaches consensus on recommendations, 'it is left to its members to decide whether and how to implement the recommendations, for example, through unilateral, bilateral or multilateral arrangements'.

[17] ICN Steering Group, 'The ICN's Vision for its Second Decade' (10th Annual Conference of the ICN, The Hague, May 2011) 5.

[18] Ibid 2.

[19] Ibid 5.

[20] William E Kovacic (Chairman, US Federal Trade Comm'n), 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (Bates White Fifth Annual Antitrust Conference, Washington, June 2008) 5, <www.ftc.gov/speeches/kovacic/080602bateswhite.pdf ('some degree of difference is not only inevitable but healthy').

or processes. One example of this experimentation and adoption is the cartel leniency programme.[21]

Consequently, by promoting experimentation (and some divergence) among competition agencies, the ICN can foster greater convergence on standards and procedures. Under this evolutionary perspective, antitrust standards and procedures never completely converge.[22] The trend toward convergence, in this innovation process, follows periods of greater divergence. As countries converge on the process or standard, the next iteration of experimentation is underway.[23]

Convergence: Importance

Antitrust policy can be dynamic. But it cannot be too dynamic. For some countries, the rule of law constrains the extent to which they can experiment and diverge from current legal norms. Antitrust law, which seeks to maximise the benefits from a free-market economy while minimising its attendant risks and correcting its failures, must adhere to basic rule-of-law principles that support any market economy. Antitrust's legal standards should promote accuracy (minimising false positives and negatives), be easy to apply, yield predictable results, leave little room for subjective input from decision-makers, reach as wide a scope of conduct as possible, and promote transparency. Antitrust's legal standards and processes should decrease the 'degrees of freedom with which a court may pursue personal, idiosyncratic goals'.[24] Under these rule-of-law principles, market participants can channel behaviour in welfare-enhancing directions and better predict their rivals' behaviour.

---

[21] The United States revised in 1993 its Corporate Leniency Program to make it easier and more attractive for companies to report their cartel activity. Many other countries have subsequently implemented a leniency programme. ICN, 'Drafting and Implementing an Effective Leniency Program' in 'Cartel Enforcement Manual' (2009), <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>; Kovacic (n 20) 5; James M Griffin (Deputy Ass't Attorney Gen, US Dep't of Justice, Antitrust Div), 'The Modern Leniency Program After Ten Years: "A Summary Overview of the Antitrust Division's Criminal Enforcement Program"' (American Bar Association Section of Antitrust Law Annual Meeting, San Francisco, Aug 2003), <http://www.justice.gov/atr/public/speeches/201477.htm>.

[22] Legal standards, for example, may converge (such as cartels being per se or presumptively illegal), but processes to deter, detect and prosecute cartels continue to evolve.

[23] Kovacic (n 20) 6: 'History of competition policy has featured a continuing search for optimal substantive rules and implementation methods.'

[24] Douglas H Ginsburg & Derek W Moore, 'The Future of Behavioral Economics in Antitrust Jurisprudence' (2010) 6 Competition Pol'y Int'l 97.

Consequently, antitrust must balance the predictability desired under the rule of law and the experimentation desired for policy innovation. Some divergence promotes policy innovations, as countries experiment with modifications to the legal standards and processes. Countries accordingly need some flexibility to experiment and adopt. But too much divergence can subject market participants to unpredictable and inconsistent antitrust enforcement. If countries frequently experiment with different legal standards and processes, firms cannot form expectations as to the boundaries of their and their competitors' behaviour. Firms may refrain from welfare-enhancing activity and opt for less efficient forms of doing business. Thus too little or too much experimentation and divergence can retard commerce and economic growth.[25]

C. WHERE DOES ANTITRUST POLICY CURRENTLY STAND ON CONVERGENCE?

As discussed above, antitrust policy is dynamic – but, given rule-of-law concerns, the shifts are gradual. In assessing how behavioural economics can affect the degree of convergence/divergence, one first must assess the extent of convergence today on antitrust policy. Antitrust, like other innovations, can follow an S-curve life cycle.[26] So where is antitrust policy currently along the S-curve? If antitrust policy is early in the life cycle, then one expects many variations that explore the basic concepts and processes. Divergence is at its zenith. As some antitrust processes and standards prove more successful, convergence increases. As the standards and processes mature, the incremental gains from refinements diminish. The tinkering does not yield significant benefits. Approaching the end of the S-curve, entrepreneurs have greater incentive to experiment.

Within the United States, antitrust theory – premised on rational market participants, with perfect willpower who pursue their economic self-interest – is near (or at) the end of the S-curve. The quest over the past thirty years was to converge on a single economic antitrust goal and to use neoclassical

---

[25] Christine A Varney (Ass't Att'y Gen, Antitrust Div, US Dep't of Justice), 'Our Progress Towards International Convergence' (36th Annual Fordham Competition Law Institute Annual Conference, September 2009) < http://www.justice.gov/atr/public/speeches/250264.htm> 2.

[26] Eric D Beinhocker, *The Origin of Wealth: Evolution, Complexity, and the Radical Remaking of Economics* (Harvard Business School Press 2006) 254–55 (describing process where performance initially is 'poor and progress slow' followed by periods of increased technological advances until the technology matures and 'the curve of performance improvement begins to taper off').

economic price theory to inform antitrust's legal standards. Price theory, for some, has unified antitrust law and fostered greater convergence. In 2001, antitrust scholar and jurist Richard Posner wrote how US antitrust law to a great extent was 'normalized, domesticated'.[27] By the early 2000s, Posner surmised that:

> Almost everyone professionally involved in antitrust today – whether as litigator, prosecutor, judge, academic, or informed observer – not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.[28]

Proponents of price theory generally consider US antitrust law before the mid-1970s an 'intellectual disgrace',[29] and 'not economically coherent'.[30] Price theory, for them, supplied antitrust with economically rational principles.[31] Enforcers and courts can analyse the likely or actual price effects of mergers and restraints in properly defined antitrust markets. The effects-based legal analysis seeks to determine whether the restraint will reduce some measure of efficiency (such as allocative efficiency) or economic welfare (such as consumer or total welfare).

However, other countries' antitrust polices, especially those recently enacted, may not be at the end of the S-curve. So in assessing the current level of convergence of antitrust globally, one must assess the convergence on three interrelated issues: on a theory of competition; over the goals of competition law; and on the legal standards. In theory, the antitrust legal standards should promote the shared theory of competition, which in turn yields the shared antitrust goals.

Limited Convergence on a Theory of Competition[32]

The first issue – 'What is competition?' – seems so basic that it need not be asked. The concept of competition is central to competition policy and

---

[27] Richard A Posner, *Antitrust Law* (2nd edn, Chicago 2001) viii.

[28] Ibid ix. See also *Chesapeake & Ohio Ry Co v US* 704 F2d 373, 376 (7th Cir 1983) (Posner, J): 'The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field.'

[29] Posner (n 27) viii.

[30] Douglas H Ginsburg & Eric M Fraser, 'The Role of Economic Analysis in Competition Law' in Ian McEwin (ed), *Getting the Balance Right: Intellectual Property, Competition Law and Economics in Asia* (Hart Publishing forthcoming).

[31] Posner (n 27) viii.

[32] This section is derived from my longer article, 'Reconsidering Competition' (n 15) which explores the current divergence over a theory of competition.

economic thinking in general. Competition law focuses on anti*competitive* restraints.[33] One oft-described goal is to ensure an effective competitive process.[34] So when policymakers agree that competition laws should promote an effective competitive process, competition on the merits, and fair competition, are they referring to the same conception of competition? Although the Sherman Act was enacted over a century ago, the concept of an 'effective competitive process' remains elusive even in the United States.

Competition authorities certainly agree on some parameters of an 'effective competitive process'. Most believe in a free-market economy, where private actors provide many, if not most, goods and services. They can also agree on the desired effects of a competitive process, such as 'low prices, high quality products, a wide selection of goods and services, and innovation'.[35]

Such desired competitive effects, however, do not supply a theory of competition. For example, the Chicago, Post-Chicago, and Populist antitrust schools all agree on the desired effects; yet they have different theories of competition. Moreover the desired effects can conflict. The US Supreme Court, for example, stresses the importance of price competition.[36] Yet the Court has on occasion accepted higher prices (and diminished intra-brand

---

[33] Eg *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877, 898–99 (2007) (noting how courts can 'devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones').

[34] ICN Unilateral Conduct Working Group, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' ('2007 ICN Report') (6th Annual ICN Conference, Moscow, May–June 2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> 6.

[35] European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2008/C 265/07); *Northern Pacific Railway Co v US* 356 US 1, 4 (1958) ('unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress'); US Dep't of Justice, 'Antitrust Enforcement and the Consumer', <www.justice.gov/atr/public/div_stats/276198.pdf>; Fed Trade Comm'n, 'Competition Counts: How Consumers Win When Businesses Compete', <http://www.ftc.gov/bc/edu/pubs/consumer/general/zgen01.shtm>.

[36] *Pac Bell Tel Co v linkLine Communic'ns Inc* 555 US 438, 129 S Ct 1109, 1120 (2009) ('Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition') (quotation omitted); *Nat'l Collegiate Athletic Ass'n v Bd of Regents of Univ of Okla* 468 US 85, 107–8 (1984) (restraint 'that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this

competition) for more services (and potentially more inter-brand competition).[37] Higher prices at times are needed for innovation.[38]

Why hasn't there been greater convergence on this relatively basic issue, 'what is competition'? One reason is the divergence, in the US and globally, over the premises of any theory of competition, including the rationality, willpower and self-interest of market participants. Competition, like any theory, depends on its premises, the validity of which may not hold true across industries, countries and time. Some, notably the Chicago and Post-Chicago Schools, differ as to the extent and effect of informational asymmetries. But both start with the premise that market participants are rational, have willpower and purse their self-interest to maximise wealth. Others start with a different premise: many consumers and firms are imperfectly rational, have limited willpower, are concerned about fairness, and are willing to punish unfair behaviour even when not in their economic self-interest. Their theory of competition accordingly will differ. In particular, issues of systemic risk, behavioural exploitation, herding, overconfidence bias, the importance of maintaining trial-and-error feedback loops, and competitive diversity will be of increased importance in such theories.

A second reason for the divergence is that competition, like athletic contests, does not exist abstractly. Athletic contests are the consequence of specific rules, informal norms, technologies and skills. Likewise, competition is defined in part by the country's laws and social and moral norms. The kinds of competition (fair versus unfair) thus vary depending upon the country's legal and informal institutions.[39] As economist RH Coase wrote,

---

fundamental goal of antitrust law' and restrictions on 'price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit').

[37] *Leegin* (n 33) 895–96.

[38] *Eldred v Ashcroft* 537 US 186, 215–16 (2003) (need to balance encouraging innovation by rewarding inventors with the right to exclude others for a limited time from using the patented invention with the 'avoidance of monopolies which stifle competition without any concomitant advance in the "Progress of Science and useful Arts"').

[39] The term 'competition on the merits' invariably involves normative considerations of unfair competition: 15 USC § 45(a) (2006) (prohibiting 'unfair or deceptive acts or practices in or affecting commerce'); Commission Regulation 864/2007, art 6 [2007] OJ L 199/40 (discussing unfair competition and acts restricting free competition); Free Trade Agreement Between the European Union and its Member States and the Republic of Korea [2011] OJ L 127/6; *FTC v Sperry & Hutchinson Co* 405 US 233, 244 (1972) ('unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior').

'the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it'.[40] Economist Douglass North further explains: 'How the game is actually played is a consequence of the formal structure [eg, formal rules, including those set by the government], the informal institutional constraints [eg, societal norms and conventions], and the enforcement characteristics.'[41] The rules of the game define the opportunity set in the economy: they affect the market participants' incentives;[42] they determine the kinds of competition[43] and competitive behaviour;[44] and they determine the extent to which the competition occurs.

Consequently, whilst price theory has informed our theory of competition, no consensus exists in the US or worldwide on a theory of an effective competition process or 'competition on the merits'.[45] Some consider competition as static price competition migrating toward an idealised end-state (the economic model of perfect competition). Others view competition as a dynamic process. Today, dynamic competition is generally recognised as more important. But the US antitrust agencies and courts 'tended to avoid dynamic efficiency analysis', focusing instead on static price competition and productive efficiencies.[46] Competition can occur (i) on various dimensions (such as price, quality, service, variety, innovation) across markets;

---

[40] RH Coase, 'The Institutional Structure of Production' (1992) 82 Am Econ Rev 713, 717–18. See also FA Hayek in Bruce Caldwell (ed), *The Road to Serfdom: Text and Documents – The Definitive Edition* (University of Chicago Press 2007) 87: Competition 'depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make sure it operates as beneficially as possible'.

[41] Douglass C North, *Understanding the Process of Economic Change* (Princeton 2005) 52.

[42] Ibid 158.

[43] Ludwig von Mises in Bettina Bien Grieves (ed), *Bureaucracy* (Liberty Fund 2007) 86: noting competition occurring even in authoritarian centrally planned economies where sycophants compete to curry favour with superiors; thus the issue is not whether competition exists, but 'what kind of competition should exist'.

[44] David J Gerber, *Law and Competition in Twentieth Century Europe* (OUP 1998) 232–65.

[45] OECD, 'Policy Brief: What Is Competition on the Merits?' (2006), <http://www.oecd.org/dataoecd/10/27/37082099.pdf> 1: noting that the term 'competition on the merits' has 'never been satisfactorily defined', which has 'led to a discordant body of case law that uses an assortment of analytical methods', which in turn has 'produced unpredictable results and undermined the term's legitimacy along with policies that are supposedly based on it'.

[46] Ibid 4. See also Kenneth M Davidson, *Reality Ignored: How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered*

(ii) operating at different levels of efficiency; (iii) with different levels of product differentiation, entry barriers, and transparency; (iv) at different stages of the product life cycle; and (v) with different demands for technological innovation.

Limited Convergence on Antitrust Goals[47]

After identifying what competition can or cannot provide under different legal and informal norms, policymakers must agree on the competition law's objectives. Are antitrust's objectives purely economic, as Posner argues? Are they also non-economic? Can there be multiple antitrust goals? If so, how do policymakers rank them?

Price theory has brought some convergence. Over the past 30 years, US antitrust policy has shifted from acknowledging multiple political, social, moral and economic goals to the current debate over a single economic goal (namely to promote certain efficiencies or forms of economic welfare). Moreover, consensus exists that antitrust furthers some goals and not others. We see this with antitrust immunities. If antitrust can promote *any* societal goal, antitrust immunity is unnecessary. The immunised activity would arguably promote some antitrust goal, and thus be otherwise legal. By immunising industries and activities from antitrust liability, policymakers implicitly recognise that some behaviour is inconsistent with antitrust's aims.[48]

On one level, global consensus exists. The ICN recently completed three surveys of its member competition authorities to identify their countries' antitrust objectives. Thirty of 33 countries in a 2007 ICN survey identified promoting consumer welfare as an objective for their monopolisation statutes.[49] The EU noted how, 'over the past two decades, the Commission's

---

the Global Economy (CreateSpace 2011) 85–86: intellectual confinement of antitrust to static price competition when dynamic competition provides the greater benefits.

[47] This section is derived from my longer article 'Reconsidering Antitrust's Goals' (n 15).

[48] See eg *Matter of Wheat Rail Freight Rate Antitrust Litig* 759 F2d 1305, 1312 (7th Cir 1985): 'Where Congress has failed to anticipate conduct and declare it immunized, a court, faced with an antitrust claim against a regulated firm based on this conduct, must craft a new particularized accommodation between the goals of the antitrust laws and the goals of regulation. If the court determines that the application of the antitrust laws to the challenged conduct would be contrary to the regulatory goals, then it creates an implied immunity to shield the regulated firm from antitrust liability.'

[49] ICN (n 34).

antitrust and merger policy more effectively placed the emphasis on consumer welfare, notably through an increasingly refined economic analysis'.[50] Many competition officials agreed on other antitrust goals, such as ensuring an effective competitive process, maximising efficiency, and ensuring economic freedom.[51]

However, the reality is that convergence is limited. Despite the push for a single economic antitrust goal, there is no consensus in the US or worldwide on any well-defined goal. Four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximising efficiency, and ensuring economic freedom) have failed to unify antitrust analysis. No consensus exists on what the four goals mean or how they are achieved. For example, the objective of an effective competitive process is simply a belief in other objectives, which can conflict. As far as consumer welfare is concerned, whilst the 2011 ICN survey found 'some agreement' among the surveyed 57 authorities, the ICN found that most countries did 'not specifically define consumer welfare and appear[ed] to have different economic understandings of the term'.[52] The ICN surveys therefore suggest that the phrase 'promoting consumer welfare' provides little guidance as an antitrust goal.[53] No consensus exists on what 'consumer welfare' actually means, who the consumers are, how to measure consumer welfare, or designing legal standards to further this goal. As a former FTC Chair observed:

> [T]he concept of 'consumer welfare' and the principle of protecting 'competition, not competitors' are so open-ended that their true meaning in practice depends on how they are applied. It is a relatively barren exercise for EU and US officials to invoke these phrases without taking the further difficult step of achieving agreement on what these phrases mean.[54]

---

[50] European Commission, 'Report on Competition Policy 2010' COM (2011) 328 final, 5.

[51] ICN (n 34).

[52] Ibid 9; Netherlands Competition Auth, 'Competition Enforcement and Consumer Welfare: Setting the Agenda' ('2011 ICN Survey') (ICN Jubilee Conference, The Hague, May 2011), <http://www.icn-thehague.org/page.php?id=78> 4–6. In the 2011 survey, only seven of the 57 authorities agreed with the provided definition of consumer welfare. Ibid 18, fnn 34–35 (consumer welfare 'relates only to consumer surplus' and excludes 'non-economic considerations'). Most antitrust authorities (38 of the 57) had 'no explicit definition' of consumer welfare. Ibid 19 and fn 37.

[53] Ibid 3 (noting 'connection between consumer welfare and the practical enforcement of competition law is not always straightforward' and that 'there may be a considerable gap between policy statements and practice').

[54] Kovacic (n 20) 9.

There has thus been limited convergence globally or in the US on antitrust's goals. As the ICN found, the 'objectives of competition laws vary widely from one jurisdiction to another … [P]arallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws.'[55]

Greater Convergence on Antitrust Legal Standards

The EU, US and other jurisdictions have converged on an effects-based legal standard to assess many restraints. The US Supreme Court over the past 30 years has migrated toward its effects-based legal standard. The rule of reason is the Court's 'prevailing',[56] 'usual',[57] and 'accepted standard'[58] for evaluating conduct under the Sherman Act. The EU likewise has noted its own 'major strides' since the late 1990s 'towards an effects-based approach'.[59] The Commission claims that today the EU's 'economic approach aimed at maximising consumer welfare has become embedded into the antitrust enforcement framework'.[60] The EU and US Horizontal Merger Guidelines share a common analytical framework in defining relevant markets, measuring market concentration, their theories of unilateral and coordinated anticompetitive effects, their entry analysis, and the available defences.

Consistency in approach does not necessarily lead to consistency of outcome. In fact, an effects-based legal standard, when applied by multiple jurisdictions with different antitrust objectives and theories of competition, should yield greater divergence than convergence. One would expect mergers approved in one jurisdiction enjoined in others. One would expect enforcers and courts reaching different conclusions when evaluating the same unilateral and vertical restraints. Surprisingly, however, such pandemonium is missing today. Competition authorities have reached far fewer inconsistent outcomes than one would predict under an effects-based legal standard, with different theories of competition and antitrust goals. Multiple

---

[55] ICN Advocacy Working Grp, 'Advocacy and Competition Policy Report' (ICN Conference, Italy, 2002), <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf> 32.

[56] *Continental TV Inc v GTE Sylvania Inc* 433 US 36, 49 (1977).

[57] *Leegin* (n 33) 882.

[58] Ibid 885.

[59] European Commission (n 50) 5. But even in an effects-based test, 'outcomes often will hinge upon the quantum and quality of evidence that a court demands before it is willing to find actual anticompetitive effects or to infer likely adverse effects': Kovacic (n 20) 12.

[60] European Commission (n 50) 6.

jurisdictions have infrequently clashed (at least publicly) over outcomes. The more salient examples over the past 20 years are the EU–US clashes over the *Boeing/McDonnell Douglas* merger,[61] the *GE/Honeywell* merger[62] and the EU's prosecution of Microsoft for abusing its dominant position.[63]

So even though price theory has not yielded greater convergence on a theory of competition and antitrust's goals, one could conclude that price theory has yielded greater convergence in deciding antitrust cases. To some extent this is correct. If price theory predicts higher prices post-merger, then competition agencies likely would enjoin the transaction. Consequently, one can conclude that competition authorities have converged, in agreeing on the methodology and economic tools to review horizontal mergers and global anticompetitive restraints.

However, other factors may explain the relative paucity of inconsistent outcomes. One factor relates to the opportunity for divergence. Although more jurisdictions now have competition laws, few jurisdictions actively enforce them. Even fewer cases involve multinational firms' conduct affecting multiple jurisdictions. One area rife for divergence is merger review. The US and EU agencies are among the more active in reviewing mergers; yet even the EU and US investigate relatively few mergers, and challenge even fewer. The EU over the past two decades examined over 4,500 mergers (which on average is 225 annually). It approved without conditions about

---

[61] *Boeing/McDonnell Douglas* (Case IV/M877) Commission Decision 97/816/EC [1997] OJ L 336.

[62] Deborah Platt Majoras (Deputy Ass't Att'y Gen, Antitrust Div, US Dep't of Justice), 'GE-Honeywell: The US Decision' (Antitrust Law Section, State Bar of Georgia, Nov 2001), <http://www.justice.gov/atr/public/speeches/9893.pdf>.

[63] Thomas O Barnett (US Dep't of Justice, Ass't Att'y General for Antitrust), 'Issues Statement on European Microsoft Decision' (Press Release 17 Sept 2007), <http://www.usdoj.gov/atr/public/press_releases/2007/226070.pdf (expressing concern that Court of First Instance's legal standards on monopolistic conduct may harm consumers); RH Pate (US Dep't of Justice, Ass't Att'y General for Antitrust), 'Issues Statement on the EU's Decision in its Microsoft Investigation' (Press Release 24 Mar 2004), <http://www.usdoj.gov/atr/public/press_releases/2004/202976.pdf> ('while the imposition of a civil fine is a customary and accepted aspect of EU antitrust enforcement, it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement. For this fine to surpass even the fines levied against members of the most notorious price fixing cartels may send an unfortunate message about the appropriate hierarchy of enforcement priorities').

90 per cent of them.[64] Likewise, the US challenged fewer than 5 per cent of all reported mergers. The challenged mergers are rarely blocked outright. In 2010, for example, the EU received 274 merger notifications.[65] The EU prohibited one merger (between Olympic Air and Aegean Airlines of Greece); in the 16 other mergers where the EU identified problems, the parties agreed to structural or behavioural remedies.[66] So one reason for the few inconsistent outcomes is the infrequent opportunities for divergence.

Second, inconsistent outcomes require at least two jurisdictions evaluating the same merger or restraint under similar market conditions. Thus the concept of convergence differs from consistent outcomes. Take, for example, Coca-Cola's acquisition of China Huiyuan, the country's largest juice company.[67] Whether the United States and China reach the same outcome in their merger review differs from the question whether the countries use and apply the same legal analysis. The public outcry when China blocked the merger came not from the fact that the merger was approved in other countries. Rather it was the belief that other countries, under the same market conditions, would have approved the merger.[68] So the relevant measure of convergence is not the number of inconsistent outcomes among different countries. Rather the relevant measure is whether, given the same factual record of particular market conditions, antitrust agencies would reach consistent outcomes. (For example, how many of the 100 competition authorities when presented the evidence in the Coca-Cola/China Huiyuan merger would reach the same outcome for the same reasons?)

Can price theory lead to true convergence on competition standards? For some, neoclassical price theory is 'responsible for the prominence of simply-stated legal norms in antitrust decisions'.[69] They assert that 'neoclassical economic analysis has promoted predictability and consistency in

---

[64] Joaquín Almunia (Vice President of the European Commission responsible for Competition Policy), 'Policy Objectives in Merger Control' (Fordham Competition Conference, New York, Sept 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/561&format=HTML&aged=0&language=EN&guiLanguage=en>.

[65] Ibid.

[66] Ibid.

[67] 'Coca-Cola Purchase of China's Huiyuan Fails to Pass Antimonopoly Review' *China View* (18 March 2009), < http://news.xinhuanet.com/english/2009-03/18/content_11031482.htm>.

[68] 'Coca-Cola in China: Squeezed out – China indicates the real targets of its Anti-Monopoly Law: outsiders' *The Economist* (18 Mar 2009), <http://www.economist.com/node/13315056>.

[69] Ginsburg & Moore (n 24) 92.

antitrust jurisprudence'[70] in the United States. Indeed one could argue that the US Supreme Court's confidence in its and the lower courts' capacity to adjudicate complex economic issues has increased over the past 30 years. Otherwise, why would the Court shift from its simpler per se illegal rules to an effects-based rule of reason?

Whilst at times price theory does improve predictability and consistency (the Coca-Cola/China Huiyuan merger, for example, under price theory would unlikely be challenged), it would be a mistake to conclude that price theory has yielded (or can yield) significant convergence. First, it is unclear what convergence remains even among the remaining Chicago School adherents.[71] Second, price theory has not delivered in the US the predictability and consistency desired under the rule of the law. The Supreme Court, for example, does not believe currently that its antitrust legal standards are rational and easy to administer by generalist judges. Instead, the Court is sceptical of its and the lower courts' competency to reach the right outcome. The Court complains of antitrust's 'considerable disadvantages'.[72] It complains about antitrust's 'interminable litigation' and 'inevitably costly and protracted discovery phase',[73] as hopelessly beyond effective judicial supervision.[74] It complains that antitrust's per se illegal standard might increase litigation costs by promoting 'frivolous' suits.[75] And it fears the 'unusually' high risk of inconsistent results by antitrust courts.[76] So the Court now places greater faith in the antitrust function being subsumed by regulatory agencies.[77]

Nor has price theory yielded over the past 30 years many simply stated legal norms. The usual legal standard under the Sherman Act today is a highly context-dependent inquiry. The Court 'presumptively applies rule of

---

[70] Ibid.

[71] John Cassidy, 'Letter from Chicago: After the Blowup' *New Yorker* (11 Jan 2010) 28. Two Chicago School judges, for example, disagreed on the mutual fund industry's efficiency. *Jones v Harris Assocs* 527 F3d 627 (7th Cir 2008), reh'g en banc denied, 537 F3d 728 (7th Cir 2008). The Court ultimately eschewed the issue, holding that the debate between Easterbrook and Posner was 'a matter for Congress, not the courts': *Jones v Harris Assocs* 130 S Ct 1418, 1431 (2010).

[72] *Verizon Commc'ns Inc v Law Offices of Curtis v Trinko LLP* 540 US 398, 412 (2004).

[73] Ibid 414.

[74] *Bell Atl Corp v Twombly* 550 US 544, 558–60 (2007) (quoting *Asahi Glass Co v Pentech Pharm Inc* 289 F Supp 2d 986, 995 (ND Ill 2003)).

[75] *Leegin* (n 33) 895.

[76] *Credit Suisse Sec (USA) LLC v Billing* 551 US 264, 281–82 (2007).

[77] *linkLine* (n 36) (Breyer J concurring): When a 'regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits'; *Credit Suisse* (n 76) 283; *Trinko* (n 72) 414–15.

reason analysis',[78] which involves a 'flexible' factual inquiry into a restraint's overall competitive effect and 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed'.[79] It 'varies in focus and detail depending on the nature of the agreement and market circumstances'.[80] Despite its label, the rule of reason is not a directive that businesses and consumers can readily understand and internalise (such as clear prohibitions on agreeing with one's competitors to fix prices). Instead, the term embraces antitrust's most open-ended principles, making prospective compliance with its requirements exceedingly difficult.[81] Few, if any, antitrust scholars today praise the rule of reason for promoting accuracy (in minimising false positives and negatives), administrability (being easy to apply), consistency (yielding predictable results), objectivity (in leaving no subjective input from the decision-makers), or transparency (in making the standard and its objectives understandable).

The ICN is therefore clearly correct regarding the need for greater convergence over the next decade. Any current convergence is precarious, and will be tested as antitrust enforcement expands beyond the coterie to jurisdictions (such as China) that have recently enacted or revamped their competition laws. It will be further tested with the increase in private antitrust enforcement in other jurisdictions.

D. WILL BEHAVIOURAL ECONOMICS INCREASE CONVERGENCE OR DIVERGENCE?

As discussed in the preceding part, neoclassical economic theory has provided some convergence in the application of effects-based legal standards, and to a lesser extent on a theory of competition and antitrust goals. But price theory has not brought antitrust to the promised land. How do we know this? First, if price theory did yield simply stated legal norms, and promoted predictability and consistency in antitrust jurisprudence, then the US courts would be quite sanguine about their ability to adjudicate antitrust issues. That is not the case. Second, predictable and consistent enforcement

---

[78] *Texaco Inc v Dagher* 547 US 1, 5 (2006).

[79] *Am Needle Inc v Nat'l Football League* 130 S Ct 2201, 2217 (2010) (quoting *Board of Trade of Chicago v US* 246 US 231, 238 (1918)).

[80] Federal Trade Comm'n & US Dep't of Justice, 'Antitrust Guidelines for Collaborations among Competitors' (2000) § 12 <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> 4.

[81] Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 42 UC Davis L Rev 1375.

of simply stated norms is generally considered a good thing. Other countries, in theory, would have adopted price theory. They too would be predictably and consistently enforcing the simply stated norms. So if the 117 antitrust agencies were applying price theory today, the ICN's goal would be preventing divergence (not achieving convergence). With every country in antitrust's promised land, the ICN would seek, as Judge Posner did before the economic crisis, to preserve the status quo. This too does not comport with reality.

Even if price theory, as some insist, brought us to the promised land, competition policy, as section B discusses, is dynamic – not static. Arguing for an antitrust policy grounded in economic analysis is different than arguing for one grounded in price theory. Economic theories, like antitrust policy, evolve.[82] Not surprisingly, some recommend that competition agencies hire 'newly-minted PhD economists who will in time depart' to keep 'the agency in touch with current economic thinking'.[83] It would be paradoxical for competition authorities to recruit newly minted economists only to scoff at the current economic thinking. If the senior officials cling to the Chicago School beliefs prevalent when they or their predecessors were in graduate school, they should hire instead economists trained in economic history. As behavioural economics (with its more realistic assumptions of human behaviour) goes mainstream in academia and the business world, one would expect newly minted lawyers and economists to bring the current economic thinking to the competition agencies and law firms. How should the competition agencies respond?

The agencies cannot ignore or downplay the new economic insights. Agencies, after all, must experiment to some degree for antitrust policy to innovate. So if antitrust policy is not yet in the promised land, in terms of convergence, to what extent will behavioural economics take us closer to, or further from, the promised land?

Returning to the three key issues identified at the outset, it is true that behavioural economics can inform our theory of competition. However, it will not provide, as neoclassical economic theory does, a simple unifying principle. Dispositional and situational factors, which affect human behaviour, can vary across regions, time and experience.[84]

---

[82] Kovacic (n 20) 7: 'Lest they be frozen in time, good competition policy systems consciously evolve through their capacity to adapt analytical concepts over time to reflect new learning.'

[83] Ginsburg & Fraser (n 30) 13.

[84] Donald C Langevoort, 'The Behavioral Economics of Mergers and Acquisitions' (2011) 12 Tenn J Bus L 65 (2011): people at any moment can act 'more or less rationally depending on a host of situational, emotional, and other contingent influences'.

To illustrate the complexity that behavioural economics brings and the importance of situational factors on market behaviour, consider one recent behavioural field experiment.[85] The study varied a lender's direct mail solicitation to 53,194 former borrowers in South Africa. The solicited products were small, high-interest (the annual percentage rate was 200 per cent), short-term, uncollateralised loans. The targeted audience was mainly the working poor who lacked the credit history and collateralised wealth to borrow from traditional institutional sources, such as commercial banks. The lender's average take-up from direct mail was about 7 per cent (ie 7 of 100 recipients of the mailer would seek a loan). The experiment sought to test whether, and by how much, specific advertising content affected demand (take-up), relative to price.

Neoclassical economic theory predicted some of the field experiment's results. Reducing price (the loan's interest rate by 100 basis points) increased loan takeup by 0.3 percentage points.[86] So for every 13 per cent decrease in interest rate, there was a 4 per cent increase in takeup.[87]

Several results from the field experiment, however, were inconsistent with neoclassical economic theory, but consistent with other behavioural economic experiments.[88] Providing consumers with more choices (showing four example loans instead of one) *reduced* consumer demand. More choices had the same effect in reducing demand as a 25 per cent increase in the interest rate (200 basis points).[89] Competition policy seeks to maximise consumer choice.[90] Consumers often demand more choices.[91] But, as this study confirms, more choices can 'trigger choice avoidance and/or deliberation that makes the advertised product less appealing'.[92] Some results were consistent with modern advertising, but unexplainable under price theory. Including a photograph of an attractive woman in the flyer had the same effect on overall demand as reducing interest rates by 25 per cent (200 basis

---

[85] Marianne Bertrand, Dean Karlan, Sendhil Mullainathan, Eldar Shafir & Jonathan Zinman, 'What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment' (2010) 125 Quarterly J of Econ 263.

[86] Ibid 267.

[87] Ibid 290.

[88] Barry Schwartz, *The Paradox of Choice: Why More is Less* (Harper Collins 2004); Sheena Iyengar, *The Art of Choosing* (Twelve 2010).

[89] Bertrand et al (n 85) 296.

[90] European Commission, 'EU Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' [2004] OJ C 31/03, § 8.

[91] Simona Botti & Sheena S Iyengar, 'The Dark Side of Choice: When Choice Impairs Social Welfare' (2006) 25 J Public Pol'y & Marketing 24, 25–26.

[92] Bertrand et al (n 85) 268.

points).[93] The photo of the smiling woman had a strong effect on male customers (equivalent to reducing interest rate by 316 basis points), with no statistically significant result on female customers.

Lastly, other results from the field experiment are mixed. The deadlines for the offered loans ranged between short (approximately two weeks) and long (approximately six weeks). The behavioural literature suggests that shorter deadlines would spur action and reduce the likelihood of customers procrastinating. However, the study found that '[s]hifting the deadline by two weeks had about the same effect as a 1,000-basis point reduction in the interest rate'.[94]

Two implications of this field experiment are that advertising and context matter. The study's authors found 'it difficult to predict ex ante which advertising content or deadline treatments would affect demand, and some prior findings did not carry over' to their study.[95] Also unresolved was why advertising content matters.[96]

This field experiment – like the behavioural economics literature generally – shows situations where neoclassical economic theory is predictably wrong.[97] But behavioural economics poses several concerns. One concern is that behavioural economics, while identifying the predictive shortcomings of price theory, does not itself provide a simple unifying principle to predict human or firm behaviour. Situational factors can influence behaviour, making it difficult at times to predict outcomes.[98] Another concern is that behavioural economics increases the range of outcomes reached in an antitrust case, and thus injects *more* unpredictability into competition law. Unlike a social sciences behavioural laboratory, the rule of law limits the degree of experimentation in a courtroom. In relaxing the assumptions of market participants' rationality, willpower and self-interest, policymakers can justify anticompetitive outcomes to protect irrational consumers. Price theory, unlike behavioural economics, at least 'narrows significantly the range of outcomes a court may reach in an antitrust case'.[99] Even though price theory may predict wrongly, it promotes greater predictability and consistency in deciding antitrust cases than behavioural economics. So if a

---

93 Ibid 296.
94 Ibid 298.
95 Ibid 302.
96 Ibid 303.
97 See eg Joseph Henrich et al, 'In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies' (2001) 91 American Econ Rev 73–78 (none of participants from 15 small-scale economies from 12 countries on four continents acted as neoclassical economic theory predicted).
98 Ibid.
99 Ginsburg & Moore (n 24) 96.

behavioural experiment suggests that monopolists, due to fairness concerns, may not raise prices when they could,[100] should antitrust law really provide a fairness defence for would-be monopolists, who would not exercise market power because of consumer loyalty concerns? As one US Supreme Court Justice has observed:

> Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.[101]

Thus a rule-of-reason analysis grounded in neoclassical economic theory is relatively better than a rule-of-reason analysis where the court can choose among different economic theories for one that supports its desired outcome.

Behavioural Economics Yielding Increased Convergence

Antitrust, it seems, is at an impasse. Neoclassical economic theory provided some convergence. But it will unlikely yield greater convergence. Indeed, the current mix (no well-accepted theory of competition, an abstract consumer welfare goal, and an open-ended effects-based legal standard) portends greater divergence. On the other hand, behavioural economics, it seems, will not promote greater convergence.

Behavioural economics ultimately represents a gambit. Adopting behavioural economics entails some risk. Policymakers sacrifice the simplicity and organising principles of rational choice theory, and risk greater divergence as enforcers predict market-participants' behaviour under various situational and dispositional factors. But this sacrifice is calculated to gain a greater advantage. In acknowledging the complexity of competition, our limited and incomplete understanding of market behaviour and the competitive system, and the predictive shortcomings of price theory, behavioural economics can shift policymakers' mindset. As scientist Robert May observed:

---

[100] Daniel Kahneman, Jack L Knetsch & Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76 American Econ Rev 728–41.

[101] *Leegin* (n 33) 914–15 (Breyer J dissenting).

> The recognition that simple and fully deterministic rules or equations can generate dynamical patterns which are effectively indistinguishable from random noise has very deep implications for science … It effectively marks the end of the Newtonian dream that knowing the rules will enable prediction; predicting local weather beyond about 10–20 days is not just a problem of computational power, but of the inherent unpredictability of chaotic dynamical systems.[102]

Behavioural economics no doubt adds complexity to the theory of competition. But then, if people were either good or evil, antitrust would be irrelevant. Competition depends on an element of trust, which cannot exist in a world of evil (or self-interested wealth maximisers). If people were virtuous and followed the golden rule, antitrust would be unnecessary.

In recognising behavioural economics, policymakers will acknowledge the shortcomings in relying on an effects-based legal standard built on faulty assumptions to promote an ill-defined consumer welfare goal. They will recognise that antitrust enforcers and courts, taken all together, still would not know how to maximise dynamic, allocative, and productive efficiencies or economic welfare in the long run.[103] As a German Bundeskartellamt official said, we cannot pretend to know what in fact cannot be known.[104] The behavioural antitrust gambit pays off with this self-actualisation. The gambit will not produce a better (or more complex) rule of reason analysis. Instead the gambit will push antitrust away from its current effects-based legal analysis to simpler prospective legal rules and presumptions designed to foster a competitive process. Agencies will take the available empirical economic literature and fashion presumptions of legal or illegal conduct, and specific exceptions.[105] Thus the promise of behavioural economics is to provide the impetus for clearer rules that market participants can internalise and follow.

One sees this trade-off in past US antitrust policy cycles. Up until the late 1970s, the US Supreme Court recognised antitrust's multiple goals. Accordingly, the Court generally (but not always) sought four things. First, it sought legal standards that were administrable for generalist judges.[106]

---

[102] Robert M May, *Stability and Complexity in Model Ecosystems* (Princeton 2001) xviii.

[103] Christian Ewald, 'Competition and Innovation: Dangerous "Myopia" of Economists in Antitrust?' (2008) 4 Competition Pol'y Int'l 253, 261.

[104] Ibid.

[105] Arndt Christiansen & Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"' (2006) 2 J Competition L & Econ 215, 219.

[106] See eg *US v Phila Nat'l Bank* 374 US 321, 362 (1963): 'in any case in which it is possible, without doing violence to the congressional objective embodied in

With some exceptions, the Court turned to the legislative history or common law precedent as a basis for its standards.[107] Second, the Court sought legal standards to enhance predictability. For example, in devising the 30 per cent market share presumption for mergers, the Court sought to foster business autonomy, holding that unless business executives 'can assess the legal consequences of a merger with some confidence, sound business planning is retarded'.[108] The Court's role was to provide clearer guidance on what was civilly (and criminally) illegal under the Sherman Act. Third, the Court sought to prevent the lower courts from being bogged down in difficult economic problems, such as trade-offs between inter- and intra-brand competition.[109] Fourth, not only was this weighing beyond its institutional competence, the Court recognised that the legislature (while subject to rent-seeking) was more politically accountable than the judiciary – so it was for Congress to make these normative trade-offs.[110]

In the past 30 years, however, the Court went in the opposite direction. It increasingly emphasised one type of competition (static price competition) and one antitrust goal (consumer welfare). It de-emphasised antitrust's political, moral and social objectives. It narrowed the applicability of its per se illegal standard and increasingly relied on its context-dependent rule of reason.[111]

Ultimately, the global debate over behavioural antitrust turns on which is the better option: (i) to rely on an effects-based analysis, premised on a simple conception of static price competition, that seeks to promote a single well-defined economic goal; or (ii) to rely on simpler rules and legal presumptions, given the inherent unpredictability of dynamic competition, and antitrust's inherent economic, social, moral and political objectives?

The gambit's likely benefits outweigh its risks. As section C shows, competition authorities have not converged, nor will they likely converge,

---

[the statute], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.'

[107] Stucke (n 81) 1402–3.

[108] *Phila Nat'l Bank*, 374 US at 362.

[109] See, eg, *US v Topco Assoc Inc* 405 US 596 (1972) (neither courts nor litigants could weigh the reduction of competition in one area (eg, intra-brand competition for Topco private-label products among Topco member supermarkets) versus greater competition in another area (eg, inter-brand competition between Topco members' and the major supermarkets' private-label goods); Stucke (n 81) 1404–5.

[110] Stucke (n 81) 1405–6.

[111] Ibid 1407–15; *California ex rel Harris v Safeway Inc* 08-55671, 2011 WL 2684942, 11 (9th Cir July 12, 2011) (noting Supreme Court's reluctance to adopt per se rules where practice's economic impact is not immediately obvious).

on a single well-defined antitrust goal. The United States' quest for a single well-defined goal proved unsuccessful. Nor has US antitrust policy, over the past century, converged on a theory of competition. And if one country cannot achieve convergence, it is doubtful that 100 jurisdictions can. Newer antitrust regimes are unlikely, after the economic crisis, to adopt an incomplete theory of competition or a single economic goal.[112] While jurisdictions can converge on an effects-based analysis, that will be unsatisfactory. As a former FTC chair has said:

> Embedded in EU and US agency evaluations of the highly visible matters … are differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate tradeoff between short-term benefits of a challenged practice and long-term effects, and the robustness of future entry as a means for disciplining firms that presently enjoy dominance. Putting these and other critical assumptions front and center in the discussion, along with the bases for the assumptions, would advance the transatlantic relationship in the future.[113]

Continued reliance on an effects-based legal analysis will not therefore yield greater convergence until enforcers and courts agree on the underlying assumptions of market participant rationality, markets' capacity to self-correct quickly, and the benefits and risks of governmental enforcement. Such convergence is unlikely. Indeed, some competition authorities, such as the OFT, are already trending toward more accurate assumptions of market participant behaviour.

Accordingly meaningful convergence will come by acknowledging the descriptive limitations of static price competition and the incompleteness of any single competition goal. In acknowledging this, competition officials

---

[112] Anti-monopoly Law of the People's Republic of China, art I (law enacted 'for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy'); Republic of South Africa Competition Act ch 1, § 2 (noting competition law is 'to promote and maintain competition in the Republic in order (a) to promote the efficiency, adaptability and development of the economy; (b) to provide consumers with competitive prices and product choices; (c) to promote employment and advance the social and economic welfare of South Africans; (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic; (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons').

[113] Kovacic (n 20) 21.

can recognise that whatever the conception of competition or antitrust goals the first order of convergence is greater transparency and objectivity of the legal standards. Thus the first step toward greater convergence will come from increasing the transparency of antitrust's legal standards (and bringing them closer to the rule-of-law ideals). Indeed, with or without behavioural economics, we are moving in this direction. As a recent ICN survey observed, 'a *clearly set* and *uniformly enforced* standard is, therefore, of utmost relevance for enforcement agencies, the business community and final consumers'.[114] Likewise in its recent *linkLine* decision, the US Supreme Court did not fall back on its 'case-by-case' analysis of the 'particular facts disclosed by the record'.[115] Instead, the Court recognised the need for simpler antitrust standards 'clear enough for lawyers to explain them to clients'.[116]

In increasing the transparency and objectivity of the legal standards, the countries can next tackle convergence on well-defined legal norms. Faced with resource constraints,[117] the United States, like other jurisdictions, will find it harder to justify the protracted, costly rule of reason. Companies will demand legal standards that provide greater transparency, objectivity, accuracy and predictability than the effects-based standard. They increasingly will demand clearer rules that their employees can easily internalise (and reduce compliance costs) that will enable them to reasonably anticipate what actions would be prosecuted so they can channel their behaviour in welfare-enhancing directions.[118]

Displacing the effects-based analysis will be rules that seek to preserve competitive processes and some diversity. Given the complexity of competition in network systems, it is harder today to predict competitive outcomes. For example, one concern is when monopolists through exclusionary behaviour seek to stifle the introduction of variation (new technologies or improvements to current products and services).[119] Monopolists may also

---

[114] Netherlands Competition Authority (n 52) 88 (emphasis added).

[115] *Eastman Kodak Co v Image Technical Services Inc* 504 US 451, 467 (1992).

[116] *linkLine* (n 36) (quoting *Town of Concord Mass v Boston Edison Co* 915 F2d 17, 22 (1st Cir 1990)).

[117] Ed O'Keefe, 'Justice Department Lawyers Say They'll Quit if Regional Offices Close' *Washington Post* (18 Oct 2011), <http://www.washingtonpost.com/politics/justice-department-lawyers-say-theyll-quit-if-regional-offices-close/2011/10/18/gIQA0JzNvL_story.html>.

[118] Netherlands Competition Authority, 2011 ICN Survey (n 52) 88.

[119] Everett M Rogers, *Diffusion of Innovations* (5th edn Free Press 2003) 15–16, 146 (discussing how information exchange, trialability, and observability are crucial in the innovation-development process); Steven Johnson, *Where Good Ideas Come From: The Natural History of Innovation* (Riverhead Books 2010) 41.

impede the market's feedback mechanism (such as preventing consumers' ability to experiment with new products or services)[120] since: 'the monopolist] prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product'.[121] Rather than engage in an effects-based analysis, enforcers can rely, as the European Commission does, on a presumption of illegality.

The gambit does, of course, present risks. One risk of simpler rules and presumptions is a higher cost from false positives and negatives. The belief is that one can minimise these costs through an effects-based analysis. But the predictions under the rule of reason are as sound as the underlying economic theory. Another risk is that setting the presumptions to preserve a competitive process, as one sees with the media ownership regulations, can be contentious.[122] It is not always clear how much diversity is necessary to promote the desired goals. Rent-seeking may be acute (especially if the stakes are high and there is little chance that courts can circumvent the presumption or rule).

But consider the alternative. The current rule of reason is sufficiently supple to induce large firms like Microsoft, Intel and Google to expend millions of dollars on lobbyists to affect the antitrust outcome. The behavioural economic experiments and the agencies' post-merger reviews will continue to identify market behaviour inconsistent with price theory. Businesses, consumers and the antitrust bar will become more sceptical about the current paradigm. More people will question enforcers' and courts' ability to predict competitive outcomes or maximise efficiency through a rule of reason premised on rational choice theory. With or without behavioural economics, market participants increasingly will demand simpler standards, more in accord with the rule of law. Behavioural economics, at least, can empirically support the legal presumptions.

---

[120] See eg *Realcomp II Ltd v FTC* 635 F3d 815, 822 (6th Cir 2011): FTC successfully challenging Realcomp's website and search-function policies that restricted limited-services discount brokers from publishing and marketing non-traditional listings.

[121] European Commission, 'Communication from the European Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EU Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C/45/02 and C/45/22.

[122] Allen P Grunes & Maurice E Stucke, 'Plurality of Political Opinion and the Concentration of the Media' in Karen B Brown & David V Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer 2012).

E. CONCLUSION

By increasing complexity, behavioural antitrust can – paradoxically – increase the demand for simpler legal standards. Rather than directly regulating market participants' behaviour through *ex post* weighing standards, courts can focus on maintaining a competitive structure and preserving the market participants' freedom therein.

However, a long-term advantage from the behavioural antitrust gambit is relevancy. The antitrust challenge over the next decade is not solely achieving greater convergence worldwide on legal standards and procedures. Another challenge is fostering convergence with other important social goals, such as sustainable development, consumption and growth. The year 2011 was one for retrospectives. The ICN celebrated its tenth anniversary and the OECD its 50th anniversary, and the EU celebrated the 40th anniversary of its report on Competition Policy. Unlike the ICN, which concentrated on antitrust policy convergence, the OECD and EU discussed the challenges in aligning antitrust's objectives with other important social policies. One essential area for the EU is where competition policy accounts for 'the protection of the environment and the promotion of sustainable growth'.[123] To the extent policymakers employ behavioural economics in assessing unfair competition, sustainability and well-being, antitrust must keep apace. Otherwise, antitrust risks marginalisation.

[123] European Commission (n 50) 11.