



Sponge

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ABSTRACT

Competition law is often perceived as a stable discipline. In fact, one is often reminded that competition law must be based on economic considerations and reject external social, or political objectives. This article argues that this appealing view—which embodies a sense of purity—is merely an illusion. It ignores the ‘sponge-like’ characteristics of the law—its susceptibility to national peculiarities originating in its design and evident in its application, and its exposure to intellectual and regulatory capture. While the idea of a stable, predictable, and economically-based antitrust discipline is in all of our interests, these traits are not inherent to the law. They are forced onto the sponge in an attempt to ‘discipline’ its natural tendencies, and propagated as reality, to support its legitimacy.

KEYWORDS: competition law, antitrust, industrial policy, lobbying, competition policy, neo-classical economic theory, behavioural economics, jurisprudence

JEL CLASSIFICATIONS: B10, K21, L40, L44, L5

I. INTRODUCTION

When government officials argue for purity, one would expect raised eyebrows. But few question competition officials who, in speeches in foreign lands, praise the ‘purity’ of competition law. They warn the hosts of polluting competition policy with social, ethical, and moral concerns.¹ They warn of industrial policy, regulation, and rent-seeking. After the hosts provide dinner, the competition officials leave for the

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1 See for instance speech by R Hewitt Pate ‘Competition and Politics’ [6 June 2005]: ‘What is the proper role of a competition agency? I think that is easy to sum up: promoting competition. Competition enforcers need to remain narrowly focused. There is a danger in focusing within our discipline on anything other than efficiency and consumer choices in making our decisions. . .’, available at: <<http://www.justice.gov/atr/public/speeches/210522.htm>> accessed 17 June 2016; Also note more recent discussion at the ICN on ‘Competition and Industrial Policy Considerations’; See: Newsletter from the ICN Chair, Andreas Mundt, March 2016.

airport, where they prepare the same speech for another audience. The hosts will politely agree on the key objectives that competition policy should promote, but beneath this veneer, ill-defined terminology, open-ended goals and variances in enforcement philosophy remain.

Differences, in one's understanding of the ends of competition law often transform into a 'purity battle'—the claim that competition analysis has been polluted by some, and that a pure approach, as propagated by others, would deliver better, optimal results. Often, these claims accompany large transactions, state aid, and foreign jurisdictions, possibly threatening the domination of national champions through enforcement of their competition laws. Sometimes these claims will be made by the competition agency. Sometimes by politicians or leading corporations. At times, the true source of the claim—politics, business, law, or economics—may be hard to ascertain.

This is not to say that purity arguments are without merit. A consensus exists that competition law cannot be all things to all people: a panacea for every policy concern, ranging from labour to the protection of national champions. And yet, the pretence of purity may be misleading as it propagates a mirage of objectivity, clarity and analytical superiority—traits that are not always present.

The notion of analytical purity is at the centre of this article. It explores the presence of an objective and systematic core at the heart of the competition discipline. In doing so, it questions the presence of a superior form of competition enforcement and considers the role of competition law as a domestic or regional social policy. The article highlights the inherently dynamic nature of competition law and its wide-ranging goals, scope, and possible outcomes. It further notes how this susceptibility makes competition law a prime target to lobbying and can result in visible, or undetected, intellectual capture.

It is important to stress at the outset that this article does not discount the rule of law. Competition policy should be applied consistently, objectively, accurately, and fairly. This article champions a consistent analytical approach to competition analysis. In line with this, it does not question the value of ongoing international harmonization and assimilation which help align our understanding and application of competition law. The thesis put forward in this article is more nuanced. It concerns the inherent characteristics of the law and the effect that these have on its susceptibility to a multitude of considerations. It argues that the sponge-like² characteristics of competition law make it inherently pre-disposed to a wide range of values and considerations. Its true scope and nature are not 'pure' nor a 'given' of a consistent objective reality, but rather a complex and, at times, inconsistent expression of many values.³

The article begins by considering the porous and absorbent characteristics of competition law. Following this it explores the economic 'membrane'—the

2 'Sponge-like characteristics' and the analogy to 'sponge' in this article refer to 'piece of a soft, light, porous absorbent substance originally consisting of the fibrous skeleton of an aquatic invertebrate but now usually made of synthetic material, used for washing and cleaning.' (Oxford English Dictionary).

3 Eg Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State Created Monopolies, ICN Report (May 2007) 6 <www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 17 June 2016.

significant role played by economic thinking. Having established the images of 'sponge' and 'membrane', it reflects on the use of 'by-pass instruments' to tilt the balance in favour of the wider political agenda. The subsequent discussion considers the impact of this 'enforcement platform' on legal certainty, legitimacy, intellectual and regulatory capture, and the international arena.

II. POROUS AND ABSORBENT CHARACTERISTICS

Recent globalization of competition law enforcement, and increased assimilation between competition regimes, enable us to speak about the common 'DNA' of competition law – the values and characteristics which shape and influence competition law worldwide. While competition laws around the world differ in language, provisions, and interpretation, they reflect large degrees of consensus on what competition law is set to achieve. However, the fact that competition laws draw their core analytical framework from the same source and, as a result, speak an increasingly similar language does not imply a tension-free international landscape of competition enforcement.⁴

To begin with, competition law, like other legal disciplines, is a social construct and stems from the domestic foundations and values of each jurisdiction.⁵ It adapts to social reality, experience and logic, and will vary over time.⁶ Indeed, the validity of a legal system is embedded in society's evolving norms of justice, morality and fairness, rather than in external presupposed norms.⁷ In fact, as will be illustrated below, being a political creation, competition law is inherently susceptible to a wide range of domestic societal variants.

Although guided by economic analysis, distinct social, economic and political foundations foster diversity. Different levels of economic development, market realities, government and enforcement structure all dictate differentiation in the composition of national competition provisions and their implementation.⁸ While key competition law principles are similar across the world, these only form a skeleton

4 Organisation for Economic Co-operation and Development, *The Objectives of Competition Law and Policy* (29 January 2003) CCNM/GF/COMP (2003)3, paras 20–21, <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP\(2003\)3&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP(2003)3&doclanguage=en)> accessed 17 June 2016; The ICN Report (May 2007) (n 3 above).

5 See eg: HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 116; Leslie Green, 'Legal Positivism' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (2009); Andrei Marmor, 'The Nature of Law' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (2011); Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 3–11; Felix S Cohen, 'Ethical Systems and Legal Ideals' in Morris S Cohen and Felix S Cohen (eds), *Readings in Jurisprudence and Legal Philosophy*, vol 2 (first published 1951, Beard Books 2002); John J Flynn, 'Antitrust Jurisprudence: A Symposium on the Economic, Social and Political Goals of Antitrust Policy' (1977) 125(6) *University of Pennsylvania Law Review* 1182–90.

6 Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25(3) *OJLS* 493. See also Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (OUP 2001) 371–409. For an opposing view see Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001); Barak (n 5) 4.

7 See Hart (n 5) 203–04; Also see Leslie Green comment on Hart 'Legal Positivism' (n 5); Also note: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2009) 39–40.

8 William E Kovacic, 'Institutional Foundations for Economic Legal Reform Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 *Chicago-Kent Law Review* 265, 314; Michael Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003).

and as such a theoretical ideal. The situational identity and function of the law is only revealed when embedded in the national setting. In a global setting, this constant fluidity at national level inevitably results in a heterogeneous landscape and, at times, blurred enforcement boundaries.

As the domestic peculiarity is embedded in the law, fragmentation should not be misunderstood as an improper application of competition law. Rather, it may be viewed as an undesirable inconsistency reflecting underlying conflicts between domestic realities and policies.⁹ Such inconsistency may trigger system friction and uncertainty and, to that extent, should be minimized. However, it does not imply the clear presence of a superior competition enforcement model.

Anecdotal reviews of the range of values which play a part in different competition regimes illustrate the 'porous' nature of the law. While many jurisdictions share common core values, the full legal and policy framework around these values, their composition, interpretation and application may differ significantly. Indeed, differences exist between jurisdictions at the philosophical, political, legislative, and enforcement levels.

Take, for example, the European Union competition regime, which pursues a multitude of different aims, including the promotion of efficiency and consumer welfare, the protection of market structure and economic freedom, and market integration.¹⁰ As stated by the European Commission: '... competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.'¹¹ Indeed, the regional history affected the evolution of European competition law. For instance, its philosophical foundations were influenced, to a large extent, by the German *ordo-liberal* school, which reflects humanist values protecting individual freedom from governmental and private power.¹² That philosophy and the unique political environment in Europe affected the EU jurisprudence, which views competition law as a tool which protects 'not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such'.¹³

9 See generally: Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan J Intl L* 999, 1003–04.

10 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/08 at para 13; 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/02 at paras 5–7.

11 Commission(EC), XXIIInd Report on Competition Policy 1992, 13.

12 Hannah L Buxbaum, 'German Legal Culture and the Globalisation of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' (2005) 23 *Berkley J Intl L* 101, 106; Katalin J Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 92–94; David J Gerber, 'Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42 *Am J Comp L* 25, 64; Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 *OJLS* 267.

13 Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, Paragraph 63; see also: Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in arts 81 and 82 of the Treaty [2003] OJ L1/1, Recital 9; Commission (EC), 'Green Paper on Vertical Restraints in EC Competition Policy' COM(96) 721 final, para 180; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras 31, 36, 38–39.

Indeed, EU competition law was not designed as a hermetically sealed discipline.¹⁴ For instance, the European market integration has been one of the major drivers of EU competition law since its inception,¹⁵ advancing political and economic goals,¹⁶ and affecting the level and nature of competition enforcement. While the European Commission alluded to the economic nature of market integration, the protection of the internal market may not always be consistent with the aim of furthering consumer welfare.¹⁷ In practice, this political goal has led to a focus on territorial restrictions that may undermine the creation of the Single Market,¹⁸ and dictate a rather restrictive view of vertical agreements and exclusivity arrangements. Furthermore, EU competition law may be applied and developed in the light of other policy concerns such as public health,¹⁹ social protection,²⁰ consumer protection,²¹ environmental concerns,²² investment,²³ transportation,²⁴ and regional development. One may say that by its constitutional nature, EU competition law is mandated with sponge attributes.

The competition agenda may also face external pressure from other interest groups. Illustrative, in this context, are comments made with respect to the Commission's merger control regime that highlight 'the need to support competition . . . , while bearing in mind that many industrial sectors, such as stainless steel,

14 On antitrust enforcement being a *political endeavour* see comments by Margrethe Vestager 'The values of competition policy' Keynote speech at CEPS Corporate breakfast 'One year in office', <http://ec.europa.eu/commission/2014-2019/vestager/announcements/values-competition-policy_en> accessed 17 June 2016.

15 Information Service High Authority of the European Community for Coal and Steel Luxembourg, 'The Brussels Report on the General Common Market' (June 1956); David J Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 *Harvard Intl L J* 97, 102.

16 The Commission has alluded to the economic nature of market integration and its potential to promote competition. See Commission (EU), 'Guidelines on Vertical Restraints' [2010] OJ C 130/1 para 7; Commission(EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, para 1.

17 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission of the European Communities* [2009] ECR I-9291, paras 62–63; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd* [2011] ECR I - 9083, paras 139–40.

18 See, eg Case 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

19 Art 168(1) TFEU; Art 35 Charter of Fundamental Rights of the European Union (2000/C 364/01).

20 Art 9 TFEU refers to 'the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

21 Art 12 TFEU; Art 38 Charter of Fundamental Rights of the European Union (2000/C 364/01).

22 Arts 11 TFEU; Art 37 Charter of Fundamental Rights of the European Union (2000/C 364/01).

23 *Ford/Volkswagen* (Case IV/33.814) Commission Decision no 93/49/EEC [1993] OJ L 20/1993, 14–22, (Recital 36): 'In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, *inter alia*, to the creation of about 5 000 jobs and indirectly create up to another 10000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty.' When considering an exemption under art 85(3) the Commission took into account these 'extremely positive effects on the infrastructure ad employment in one of the poorest regions in the Community' (Recital 23).

24 Eg, the transport industry was exempt from the application of EU competition law by the Treaty of Rome: see Lars Gorton, 'Air Transport and EC Competition Law' (1997) 21 *Fordham Intl L J* 602, 608.

operated in an environment that was becoming increasingly global, hence the importance for Community policies to actively facilitate the creation of large European groups'.²⁵

Lastly, the importance of agency design should be noted since it reflects the wider matrix in which enforcement policies are shaped. While the investigation of competition violations and recommendations are within the remit of DG Competition, the formal decision in each case is taken, not only by the competition commissioner, but by the College of 28 Commissioners responsible for all European policies. Although this feature of governance is of limited importance in most cases, it does amplify the intrinsic constitutional sponge characteristics of EU competition law. As stated by Commissioner Margrethe Vestager, 'Competition is not a lonely portfolio'.²⁶

Significantly, the EU example is by no means unique. Other jurisdictions often take into account a wide array of considerations in the design and enforcement of competition law. Domestic culture, politics, inequality and economic agenda are only some of the variables which affect the soul and realm of each competition regime.

For instance, United States' federal antitrust law initially addressed powerful trusts and monopolies arising from the post-Civil War industrialization.²⁷ Its application has been based on a range of economic approaches²⁸ and evolving ideology. In the early days of antitrust enforcement, the antitrust provisions in the Sherman Act were used to target *the victims* of market power, such as union officers and unions.²⁹ Since then, the application of the antitrust laws has evolved to reflect our modern understanding of the aims and goals of antitrust: curtailing economic injustice; promoting economic liberty; and, advancing consumer welfare.³⁰ Indeed, the interpretation of the Sherman Act's antitrust provisions evolved over the years to meet dynamic economic conditions and changing enforcement philosophy.³¹ The

25 Page 14, Minutes from the Commission's meeting on 7 November 2012, PV(2012) 2022 final (with author).

26 Margrethe Vestager, 'Approval hearing before the Economic and Monetary Affairs Committee of the European Parliament' (2 October 2014).

27 David J Gerber, *Global Competition, Law, Markets and Globalization* (OUP 2010) 123.

28 Steven C Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard' (2010) 22 *Loyola Consumer L Rev* 336; Douglas H Ginsburg, 'Judge Bork, Consumer Welfare and Antitrust Law' (2008) 31 *Harvard J L & Public Policy* 449; Robert H Lande, 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' (1989–90) 58 *Antitrust L J* 631.

29 Note, for instance the injunction against Eugene V Debs and the American Railway Union officers, who were ordered to cease union action that interfered with the railroads services, for the benefit of the general welfare of the nation. Also note the Danbury Hatters' Case (*Loewe v Lawlor*) in which the Supreme Court held that labour unions were subject to the Sherman Anti-Trust Act's prohibitions. For an overview of the early days of the Sherman Act, see: <http://www.fjc.gov/history/home.nsf/page/tu_debs_questions.html> accessed 17 June 2016.

30 Frederic M Scherer, 'A Century of Competition Policy Enforcement' in Chao Yang Ching (ed), *International and Comparative Competition Laws and Policies* (Kluwer Law International 2001) 7–9; Robert T Pitofsky, 'Antitrust at the Turn of the Twenty-First Century: A View from the Middle' (2002) 76 *St John's L Rev* 583; Gerber (n 27) 122–24.

31 Note eg comments by the Supreme Court in its *Leegin* judgment: *Leegin Creative Leather Products, Inc v PSKS, Inc* (06–480), 127 SCt 2705 US (2007).

relatively abstract language enabled the court to develop and adjust the realm of anti-trust law.³²

Importantly, modern application of US antitrust law has been characterized by an attempt to reduce its susceptibility to non-economic considerations.³³ This approach has dominated the FTC and DOJ's practice as they strive to foster transparency and predictability based on economic principles. An interesting, and somewhat unusual, statement which seems to suggest susceptibility to wider values may be found in comments made by Attorney General Lynch at the 2016 ABA Antitrust Law Spring Meeting. The AG noted that the DOJ is 'committed to fair, open and competitive markets' and noted the significant role of 'economic justice'.³⁴ This hint of a widening of jurisdiction, did not go unnoticed, and led to some criticism.³⁵

Importantly, when considering the realm of US antitrust law one should not focus solely on its careful application by the competition agencies. A consideration of the broader legal framework reveals susceptibility to wider factors. For instance, the application of US antitrust law is limited by a number of exemptions, which carve out certain sectors and activities to various degrees.³⁶ Also noteworthy is the US Supreme Court's 'State-Action' doctrine, which enables the states to consider non-competition values they deem fundamental in the operation of their markets.³⁷ The

- 32 Richard Hofstadter, 'What happened to the Antitrust Movement' in Richard Hofstadter (ed), *The Paranoid Style in American Politics, and Other Essays* (first published 1965, Vintage Books 2008); Gary Minda, 'Antitrust at the Century's End' (1995) 48 *SMU L Rev* 1749, 1762, 1754; Harry First and Spencer Weber Waller, 'Antitrust's Democracy Deficit' (2012) 81(5) *Fordham L Rev* 2543, 2544; Also worth of note is s 5 of the Federal Trade Commission Act, which uses a wide intervention formula—'unfair methods of competition'—that enables discretion as to the scope of intervention. That provision has been criticized as going too far afield from antitrust concerns. See: James C Cooper, 'The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act' (2015) *J Antitrust Enforcement* 87; Maureen K Ohlhausen, 'Section 5 of the FTC Act: Principles of Navigation' (2014) 2 *J Antitrust Enforcement* 1.
- 33 Note for instance the Supreme Court Decides *North Carolina State Board of Dental Examiners v Federal Trade Commission*, 25 February 2015, <<http://www.faegeb.com/supreme-court-decides-north-carolina-istate-board-of-dental-examiners>> accessed 17 June 2016.
- 34 Attorney General Loretta E Lynch Delivers Keynote Luncheon Address During the 64th Annual American Bar Association Antitrust Law Spring Meeting, Washington, DC, (6 April 2016), <<https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-keynote-luncheon-address-during-64th-annual>> accessed 17 June 2016.
- 35 See Alden Abbott commentary titled: 'Attorney General Lynch Demonstrates a Misunderstanding of American Antitrust Law, and its Proper Role in Promoting Economic Dynamism' (11 April 2016), <<https://truthonthemarket.com/2016/04/11/attorney-general-lynch-demonstrates-a-misunderstanding-of-american-antitrust-law-and-its-proper-role-in-promoting-economic-dynamism/>> accessed 17 June 2016.
- 36 Agricultural cooperatives: The Capper-Volstead Act, 1922, 7 USC ss 291–92; Insurance: The McCarran-Ferguson Act of 1945, 15 USC ss 1011–15, see the 'Health Insurance Industry Fair Competition Act' 2013: <www.congress.gov/bill/113th-congress/house-bill/743> accessed 17 June 2016; Labor unions: Clayton Antitrust Act of 1914, 15 USC s 17; Sports leagues: Sports Broadcasting Act (1961), 15 USC ss 1291–95, but see: Furthering Access and Networks for Sports Act (2013): <www.arstechnica.com/tech-policy/2014/10/nfl-must-end-tv-blackouts-or-lose-its-antitrust-exemption-senators-warn> accessed 17 June 2016; Export trade: Export Trade (Webb-Pomerene) Act, 15 USC ss 61–66. See also: <www.nytimes.com/2009/10/18/us/politics/18address.html?_r=1&> accessed 17 June 2016. Media has immunity from antitrust in certain areas. For a discussion see Maurice E Stucke and Allen P Grunes, 'Why more Antitrust Immunity for the Media is a Bad Idea' (2011) 105 *Northwestern University L Rev* 1399.
- 37 *Parker v Brown*, 317 US 341 (1943); *ibid*.

immunity from the federal antitrust laws, despite anticompetitive effects, opens the door to consideration of industrial elements. On the role played by such considerations at state level, consider the *Tesoro Corporation/BP PLC* transaction which was approved subject to conditions limiting the ability of the company to lay off workers.³⁸ The commitments were designed to ‘protect jobs for potentially thousands of Californians’.³⁹ The protection of jobs at a national level has also affected the antitrust debate in other instances.⁴⁰

As in other jurisdictions, the nature and intensity of US antitrust enforcement is also affected to some extent by the wider political matrix. Allocation of resources, appointment of antitrust officials and Supreme Court Justices are only some of the interfaces through which ideology affects antitrust intervention.⁴¹ An interesting, albeit unusual, example of the politicising of US antitrust law concerned the use of the threat of antitrust prosecution. In 1971, President Richard M. Nixon threatened the television networks ABC, NBC, and CBS with an antitrust suit in order to curtail their negative media coverage. An internal White House recording of the President, which was later made public, includes comments made by him on the threat of an antitrust suit: ‘If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat . . . Our gain is more important than the economic gain. We don’t give a goddam about the economic gain. Our game here is solely political . . .’⁴²

Beyond the EU and US, other competition regimes exhibit a similar susceptibility to domestic realities and a wide range of goals and interests that affect and shape competition enforcement.

For example, in China the Anti-monopoly Law advances consumer welfare and efficiency as well as the public interest and the development of a socialist market economy.⁴³ Article 15 of the Chinese Anti-Monopoly Law limits the application of

38 The US FTC approved Tesoro’s acquisition of a BP refinery in Southern California. California’s Attorney General also approved the transaction subject to conditions which included restriction on Tesoro’s ability to lay off any workers at Los Angeles area refinery for two years: <www.ftc.gov/enforcement/cases-proceedings/closing-letters/tesoro-corporationbp-plc> accessed 17 June 2016. As noted by Attorney General Harris: ‘These commitments will protect jobs for potentially thousands of Californians . . .’; See State of California Department of Justice Press release, ‘California Reaches Agreement with Tesoro to Protect Jobs and Monitor Gas Prices’: <www.oag.ca.gov/news/press-releases/california-reaches-agreement-tesoro-protect-jobs-and-monitor-gas-prices> accessed 17 June 2016.

39 *ibid.* Also note the merger between American Airlines and US Airways <www.usnews.com/opinion/blogs/economic-intelligence/2013/03/01/whats-behind-the-american-airlines-us-airways-merger> accessed 17 June 2016.

40 Harry First and Eleanor M Fox, ‘Philadelphia National Bank, Globalization, and the Public Interest’ (2015) 80(2) *Antitrust L J* 307.

41 Vivek Ghosal, ‘Economics, Politics and Merger Control’ in Jay Pil Choi (ed), *Recent Developments in Antitrust: Theory and Evidence* (MIT 2006) 125.

42 Walter Pincus and George Lardner Jr, ‘Nixon Hoped Antitrust Threat Would Sway Network Coverage’ [1997] *Washington Post Staff Writers* (1 December 1997), <<http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>> accessed 17 June 2016; Maurice E Stucke, ‘Does the Rule of Reason Violate the Rule of Law?’ (2009) 42(5) *UC Davis L Rev* 1375, 1449.

43 Anti Monopoly Law, art 1. See: Xiaoye Wang, ‘The New Chinese Anti-Monopoly Law: a Survey of a Work in Progress’ (2009) 54 *Antitrust Bulletin* 579, 584; Hao Qian, ‘The Multiple Hands: Institutional Dynamics of China’s Competition Regime’ in Adrian Emch and David Stallibrass (eds), *China’s Anti-Monopoly Law: The First Five Years* (Kluwer Law International 2013).

the law through exemptions that apply in a range of cases. These include instances when an agreement has the purpose of: reinforcing the competitiveness of small and medium-sized businesses; achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster; mitigating serious decrease in sales volume or excessive production during economic recessions; or, safeguarding the justifiable interests in foreign trade or foreign economic cooperation.⁴⁴ Also noteworthy is the institutional structure in China which includes three competition agencies subrogated to the political arm and overseen by a council of high-ranking party officials.⁴⁵

In Japan, competition law promotes 'fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers'.⁴⁶ In South Korea, competition law is set to encourage creative business activities, protection of consumers, and promoting the balanced development of the national economy by encouraging fair and free competition.⁴⁷ In Taiwan, competition law seeks to maintain trading order, protect consumers' interests, ensure fair competition, and promote economic stability and prosperity.⁴⁸ In Namibia, competition law serves, among other things, to protect minority empowerment.⁴⁹ In India, Section 54 of the 2002 Competition Act creates a mechanism for exemption from the application of competition law in the interest of matters such as security of the state or public interest.⁵⁰ In Hong Kong, exclusions and exemptions are listed in the Competition Ordinance. They narrow the application of competition law in a range of instances, including general economic interest, public policy grounds or in the case of statutory bodies.⁵¹ In Russia, the Federal Antimonopoly Service is responsible for the regulation of unfair competition and consumer protection, regulation of financial organizations and the granting of state preferences. State

44 Anti-Monopoly Law 2008, art 15; See: Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar Publishing 2014); H Stephen Harris, *Anti-Monopoly Law and Practice in China* (OUP 2011) 85.

45 Xiaoye Wang and Adrian Emch, 'Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges' (2013) 1(2) *J Antitrust Enforcement* 247–71.

46 The Antimonopoly Act (JP), art 1.

47 Monopoly Regulation and Fair Trade Act (MRFTA) art 1; Meong-Cho Yang, 'Competition Law and Policy of the Republic of Korea' (2009) 54 *Antitrust Bulletin* 621, 624–25.

48 Fair Trade Act 2011, art 1.

49 Competition Act 2003 (No 2 of 2003). The purpose of the Act is, *inter alia*, stated at s 2(f) to be to 'promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons'. 'Historically disadvantaged persons' are described in the Act at s 1 as 'persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices'. In terms of substantive law, s 28(2) allows exemption from the application of the Act for restrictive practices which fall under a 'public policy' exception. At s 28(3)(b) is it further explained that when making this decision for an exemption under public policy the Commission must consider whether the agreement, decision or concerted practice results in 'enabling small undertakings owned or controlled by historically disadvantaged persons, to become competitive'.

50 The Competition Act, 2012 (IN), s 54. Found at: <www.ieee.org/documents/competition_act_2002_india.pdf> accessed 17 June 2016.

51 Competition Ordinance, ss 9, 24. Draft Guidelines on Applications for a Decision under ss 9 and 24 (Exclusions and Exemptions) and s 15 Block Exemption Orders were published in 2014.

preferences can be granted exclusively for the purpose of advancing education and science, protection of the environment, and protecting citizens' health.⁵²

In the UK, consideration of 'public interest' enables the Secretary of State for Business and Enterprise to clear a merger despite competitive concerns.⁵³ Most noticeably, that benchmark was used to clear a merger transaction between *Lloyds/HBOS* which was deemed essential to ensuring the stability of the UK financial system.⁵⁴ In Germany, ministerial approval may be used to override the competition authority decision-making.⁵⁵ Under this overriding public interest provision, the minister may consider wider policy concerns and advantages to the economy as a whole. For instance, in the *E.ON/Ruhrigas* transaction, public interest considerations led the Minister for Economics to set aside a Bundeskartellamt prohibition decision.⁵⁶ The transaction was cleared, as it was deemed necessary for the stability of the national gas supply and would have improved E.ON's international competitiveness.⁵⁷

In South Africa, public interest grounds—including the impact on particular industrial sectors or regions, employment, and the ability of national industries to compete in international markets—play a role in the appraisal of merger transactions.⁵⁸ This test, which explicitly introduces industrial policy considerations into the analysis, may be used to block pro-competitive mergers or approve harmful ones.⁵⁹

52 Federal Law No 135-FZ of 26 July 2006 'On Protection of Competition', art 19.

53 Enterprise Act 2002, s 45.

54 Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under s 45 of the Enterprise Act 2002 (31 October 2008). A challenge to the legality of the decision was subsequently dismissed by the Competition Appeal Tribunal: 1107/4/10/08 *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36 (10 December 2008). This was despite competitive concerns identified by the Office of Fair Trading in *Anticipated acquisition by Lloyds TSB plc of HBOS plc: Report to the Secretary of State for Business, Enterprise and Regulatory Reform* (24 October 2008) 27–58. See also Leela Cejnar and Arlen Duke, 'Competition Policy and the Banking Sector: The Need for Greater International Co-operation' (2013) 34(11) *Eur Comp L Rev* 583.

55 s 42 des deutschen Gesetzes gegen Wettbewerbsbeschränkungen (GWB).

56 On the Bundeskartellamt decision, see Press Release, 'Bundeskartellamt prohibit E.ON/ Gelsenberg (Ruhrgas) merger' (21 January 2002) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/21_01_2002_EON_eng.html> accessed 17 June 2016.

57 See: <http://presseservice.pressrelations.de/standard/result_main.cfm?aktion=jour_pm&r=104766&quelle=0&pfach=1&n_firmanr_=539&sektor=pm&detail=1> accessed 17 June 2016. Further, article in the *Frankfurter Allgemeine Wirtschaft*, available at: <<http://www.faz.net/aktuell/wirtschaft/eon-ruhr-gas-fusion-archiv-ministererlaubnis-unter-harten-auflagen-170706.html>> accessed 17 June 2016.

58 Competition Act 1998 (Act No. 89 of 1998) (SA), s16. Such for example was the case in *Metropolitan Holdings Ltd v Momentum Group Ltd* (41/LM/Jul10) [2010] ZACT 87 (9 December 2010), para 69; Also see *Wal-Mart Stores Inc v Massmart Holdings Limited* (73/LM/Dec10) [2011] ZACT 42 (29 June 2011), where the merger was approved by the Competition Tribunal subject to certain conditions, including that the merged entity must: ensure there are no retrenchments as a result of the merger for a period of two years; continue to honour existing labour agreements; and establish a programme aimed exclusively at the development of local South African suppliers, including small, micro and medium enterprises, funded to the value of R100 million. The amount was increased to R200 million by the Competition Appeal Court: *Minister of Economic Developments and Others v Competition Tribunal and Others, SACCAWU v Walmart* (110/CAC/Jun11, 111/CAC/Jun11) [2012] ZACAC 6 (9 October 2012), para 43.

59 Mark Griffiths and Wiri Gumbie, 'The Public Interest Test in the South African Merger Control Regime' (2015) 3 *J Antitrust Enforcement* 408.

Coupled with the limited independence of the South African competition authorities, it has attracted concerns as to the scope and limits of competition analysis.⁶⁰

These examples highlight the ‘sponge’ properties of competition law. The ability to stretch or narrow its application and harness it, at times, to protect a wide range of social goals. They illustrate the possible ‘instrumentalisation’ of competition law: advancing goals which may go beyond the competitive process as understood by many. When coupled with politically dependent enforcement structures, the ‘sponge’ may well become arbitrary and less predictable.

Often, these sponge qualities remain below our collective radar. However, when one is confronted with parallel enforcement and possible conflicts between jurisdictions, we recall this peculiarity. We treat it as an abnormal outcome of the analysis, opting to ignore its being intrinsic to the fabric of competition enforcement.

III. ECONOMIC ‘MEMBRANE’

The discussion above illustrates that, while sharing the same basic properties, competition laws around the world, being rooted in the domestic landscapes, echo a wide range of interests and enforcement philosophies.

In a quest to limit the sponge-like characteristics of competition law, one naturally looks for a constant benchmark which may provide a stabilizing effect and a focal point for antitrust enforcement. That benchmark, not surprisingly, has been shaped by economic thinking which provides insights as to welfare effects and the adequate level of intervention. With the ‘sponge’ analysis in mind, one may view the economic discipline as a ‘membrane’ which surrounds the ‘sponge’ and limits its absorption properties. As such, it prevents it from ‘over absorbing’ values and goals which are inconsistent with economic thinking. In doing so it helps stabilize the ‘sponge’ by limiting and slowing its absorbency rate.

It is widely accepted that economics play a central and crucial role in shaping competition enforcement and intervention.⁶¹ The centrality of economic analysis is acknowledged in all competition jurisdictions and results in an ever increasing ‘economisation’ of antitrust enforcement.⁶² Visibly, the emphasis on economic analysis has led to institutionalization at the enforcement level, with increased investment in analytical capacity and recruitment of economic experts.⁶³ As noted by Chief Judge Posner:

60 *ibid.*

61 William E Kovacic, ‘The Influence of Economics on Antitrust Law’ (1992) 30 *Economic Inquiry* 294; William E Kovacic and Carl Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’ (2000) 14 *J Econ Perspectives* 43; William E Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’ (2007) *Colum Bus L Rev* 1.

62 Roger D Blair and D Daniel Sokol, ‘Introduction’ in Rogar D Blair and D Daniel Sokol (eds), *The Oxford Handbook of Antitrust Economics* vol 1 (OUP 2015) xiii.

63 Kovacic and Shapiro (n 61) 58; Lars-Hendrik Röller, ‘Economic Analysis and Competition Policy Enforcement in Europe’ in Peter A G Van der Bergeijk and Erik Kloosterhuis (eds), *Modelling European Mergers: Theory, Competition and Case Studies* (Edward Elgar Publishing 2005) 14; Damien J Neven and Lars-Hendrik Röller, ‘On the Scope of Conflict in International Merger Control’ (2003) 3(4) *J Industry, Comp & Trade* 235.

[a]lmost everyone professionally involved in antitrust today – whether as litigator, prosecutor, judge, academic, or informed observer – not only agrees that the only goal of 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.⁶⁴

In an ideal world, one could imagine a well-defined universal economic ‘membrane’ that regulates the diffusion of external values into the ‘sponge’. Unfortunately, reality is less impressive. The economic ‘membrane’ is not always clearly defined and it is subjected to internal expansion and change. In some ways, like the ‘sponge’, it derives part of its identity from its surrounding environment.

Several forces may impact on the stability of the ‘membrane’ and its ability to regulate the flow of variants into the ‘sponge’. To begin with, one should note that economic theory—that is the membrane—has been welded onto the sponge. Antitrust, at its origins, is one of many political creations. Even in the United States, it was created as an instrument designed to dismantle powerful corporations and prevent the amalgamation of economic power that could threaten the political arm. The political origins of the sponge, its roots and goals, were only later constrained and rationalized by economic thinking.

Despite our habit to view the two as one whole, the fit is not always perfect. To begin with, the membrane is fitted onto the sponge and as such is shaped and limited by its scope which, in turn, was shaped by domestic political and legislative processes.⁶⁵

Beyond that, the stability of the membrane is not guaranteed. Economic theory in and of itself is not monolithic. While neoclassical economics is often presented as the only strand of economic theory, it is one of several strands.⁶⁶ Naturally, diverging theories affect one’s perception of the competitive process,⁶⁷ the relevant competition forces,⁶⁸ one’s assumptions regarding market participants,⁶⁹ and the role of

64 Richard A Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001); Note comments by Stucke who argues that the ‘U.S. antitrust community never agreed that antitrust’s goals were only economic or that antitrust only had one goal – to promote economic welfare . . .’. Maurice E Stucke, ‘Reconsidering Antitrust’s Goals’ (2012) 53 Boston College L Rev 551, 564.

65 On that point, it has been argued that ‘the most important determinants of US policy on maintaining fair market competition are political, not economic or bureaucratic’. See: B Dan Wood and James E Anderson, ‘The Politics of US Antitrust Regulation’ (1993) 37(1) Am J Pol Sci 1, 34.

66 For instance: Austrian, Behaviourist, Classical, Developmentalist, Institutional, Keynesian, Marxist, and Schumpeterian; See: Ha-Joon Chang, *Economics: The User’s Guide* (2014) ch 4; John J Flynn, ‘Misuse of Economic Analysis in Antitrust Litigation’ (1981) 12 Southwestern Uni L Rev 335, 340–410; Kovacic (n 61) 10; See also Dworkin, *Taking Rights Seriously* (1977) [Ch 6] and Baker, ‘The Ideology of the Economic Analysis of Law’ (1975) 5(1) Philosophy and Public Affairs 3–48, especially at, eg p 37.

67 Robert H Bork *Antitrust Paradox: A Policy at War with Itself* (1978); Herbert Hovenkamp *Antitrust Enterprise: Principle and Execution* (2005); J Gregory Sidak and David J Teece, ‘Dynamic Competition in Antitrust Law’ (2009) 5(4) J Comp L & Econ 581.

68 For example, *Static v Dynamic forces* (evolutionary economic theory); For an in-depth description of evolutionary economics see Richard R Nelson and Sidney G Winter, *An Evolutionary Theory of Economic Change* (Harvard University Press 1982).

69 See generally on behavioural economics: Herbert A Simon, ‘A Behavioural Model of Rational Choice’ (1955) 69(1) Quart J Econ 99; Daniel Kahnemann, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Francesco Parisi and Vernon L Smith (eds), *The Law and Economics of Irrational Behaviour*

institutions in antitrust enforcement. Even if one endorses neoclassical economics as the leading strand, the dynamic nature of economic thinking and its susceptibility to change should be acknowledged. As put by Stucke: '[u]ltimately economics is not a value-free science, inoculated from normative judgments. Thus, any competition policy in a world with humans, transaction costs, coercion, and informational asymmetries is built on the normative judgments of legal and informal institutions'.⁷⁰ Indeed, a given underlying economic analysis may evolve when it is embedded in a different context and market reality. In fact, it may be viewed as a narrow strand of industrial policy, driven by economic rationale. Its interface with the 'sponge' reflects one choice among a spectrum of such policies.

Furthermore, while neoclassical economic terminology provides for a seemingly homogeneous benchmark worldwide, that language similarity may be misleading. The scope and meaning of some of the terms used in economic analysis may differ and are context dependent. While this would not give rise to inconsistency in the majority of cases, it is worth exploring. For instance, the concept of 'consumer welfare', which is universally referred to as a leading benchmark, does not embody universally agreed properties. Differences emerge as to the exact composition of the term and the means of achieving it.⁷¹ As commented by Werden: 'Every favoured policy is said to promote "consumer welfare" . . . But the superficial consensus on this point masks a deep disagreement about what "consumer welfare" means and especially about what policies best to promote it.'⁷² Similarly, the measurement of welfare in competition law has also been the subject of varying approaches, from the protection of total welfare,⁷³ to a focus on consumer surplus.⁷⁴ The concept of 'efficiency', which dominates our terminology, triggers similar ambiguity.⁷⁵ It is used universally, despite limited consensus as to its meaning, thus portraying an impression of conformity.

(Stanford University Press 2005); Maurice E Stucke, 'Behavioural Economists at the Gate: Antitrust in the Twenty-First Century' (2007) 38 *Loyola University Chicago Law Journal* 513; Avishalom Tor, 'The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Discipline' (2002) 101 *Michigan L Rev* 482.

70 Stucke (n 64), 609; Maurice E Stucke, 'Occupy Wall Street and Antitrust' (2013) 85 *Southern California L Rev Postscript* 33; Michael E Porter and Mark R Kramer, 'Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth' [2011] *Harvard Bus Rev* 89.

71 See eg ICN discussion document 'Competition Enforcement and Consumer Welfare' (2011), <<http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf>> accessed 17 June 2016; Gregory J Werden, 'Consumer Welfare and Competition Policy' in Josef Drexel, Wolfgang Kerber and Rupprecht Podszun, *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011) 11; Also note the possible consideration of wider values within consumer welfare. See eg Jonathan Baker and Steven Salop, 'Antitrust, Competition Policy, and Inequality' *American University Washington College of Law Working Paper* 25 February 2015.

72 Gregory Werden, 'Essays on Consumer Welfare and Competition Policy' (2009), <<http://ssrn.com/abstract=1352032>> accessed 17 June 2016.

73 Aggregate economic welfare is also referred to as an 'efficiency' or 'total surplus' standard. Steven C Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard' (2010) 22 *Loy Consumer L Rev* 336; Ginsburg (n 28) 449.

74 Eg Salop, *ibid*; Massimo Motta, *Competition Policy* (CUP 2004) 18.

75 Damien Geradin, 'Efficiency claims in EC Competition law and Sector-Specific Regulation' (8 November 2004) 2. Available at SSRN: <<http://ssrn.com/abstract=617922>> accessed 17 June 2016; Joseph F Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 *New York University Law Review* 1020.

Another challenge that may affect the role played by the economic ‘membrane’, relates to the assumptions at the base of the analysis. Even if one assumes a single neoclassical economic approach and clear terminology, the economic modelling is rooted in the assumption of rationality and utility maximization.⁷⁶ That assumption has been challenged in several interdisciplinary economic fields.⁷⁷ Most notably, behavioural economics literature illustrates the limits of rationality and predictability.

The conceptual challenges described so far are joined by a practical challenge, evident on a case-by-case level. Even if one assumes a stable and predictable economic discipline, this stability is often shaken once applied to specific cases. In court, it is common for economic experts, utilizing the same principles, to present opposing interpretations—different theories of harm and different welfare outcomes. Indeed, it is often the case that each economic expert would display ‘a tendency to become an advocate for the party by which he was instructed’.⁷⁸

The transition from economic theory to practice is often imprecise. While the use of proxies is a necessity, its inexact nature and susceptibility to subjective interpretation should be acknowledged. Take, for example, the traditional definition of the relevant market and the assumption of a boundary of competition.⁷⁹ The excessive (and at times fictional) simplicity of traditional analysis has long been acknowledged.⁸⁰ Indeed, one may witness a de-emphasis on market definition in favour of a focus on competitive pressures. Similarly, consider the approximation of market power. The term has been used loosely to describe a wide range of powers, from monopoly to lesser market presence. Its assessment is subjected to numerous assumptions as to market dynamics, barriers to entry and behaviour of economic actors. Likewise, the analysis of market dynamics, innovation and behaviour is often riddled with simplification and imprecision.

To remedy this, one often employs complex economic analysis and modelling to provide insights into market dynamics and welfare outcomes.⁸¹ Naturally, these models do not portray facts, but predict an outcome based on partial resemblance to the market. The accuracy of the approximation heavily depends on the available data⁸² and the accuracy and relevance of the base assumptions.⁸³ A disparity between theory and fact may lead to misleading conclusions. As put by Bishop: ‘It is one thing

76 See generally: Robert H Bork, *Antitrust Paradox: A Policy at War with Itself* (Free Press 1978).

77 Amanda P Reeves and Maurice E Stucke, ‘Behavioral Antitrust’ (2011) 86 *Indiana L J* 1527, 1528.

78 Justice Peter Roth commenting on the diverging views presented by economic experts as part of a hot-tub process conducted in the *Streetmap v Google* hearing. Para 47, *Streetmap v Google* [2016] EWHC 253 (England and Wales High Court (Chancery Division)).

79 Thomas E Kauper, ‘The Problem of Market Definition Under EC Competition Law’ (1996) 20 *Fordham Intl L J* 1682; OECD, ‘Policy Roundtable: Market Definition’ (2012) DAF/COMP(2012)19 at11 (executive summary).

80 Richard Schmalensee, ‘Another Look at Market Power’ (1982) 95 *Harvard L Rev* 1789, 1789; John Vickers, ‘Market Power in Competition Cases’ (2006) 2 *Eur Comp J* 3; John Vickers, ‘Abuse of Market Power’ (2005) 115 *Econ J* F244.

81 Simon Bishop, ‘Snake-Oil with Mathematics is Still Snake-Oil: Why Recent Trends in the Application of so-called “Sophisticated” Economics is Hindering Good Competition Policy Enforcement’ (2013) 9 *Eur Comp J* 67, 72.

82 On the limitation of economic analysis see: Wouter PJ Wils, ‘The Judgment of the EU General Court in Intel and the so-called “more economic approach” to Abuse of Dominance’ (2014) 37 *World Competition* 405.

83 Gunnar Niels, ‘The Economist in Court: Guilty of Theories that don’t Fit the Facts’ (2007) 6 *Competition L Rev* 358; Bishop (n 81).

to devise a theoretical economic model that produces a particular prediction and quite another to understand whether that same model has any practical relevance for the actual case in hand.⁸⁴

A related challenge concerns the ability to accurately predict behaviour and competitive outcomes in dynamic and complex markets.⁸⁵ For instance, technology markets have long been characterized by rapid changes to competition, resources, data usage, products and demand characteristics. Industry evolution and competition on these markets is constantly redefined and may be difficult to capture and predict through static analysis.⁸⁶

Another challenge concerns the capacity of the judiciary to properly assess and digest complex and evolving theories when considering antitrust cases.⁸⁷ While some jurisdictions benefit from experienced and dedicated competition courts, others may not. The disparity between the court's capacity and economic complexity increases the likelihood for mistakes and error costs.⁸⁸ The difficulty associated with understanding the economic analysis leads, at times, to oversimplification, the discounting of base assumptions, and the overlooking of market peculiarities. In those instances, the economic 'membrane' provides nothing but a false sense of accuracy and stability. With that in mind, it is perhaps not surprising that when overwhelmed with economic complexity, some courts have been known to favour a procedural route—resolving a case on a technicality—thus avoiding the pitfalls of complex econometric analysis.

Lastly, at policy level, economic theory may give rise to diverging views on the adequate level of intervention and the goals of competition policy.⁸⁹ Disagreements over competition policy, the ability of markets to self-correct, and the sagacity of particular enforcements (or failures to enforce the competition laws) exist between liberals and conservatives, and between progressives and libertarians. A well-publicized example of such divergence was the issuance and subsequent withdrawal in 2009 of the DOJ report on Competition and Monopoly.⁹⁰ The FTC did not join the report, even though it was a joint task force. The report was seen as advocating hesitancy in the application of section 2 of the Sherman Act.⁹¹

It is important to nuance the arguments put forward in this section; economics is central to antitrust analysis—that proposition is not contested. Indeed, it will often

84 Bishop, *ibid.*

85 See eg David J Teece, 'Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy' (2012) 9 *J L Econ & Policy* 97, 97.

86 Ronald A Cass, 'Antitrust for High-Tech and Law: Regulation, Innovation, and Risk' (2013) 9 *J L Econ & Policy* 169, 170.

87 Richard A Posner, 'Antitrust in the New Economy' (2001) 68 *Antitrust L J* 925.

88 Michael R Baye and Joshua D Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) 54 *J L & Econ* 1, 5.

89 See eg Fordham Law review special issue on the 'The Goals of Antitrust' (April 2013) Vol 81, No 5.

90 As stated by Christine A Varney, then Assistant Attorney General in charge of the Department's Antitrust Division: 'Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers' <<http://www.usdoj.gov/atr/public/reports/236681.pdf>> accessed 17 June 2016.

91 DOJ Press Release: <http://www.justice.gov/atr/public/press_releases/2009/245710.htm> accessed 17 June 2016.

provide predictable, consistent, and applicable benchmarks for assessment. The ‘economisation’ of competition law provides a valuable common benchmark for enforcement and, while not monolithic, it does put forward a body of accepted principles.

Taking these caveats into account, the discussion above should be understood as not challenging the validity or necessity of economics, but rather the assumed stability, clear scope, and exhaustiveness of the economic envelope. That envelope will not always lead to a single correct outcome, and subsequently, its ability to restrain the sponge-like characteristics of competition law should not be assumed. Importantly, ill perceived stability and predictability of the economic ‘membrane’, which ignores its imprecise nature, could result in over-confidence, government failure and high-error costs.

IV. EXTERNAL BYPASSES

Having established the image of ‘sponge’ and ‘membrane’, this section reflects on the use of external bypasses. A state may legitimately favour other enforcement or regulatory vehicles over competition law when dealing with distinct industries or markets. Similarly, it may find it desirable to exclude certain sectors from the realm of competition law. Such means may be viewed as ‘external peripheral bypasses’ that divert the subject matter away from competition analysis, or limit its scope. At times, these tools may enable a state to advance public interest or industrial policies which would otherwise not fit within the ‘sponge’ and ‘membrane’ framework.

For instance, states may exclude certain organs and industries from the realm of competition law. An example of this is the Hong Kong Competition Ordinance that exempts statutory bodies from competition rules.⁹² Over 160 statutory bodies, in charge, among others, of airports, broadcasting and housing, are excluded from the application of the law.⁹³ Similarly, in the US, the limitations on the application of antitrust laws to agriculture, insurance, and the baseball league are noticeable.⁹⁴ Indeed, most jurisdictions will implement some level of limitation through the provision of peripheral bypasses.

Other bypasses may be triggered when national interests are at stake. In Germany, public interest considerations enable the Minister for Economics to bypass the Bundeskartellamt decision-making. Notable is the *E.ON/Ruhrigas* transaction, mentioned earlier above, which was deemed necessary for the stability of the national gas supply.⁹⁵ A similar mechanism was activated in Israel to approve a major gas deal. There, the Prime Minister, acting as the Minister of the Economy, made use of Article 52 of the Israeli Antitrust Law which stipulates that overarching national security and foreign policy considerations may allow bypassing the decision-making powers of the Antitrust Authority. The gas deal was approved, despite opposition from the Antitrust Authority which warned of its harmful effect on consumer welfare.⁹⁶

92 Competition Ordinance, s 3 (1).

93 See: <<http://www.info.gov.hk/cml/eng/cbc/index1j.htm>> accessed 17 June 2016.

94 *Federal Baseball Club v National League*, 259 US 200 (1922), where it was held by the US Supreme Court that baseball was not interstate commerce for the purposes of the Sherman Act.

95 Bundeskartellamt Press Release (n 56).

96 See: <<http://www.naturalgaseurope.com/netanyahu-signing-article-52-petitions-opposition-israel-27193>> accessed 17 June 2016; <<http://www.naturalgaseurope.com/knesset-committee-recommends-pm>>

At times, bypasses may be tailored to a specific sector, brought forward by legislators (and lobbyists) to circumvent a decision of the Competition Agency. Illustrative of this is the French legislator's ban on parity clauses in contracts between price comparison websites and hotels in the French hotel sector. The legislation overrode an earlier decision by the French Competition Agency which found narrow parity clauses to be welfare enhancing.⁹⁷ Narrowly tailored legislation may also be used to block an attempt to apply the competition laws. To illustrate, note for instance, the attempt by the West Virginian State Legislature to block US Federal Trade Commission's challenge of a hospital merger.⁹⁸

Some sectors may be taken out of competition analysis through the use of specific regulatory means. For instance, in Canada the 'Regulated Conduct Defence' limits the scope for the application of competition law in regulated sectors.⁹⁹ In the USA, the insurance sector is exempted from the application of antitrust law to the extent that it is regulated by states.¹⁰⁰

The relationship between regulated industries and competition enforcement has been explored extensively.¹⁰¹ The availability of an industry regulatory regime is seen at times as tilting the balance against antitrust intervention in that sphere, thus creating an 'organic' bypass. As held by Justice Scalia in the *Trinko* judgment, the benefit of antitrust intervention is minimal where a regulatory structure designed to deter and remedy anticompetitive harm exists. The slight benefits of antitrust intervention are outweighed by the likely costs, enforcement errors and the risk of chilling competition.¹⁰² A different approach would see the two as complementary instruments.¹⁰³ In the UK, for example, sector regulators¹⁰⁴ are empowered with concurrent jurisdic-

netanyahu-israel-antitrust-authority-27118> accessed 17 June 2016; <<http://www.jpost.com/Business-and-Innovation/Antitrust-Commissioner-David-Gilo-to-resign-in-August-amid-gas-disputes-404017>> accessed 17 June 2016.

97 Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015) 11 *Eur Comp J* 488.

98 'West Virginia bill would shield merging hospitals from antitrust laws' <<http://www.modernhealthcare.com/article/20160218/NEWS/160219892>> accessed 22 July 2016.

99 ICN Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 2: Enforcement experience in regulated sectors, *Report* (April 2004) at 20–21, quoting from Canada's contribution to the OECD working group on competition and regulation. <www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf> accessed 17 June 2016.

100 See: n 36 above.

101 ICN (n 99); Alexandre de Steel, 'The Relationship between Competition Law and Sector Specific Regulation: The Case of Electronic Communications' (2008) 47 *Reflets & Perspectives de la vie économique* 55.

102 *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP*, 540 US 398 (2004).

103 Contrast the ex-post application of EU competition law to a market which was subjected to ex-ante regulation, with the US Supreme Court non-interventionist approach: Case C-280/08 P *Deutsche Telekom AG v Commission* *Court of Justice* [2010] 5 *CMLR* 27. For comment on the intersection between competition law and sector regulation in the telecommunications industry see Pierre-André Buiges and Patrick Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (Edward Elgar Publishing 2004).

104 Ofcom, Ofgem, Ofwat, Office of Rail Regulation, Civil Aviation Authority, Financial Conduct Authority (FCA).

tion to apply competition law alongside the Competition and Markets Authority (CMA).¹⁰⁵

Another bypass route concerns the limitation of jurisdiction to certain anticompetitive activities. Notable in this respect are exemptions of export cartels from domestic competition law. These cartels typically target foreign markets without generating domestic anticompetitive effects. Several jurisdictions have adopted formal exemptions taking these arrangements outside domestic authority.¹⁰⁶ Others lack jurisdiction due to their substantive provisions that focus on domestic anticompetitive effects, thus implicitly exempting these activities. In both cases, when faced with welfare loss which is externalized on other jurisdictions, competition scrutiny is not triggered and the domestic regime will take no action against the anticompetitive activity.

All in all, external bypasses may echo domestic preferences by creating parallel or alternative mechanisms which advance domestic interests. Note that external bypasses are triggered before the competition analysis, and as such do not affect the perceived scope of the 'sponge'. They therefore escape direct criticism of their role in politicizing and skewing the competition process. Yet in essence, they may provide for a similar outcome.

On the one hand, the exclusion from a transparent and structured competition analysis may expose these alternative vehicles to even greater political susceptibility and open the door, at times, to corruption and misuse. On the other hand, transparent bypasses may offer a clear and legitimate vehicle to advance public policy objectives. The separate treatment of these objectives, outside the competition law analysis, may assist in consideration of the costs and trade-offs of different public objectives, one of which may be competition law.

Importantly, these bypasses reflect social and political preferences. While they may be viewed as external to the competition analysis—they in fact limit its scope and influence. The sense of purity which they bestow on the antitrust community should not mask the distorting effect they have on the outcome of analysis. With that in mind, one may question the true primacy of antitrust law—even in jurisdictions which champion it.¹⁰⁷

105 Competition and Markets Authority (CMA), 'Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries' CMA10, available at: <www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries> accessed 17 June 2016; Angelene Duke, 'Concurrency: Is it the dawn of a new day?' Kluwer Competition Law Blog (13 January 2014) available at: <<http://kluwercompetitionlawblog.com/2014/01/13/concurrency-is-it-the-dawn-of-a-new-day/>> accessed 17 June 2016.

106 Common justifications for exempting export cartels have focused on cost reduction, risk sharing and the target jurisdiction being in a better position to confront and deter such activities. D Daniel Sokol, 'What Do We Really Know About Export Cartels and What Is the Appropriate Solution?' (2008) 4 *J Comp L & Econ* 967; Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3 *J Comp L & Econ* 97; Margaret C Levenstein and Valerie Y Suslow, 'The Changing International Status of Export Cartels' (2005) 20 *Am Uni Intl L Rev* 785.

107 Note for instance Newsletter from the ICN Chair – March 2016 on 'Competition and Industrial Policy Considerations' which reported on efforts to limit these considerations.

V. LEGAL CERTAINTY

The desire for a well-defined and consistent legal and analytical framework leaves one slightly uncomfortable when faced with the ‘sponge’ and ‘membrane’ analogy. Naturally, we prefer to work in a predictable environment and to act as advocates of a clear and precise discipline. Indeed, the antitrust community has limited tolerance to such chatter—preferring to view each deviation as an anomaly. However, understanding the ‘sponge’ properties provides valuable insights to the scope and limits of competition law.

To begin with, the potential burden of the ‘sponge’ properties should not mask their compatibility with the dynamic nature of the law. To the extent that such dynamism does not override predictability, transparency, and objectivity, it may prove beneficial. To that extent, consistency should not be viewed as an overriding legal value.¹⁰⁸ As noted by Justice Kennedy, in the *Leegin* judgment, while antitrust jurisprudence is not written on a clean slate the ‘[c]ourt should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance’.¹⁰⁹ Dynamism enables competition law to address a wide range of market and social realities, while retaining its conceptual core. As such it safeguards competition law from turning into a closed system, detached from domestic needs. It provides a reflection of the changing political landscape and forms part of the democratic process. In addition, the analytical elasticity allows enforcers to experiment with ranging levels of intervention, remedies, and enforcement tools. The ‘sponge’ properties may, for instance, allow a competition agency to address market failures or a period of crisis by relaxing the analytical framework and allowing for a wider range of considerations to affect the level and scope of intervention. A rigid analytical framework may become obsolete over time.¹¹⁰

Having acknowledged the benefits of the ‘sponge’ properties, one should be wary of the possible welfare costs. The most notable consequence of the ‘sponge’ properties concerns the ability of market participants to assess the likely outcome of antitrust scrutiny and the boundaries of legality. Beyond the clear approach to pro-competitive action or hard-core restriction, one may face considerable uncertainty. With so many moving parts and variants, the predictability of competition analysis may be undermined and lead to welfare loss.¹¹¹ Arguably, that predictability is further undermined in today’s antitrust landscape which has been dominated by technical experts, expert lawyers and skilful economists with the power to advance selective

108 Oren Perez, ‘Law in the Air: A Prologue to the World of Legal Paradoxes’ in Oren Perez and Gunther Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Bloomsbury Publishing 2005) 16–17.

109 *Leegin* (n 31).

110 Note, for instance, Timothy Endicott’s argument for the value of vagueness: ‘to understand the value of vagueness, we need to remember that both vagueness and precision *always* bring forms of arbitrariness with them: precision does so because it makes the application of the rule turn on a measure which cannot be perfectly commensurate with the purpose of the rule, and vagueness does so because it leaves the application of the standard to persons or institutions that may act capriciously. The guidance value and the process value of precision need to be reconciled with the arbitrariness of precision’. Timothy Endicott, ‘The Value of Vagueness’ in *Philosophical Foundations of Language in the Law* (OUP 2011) 28.

111 On legal certainty see: Friedrich A Hayek, *The Constitution of Liberty* (1960) 156–57; Ofer Raban, ‘The Fallacy of Legal Certainty: Why Vague Legal Standards would be Better for Capitalism and Liberalism’ (2010) 19 Boston Uni Public Interest L J 175, 179.

goals.¹¹² Overall, the fluid nature of the ‘sponge’ and ‘membrane’, and the possibility for them to generate a wide range of outcomes to a given scenario may open the way for opportunism.¹¹³

The ‘sponge’ properties not only affect the analytical framework, but also impact on enforcement policies. The way one understands competition law and its goals is naturally linked to one’s approach to selection of cases and remedies. Areas affected may include case selection and prioritization,¹¹⁴ allocating budget,¹¹⁵ investment in capacity building, advocacy,¹¹⁶ or case investigation.

Furthermore, the sponge may affect agency design and allocation of functions. An agency’s mandate and the intensity of its enforcement may vary based on the range of goals and interests it protects. Functions may include, for example, competition enforcement, consumer protection, regulation of sectors, data protection, protection of intellectual property rights, and monitoring of public procurement. The amalgamation of tasks creates a ‘policy conglomerate’ and affects the agency’s definition of goals, prioritization, and performance.¹¹⁷ The sponge may affect the scope of these functions. A widening of function may, in turn, affect the absorbent properties of the ‘sponge’ and its usage.

Arguably, it is in the enforcer’s interest to stabilize the ‘sponge’ characteristics and foster a predictable analytical framework. That indeed has been the case in many jurisdictions. However, the difficulty with ‘self-policing’ by the enforcer is that it relies on an unpredictable safety valve. Different enforcers may exhibit ranging levels of expertise and independence. Imprecise analysis, balanced through the enforcer’s self-restraint, is in itself a recipe for unpredictability. In such cases the level of enforcement becomes overly dependent on the individual and subsequently exposed to its personal agenda, to agency-problems, and to externalities. At the extreme, the imprecise analytical framework may open the door to ‘reverse reasoning’—allowing one to identify the target and outcome, and only subsequently construct the reasoning to support it. Such an arbitrary approach, even when shielded by complex reasoning, is detrimental to the integrity of the analytical process. It creates a subjectively driven inquiry in which the individuals on both sides, and the interaction between them, set the tone for the analysis and determine its outcome.

112 First and Waller (n 32), 2544; Thomas Horton, ‘Fairness and Antitrust Reconsidered: An Evolutionary Perspective’ (2013) 44 *McGeorge L Rev* 823, 828–29.

113 On the correct balance between certainty and adaptability see: Louis Kaplow, ‘A Model of the Optimal Complexity of Legal Rules’ (1993) 11 *J L Econ & Org* 150; Isaac Ehrlich and Richard A Posner, ‘An Economic Analysis of Legal Rulemaking’ (1974) 3(1) *J Legal Stud* 257.

114 See: n 10 above.

115 William E Kovacic, ‘Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement during the Reagan Administration’ (1988) 33 *Antitrust Bulletin* 467, 467–68.

116 Allan Fels and Wendy Ng, ‘Paths to Competition Advocacy’ in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012) 191; ICN Advocacy Working Group, ‘Advocacy and Competition Policy’ (International Competition Network Conference, 2002).

117 David A Hyman and William E Kovacic, ‘Competition Agencies with Complex Policy Portfolios: Divide or Conquer?’ [2013] *Concurrences* 9, 9; David A Hyman and William E Kovacic, ‘Institutional Design, Agency Life Cycle, and the Goals of Competition Law’ (2013) 81 *Fordham L Rev* 2163; Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (OUP 2011) xi.

VI. LEGITIMACY

An interesting question raised by the ‘sponge’ analogy concerns the legitimacy of competition regimes worldwide. One may wonder the extent to which competition law, as one or many understand it, reflects a superior benchmark for other jurisdictions to follow. Can one jurisdiction legitimately criticize another for opting for a different composition of values?

While leading western authorities may view other regimes as diverting from the acceptable template, the ‘sponge’ analogy tells a more complex story. Those ‘other’ regimes do not necessarily divert from a well-defined and superior template but rather divert from the state of play in another jurisdiction—which may well reflect the development and absorption properties in that jurisdiction. This insight affects the authority with which one may delegitimize other regimes.

Of course, this is not to suggest that competition law ought to be accepted as an instrumental platform advancing industrial policies. It does however remind one that, by its nature, the ‘sponge’ and ‘membrane’ are dynamic and embedded in the domestic context. The goals and values of competition enforcement and the hierarchy between them are not set. *A purist approach is often rooted in one’s misguided perception as to the limited susceptibility of its own regime to these forces.*

Even when a jurisdiction heavily relies on economic thinking in case analysis, this does not imply that ‘economics’ equates to the ‘law’. The realm and scope of competition law are set and affected by the legislative process and political forces, some visible through ‘bypasses’ and others less so. While the competition analysis may be economic in nature, it is confined by legislative and domestic boundaries. In other words, the economic display may be central to the analysis, yet the totality of the intervention is likely to echo domestic peculiarities. In addition, recall the dynamic nature of economic thinking, its evolution over time and susceptibility to social, political, and moral norms. All in all, economic analysis ought to guide the discussion, but should not be mistaken to represent the whole, rather than one of its parts.

Linked to the legitimacy debate are institutional choices and agency designs, which may amplify the ‘sponge’ characteristics. Most notably, the link between the enforcer and the political arm may increase emphasis on wider industrial policies, fostering uncertainty and an arbitrary environment. On this point, note that the further one ventures from the core values of competition law, the easier it may be for special interest groups to affect the analysis.

When considering the legitimacy of the enforcement environment one should also be mindful of the scope of admissible evidence and considerations. The ability of parties to present industrial, political, and social considerations at trial or hearing may inevitably lead to ‘instrumentalisation’ of the process, even when the process is conducted openly and is subjected to checks and balances. Indeed, the prominence of lobbying adds a further dimension of influence, as discussed below. An alternative approach that de-politicises the process would reject such considerations, treating them as irrelevant. Such a purist approach is naturally perceived as more accurate and focused on the core goals of competition law. Recall, however, that industrial, political, and social considerations may affect the legislative process, the enforcement priorities, allocation of resources, susceptibility to lobbying, and many other dimensions, while retaining a purist front at the trial or hearing. A consideration of a

regime's position on the spectrum of real, and perceived, purity should be conducted while taking the whole ecosystem into account.

VII. INTELLECTUAL AND REGULATORY CAPTURE

The inherent characteristics of the sponge and membrane open the gate to intellectual capture. After all, the more flexible the structure, the easier it may be for one to subject it to manipulation and mould it to serve one's interests. When considering the centrality of competition enforcement to corporations' strategies and profit margins, it is of little surprise that competition law became a prime target of lobbying. In fact, lobbying efforts may be seen as a rational, cost-effective investment by profit maximizing firms, invited by the sponge characteristics. Indeed, on-going efforts by pressure groups, chambers of commerce, corporations, and other interested parties, have dominated the antitrust landscape since its early days. From the promotion of limited enforcement action, to arguments in favour of robust intervention; from arguments in favour of narrow economic goals, to wider enforcement agenda.

When considering the scope of such influence, one may identify two distinct levels. The first one is case (or industry) specific and aimed at discouraging or encouraging enforcement action. Lobbying may be used to affect the enforcer's views as to the appropriate scope of competition enforcement, the merit of pursuing a case or investigating an industry.¹¹⁸ It may be implemented directly or indirectly—through communications with competition officials, politicians, and the media. When visible and case specific, it is often the case that such efforts will be rejected by the competition agency, as it strives to operate independently and within the analytical framework prescribed by the law and economic thinking.

The second form of influence may be less apparent, and concerns the analytical framework prescribed by the law and economic theory and followed by the competition agency. That framework, with its sponge characteristics, may be subjected to ongoing manipulation. Pressure groups and powerful interested parties can capture the debate through the media, online channels, think tanks, academic discussions, conferences, publications and other means. In doing so they may affect the analytical framework—the sponge and membrane—and shape them to serve their corporate or political interest. The influence in such cases is often inconspicuous as it targets

118 Adrian J Vossestein, 'Corporate Efforts to Influence Public Authorities, and the EC Rules on Competition' (2000) 37(6) CMLR 1383; Cristina Mariani and Simone Pieri, 'Lobbying Activities and EU Competition Law: What Can be Done and How' (2014) 5 J Eur Comp L & Practice 423; Also note the Microsoft investigation and the reported efforts by some senators to affect the FTC's decision-making. Andrew I Gavil and Harry First, *The Microsoft Antitrust Cases* (MIT 2014) 22–25; Also note reports on Google's lobbying: Mullins, 'Google Makes Most of Close Ties to White House' *Wall Street Journal* (24 March 2015) <<http://www.wsj.com/articles/google-makes-most-of-close-ties-to-white-house-1427242076>> accessed 17 June 2016; David Dayen, 'The Android Administration' *The Intercept* (22 April 2016) <<https://theintercept.com/2016/04/22/googles-remarkably-close-relationship-with-the-obama-white-house-in-two-charts/>> accessed 17 June 2016; Tim Sculthorpe, 'The Revolving Door between Google and European Governments has Spun at Least EIGHTY Times in the Past Decade, new research reveals' *Daily Mail* (5 June 2016) <<http://www.dailymail.co.uk/news/article-3626126/The-revolving-door-Google-European-governments-spun-EIGHTY-times-past-decade-new-research-reveals.html>> accessed 17 June 2016; Simon Marks and Harry Davies, 'Revealed: how Google Enlisted Members of US Congress to Fight \$6bn EU Antitrust Case' *The Guardian* (17 December 2015).

the wider framework within which the competition agency operates—the legal and analytical reality as accepted by the decision-makers.¹¹⁹

When successful, these efforts can lead to intellectual and regulatory capture—shaping competition policy to echo the will of interest groups and propagating it as its sole objective reality. Indeed, our ability to distinguish ‘true’ competition principles advocated by independent scholars from those ‘fed’ to us by interested parties, is limited. Even more so when those representing corporate agenda or interested groups engage in the economic and academic debate, or join the ranks of the policy-makers, without revealing their interests and funding.¹²⁰ When successfully concealed, the perfect capture emerges. The subjects of this capture will operate within what they perceive to be a clearly defined framework. They would often do so with a sense of purity and with little awareness of the sophistication with which the trusted framework in which they operate has been affected by interested parties.¹²¹ The sponge, for them, remains a myth.

VIII. INTERNATIONAL ARENA

Embedding the ‘sponge’ in a global environment of plural sovereignties amplifies many of the challenges discussed above. With more than 120 competition regimes worldwide and ever increasing cross border business activity, the prospect for inconsistency and system friction is apparent. Addressing this multitude and friction has been at the focal point in recent decades—from early unilateral policies, through enhanced bilateral cooperation, regional, and multinational negotiations.

Much has been written about the internationalization of competition law and the means to enhance harmonization and convergence. With the ‘sponge’ analogy in mind, a number of insights are worth mentioning.

Firstly, the proliferation of competition regimes has been celebrated as a move towards a more competitive international landscape. Indeed, many jurisdictions and international organizations have been supporting the emergence of new competition regimes. The promotion of antitrust around the world has undoubtedly been a worthwhile goal. Interestingly, while ‘bundles’ of ‘sponge’ and ‘membrane’ resemble each other on the ‘factory floor’, they are dynamic in nature and mutate once immersed in their unique domestic reality. One should therefore not be surprised when the ‘successful export’ of a ‘sponge’ into a foreign jurisdiction results in differences and inconsistencies. The drive towards competition homogeneity does not

119 Eric Lipton and Brooke Williamsaug, ‘How Think Tanks Amplify Corporate America’s Influence’ *New York Times* (7 August 2016); Eric Lipton and Brooke Williamsaug, ‘Think Tank Scholar or Corporate Consultant? It Depends on the Day’ *New York Times* (8 August 2016) <http://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html?smprod=nytcore-iphone&mid=nytcore-iphone-share&_r=0>; <<http://www.nytimes.com/2016/08/09/us/politics/think-tank-scholars-corporate-consultants.html>>. accessed 22 August 2016

120 Illustrative is a report by Campaign for Accountability, which reported on academics and experts who played a major role at government conferences and policy debates in the US, yet often failed to disclose their financial ties to Google. CfA report ‘Google’s Silicon Tower’: <<http://campaignforaccountability.org/wp-content/uploads/2016/07/CfA-Google-Silicon-Tower-7-19-16-Final-1.pdf>>.

121 On the possible use of intellectual capture in antitrust see further discussion in: Ariel Ezrachi and Maurice Stucke, *Virtual Competition – The Promise and Perils of the Algorithm Driven Economy* (Harvard 2016).

override the domestic reality. Accordingly, the full composition of the ‘sponge’ is only revealed once immersed in the national matrix.

Secondly, the ‘sponge’ properties should be acknowledged when faced with inconsistency in the application of competition law by one or more jurisdictions. Such inconsistency has become less common on the international arena, but may arise even between close trading partners. Such, for instance, has been the case in the *Boeing/McDonnell Douglas* transaction,¹²² the Microsoft investigation¹²³ and more recently the European Commission’s Google investigation.¹²⁴ Despite the harmonious relationship between the EU and the US, and the impressive track record of cooperation, these cases triggered friction between the jurisdictions. Faced with system friction, an ‘ideal of purity’ is at best naïve and should not be used as a benchmark against which other regimes are condemned. A more intellectually honest approach would accept the properties of the ‘sponge’ and ‘membrane’, while highlighting also the desire for coherence and transparency at domestic and international levels. Such an approach does not imply an acceptance of possible politicization or instrumentalization of competition analysis. It merely implies a more honest discussion when criticizing other jurisdictions’ composition of values.

Indeed, if one observes how competition law enforcement has developed over the past century, an evolving journey emerges. At different stages of economic development and political circumstances, different jurisdictions used competition enforcement to advance varied goals. Such development is consistent with ‘sponge’ properties and raises questions as to one’s ability to credibly push another to align its policies to a superior universal template.¹²⁵ In addition, the mere transplantation of legal text—from one jurisdiction to another—may provide for perceived assimilation but offer little in terms of substantive alignment. In fact, the commonality and similar lingo used by competition officials, which are of course of significant value, may disguise the true domestic nature of competition law and its inherent characteristics.

Furthermore, the notion that uninterrupted competitive pressure serves as the optimal solution to enhance welfare and market mechanism, has to be considered in context. Indeed, different cultural, economic, social, and political circumstances may impact on the effectiveness of competition policies and result in a heterogeneous enforcement landscape.¹²⁶ The promotion of a certain enforcement agenda, as

122 US 105th Congress, 1st Session, 21 July 1997, ‘H. Res. 191 (ih) - Expressing the sense of the House of Representatives regarding the interference of the European Commission in the merger of the Boeing Company and McDonnell Douglas.’; ‘Clinton Warns Europeans of Trade Complaint on Boeing Deal’ *The New York Times* (18 July 1997).

123 Gavil and First (n 118) 233–34; Also see: Press Release, US Dep’t of Justice, Assistant Attorney General for Antitrust, R Hewitt Pate, ‘Issues Statement on the EC’s Decision in Its Microsoft Investigation’ (24 March 2004).

124 See eg ‘Obama attacks Europe over technology protectionism’ *Financial Times* (16 February 2015); ‘Europe Challenges Google, Seeing Violations of Its Antitrust Law’ *The New York Times* (15 April 2015); ‘Concerns grow over EU rules targeting American Companies’ *Financial Times* (29 July 2015).

125 Note the literature on legal transplants, from core writing on the topic: A Watson, *Legal Transplants: An Approach to Comparative Law* (1974), to antitrust specific literature such as: Tay-Cheng Ma, ‘Legal Transplant, Legal Origin, and Antitrust Effectiveness’ (2013) 9 *J Comp L & Econ* 65–88; Michal S Gal *Competition Policy for Small Market Economies* (Harvard University Press 2003).

126 Note, for instance, how in some jurisdictions moral norms and religion may undermine the effectiveness of leniency programmes. When local culture condemns the reporting of the violator to the competition

attractive and helpful as it may be to one jurisdiction, may be the wrong cure for another. It is rooted in a belief of universality which is inconsistent with the sponge properties. It ignores the possibility that, over time, policy-makers may have been intellectually captured by different ideas and pressure groups, rather than by an objective truth. It also ignores the fact that substantive analysis forms part of a wide legal matrix of exclusions and bypasses. Accordingly, a jurisdiction's analytical approach promoted worldwide might not be as pure as perceived.

Of course, these insights should not mask the risk of misusing competition law to advance industrial policies. The sponge characteristics may allow jurisdictions to advance political agendas and protectionist policies in the guise of competition enforcement, thus bypassing the scrutiny of international trade agreements. Such misuse has sometimes led to political friction between jurisdictions, in particular when appraising cross border merger transactions.¹²⁷ It may allow a jurisdiction to block beneficial foreign transactions due to negative, non-competitive effects on the domestic market. It may also serve as a tool to establish 'royalty payments' and a 'positive transfer of wealth' as conditions for clearing a transaction. Conflicts posed by the increased volume of transnational enforcement may lead to delays and inconsistencies, and in sensitive cases, to political friction.

To illustrate the potential for system friction, take for example the alleged misuse of Chinese competition law to block Coca-Cola's bid for China Huiyuan Juice Group Ltd. The Chinese Ministry of Commerce decision has been seen by some as advancing protectionist, domestic industrial, and political considerations disguised as competition appraisal.¹²⁸ Without taking a stance on this specific case, one could nonetheless appreciate the wide margin for decision-making offered by the sponge. Such a margin may enable bypassing international agreements by embedding political considerations into the sponge and using competition law as a façade for protectionist policies. Such instances highlight the significance of international efforts to foster transparent and predictable competition principles. They should serve to promote more consistent appraisal benchmarks that would safeguard the rule of law.

Another insight concerns the limitations of antitrust imperialism. As noted earlier, the valuable convergence towards an agreed spectrum of goals and the use of similar language in competition regimes worldwide does not imply the presence of a unified and consistent platform. The ongoing world-wide assimilation of competition law analysis does not override the 'sponge' properties. It merely reflects successful

agency, formal adoption of such programmes may yield limited results. See: Julián Peña, 'The Limits of Competition Law in Latin America' in Ioannis Lianos and Daniel Sokol (eds), *The Limits of Competition Law* (Stanford University Press 2012); Anecdotal evidence suggests that resistance to leniency due to cultural and religious values, led in some jurisdictions to the majority of applications being submitted by foreign companies, with limited cooperation from domestic enterprises.

127 Ariel Ezrachi, 'Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between' in Philip Marsden (ed), *Handbook on Trans-Atlantic Antitrust* (Edward Elgar Publishing 2007) 622–41.

128 See eg Stephanie Wong and Wing-gar Cheng, 'China Blocks Coca-Cola's \$2.3 Billion Huiyuan Bid' (Bloomberg, 18 March 2009) <[http://www.progresscapital.net/actual/china-blocks-coca-cola%60s-\\$2-3-billions-bid-for-huiyuan-3](http://www.progresscapital.net/actual/china-blocks-coca-cola%60s-$2-3-billions-bid-for-huiyuan-3)> accessed 17 June 2016; Cecil Saehoon Chung, Kyoung Yeon Kim and Kyu Hyun Kim, 'Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet' (29 October 2015) <<https://www.competitionpolicyinternational.com/early-signs-of-protectionist-merger-control-in-korea-probably-no-at-least-not-yet/>> accessed 17 June 2016.

attempts to tame and align regimes worldwide through unilateral and collaborative means. Accordingly, to a large extent, multinational and regional negotiations may be viewed as external pressures which limit the natural properties of the ‘sponge’ and ‘membrane’. Their legitimacy is external and not necessarily rooted in the presence of purity within the ‘sponge’. They stem from the desire to limit system friction and enhance consistency in the application and enforcement of competition law worldwide. The choice of an agreed benchmark is often the result of international negotiation, political pressure, and compromise by the weaker participants. In other words, ‘purity’ is often moulded in accordance with the dominant jurisdictions’ viewpoints. Accordingly, worldwide assimilation should not be confused with the presence of a single superior enforcement or analytical framework. Indeed, in the context of multinational efforts, one should recall that unity is often a hegemonic project—transforming the strongest power’s own perspective into the unified benchmark.¹²⁹

A further insight concerns the areas of competition law that are best suited for negotiation and convergence. Some areas of the ‘sponge’ may be predisposed to domestic, social, and political surroundings, while others may be more resistant to domestic effects. For instance, secondary provisions—often procedural in nature—tend to be less susceptible to wider domestic interests and as such form better candidates for wide multinational convergence. Indeed, harmonization of procedural provisions has been a prime target for successful multinational collaboration. Noteworthy in this respect is the ICN’s contribution to the assimilation of merger notification regimes¹³⁰ and the increase of the nexus between the reviewing jurisdiction and the transactions.¹³¹ The ICN was successful in mitigating some of the effects of the sponge by fostering wide consensus among its members, through dialogue and joint working groups. Also noteworthy are the OECD’s contribution to convergence in merger control¹³² and UNCTAD’s work through the Competition and Consumer Protection for Latin America programme and its voluntary merger notification programme.¹³³

Other areas which are more domestically sensitive have proved more difficult for alignment. They display resistance to binding frameworks and limited alignment

129 Martti Koskeniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversifications and Expansion of International Law’ (International Law Commission 2006) A/CN.4/L.682 para 491; Joost Pauwelyn, ‘Fragmentation’ Max Planck Encyclopaedia of Public International Law (2006) para 15.

130 International Competition Network - ICN Mergers Working Group, Notification and Procedures Subgroup.

131 ICN Mergers Working Group, International Competition Network (ICN), *Recommended Practices for Merger Notification Procedures* (June 2003); ICN Mergers Working Group, International Competition Network (ICN), *Guiding Principles for Merger Notification and Review* (September 2002); ICN Mergers Working Group, International Competition Network (ICN), *ICN Notification & Procedures Subgroup Draft Self-Assessment Tool: Evaluating Merger Notification Provisions for Conformity with ICN Recommended Practices for Merger Notification & Review Procedures* (2011).

132 The Organisation for Economic Co-operation and Development - BIAC and ICC, *Recommended Framework for Best Practices in International Merger Control* (4 October 2001).

133 United Nations Conference on Trade and Development - Competencia y Protección del Consumidor en America Latina <www.unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=742> accessed 17 June 2016; Ariel Ezrachi and Hassan Qaaya, ‘UNCTAD’s Collaborative Information Platform’ (2012) 4 *Concurrences* J 204.

with voluntary ones. Past attempts that ignored the 'sponge' characteristics and pushed for overreaching binding multinational agreements have failed. Indeed, from the Havana Charter¹³⁴ to the Munich group initiative¹³⁵ and attempts at the World Trade Organisation,¹³⁶ the international community has been unable to reach meaningful binding agreements on competition law and policy. By contrast, voluntary frameworks have been more successful in promoting selective convergence.

Related is the significance of similarity of domestic environments in achieving international consensus. Similar market, social and political realities produce corresponding environments which subsequently lead to similar 'sponge' and 'membrane' compositions. Indeed, one can observe the parallels in enforcement and policy between developing countries, and differences in approach to developed countries. These realities explain the selective investment in high-impact bilateral agreements which often link jurisdictions which share similarities in trade patterns and enforcement. They may also shed light on the negative correlation between the number of jurisdictions involved in negotiation and the binding nature and scope of the provisions agreed.

IX. CONCLUSION

The 'sponge' analogy implies that competition policy is more flexible than some might argue. It acknowledges that the effects of the domestic environment are an integral part of competition law and are echoed in the properties of the law. In doing so it points to the margin for subjective, or at times, arbitrary, decision-making that may be shielded under the perceived structure of the law and the legitimacy of economic analysis.

So where does it leave us? Importantly, this article does not seek to promote the sponginess of competition law. It merely describes its characteristics—its state of being. Similarly, the article does not set out to challenge the overall benefits that stem from antitrust intervention. It does, however, question the conviction with which one portrays it as a solid discipline with apparent outcomes. As idyllic as such a view may be, it often leads to a shallow and an overpolarised debate at national and international levels. It stands in contrast to the true nature of the 'sponge' and to reality, as experienced daily by competition lawyers, enforcers, judges, policy-makers, and businessmen.

The key to effective competition law enforcement is not in the pretence of purity, but in the understanding of the interface between the 'sponge', 'membrane' and the domestic environment, and in a credible move to enhance its transparency, limit its susceptibility, and promote a workable rule of law. The reflective approach put forward in this article should not challenge the rationale at the heart of competition enforcement. It ought to advance it. Indeed, competition law is of great intellectual beauty and practical significance, even when observed with its imperfections and blemishes.

134 Barbara Ingham, *From ITO to WTO: Trade and Protection in a Changing World* (Salford University 1998); Lynden Briscoe and Lynden Moore, *The Growth and Structure of International Trade Since The Second World War* (Wheatshaf Books 1985) 42–50; Clair Wilcox, *A Charter for World Trade* (Macmillan Co 1949) 103–13, 153–60.

135 The Munich Draft International Antitrust Code; reprinted in (1993) Antitrust & Trade Regulation Report 65, No 1628.

136 Josef Drexel, 'International Competition Policy After Cancun: Placing a Singapore Issue on the WTO Development Agenda' (2004) 27 World Competition 419.