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Checks and Balances: European Competition Law and the Rule of Law

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DISCUSSION

CHECKS AND BALANCES: EUROPEAN COMPETITION LAW AND THE RULE OF LAW

By Philip Marsden

PROFESSOR WALLER: Welcome back. In marathon terms, we have completed the first 10 kilometers or so.

DOCTOR MARSDEN: Are we at Wellesley yet?

PROFESSOR WALLER: I don't know. You will have to tell me Monday. I think we're off to a great start. Obviously many of the issues are going to kind of crisscross between the four sessions that in no way are intended to be airtight. And I think what you'll find is some interesting things in looking at these papers. We have the first of our EU presentations. Both of the EU papers have a heavy procedural view and/or institutional view about the way the rule of law questions play out in the competition area.

I think our discussion from Maurice's paper, and I'm sure with Elbert's paper as well, show at least the two U.S. that focus much more on what are the substance rules that are going to be applied. I think it's interesting. I'm not sure how much I want to make of it. And I hope as we continue with the discussion, we will address one thing that I saw that we left out a little bit in the first paper. That is discussion of the role of agency guidelines because as much as we focus on court decisions, they are the tip of the iceberg in a variety of different ways. In merger law and elsewhere, case law, at least in the U.S., is often quite old and quite at a high level of generality. The agencies have tried to fill in the gaps with long, complicated guidelines and commentary and other things to sort of fill in the gaps. Now it's my pleasure to introduce our co-host, Phil Marsden, to discuss checks and balances in the European competition market.

DOCTOR MARSDEN: Mine is really a little bit of an *amuse bouche* in a way to the far more substantive paper that Tim Cowen has prepared that looks at the European courts. But

I hope that some of what I am going to address picks up our earlier discussion.

I want to look at three areas that come from the rule of law principle. The first area is the exercise of control and discretion. Is the law supreme in that sense? Is it something where we can feel happy about the expertise being exercised? And is it something where we understand the decisions and we feel they are fully objective?

Secondly, is the case handling and allocation within Europe consistent and accountable? Could there be more done to make sure that there is consistency, not just to please the hobgoblins of mediocre minds, but to ensure true equality before the law? And thirdly, is the law really being interpreted and enforced by the courts, or really are the agencies running the show?

So with respect to the first issue, with respect to the control of discretion and expertise, the issue here that has come up in a recent OECD study is the fact that DG-Competition investigates, prosecutes, and adjudicates.

Are there enough checks and balances on this multi-tasking? Of course the Commission's findings are subject to appeal, but in reality that is a very limited review and so the agency has set up a range of internal checks on itself. Now there are multiple checks and balances within DG-Competition. There is the new 'fresh pair of eyes' procedure and peer review within DG-Competition, there is review by the Chief Economist, the involvement of the Hearing Officer and other ways to try to ensure there is some form of due process of decision making.

That said, there are some lingering gaps. At hearings, when they happen, there is no real right to cross-examine a witness. No other jurisdiction in the world has decision-making responsibility where the Commissioner, her Director General, and her senior staff are not required to attend the oral hearings. And there has been an argument raised in courts as to whether or not this fact raises human rights issues because any tribunal that imposes quasi-criminal penalties should be independent and impartial, rather than simply being made up of the case team itself, or having decisions made by a far-removed and distant College of Commissioners.

So suggestions for reform: perhaps there should be separate functions within DG-Competition where you should involve senior staff more, require the director general to attend oral hearings or separate the functions such that DG-Competition

investigates and prosecutes. Then you move more to the Justice Department model where the Commission is required to bring a case to the Court of First Instance to adjudicate and determine whether or not a case has been made, and particularly whether a fine is appropriate. That is the first area relating to the control of internal checks and balances within one agency, the European Commission.

The second topic, relating to consistency, involves the European Competition Network, a mechanism by which the authorities exchange information and allocate cases amongst themselves. There is an argument that the ECN operates a bit like a black box. Nobody, other than the officials, knows how the cases are allocated. And there is concern that something untoward might be going on. Again this relates to a lack of transparency that I was raising in the previous panel. There's a general fear of the unknown that is natural.

There is an argument from the officials that actually '*no, don't worry, we prepare reports for you, there's been 800 cases or so in the last few years and we've referred this many cases to this many authorities, two or three authorities are working on this case one on that, and it is all just mechanical and boring so we don't need to disclose more.*' Of course that kind of response is both true and naive, considering the huge interests that are involved in some cases, both corporate and political. But the main complaint that still arises is this lack of transparency, this black box argument. In addition to that, there is also a concern about a lack of consistency of decision making amongst the authorities.

Now I am going to focus on the Article 82 monopolization provision here with the caveat that the national authorities have been allowed to have a stricter approach to the enforcement of Article 82 than is required under European law. So obviously some inconsistency was provided for at the creation so to speak.

That said, some of the inconsistency raises concerns from a rule of law point of view. There are RPM practices banned *per se* in Italy and Holland but the same practice by the same parties is approved in Spain. You have the Michelin II rebates banned and fined quite heavily at the European level but approved in France. And there is a very nice point stemming from the British Airways case banning loyalty-based commissions to travel agents. Here the European Court of Justice upheld the Commission's prohibition and fine so there was a clear statement of what European law was in this area. The OFT responded by shutting

down its same cases in that area on the basis of lack of resources and lack of enforcement priorities.

It's a nice way of one authority signaling to the rest of the authorities that it doesn't believe in this theory of harm, or these kind of cases, but doing it in a way more like a fudge than anything else. Perhaps they were trying to use it as a nudge of sorts, to move European law on a bit. Nice, but effective? After all, case law at the ECJ presumably has more precedence throughout all of Europe than the act of one national agency.

I appreciate that each member state has different enforcement priorities, different legal regimes, different structures, different operating systems. But on the other hand, DG-Competition and European law is supposed to oversee this. And there is a question with respect to how much the Commission should perhaps be intervening to preserve the *acquis communautaire*. There is a process by which the Commission can intervene to alter these national cases. And we haven't seen much of that yet. Presumably to ensure national buy-in first.

So there are suggestions related to whether the agencies should, when they are shutting down these cases or taking different decisions, do more to at least publish their decisions and be a bit more forthcoming on their theory of harm so that you have that discussion about what is really motivating some of these case closures or decisions. So basically once more from me, a call for greater transparency, which might lead to greater understanding, greater consistency, or at least more informed divergence.

Finally a few words on the court, which Tim will address more directly. The issue here is that in a way, the European courts have been a victim of their own success. There is a huge backlog of cases. Anybody who has appeared before the European courts will know it's not a judicial system that they might be familiar with on this side of the Atlantic. There is quite an extensive pleading system where supposedly all the facts do get out and experts are questioned by the court. But there isn't a system of cross-examination or thorough fact-finding. It is more a system of administrative judicial review than an actual appeal.

One of the points that I would like to raise is the requirement of unanimity in the judgments: some cases have resulted in a situation where there is just a repetition of the law as opposed to an actual evolution of the law, and perhaps this requirement of unanimity should be rethought. If judges

are allowed to dissent or write concurring opinions, you might see a richer jurisprudence developing. And I do think at this stage, just a few decades but still European law is robust now, it can handle a system of concurring opinions or even dissents and that would make European law a lot richer.

The last point: in the Europe context at least, the introduction of more use of the rule of reason could help matters from a rule of law point of view. At least then, with the use of more rule of reason analysis, judges will be required to explain their theories more as opposed to relying on more formalistic points of view. So rule of reason balancing, married to some transparency might help bolster faith in the process of decision making.

MR. CALVANI: During the first session this morning, it was suggested that the asymmetry of plaintiffs' win/loss record in private rule of reason cases was evidence of a problem. It is not. The fact that plaintiffs lose approximately ninety percent of these cases does not establish that something is wrong.

For the benefit of the European participants, it's important to understand a little bit about private litigation in the United States. Much of it is class action litigation. And good class action litigators need to get a case on file early to stake out their territory and advance their claim to be lead counsel. Sometimes an obscene amount of money is at stake. As a result, cases are filed predicated with very little information—sometimes only a snippet of a story that might have appeared in the *Financial Times* or the *Wall Street Journal*. But that is sufficient to prompt the race to the courthouse.

The good plaintiff's lawyer is very much like the Texas wildcatter drilling wells. He or she has to drill a lot of holes to strike oil. The win/loss record is going to be asymmetrical. Filing suits based on very limited information is similar; there will be lots of dry holes. It is not surprising at all that many cases are dismissed, and it is certainly not evidence of a problem.

But now to the assigned task. When Doctor Marsden asked your commentator to critique his paper, he asked for kindness, which your commentator rather disingenuously promised. Nevertheless, it is the commentator's lot to wield the hatchet, and this one fully intended to do so. But despite best efforts, the high quality of the paper renders harsh criticisms impossible. It is a fine paper, and the first part is exceptionally so.

To the question of who guards the guardians in Europe, the answer is "no one." The noble lie is nonsense; DG-Comp is

not capable of guarding itself any more than any government agency. The “fresh pair of eyes” and quality control mission of the Chief Economist are both good ideas. Substantial advances, but they do not come close to providing independent checks. And the idea that the College of Commissioners could fill that role cannot be seriously maintained by anyone with the slightest familiarity with the works of the Commission.

Dr. Marsden’s focus on the OECD sources was spot on. If fault can be found with the discussion, it is with the treatment of the oral hearing. Note that Doctor Marsden stated that neither the Director-General nor the Commissioner, much less the College of Commissioners, attend the oral hearing. Doctor Marsden implied that their absence was a problem. They should have attended the oral hearing. That assumes that something of importance occurs at the oral hearing making attendance worthwhile.

Your commentator has attended many oral hearings, both as an advocate for an addressee or as a member of the Member State Advisory Committee. The oral hearing bears little resemblance to a trial in a common law jurisdiction. Rather, the Commission staff opens and briefly describes the Statement of Objection. The immunity applicant, if there is one, follows with a brief submission. The addressees then typically make what are really jury summations, sometimes augmented by an economic presentation. Oral hearings are very short when compared with trials. One recent oral hearing, in an incredibly complicated case, lasted one week. Each addressee took, on average, about 20 minutes to present their case. Evidence is seldom critically examined. It is not a trial by any stretch of the imagination.

One suspects that the reason why the Director-General and Commissioners fail to attend oral hearings is because they are not important. What is missing, and what is important, is some forum to test the evidence. Consider an email contained in the Commission file purportedly memorializing the content of a meeting. There is no way to cross-examine the author to test his memory, etc. Even though an addressee may contest the accuracy of the evidence in its response to the Statement of Objections, there is no opportunity to really test the evidence from either perspective.

Turning briefly to the European Competition Network, your commentator was a member of the Member State Advisory Committee that considered several aspects of Modernization.

Issues are inevitable. It is too early in the day to render any informed assessment of the ECN success.

Focusing briefly on the community courts, Judge Cooke's comment, which Dr. Marsden memorializes, is certainly curious. It may be a very good thing that Judge Cooke is no longer in Luxembourg and is now back in Dublin. Generally the community courts have played an important, but insufficient, role in reviewing the actions of the Commission in competition cases.

MR. McGRATH: I'll just bring a UK flavor in on it and pick up on Phil's mention of the desire for transparency. Somehow it's a negative view of use of the administrative priority, and as somebody who contributed to that development of that policy, I guess I just need to defend it a bit but also show how it strengthens my point about being called into getting judicial oversight.

In brief, the history in the UK was that in the early days of the Competition Act, after 2000, the office received about 1,200 complaints a year and investigates optimistically twelve, pessimistically three or four a year. So they had to reject a lot, and case handlers were trying to be helpful and would tend to say "We're not going to take this complaint forward because it doesn't show what you would call antitrust harm. It doesn't show an infringement of the law."

And in its desire to get some cases under its belt, the appeal tribunal viewed those cases as full non-infringement decisions, which I think subverted the intention of the statute. But you can understand why it wanted to look at these and only had jurisdiction to review full non-infringement decisions. Form doesn't matter. It's about reaching a view of whether the law has been infringed or not; if so, we can look at it. And these then got subjected to full merit appeal with all the panoply of barristers on one side and barristers on the other with a lot of in-depth factual analysis. This meant the OFT got poked down in a lot of these cases for no, I would argue, real benefit. And the only way out of that particular hole was to use the administrative discretion route.

I remember a meeting I had when I was at the OFT with my counterpart, the Department of Justice over here, and one of the big headaches was sports cases. We had a ream of cases involving horse racing which was an incredible amount of antitrust law in the UK. And I said, how do you deal with sports cases? We just don't do them. We leave it to the private club to

do sports cases. We don't use arbitrating fights between American football stars and their agents and the clubs and you know, it's just not for us. Administrative discretion.

And I thought and I also think it's quite legitimate because the original approach that we were advised to do by the lawyers in the OFT was to say we're rejecting this complaint but don't view this as a decision. This isn't the decision. It was a very sort of sophistic and rather confusing approach, even confusing for a lawyer, small businessman, or consumer who had received this letter and asked what it was.

I used to say if you generally don't think it's a good case and a good use of your time, then it's legitimate to say that. It's legitimate to say this is not a priority. We are not going to take it on. That presupposes that you have priorities and you can say what your priorities are. And I think problems can arise still where you get a mixing up of what are the reasons for dismissing a case.

And I think the *City Cook* case is a fascinating example of where cases get rejected. I won't go into the facts, it's a bit too long and tedious, too personal, painful a memory that case. But essentially you had both the administrative court and the competition appeal tribunal of the court reviewing the OFT's reason for closing the case. And effectively the OFT was saying we can't decide whether this is a clearly object-based case, effectively *per se* infringement, or whether this is an effects case; in other words, a rule of reason case because it would take so long to argue this as an effects case and because we haven't done it as effects case. It was very familiar to all these rule of reason cases where we have to do economic analysis of the service. We decided to just close it because it becomes a prioritized issue not worth doing all the work. That's a bit problematic when you get into that territory.

But essentially, to conclude, their approach is to administer the claims using a priority system even though competition transparency is not a bad thing. I think it's particularly interesting in that context to see how the European Commission has recognized that and to see what the law is in Article 82 and frankly how bad some of the law is in Article 82. Say we are going to use administrative priority in effect and this is how we do it. I don't think the outcome is actually that great but I certainly understand how they ended up there.

PROFESSOR ROBERTSON: I wanted to say to Phil, in light of Professor Stucke's presentation this morning and some of

the points I will make later this afternoon, the movement towards the rule of reason that you are suggesting that the Europeans might also want to make, is one perhaps we'll want to make, but you won't be able to say you weren't forewarned.

There might be norms that exist in the continental traditional notions of fairness and reciprocity that, combined with an enlightened use of economics and political sensibilities, might make for an effective competition policy. It could utilize a rule of reason better than we're using it here right now; we are clearly in an era in which the *per se* rule is devolving.

I would like to make a second point which is, with all due respect to Terry Calvani, who was my Commissioner when I was a fledgling economist-in-training at the FTC back in the early 1980s, there is something fundamentally wrong with an adversary system that essentially dictates that ninety percent of the time plaintiffs are going to lose. There is something wrong with a system like that regardless of whether or not we're dealing with class actions or individual private antitrust enforcement suits. And what is wrong with it is that the universe of false negative space is just way, way too big. And it is so unjustifiably big that raw substantive notions of equal justice for both parties under the rule of law I think are lost. There is therefore an affront at a very basic level to the concept of both procedural and substantive justice in an adversarial legal process that preordains that type of overwhelming result.

That being said, I would like to make one last point about the rule of law. The binding force of the rule of law, however, is that we will accede to the legitimacy of the system, even to one that offers such a lopsided result, as long as the formalistic process that produces it is one that is clear and transparent with all of the other sort of formal features that go along with the rule of law in place.

The last point I would like to make is a warning about the rule of reason to the extent that you hope rule of reason balancing is a way out of rigid civil law formalism that could be hampering competition in the European context. The rule of reason has its own formalistic elements that are highly problematic and Professor Stucke's paper speaks to those elements and their pitfalls very clearly, and I'll talk about that a little bit later on today also. But you can't say you weren't warned.

MR. CAMPBELL: I'm a rule of reason guy. I don't know how much empirical work has been done on how important the

transaction costs are in doing rule of reason type cases, relative to how important false positives and false negatives are. The problem of *per se* rules in this area is that economics are complex and it's hard to get *per se* rules that do a good job and leave relatively few false positives and false negatives.

That is just my gut feeling from what I've seen in my practice. I can't support it quantitatively, but my sense is that this is an area that actually responds well to allowing for fairly fact-intensive and economics-intensive case-by-case analysis on most kinds of issues.

The thing that I think is most notable once you get into a zone of discretion, as opposed to tight rules, is a book I read many years ago called *Discretionary Justice* by K.C. Davis.¹ He starts with the premise that discretion is not necessarily always a negative thing. It actually has a number of very positive aspects in a wide range of contexts, not just courts but tribunals and indeed public officials, police officers, the whole range.

David suggests three basic things. One, to figure out how much you want to confine the discretion, so there is some place for some rules in this process. Once you figure out the zone of discretion, his view is that factors and processes are critical. Structuring is his term, which includes things like guidelines, reasoned decisions and transparency. I think this is where the action really is in this field in terms of getting good decision-making.

And then checking is Davis' term for a broad umbrella of review mechanisms that include internal hierarchical decision-making processes within an organization, peer review or whatever other internal checks may exist, as well as the level of supervision that you get externally.

So from my point of view, the work to be done should focus on the structuring and checking. If you start, as I do, from a premise that rule of reason is useful for fairly open, textured laws with a fairly broad scope for facts and economics to be in play, then you work on how you get good processes that are reasonably streamlined.

MR. SAVRIN: In my comments I want to first extol the virtues of the rule of reason approach and then address the issue that Terry raised with respect to foreclosing access to relief, whether that really is a problem in the U.S. system and whether it

¹ K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (Greenwood Publishing Group 1969).

makes sense for a rule of reason approach to be adopted in the European system.

I think there is a problem with looking at the raw numbers and just saying ninety percent of the cases are dismissed on motions to dismiss or motions for summary judgment in the U.S. and not separating that point from the lure of treble damages. I think functionally a lot of these issues arise because, given the lure of treble damages, cases are brought that are not (1) genuine antitrust cases, or (2) genuinely addressing anticompetitive behavior. So if you're going to challenge the merits of rule of reason, which I am a big fan of, I think you really need to dig down and look at those motions to dismiss and motions for summary judgment and see whether there really was something of a genuine and viable antitrust claim stated and whether it was truly unjust not to allow that case to go forward and allow for some recovery in that circumstance.

Secondly, I do think that the rule of reason does allow some predictability because it does require a court to analyze and put forth an opinion as to why certain behavior is viewed as permissible or impermissible. And in that context it does provide guidance and commercial actors can look at the decisions, can look at the guidelines from the various agencies, and can in that balance do what it is that they essentially do all the time, cost benefit analyses of what is the practical business opportunity and whether the benefits to them outweigh the anticipated harm to competition arguments.

If you're looking at whether it makes sense to adopt it in the EU, I think one of the things I hear from EU practitioners is that transparency, given the amount of decisions and guidance that you get in the U.S. on standards, is far greater here. The existence of those decisions and guidance flows from the fact that we have the rule of reason.

So to your last point in Philip's paper, I do think the rule of reason would get you to greater transparency. There may be lessons — as much as you would like to learn from our experience in treble damages how better to deal with private damages actions — from how we deal with the rule of reason. I think, as a baseline point, use of the rule of reason approach will bring greater transparency in the system, give greater guidance, and will allow commercial actors to really figure out, within the confines of the decisions, what conduct has been found inappropriate or appropriate so that they can reasonably guide or modify their behavior going forward.

MR. AHLBORN: I want to pick up a point which Terry made earlier, the question of validation of evidence which I do think is one of the weaknesses of the system. Even worse though not clear is what evidence or what standard of proof and what standard of evidence is even required after more than fifty years of case law. You still don't know what the status is you work for. I think at least two reasons. One is to pursue even if you don't care much about facts. I think the other problem is if you administer the system which is not adversarial I think you get inferior outcomes.

And the last point of course is one element to value the fact quantity of the court. If you look at the CFI and CJ, you have a large number of members of the court who have actually lost sort of a solid crown in law. Imagine a U.S. example where you have Supreme Court judges who rule on the base of U.S. federal law. That is the equivalent and quite a number said actually sort of not my area of specialty. Then obviously you'll have very, very cautious judicial review, and no one will actually test the commission either as to facts. All those fundamental weaknesses, which explains sort of a lot of the decisions which you have in Europe.

PROFESSOR WALLER: I don't have any experience with either the EU member state courts or the EU courts directly. So I am going to focus my comments on questions of agency discretion. One is to Becket, which is that our agencies have that discretion because of our vigorousness, in some people's view too vigorous a system of private litigation. Obviously that is also an issue for the EU currently. So you have to have viable private rights of action before an agency can simply punt to the private sector. And I'm fascinated because I do read a lot of European Court of First Instance and ECJ decisions, and there are a fair number of them on appeal from decisions not to initiate complaints. This is fascinating for an American because we don't have any equivalent of that other than the occasional press release explaining why something wasn't challenged. I read these things and yet I wonder to what extent do they really control agency discretion for DG-Comp because I can't think of more than one really important case where the court really ever said you should have been initiated when you choose not to. I think it's *Sony-Impala*?² Beyond that

² Case C-413/06 P, Bertelsmann AG. v. Indep. Music Publishers and Labels Ass'n, (July 10, 2008) available at <http://curia.europa.eu>.

I'm not sure. They're lengthy and they seem to inevitably validate the decision that it was an appropriate use of discretion not to proceed with whatever the matter is. So if that's guarding the guardians, that struck me as somewhat elusive.

Phil, do you want to respond to anything?

DOCTOR MARSDEN: I'd just like to pick up on something Elbert said earlier, and Spencer's paper that I mentioned earlier about whether the Chicago School is a virus and finally my point that European Union law is already immune from any infection by the 'Law and Economics' movement.

Let's accept that the concerns for fairness and distribution and the related Ordoliberal concerns in Europe about power will never go away. Now, one benefit of the call for a more economic approach and greater reliance on rule of reason analysis would allow these faith-based populist concerns to be tested. Not by the narrow strictures of Chicago School antitrust because we know what will happen; they would be rejected. But since the Chicago School has no traction in Europe, it may well be that the fairness concerns will be tested and supported by new economic, new institutional and game theory thinking. That would help build the acceptability of the concerns themselves and any enforcement based on them.

You see this in certain aspects in the *Microsoft* case in the European Union where there are interesting theories of harm that were developed in that case that are not necessarily something that harkens back to 1960 is U.S. antitrust, but something that actually involves some new theorizing that should be tested.

I'm just querying the system in Europe, the inadequate oral hearing system and limited judicial review of the European Commission's analysis. The court will tend to defer to the Commission because the Commission is the expert, especially in monopolization cases. So I'm hoping a greater introduction of the rule of reason will bring out and test any new theory of harm, so it's not hidden behind old dogma.

MR. COWEN: I'll pick my way through this. I'm reading it.

It struck me that what Harry said before the break worried me in the context of what Becket said, so let me try to explain why I was worried. He said: "well it's okay to have the politics and the politicians appointing the enforcement agencies." Okay? I was then thinking about what Neil said in terms of prosecutorial discretion and the rule of law.

If you have a policy maker who is able to make a decision in the context of evidence, discretion, transparency, clarity, and a system that gives rise to a predictable outcome, is that enough? The basic issue, and one of the nice examples that Lord Bingham refers to, points out that any legislator transgresses a fundamental principle of justice if as he points out, it would be impossible, even if democratically elected, to pass a law that only related to redheaded people. I thought well, fair enough, and does prosecutorial discretion only to prosecute redheaded people actually then amount to the same thing as a law against redheaded people? If you have a policy that allows a discretion in the hands of the policeman to only pick on redheaded people, you have a general law which is only applicable by the policeman directly, they seem to me amount to the same thing: a lack of rule of law. You have a fundamental lack of justice there.

And listening to this question, it seems that maybe Microsoft probably might be one of the redheaded people. It doesn't seem to be terribly fair to pick only the people you choose to pick on when you have the evidence in the system. Where is the objective process that gathers evidence impartially and assesses each new economic theory in that way?

In the U.S. system, I'm interested, very interested, to understand more about that prosecutorial discretion and how it's exercised. It certainly appears to me in my experience over the last eight years that that has been heavily politicized. And then if you contrast that with the European experience, the question really is "Where is the Policy?" At least with the U.S. it's clear here that politicians make policy and that this has been a very clearly politicized system, a problem one way. There's a problem the other way in identifying the political mandate: how does that work actually in Europe?

PROFESSOR STUCKE: A couple of responses. One of them is that regardless of how we may feel that the rule of reason is working, the Supreme Court believes that antitrust is broken. And if they feel that antitrust is broken, then is that more determinative than our individual belief? If they think so and they're going to construct rules that are going to create barriers for the plaintiffs, that may be more determinative than how we may individually feel about it.

Secondly, with respect to Daniel's point about treble damages, I would be sympathetic to that claim if ninety percent or more of plaintiffs in state UDAP claims, those are state unfair and deceptive acts and practices where in several states you can

get multiple damages. If those plaintiffs' claims are being dismissed ninety percent as well as civil RICO claims as well as common law fraud claims with punitive damages, I wonder to what extent are plaintiffs now just simply abandoning antitrust and going into other areas of law such as business tort. So I don't know to what extent, I mean there is always a claim in treble damages in antitrust somehow. I don't know if it's empirically supported because the level of cases brought since *Sylvania*,³ although increasing in number, can be misleading if they themselves are not the levels they were at the time that *Sylvania* was brought.

With respect to Phil's point, I don't think necessarily you need a full-blown rule of reason in order to introduce economics. I think you can engage in some sort of legal presumptions based on the available empirical evidence. You can then say, the person who writes about this where you can have these differentiated rules based on the available empirical, and then you make some sort of proxy, eighty percent of the time is likely to be anticompetitive, and the magnitude of such effects we can then sacrifice twenty percent, or you can create sort of a safe harbor.

And then the final point, Tim will address this, but you raise it in your paper as well, is the extent of having courts to deal with antitrust. And I had two thoughts about that. First is that feasibly, can you divorce competition law from the rest of society, and Tim raises that in his paper and Diane Wood has a nice paper to that effect as well for us. And secondly, is that an admission of failure? Are we saying then that the law is so complex that not even a generalist court much less a business executive can readily apply the standards? We need to have specialists who should undertake this.

MR. BRUNELL: I hate to be the one always commenting about whose ox is being gored. In the U.S., the FTC has this nice judicial-type administrative procedure with cross-examination of witnesses. And a lot of folks here are not particularly happy with seeing cases go to the FTC, notwithstanding this judicial procedure, because they know the result is going to be that at the end of the day, the commissioners are going to rule in favor of the complainant's counsel and then maybe there is judicial review down the road. Sometimes the commissioners do get reversed.

I'm just curious whether in Europe part of the impetus for

³ Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

a more judicial-type of hearing before the Commission has anything to do with getting the decisions to be made by the courts rather than DG Comp.

PROFESSOR FIRST: Well, I really enjoyed your paper. As a U.S. antitrust person, I always am thankful for Europe. Gives us something else to write about and say, Oh my God you have antitrust some place, which is good.

But your paper and Terry's comments show the flip side, which we may tend to overlook in the U.S., because what I hear in your paper is that the process isn't so great in Europe and it's not great in ways that we in the U.S. think we have.

And particularly your comments about what do these hearings look like, you can't really get to fact-finding determinations. Well, you don't have the right mechanisms. So I'm sitting here thinking we call our proceedings "trials." We call fact finders "juries." And despite what the Court has been doing consistently in antitrust cases, which is, oh my God, we don't want to get them into court, and we don't want juries, juries are really the great driver for finding facts. They might not find them perfectly but it's a mechanism to test things where you have to present evidence. And so we tend to lose sight of that aspect of how things happen in the United States and maybe it also has an interplay with what legal standards we have.

That goes with a question that I have that was sort of threaded through your paper, which is this notion of consistency as part of the rule of law, and I just would like to suggest that we don't get too carried away with the virtue of consistency. One of the things we do get from comparative institutions is comparing. We have natural experiments. And we need to make better use of that, so we can compare how things happen in the states, how things happen in Europe. But actually really compare them.

In Europe, judging from your comments, there is a lot of this weird inconsistency. Who knows what the Russians are laughing at? We have no idea. In the U.S., the desire for consistency has tended to be muted recently because we know what the consistency is. The defendant always wins, and the Justice Department says fine. So that's pretty consistent. But we also overlook a little of the inconsistencies which are potential and sometimes bubble up. We have state enforcers. They don't take the view. We do have inter-circuit disparities, differences among the circuits too, as litigators know. Litigators are conscious of these things. We can learn from these inconsistencies.

I was struck by the declination decision and talking about the reviewability of declinations in Europe. There is a reason why we don't spend a lot of time on them in the U.S. They're not reviewable in the United States by courts in any area that we have got. We don't review declinations of prosecution. Now there is something to compare. We have two different sorts of institutions. Unanimity on panels versus dissents in the U.S. There is a lot of work done on panel effects in appellate decisions and the correlation between political affiliations and panel decisions. So we do have a lot to learn by a lack of consistency.

The problem from a defendant's point of view is these are experiments and no one likes to be the guinea pig. So that's a little problem.

Finally, on the politics, I was interested in how you heard what I said because I like what you heard, Tim, but I'm not sure that's completely what I said. I do like political values. The question is political control of the enforcers and how correct or incorrect that is. The state enforcers are elected. State agencies are elected. Antitrust people seem to hate this. You would think that would be good from a democratic point of view. For federal enforcers, political control is less direct and for Europe it's less less direct. I think these are important things to look at, how that political control works, and to think through.

Political values, this is a hard thing to dice, and it's not just—is Microsoft redheaded (a redhead sounds communist to me)? But there are political values to think about that are involved in antitrust, some that are appropriate and maybe some that are less. One may be taking account of distributive effects, which we have stopped doing but may be an important political value you want to think about.

Concentration, I hate to say it, concentration of economic power is a political value. We washed that out some time ago. Maybe we want to wash it back in. And these are the sort of underlying political values that come in and out of antitrust, and I think there is a place, I think they're always there, it's just a question of whether we consciously think about them or not.

PROFESSOR HYLTON: There were two very general topics that came out of the talk that I wanted to touch on briefly. One is whether the rule of reason constrains decision making, or does it just give judges freedom to exercise their preferences without constraint. And the other is the separation of powers issue that you raised.

So for the people who talked about the rule of reason

issue, maybe I'll try to deal with that quickly. It's true that one way you can look at the rule of reason is that it forces judges to state the grounds of their decisions, which provides information and in that sense offers some predictability advantage and I think in addition to that, that the process has a constraining influence itself that shouldn't be discounted.

The best example I can point to is from the common law of torts. I teach torts so I look at all these old cases. Take an area like nuisance law. In the oldest nuisance law cases, you see the judges acting as if it is almost like a field of applied utilitarianism, the judges weighing the factors throughout. They don't seem to be greatly constrained, there is not a whole lot of earlier decisions for them to base their decisions on. And over time what happens is the common law torts; the judges make the bases of their decisions clear, and you begin to see what sort of factors they're considering. Over time that crystallizes into the form of hardened rules, and the Restatement publishes various six-factor tests.

I have to say that the earlier decisions are often a lot better in stating the grounds of their decisions than the modern decisions. The modern opinions point to six-factor tests. In that sense, the early common law, the discretionary fact-based decision-making process, offers some advantages both in predictability and in constraining judges. I don't think the six-factor test approach that we see today in a lot of courts is superior, or obviously superior to what we had.

My second point is about the separation of powers. The notion behind the separation of powers is a notion of checks and balances, but there is also this notion of different branches jealously guarding their areas of control, and almost a competition between these different branches. And the system was designed for that kind of competition. You wonder whether it can work when one branch defers or says we're not going to compete. We're going to defer to that other branch.

The same question appears in the newspapers now about the current administration backing away from inherent powers-based arguments under the Constitution in the prosecution of war. When in the European system you see the court of first instance and other courts stating manifest error doctrines and other rules that allow them to defer or require them to defer to the EU Commission on some issues, that's a kind of backing away, deferring to the EU Commission, letting them determine the law to some extent, and I don't know if, and I wonder if,

that's good in the long run for rule of law.

If it happened in the U.S., if the courts deferred to the FTC, then I think that would be bad for rule of law, and the reasoning of the law, because the FTC is under some political control. You have different administrations moving from one extreme to another. You would have the law, if the courts were deferring to the FTC on its view of the law, changing frequently depending on which administration gets into power. We have independent courts that say we're going to do this our own way, we're going to set out the law, we're going to frame our own rule of reason. We're not going to defer to the agency on these issues. That gives a lot of predictability and stability to the law that I think would be otherwise missing if you didn't have this competition between different branches of government that are jealously guarding what they are supposed to be in charge of.

I think those are my two reactions to the most general questions that I see coming out of the talk.

PROFESSOR WALLER: As we approach lunchtime, we'll have a couple of short comments. Just one thing, Keith, your comment raises an interesting issue. There is a minor rule of law issue in the United States which is whether the courts are supposed to be deferring to the FTC or don't or at least are not deferring to them to the same extent that they're deferring to other administrative agencies that are similarly situated. That's a real open question in the United States.

PROFESSOR CAVANAGH: I have two very quick remarks. One on discretion. It seems to me judicial discretion is the hole in the donut. Without the donut, the hole is not there. So it has to be cabin by guidelines. And Spencer, I'm just saying in civil procedure, supplemental jurisdiction form not convenience where courts have offensive non-mutual issue. All sorts of tests. Discretion by cabin by factors which you are supposed to take into account. If the courts have that then I think there is a way of keeping them in check. It's harder with the agency, prosecutorial discretion you just don't have that. And also because we know it's just not reviewable, at least in this country not reviewable.

And the second thing is Maurice, you're dead-on right about cases that were antitrust cases becoming other kinds of cases. A WPK right here before Judge Saris in the District of Mass in Boston,⁴ classic example of cases that started as antitrust

⁴ *Alves v. Harvard Pilgrim Health Care, Inc.*, 204 F. Supp. 2d 198,

cases with and RICO cases where consumer supplemental claims the antitrust case, the antitrust case, RICO cases get tossed in, the consumer cases are there and the defendants are getting hit for millions of dollars. That's exactly what is happening. So the same group of plaintiff lawyers, entrepreneur plaintiff lawyers, are around just looking for the law and if it's not antitrust and it's not securities and not RICO, now the gold mine right now is consumer protection.

MR. McGRATH: On the transparency issue talking about in terms of what Tim was talking about, transparency is nice in principle and it's ideal, but I think there is a danger that people refer to light into the magic in regard to the royal family. It can actually, it can get in the way of agencies making the right decisions, and I always take the approach, having been in the agency, don't look at what the agency says look, at what it does.

And Article 82, the OFT basically isn't really doing Article 82 Chapter 2 cases, other than business relation cases⁵. Local business relation is one of these long running things where the regime has changed in the UK but business relation cases remains. But putting that to one side, it's not really doing those cases. And I think that's not such a bad thing because I think you can apply too much. OFT wasn't able to say that. In fact they said the opposite. I would love some Article 82 cases. Great. Give me your Article 82 cases. I will take them. And was that being transparent, personally I'm not so sure, but what did that have to be said in order to make sure that the funding kept coming for the regime and the regime—maybe it did. Maybe I'm just being cynical.

On the issue of discretion and margin of appreciation, I do think you need to accept that the authorities should have some margin of appreciation, some benefit. And the question is where that is. One area I would say is market definition for example. Because I had two cases in front of the appeals tribunal both rejected, some on market definition and ultimately market definition no matter what the economy may tell me, I think is highly subjective and can be argued many different ways. And if you show you've gone through certain procedures, certain research, and find the market, you talk to the customer, did a certain amount of things, you're not just relying on bare

212-214 (D. Mass. 2002), *aff'd*, 316 F.3d 290 (1st Cir. 2003).

⁵ See, e.g., *Maquarie/S.E. London & Kent Bus Co./E. London Bus & Coach Co.*, Case No. COMP/M.4303, Regulation (EC) No. 139/2004 Article 6(1)(b) Non-Opposition (Aug. 23, 2006).

assertions which many, many Europeans do this. Going beyond that you should have the benefit of the doubt.

Once these sort of issues get reheard and reassessed on appeal, then you're really in a lot of trouble because cases will just not get off the ground and you can spend years putting further layers on the analysis justifying the market definition that you've adopted in that decision, but does that actually help you? Does it lead to a better outcome, I'm not so sure.

PROFESSOR WALLER: We have reached the halfway point. We're going to continue many of these items with Tim's paper in the afternoon. Will we hit the wall? What will happen when we get to heartbreak hill? Stay tuned. We have lunch available.