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SPONGE

Ariel Ezrachi*

A look at the international competition law landscape reveals consensus as to the main goals of competition law. Indeed, core economic reasoning and market analysis serve as the backbone to competition analysis and support assimilation of thought and policy worldwide. Orbiting that core, one may identify a wider, heterogeneous, range of policies advanced by competition regimes. These policies are sometimes viewed as external to the pure competition analysis and, as such, may be regarded as illegitimate. Overall, the ‘in’ and ‘out’ methodology presupposes the presence of a legal and analytical structure which defines competition law and to which jurisdictions are expected to align. This paper explores that proposition. It considers the inherent properties of the law and questions the presence of a clear dividing line between competition law and external considerations. It argues that the law, by its nature, provides for an absorbent and flexible platform which soaks up national values and interests. Accordingly, the inherent scope and nature of modern competition laws are not necessarily as consistent and objective as one might like them to be.

* Slaughter and May Professor of Competition Law, The University of Oxford. Director, The University of Oxford Centre for Competition Law and Policy. email: ariel.ezrachi@law.ox.ac.uk.

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I. Introduction

When considering the scope, aim and nature of competition law, one often resorts to a description of its core goals as understood by competition enforcers, practitioners and academics. Recent globalisation 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.

This is not to say that the international landscape of competition enforcement is tension free. Indeed, the domestic perspective on competition enforcement, the presence of cross border externalities and transfers of wealth are only a few of the many forces which often introduce tension and inconsistency.¹ Nevertheless, competition laws draw their core analytical framework from the same source and as a result speak an increasingly similar language.

The ongoing process of assimilation and harmonisation worldwide, as well as the commonality and similar lingo used by competition officials are of significant value.² They may, however, at times, disguise the true domestic nature of competition law and its inherent characteristics. So much so that one is often critical of competition regimes which do not conform to the common ‘world-wide’ template and values. Indeed, the discussion of competition law tends to assume the presence of an objective core, departure

¹ 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/dataoecd/57/39/2486329.pdf>> accessed 7 January 2015; The Unilateral Conduct Working Group, International Competition Network (ICN), Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State Created Monopolies, ICN Report (May 2007) <www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 7 January 2015.

² Mario Monti, Speech, 28 February 2004, ‘Convergence in EU-US antitrust policy regarding mergers and acquisitions: an EU perspective’ SPEECH/04/107

from which is criticised as introducing ‘external considerations’ into the analysis.

This paper explores that proposition and questions the presence of a clear dividing line between competition law and external considerations. The paper considers the role of competition law as a domestic, or regional, social policy which is shaped by a multitude of forces. It highlights the inherently dynamic nature of this legal vehicle and as a result, its wide-ranging goals, scope and possible outcomes.

It is important to stress at the outset that this paper does not discount the benefits of harmonisation and assimilation. Nor does it question the merit of promoting a consistent analytical approach to competition analysis. The benefits of a well-defined competition law regime cannot be overstated. The thesis put forward in this paper 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-like³ characteristics of competition law make it inherently susceptible to a wide range of values and considerations. Its true scope and nature are not a ‘given’ via a consistent objective reality, but rather a complex, and at times inconsistent expression of a multitude of values.⁴

The paper begins with a consideration of the porous and absorbent characteristics of competition law. Following this it explores the economic ‘membrane’ – the significant role played by economic thinking. Having established the image of ‘sponge’ and ‘membrane’, it reflects on the use of ‘by-pass instruments’ to tilt the balance in favour of the wider political agenda. Subsequent discussion considers the impact of this ‘enforcement platform’ on legal certainty, transparency, the international arena and legitimacy.

³ ‘Sponge-like characteristics’ and the analogy to ‘sponge’ in this paper 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 Dictionary)

⁴ E.g. The 2007 ICN Report (n 1 above) 6.

II. Porous and Absorbent Characteristics

Law, generally being a social construct, stems from the domestic foundations and values of society and changes to reflect their development.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

Competition law is not immune to these dynamic society-driven processes. In fact, as will be illustrated below, it is inherently susceptible to a wide range of national variants. Although guided by economic analysis, one may identify distinct social, economic and political foundations which 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

⁵ See for example: Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 116; Leslie Green, 'Legal Positivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2009, 2009); Andrei Marmor, 'The Nature of Law' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Winter 2011, 2011); Aharon Barak, *The Judge in a Democracy* (Princeton UP 2006) 3-11; Felix S Cohen, 'Ethical Systems and Legal Ideals' in Morris S Cohen and Felix S Cohen, *Readings in Jurisprudence and Legal Philosophy, Volume 2* (first published 1951, Beard Books 2002); John J Flynn, 'Antitrust Jurisprudence: A Symposium on the Economic, Social and Political Goals of Antitrust Policy', (1997) 125(6) *University of Pennsylvania Law Review* 1182-1190.

⁶ Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25(3) *Oxford Journal of Legal Studies* 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* (Oxford University Press 2001) 371-409. For an opposing view see Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001); Barak (n 6 above) 4.

⁷ See Hart (fn 5) 203-204; Also see Leslie Green comment on Hart 'Legal Positivism' (fn 5); Also note: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 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* (2003).

While key competition law principles are similar across the world, these only form a skeleton 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 necessarily be criticised 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 minimised. 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

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 Journal of International Law 999, 1003–1004.

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.

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

A notable characteristic of EU competition law is its role in safeguarding the integration of the European market. Market integration has been one of the major drivers of EU competition law since its inception,¹⁴ advancing political and economic goals,¹⁵ 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.¹⁶

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 Journal of International Law* 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 *American Journal of Comparative Law* 25, 64; Pinar Akman, ‘Searching for the Long-Lost Soul of Article 82 EC’ (2009) 29 *Oxford Journal of Legal Studies* 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 Articles 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, Paragraph 180; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, Paragraphs 31, 36, 38-39.

¹⁴ 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 International Law Journal* 97, 102.

¹⁵ 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 Paragraph 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, Paragraph 1.

¹⁶ 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*

In practice, this political goal has led to a focus on territorial restrictions that undermine the creation of the Single Market,¹⁷ and dictate a rather restrictive view of vertical agreements and exclusivity arrangements.

At times, the application of European competition law is affected by wider policy attributes, such as environmental concerns,¹⁸ investment,¹⁹ transportation,²⁰ social agenda,²¹ regional development or other industrial policies.²² From time to time, 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, operated in an environment that was becoming increasingly global, hence the importance for

Communities [2009] ECR I-9291, Paragraphs 62-63; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd* [2011] ECR I - 9083, Paragraphs 139-140.

¹⁷ See, for example, Case 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

¹⁸ Article 11 TFEU; For a consideration of EU Competition Law's approach to environmental concerns see Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011).

¹⁹ *Ford/Volkswagen* (Case IV/33.814) Commission Decision no. 93/49/EEC [1993] OJ L 20/1993, 14-22, 19: '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 Article 85(3) the Commission took into account these 'extremely positive effects on the infrastructure and employment in one of the poorest regions in the Community.' (Recital 23).

²⁰ For example, 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 International Law Journal* 602, 608.

²¹ Case C-26/76 *Metro v SABA and Commission* [1977] ECR 1875,1916, Point 43: '[t]he establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to [Article 101(3)].'

²² For consideration of industrial policy at member States and Commission levels, see: Damien Geradin and Ianis Girgenson, 'Industrial Policy and European Merger Control - A Reassessment' TILEC Discussion Paper No. 2011-053.

Community policies to actively facilitate the creation of large European groups.’²³

Lastly, the importance of agency design should be noted since it reflects the wider matrix in which enforcement policies are shaped. In Europe, Competition law decisions are taken by the College of Commissioners, thus reflecting the views of not only the Competition Commissioner, but of the other 27 Commissioners responsible for other policies. As stated by Commissioner Margrethe Vestager ‘Competition is not a lonely portfolio.’²⁴

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, economic agenda and philosophies 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.²⁵ Its application has been based on a range of economic approaches²⁶ and evolving ideology. For instance, 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.²⁷

²³ Page 14, Minutes from the Commission’s meeting on November 7, 2012, PV(2012) 2022 final (with author)

²⁴ Margrethe Vestager, Approval hearing before the Economic and Monetary Affairs Committee of the European Parliament (2 October 2014)

²⁵ David J. Gerber, *Global Competition, Law, Markets and Globalization* 123 (OUP 2010)

²⁶ Steven C. Salop, ‘Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard’ (2010) 22 *Loyola Consumer Law Review* 336; Douglas H. Ginsburg, ‘Judge Bork, Consumer Welfare and Antitrust Law’ (2008) 31 *Harvard Law Journal and Public Policy* 449; Robert H Lande, ‘Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust’ (1989-1990) 58 *Antitrust Law Journal* 631.

²⁷ 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

Since then, the application of the antitrust laws has evolved to reflect our more modern understanding of the aims and goals of antitrust - curtail economic injustice, promote economic liberty, and advance the consumer welfare.²⁸

The interpretation of the Sherman Act's antitrust provisions evolved over the years to meet dynamic economic conditions.²⁹ The relatively abstract language enabled the court to develop and adjust the realm of antitrust law. Also noteworthy in this respect is Section 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 criticised as going too far afield from antitrust concerns.³⁰

Evolving enforcement philosophy has also been prominent in determining the scope of enforcement. Take for example the withdrawal in 2009 of the DOJ report on Competition and Monopoly.³¹ The report was seen as advocating hesitancy in the application of Section 2 of the Sherman Act. 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.'³²

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

²⁸ Scherer, 'A Century of Competition Policy Enforcement' in Chao Yang Ching, *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 Law Review* 583; Gerber, *Global Competition: Law, Markets and Globalization* (OUP 2010) 122-124

²⁹ Note for example comments by the Supreme Court in its *Leegin* Judgement

³⁰ James Campbell Cooper, 'The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act' (2015) *Journal of Antitrust Enforcement*; Maureen K. Ohlhausen, 'Section 5 of the FTC Act: principles of navigation' (2014) 2 *Journal of Antitrust Enforcement* 1.

³¹ Online: <http://www.usdoj.gov/atr/public/reports/236681.pdf>

³² DOJ Press Release: http://www.justice.gov/atr/public/press_releases/2009/245710.htm

The application of US Antitrust Law is limited by a number of exemptions, which carve out certain sectors and activities to various degrees.³³ At times, case by-case analysis reveals the possible susceptibility of analysis to wider considerations. While uncommon in US antitrust jurisprudence, the role played by employment in the merger between American Airlines and US Airways³⁴ and the Tesoro Corporation/BP PLC transaction³⁵ is interesting. More generally, the modern application of US antitrust law through private and public enforcement has been criticised at times as too detached from its core ideals and entrenched as a bureaucratic specialty administered by technocrats.³⁶ As noted by Waller and First, the antitrust system ‘puts too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots.’³⁷

³³ Agricultural cooperatives: The Capper-Volstead Act, 1922, 7 U.S.C. §§ 291-292; Insurance: The McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015, see the ‘Health Insurance Industry Fair Competition Act’ 2013: <www.congress.gov/bill/113th-congress/house-bill/743> accessed 15 January 2015; Labor unions: Clayton Antitrust Act of 1914, 15 U.S.C. § 17; Sports leagues: Sports Broadcasting Act (1961), 15 U.S.C. §§ 1291-1295, 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 16 January 2015; Export trade: Export Trade (Webb-Pomerene) Act, 15 U.S.C. §§ 61-66. See also: <www.nytimes.com/2009/10/18/us/politics/18address.html?_r=1&> accessed 16 January 2015. 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’ (2010) 105 *Northwestern University Law Review* 1399.

³⁴<www.usnews.com/opinion/blogs/economic-intelligence/2013/03/01/whats-behind-the-american-airlines-us-airways-merger> accessed 16 January 2015.

³⁵ 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 16 January 2015. 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 16 January 2015.

³⁶ Richard Hofstadter, ‘What happened to the Antitrust Movement’ in Richard Hofstadter, *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 Law Review* 1759, 1762, 1754.

³⁷ Harry First and Spencer Weber Waller ‘Antitrust’s Democracy Deficit’ (2012) 81(5) *Fordham Law Review* 2543, 2544.

As in other jurisdictions, the nature and intensity of US antitrust enforcement is 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 political ideology affects antitrust intervention.³⁸ Also noteworthy is the possible use of lobbying and political influence to affect case selection and investigations.³⁹ It has been argued that ‘the most important determinants of US policy on maintaining fair market competition are political, not economic or bureaucratic. Decisions by all major US democratic institutions shape both the *level* and *substance* of US antitrust regulation through time.’⁴⁰

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...’⁴¹

³⁸ Vivek Ghosal, ‘Economics, Politics and Merger Control’ in Jay Pil Choi (ed), *Recent Developments in Antitrust: Theory and Evidence* (MIT 2006) 125.

³⁹ Note for example 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 the number of White House visits by Google executives during Obama administration: ‘Google Makes Most of Close Ties to White House’ Wall Street Journal, March 24, 2015, Available on: <http://www.wsj.com/articles/google-makes-most-of-close-ties-to-white-house-1427242076>

⁴⁰ B. Dan Wood and James E. Anderson, ‘The Politics of US Antitrust Regulation’ (1993) 37(1) *American Journal of Political Science* 1, 34.

⁴¹ Walter Pincus and George Lardner Jr. ‘Nixon Hoped Antitrust Threat Would Sway Network Coverage’ [1997] *Washington Post* Staff Writers (December 01, 1997). Available online: <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>; Maurice E. Stucke ‘Does the Rule of Reason Violate the Rule of Law?’ 42:5 *University of California, Davis* [2009] 1375, 1449

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 policy.

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.⁴² Article 15 of the Chinese Anti Monopoly Law limits the application of the law through exemptions that apply in a range of cases.⁴³ For instance, 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 and 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

⁴² Anti Monopoly Law, Article 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).

⁴³ Anti-Monopoly Law 2008, ss 13, 14.

⁴⁴ Anti-Monopoly Law 2008, s 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’ *J Antitrust Enforcement* (2013) 1 (2): 247-271

⁴⁶ The Antimonopoly Act (JP), Article 1.

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, among other things, of 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 organisations and the granting of state preferences. State preferences can be granted exclusively for the purpose of advancing education and science, protection of the environment and protecting citizens' health.⁵²

In the United Kingdom, consideration of 'public interest' enables the Secretary of State for Business and Enterprise to clear a merger despite

⁴⁷ Monopoly Regulation and Fair Trade Act (MRFTA) Article 1; Meong-Cho Yang, 'Competition Law and Policy of the Republic of Korea' (2009) 54 *Antitrust Bulletin* 621, 624-625.

⁴⁸ Fair Trade Act 2011, Article 1.

⁴⁹ Competition Act 2003 (No.2 of 2003). The purpose of the Act is, *inter alia*, stated at section 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 section 1 as 'persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.' In terms of substantive law, section 28(2) allows exemption from the application of the Act for restrictive practices which fall under a 'public policy' exception. At section 28(3)(b) it is 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.'

⁵⁰The Competition Act, 2012 (IN), section 54. Found at: <www.ieee.org/documents/competition_act_2002_india.pdf> accessed 16 January 2015.

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

⁵²Federal Law No.135-FZ of July 16th, 2006 'On Protection of Competition', Article 19.

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, public interest considerations led the Minister for Economics to set aside a Bundeskartellamt prohibition decision in the E.ON/Ruhrgas transaction.⁵⁵ The transaction was approved,⁵⁶ despite competition concerns, as it was deemed necessary for the stability of the national gas supply and would have improved E.ON's international competitiveness, especially against Russian enterprises.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

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 Section 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 No. 11 *European Competition Law Review* 584.

⁵⁵ Bundeskartellamt Press Release, 'Bundeskartellamt prohibits E.ON/ Gelsenberg (Ruhrgas) merger' (21 January 2002) <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/21_01_2002_EON_eng.html> accessed 29 January 2015.

⁵⁶ Ministerial authorisation was granted under section 42 GWB - Gesetz gegen Wettbewerbsbeschränkungen (GWB), § 42 Ministererlaubnis.

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. Further, article in the *Frankfurter Allgemeine Wirtschaft*: <http://www.faz.net/aktuell/wirtschaft/eon-ruhrgas-fusion-archiv-ministererlaubnis-unter-harten-auflagen-170706.html>.

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

introduces industrial policy considerations into the analysis, may be used to block pro-competitive mergers or approve harmful ones.⁵⁹ Coupled with the lack of 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 less predictable and arbitrary.

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 stabilising 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 stabilise the ‘sponge’ by limiting and slowing its absorbency rate.

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) *Journal of Antitrust Enforcement*

⁶⁰ *Id*

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 institutionalisation at the enforcement level, with increased investment in analytical capacity and recruitment of economic experts.⁶³ As noted by Chief Judge Posner: ‘[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.

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 *Journal of Economic 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, Volume 1* (OUP 2015) xiii.

⁶³ William E Kovacic and Carl Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’ (n 56 above) 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) *Journal of Industry, Competition and Trade* 235.

⁶⁴ Richard A Posner, *Antitrust Law* (2nd ed, 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 Law Review* 551, 564.

Several forces may impact on the stability of the ‘membrane’ and its ability to regulate the inflow of variants into the ‘sponge’. To begin with, economics 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 perspectives.⁶⁵ Chang identifies nine different strands of economic theory: Austrian, Behaviourist, Classical, Developmentalist, Institutionalist, Keynesian, Marxist, Neoclassical and Schumpeterian.⁶⁶ Naturally, the divergence in strands of theory affects one’s perception of the competitive process,⁶⁷ the relevant competition forces,⁶⁸ one’s assumptions regarding market participants,⁶⁹ and the role of 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

⁶⁵ Chang, Ha-Joon, *Economics: The User’s Guide*, (2014); William E Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’ [2007] *Columbia Business Law Review* 1, 10; See also Dworkin, *Taking Rights Seriously*, (1977) [Ch 6] and Baker, ‘The Ideology of the Economic Analysis of Law’, *Philosophy and Public Affairs*, Vol. 5, No.1 (1975), 3-48, especially at, e.g., p.37

⁶⁶ Ha-Joon Chang, *Economics: The User’s Guide* (Penguin Books 2014) in Chapter 4; also see: John J Flynn, ‘Misuse of Economic Analysis in Antitrust Litigation’ (1981) 12 *Southwestern University Law Review* 335, 340 – 410.

⁶⁷ J Gregory Sidak and David J Teece, ‘Dynamic Competition in Antitrust Law’ (2009) 5(4) *Journal of Competition Law and Economics* 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) *The Quarterly Journal of Economics* 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* (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 Law Review* 482

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. 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

⁷⁰ Maurice E. Stucke, ‘Reconsidering Antitrust’s Goals’ (2012) 53 Boston College Law Review 551, 609; Maurice E. Stucke, ‘Occupy Wall Street and Antitrust’, (2013) 85 Southern California Law Review 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 Business Review 77.

⁷¹ See for example: ICN discussion document ‘Competition Enforcement and Consumer Welfare’ (2011) available online: <http://www.icn-thehague.org/page.php?id=78>; Gregory J Werden, ‘Consumer welfare and competition policy’ in Josef Drexl, Wolfgang Kerber, Rupprecht Podszun, *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011) 11.

⁷² Gregory Werden, ‘Essays on Consumer Welfare and Competition Policy’ (2009) <<http://ssrn.com/abstract=1352032>> accessed 21 January 2015.

⁷³ Aggregate economic welfare is also referred to as an “efficiency” or “total surplus” standard. Salop, SC: ‘Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard’ 22 Loy. Consumer L. Rev. 336 (2010); Ginsburg ‘Judge Bork, Consumer Welfare and Antitrust Law’ [2008] 31 Harvard law Journal and Public Policy 449

⁷⁴ For example: Salop (Id); Motta *Competition Policy* 18

ambiguity.⁷⁵ It is used universally, despite limited consensus as to its meaning, thus portraying an impression of conformity.

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 maximisation. That assumption has been challenged in several interdisciplinary economic fields.⁷⁶ Most notably, behavioural economics literature illustrates the limits of rationality and predictability.

A further challenge relates to the methods and approaches used to approximate the effects on welfare. From the definition of a market, through the consideration of market power, to the analysis of market dynamics and behaviour - 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.⁷⁷ The excessive, and at times, fictional, simplicity of traditional analysis has long been acknowledged.⁷⁸ 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

⁷⁵ Damien Geradin, ‘Efficiency claims in EC Competition law and sector-specific regulation’ (November 8, 2004), 2. Available at SSRN: <<http://ssrn.com/abstract=617922>> accessed 21 January 2015; Joseph F. Brodley, ‘The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress’ (1987) 62 *New York University Law Review* 1020, 1020.

⁷⁶ Amanda P. Reeves and Maurice E. Stucke, ‘Behavioral Antitrust’ (2011) 86 *Indiana Law Journal* 1527, 1528.

⁷⁷ Thomas E Kauper, ‘The Problem of Market Definition Under EC Competition Law’ (1996) 20 *Fordham International Law Journal* 1682; OECD, ‘Policy Roundtable: Market Definition’ (2012) DAF/COMP(2012)19 at11 (executive summary)

⁷⁸ Richard Schmalensee, ‘Another Look at Market Power’ (1982) 95 *Harvard Law Review* 1789, 1789; John Vickers, ‘Market Power in Competition Cases’ (2006) 2 *European Competition Journal* 3. John Vickers, ‘Abuse of Market Power’ (2005) 115 *The Economic Journal* F244.

numerous assumptions as to market dynamics, barriers to entry and behaviour of economic actors.

To remedy possible imprecisions, one often employs complex economic analysis and modelling to provide insights into market dynamics and welfare outcomes.⁷⁹ 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 accuracy and relevance of the base assumptions.⁸⁰ A disparity between theory and fact may lead to misleading conclusions. As put by Bishop: ‘It is one thing 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.’⁸¹

A related challenge concerns the ability to accurately predict behaviour and competitive outcomes in dynamic and complex markets.⁸² For instance, technology markets have long been characterised 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.⁸³

Another challenge concerns the capacity of the judiciary to properly assess and digest complex and evolving theories when considering antitrust cases.⁸⁴ While some jurisdictions benefit from experienced and dedicated competition courts, others may not. The disparity between the court’s

⁷⁹ 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 *European Competition Journal* 67, 72.

⁸⁰ Gunnar Niels, ‘The Economist in Court: Guilty of Theories that don’t fit the facts’ (2007) 6 *Competition Law Review* 358; Simon Bishop (Id)

⁸¹ Simon Bishop (Id).

⁸² See for example: David J Teece, ‘Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy’ (2012) 9 *Journal of Law, Economics and Policy* 97, 97.

⁸³ Ronald A Cass, ‘Antitrust for High-Tech and Law: Regulation, Innovation, and Risk’ (2013) 9 *Journal of Law, Economics and Policy* 169, 170.

⁸⁴ Richard A Posner, ‘Antitrust in the New Economy’ (2001) 68 *Antitrust Law Journal* 925.

capacity and economic complexity increases the likelihood for mistakes and error costs.⁸⁵ The difficulty associated with understanding the economic analysis leads, at times, to over simplification, 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. 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 technicality - thus avoiding the pitfalls of complex econometric analysis.

It is important to nuance the argument put forward in this section; economics is central to antitrust analysis – that proposition is not contested. Its significance to enforcement and policy cannot be overstated. Indeed, it will often provide predictable, consistent and applicable benchmarks for assessment. However, the challenges outlined above affect the scope and stability of the economic envelope and subsequently its ability to restrain the sponge-like characteristics of competition law. Importantly, ill perceived stability and predictability of the economic ‘membrane’, which ignore its imprecise nature, could result in over confidence, government failure and high error costs.

IV. 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.

⁸⁵ 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 *Journal of Law and Economics* 1, 5.

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.⁸⁶ Over 160 statutory bodies, in charge, among others, of airports, broadcasting and housing, are excluded from the application of the law.⁸⁷ Similarly, in Japan, the Antimonopoly Act exempts national monopolies relating to ‘railways, electricity, gas or any other business constituting a monopoly by the inherent nature of the said business.’⁸⁸ In the US, the limitations on the application of antitrust laws to agriculture, insurance⁸⁹ and the baseball league are noticeable.⁹⁰ Indeed, most jurisdictions will implement some level of limitation through the provision of peripheral bypasses.

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.⁹¹ In the US, the insurance sector is exempted from the application of antitrust law to the extent that it is regulated by states.⁹²

The relationship between regulated industries and competition enforcement has been explored extensively.⁹³ 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

⁸⁶ Competition Ordinance, s 3 (1).

⁸⁷ <http://www.info.gov.hk/cml/eng/cbc/index1j.htm>

⁸⁸ Antimonopoly Act, Article 21.

⁸⁹ See fn 34

⁹⁰ *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.

⁹¹ 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.

Available at <www.internationalcompetitionnetwork.org/uploads/library/doc379.pdf> accessed 22 January 2015.

⁹² N 34 above

⁹³ ICN (n 86 above); 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.

Justice Scalia in the *Trinko* judgement, 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.⁹⁴ A different approach would see the two as complementary instruments.⁹⁵ In the UK, for example, sector regulators⁹⁶ are empowered with concurrent jurisdiction to apply competition law alongside the Competition and Markets Authority (CMA).⁹⁷

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.⁹⁸ Others lack jurisdiction due to their substantive provisions that focus on domestic anticompetitive effects,

⁹⁴ *Verizon Communications Inc v Law Offices of Curtis v. Trinko LLP*, 540 US 398 (2004).

⁹⁵ 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)

⁹⁶ Ofcom, Ofgem, Ofwat, Office of Rail Regulation, Civil Aviation Authority, Financial Conduct Authority (FCA).

⁹⁷ Competition and Markets Authority (CMA), 'Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries' CMA10 <www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>; Angelene Duke, 'Concurrency: Is it the dawn of a new day?' *Kluwer Competition Law Blog* (13 January 2014) <<http://kluwercompetitionlawblog.com/2014/01/13/concurrency-is-it-the-dawn-of-a-new-day/>>.

⁹⁸ 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 *Journal of Competition Law & Economics* 967; Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3 *Journal of Competition Law & Economics* 97; Margaret C. Levenstein & Valerie Y. Suslow, 'The Changing International Status of Export Cartels' (2005) 20 *American University International Law Review* 785.

thus implicitly exempting these activities. In both cases, when faced with welfare loss which is externalised 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 politicising and skewing the competition process. Yet in essence, they may provide for a similar outcome. Furthermore, 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 payment corruption and misuse. Accordingly, the usage of external bypasses may help retain the perceived integrity of the competitive analysis, but its use does not necessarily immunise the process as a whole from industrial and political variants.

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 well defined discipline. However, understanding the ‘sponge’ properties of competition law provides valuable insights to its scope and limits.

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.⁹⁹ As noted by Justice Kennedy,

⁹⁹ 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.

in the *Leegin* Judgement, while antitrust jurisprudence is not written on a clean slate the ‘Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance.’¹⁰⁰ 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, irrelevant to 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 scope of considerations to direct the level and scope of intervention.

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.¹⁰¹ Arguably, that predictability is further undermined in today’s antitrust landscape which has been dominated by technical experts, expert lawyers and skillful economists with the power to advance selective goals.¹⁰² 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.¹⁰³

¹⁰⁰ *Leegin Creative Leather Products, Inc* (No. 06-480, Supreme Court Of The United States) June 28, 2007.

¹⁰¹ On legal certainty see: Friedrich A Hayek, *The Constitution of Liberty* (1960) 156 – 7; Ofer Raban, ‘The Fallacy of Legal Certainty: Why Vague Legal Standards would be Better for Capitalism and Liberalism’ (2010) 19 Boston University Public Interest Law Journal 175, 179.

¹⁰² Harry First and Spencer Weber Waller, ‘Antitrust’s Democracy Deficit’ (2012) 81(5) *Fordham Law Review* 2543, 2544; Thomas Horton, ‘Fairness and Antitrust Reconsidered: An Evolutionary Perspective’ (2013) 44 *McGeorge Law Review* 823, 828-829

¹⁰³ On the correct balance between certainty and adaptability see: Louis Kaplow ‘A Model of the Optimal Complexity of Legal Rules’ (1993) 11 *Journal of Law, Economics and*

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 prioritisation,¹⁰⁴ allocating budget,¹⁰⁵ investment in capacity building, advocacy¹⁰⁶ or case investigation.

Further, agency design and allocation of functions may affect the intensity of enforcement. An agency’s approach 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, prioritisation and performance.¹⁰⁷ It may thus affect the absorbent properties of the ‘sponge’ and its usage.

Arguably, it is in the enforcer’s interest to stabilise 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, philosophies and

Organization 150; Isaac Ehrlich and Richard A Posner, ‘An Economic Analysis of Legal Rulemaking’ (1974) 3 No. 1 *Journal of Legal Studies* 257.

¹⁰⁴ ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7.

¹⁰⁵ William E Kovacic, ‘Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement during the Reagan Administration’ (1988) 33 *Antitrust Bulletin* 467, 467 – 468

¹⁰⁶ Allan Fels and Wendy Ng, ‘Paths to competition advocacy’ in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012) at 191; ICN Advocacy Working Group, ‘Advocacy and Competition Policy’ (International Competition Network Conference, 2002).

¹⁰⁷ 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 Law Review* 2163; Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (OUP 2011) xi.

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 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.

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 criticise 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 delegitimise 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 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. 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, 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. An alternative approach which 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 echo system into account.

VII. 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 the focal point of recent decades - from early unilateral policies, through enhanced bilateral cooperation, regional and multinational negotiations.

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

First, the proliferation of competition regimes has been celebrated as a move toward a more competitive international landscape. Indeed, many jurisdictions and international organisations 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 transform 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 toward competition homogeneity does not override the domestic reality. Accordingly, the full composition of the ‘sponge’ is only revealed once immersed in the national matrix.

Second, the ‘sponge’ properties should be acknowledged when faced with inconsistency in the application of competition law by one or more jurisdictions. 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 the desire for coherence and transparency at domestic and international levels. Such an approach does not imply an acceptance of possible politicisation or instrumentalisation of

competition analysis. It merely implies a more honest discussion when criticising 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.¹⁰⁸

Linked to the above, the third insight concerns the risk of misusing competition law to advance industrial policies. The sponge characteristics may allow jurisdictions to advance political agenda and protectionist policies in the disguise 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.¹⁰⁹ 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 'positive transfer of wealth' as condition for clearing a transaction.

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

¹⁰⁸ Note the literature on legal transplants, for instance: Tay-Cheng Ma, 'Legal transplant, legal origin, and antitrust effectiveness' (2013) 9 *Journal of Competition Law & Economics*, 65-88; Michal S Gal *Competition Policy for Small Market Economies* (2003); Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2000)

¹⁰⁹ *Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between in Handbook on Trans-Atlantic Antitrust* (ed, Philip Marsden), 622-641, Edward Elgar Publishing, (2007)

industrial and political considerations disguised as competition appraisal.¹¹⁰ 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.

A fourth insight concerns the limitations of international harmonisation. As noted earlier, the valuable convergence toward 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 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 absolute truths 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. It should not be confused, however, 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.¹¹¹

¹¹⁰ See for example: Stephanie Wong and Wing-gar Cheng ‘China Blocks Coca-Cola’s \$2.3 Billion Huiyuan Bid’ (Bloomberg, March 18, 2009) Online: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awHnS1HJ2Usw>; Cecil Saehoon Chung, Kyoung Yeon Kim, Kyu Hyun Kim ‘Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet’ available online: <https://www.competitionpolicyinternational.com/early-signs-of-protectionist-merger-control-in-korea-probably-no-at-least-not-yet/>

¹¹¹ Martti Koskenniemi, ‘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 Encyclopedia of Public International Law (2006) para 15.

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, harmonisation 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 regimes¹¹² and the increase of the nexus between the reviewing jurisdiction and the transactions.¹¹³ Also noteworthy are the OECD’s contribution to convergence in merger control,¹¹⁴ and UNCTAD’s work through the Competition and Consumer Protection for Latin America programme and its voluntary merger notification programme.¹¹⁵

Other areas which are more domestically sensitive have proved more difficult for alignment. They display resistance to binding frameworks and limited alignment with voluntary ones. Past attempts that ignored the ‘sponge’ characteristics and pushed for overreaching binding multinational agreements have failed. Indeed, from the Havana Charter¹¹⁶ to the Munich

¹¹² International Competition Network - ICN Mergers Working Group, Notification and Procedures Subgroup.

¹¹³ 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).

¹¹⁴ The Organisation for Economic Co-operation and Development - BIAC and ICC, *Recommended Framework for Best Practices in International Merger Control* (4 October 2001).

¹¹⁵ United Nations Conference on Trade and Development - Competencia y Protección del Consumidor en America Latina; Ariel Ezrachi and Hassan Qaqaya, ‘UNCTAD’s Collaborative Information Platform’ (2012) 4 *Concurrences Journal* 204.

< www.unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=742> accessed 22 January 2015.

¹¹⁶ 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*

group initiative¹¹⁷ and attempts at the World Trade Organisation,¹¹⁸ the international community was 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 present 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.

VIII. 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.

This paper does not set out to challenge the overall benefits that stem from antitrust intervention.¹¹⁹ It does, however, question the conviction with which one portrays it as a solid discipline with apparent outcomes. As

of International Trade Since The Second World War (Wheatsheaf Books 1985) 42-50; Clair Wilcox, *A Charter for World Trade* (Macmillan Co. 1949) 103-113, 153-160.

¹¹⁷ The Munich Draft International Antitrust Code; reprinted in (1993) *Antitrust & Trade Regulation Report* 65, No. 1628.

¹¹⁸ Josef Drexl ‘International Competition Policy After Cancun: Placing a Singapore Issue on the WTO Development Agenda’ (2004) 27 *World Competition* 419.

¹¹⁹ For a critique of antitrust law as a whole, see: Edwin S Rockefeller, *The Antitrust Religion* (KATO Institute 2007).

idyllic as such view may be, it often leads to a shallow and an over polarised 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 pretense 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 and limit its susceptibility. The reflective approach put forward in this paper 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.