THE ECONOMICS OF INTERPRETING AND APPLYING U.S. AND E.C./E.U. ANTITRUST LAW: A SUMMARY

This "book" (two-volume study) has nine inter-related components. First, it articulates or (in one instance) discusses operational definitions of seven economic concepts that play a critical role in U.S. antitrust law and E.C./E.U. competition law. The first is the general concept of conduct undertaken with specific anticompetitive intent—*i.e.*, conduct that would have been unprofitable if its profitability was not otherwise distorted by the extant Pareto imperfections whose perpetrator-perceived *ex ante* profitability was critically inflated by the perpetrator's belief that it would or might reduce the absolute attractiveness of the offers against which the perpetrator would have to compete. This concept covers the cognate U.S. Sherman Act concepts of a restraint of trade, monopolizing conduct, or an attempt to monopolize, the E.C./E.U. now-Article 101 concept of conduct whose *object* is the prevention or restriction of competition, and the E.C./E.U. now-Article 102 concept of conduct that is exclusionary.

The second economic concept that this book operationalizes is the concept of predatory conduct, which is a subtype of conduct undertaken with specific anticompetitive intent: conduct is correctly termed predatory if (1) its perpetrator's (or perpetrators') *ex ante* perception that it was profitable was critically affected by the perpetrator's perception that it would reduce the absolute attractiveness of the best offers against which the perpetrator would have to compete by driving a rival out, deterring a rival from introducing a new investment that would be rivalrous with one or more projects of the perpetrator, or by inducing an actual/potential rival of the perpetrator to relocate/locate an investment further away in product-space from the perpetrator's project(s) and (2) these effects would render the conduct profitable though economically inefficient if its profitability were not otherwise distorted.

The third economic concept the book operationalizes is the concept of oligopolistic conduct: in my usage, an actor is said to have made a primary (initiating) oligopolistic move when the actor would not have made the choice it made had it not believed that its rivals' responses would or might be influenced by their realization that it might react to their responses. When the relevant rivals anticipate such a reaction because the perpetrator has communicated its

intention to reciprocate to cooperation by foregoing otherwise-profitable opportunities to beat any cooperating responders' offers and/or to retaliate against non-cooperation by making otherwise-unprofitable decisions that would harm non-cooperators, the oligopolistic conduct in question is said to be "contrived";when the relevant rivals anticipate the initiating-perpetrator reaction in question because the relevant reaction would be inherently profitable for the perpetrator—*i.e.*, profitable even if it would not induce future cooperation, the oligopolistic conduct is said to be "natural." (This distinction is legally critical in the U.S. since U.S. antitrust law does not cover natural oligopolistic conduct.)

The fourth economic concept the book operationalizes is the U.S. Clayton Act concept of lessening competition and the coincident European Merger Control Regulation (EMCR) concept of impeding effective competition: in my judgment in the relevant contexts, conduct is correctly deemed to have lessened competition or to have impeded effective competition if it imposed a net equivalent-monetary loss on the "combination of" the potential and actual customers of the perpetrator(s) and the potential and actual customers of the perpetrator's or perpetrators' product rivals in circumstances in which this outcome was critically affected by the conduct's reducing the absolute attractiveness of the best offer these buyers respectively received from any inferior supplier.

The fifth "economic" concept that the book operationalizes—lessening the competition for the patronage of an individual buyer or a subset of the buyers that are affected by the conduct in question—is obviously related to the fourth. In my view, now-Article 101(3) of the E.C./E.U. Treaty requires now-Article 101(1)'s concept of conduct whose effect is to prevent or restrict competition to be defined in this way—*i.e.*, to be defined to refer to conduct that inflicts a net equivalent-monetary loss on any or any significantly-large subset of the actual or potential customers of its perpetrator(s) and the actual or potential customers of its/their product rivals by reducing the absolute attractiveness of the best offer these buyers respectively receive from any inferior supplier.

The sixth economic concept that the book operationalizes is a concept that covers one dimension of the U.S. Federal Trade Commission Act concept of "unfair methods of competition" and the E.C./E.U. now-Article 101(1) concept of conduct that has the object of "distorting competition"—*viz.*, conduct that is designed to give its perpetrator a sale that the

perpetrator is worse-than-allocatively-best-placed to make by causing potential buyers to overvalue the perpetrator's product or undervalue one or more of its rivals' products.

The seventh economic concept the book discusses is the concept of market power (which some U.S. judges and U.S. antitrust-law scholars mistakenly believe has an important role to play in the correct application of U.S. antitrust law) and the related concept of firm dominance (occupying a dominant position), which *is* relevant to the application of now-Article 102 of the E.C./E.U. competition law. The book does not offer an operational definition of these concepts, but it does point out that they must be defined in a way that reflects the relevant firm's power over both price and investment and that the concepts could be defined to refer to either the firm's monopoly power over price and investment or the sum of the firm's monopoly and oligopoly power over price and investment. The book also points out that, because, for reasons it explains, market definitions are inherently arbitrary, to the extent that antitrust law makes a firm's power or dominance legally relevant, analysts should focus on *economic* power and dominance as opposed to *market* power and dominance.

Second, the book analyzes the possible non-monopolizing functions (*i.e.*, functions that do not relate to specific anticompetitive intent) of the various types of business conduct to which U.S. antitrust law and E.C./E.U. competition law apply or have been applied: *inter alia*, (1) decisions to make quality-or-variety increasing (QV) investments (decisions to introduce new product variants, open up new distributive outlets, or add to the firm's capacity or inventory) and decisions to engage in production-process research (aimed at discovering a cheaper way to produce a relevant quantity of an existing product) or to invest in plant modernization, (2) decisions to execute horizontal and conglomerate mergers, acquisitions, and joint ventures, (3) decisions to vertically integrate internally or execute vertical mergers, acquisitions, and joint ventures, and (4) decisions to engage in other types of conduct to achieve some of the non-monopolizing goals that vertical integration can enable a firm to achieve—*inter alia*, decisions to engage in perfect price discrimination, to combine lump-sum fees with supra-marginal-cost per-unit prices, to engage in conventional inter-buyer price discrimination, to use tie-ins and reciprocity, to subsidize the advertising budget of independent retailers, to require independent retailers to engage in specified amounts and/or types of advertising and promotional activities, to require independent retailers to provide specified pre-sales advice and/or post-sales service or to pay them for doing so, decisions to engage in resale price maintenance or to include vertical

territorial restraints or customer-allocation clauses in contracts with independent distributors, decisions to refuse to deal, and decisions to enter into long-term full-requirements sales or purchase contracts.

Third, the book develops theories that delineate the conditions under which the various types of conduct in question can properly be said (1) to manifest anticompetitive intent (to be monopolizing or exclusionary) or (2) to lessen competition. These theories have three distinctive features. First, they focus separately on price competition and what I call "quality-or-variety-increasing-investment (QV-investment) competition"—the competition in which firms engage when they make investments that increase the quality and/or variety of the products they offer for sale or the distributive outlets they operate or that create additional inventory or capacity, which increases the average speed with which its owner can supply its product throughout a fluctuating-demand cycle. Second, the price-competition theories in question all focus on non-market-aggregated factors, focus separately on situations in which sellers set across-the-board prices (which apply to all their potential customers) and situations in which they set separate, individualized prices to each of their potential customers, and make use of two sets of complicated conceptual systems (one for each of the above two situations) that distinguish various (non-market-aggregated) components of the gap between a seller's price and its conventional marginal costs. Third, the QV-investment-competition theories the book develops (1) categorize and delineate operational definitions for the various barriers to entry that can confront the best-placed and successively-worse-placed potential entrants into any "market"—*i.e.*, arbitrarily-defined area of product-space, the counterpart barriers to (QV-investment) expansion that can confront an established firm in any area of product-space, the monopolistic QV-investment incentives an established firm may have to make a QV investment in an area of product-space in which it is already operating, and the monopolistic or natural oligopolistic QV-investment disincentives that may confront such an established firm in relation to such an investment and (2) analyzes the way in which (A) the sum of the barriers to entry facing best-placed and successively-worse-placed potential entrants into any area of product-space and (B) the sum of the barriers to expansion and operative QV-investment disincentives or incentives facing best-placed and successively-worse-placed potential expanders in any area of product-space interact to determine the intensity of QV-investment competition in that (arbitrarily-defined) area of product-space.

The book uses these theories to generate conclusions about the kinds of evidence that can and cannot be used to prove that antitrust defendants (1) have engaged in predatory pricing, promotional activity, or refusals to deal, have entered into predatory long-term full-requirements contracts, or have made predatory QV investments or predatory investments in production-process research or plant modernization, (2) have engaged in illegal oligopolistic conduct of various types, and (3) have participated in mergers, acquisitions, or joint ventures that manifest specific anticompetitive intent or that lessen competition. The book also analyzes the (rare) circumstances in which vertical integration and its various contractual and sales-policy partial surrogates will manifest specific anticompetitive intent, will reduce competition, or will cause the perpetrator to be guilty of an exploitative abuse of a dominant position (assuming that the last, E.C./E.U. concept can be operationally defined).

Fourth, the book criticizes various concepts, theories, and claims in the Industrial Organization/Antitrust-Law Economics literature. Most importantly, it argues that (1) regardless of whether one is seeking to define classical (ideal-type) or antitrust (functional) markets, market definitions are inherently arbitrary, not just at their periphery but at their core, (2) various approaches to defining markets that have been proposed in the academic literature (and in U.S. and E.C./E.U. enforcement-agency Guidelines) are indefensible, and (3) no approach to any antitrust-law-related economic issue that presupposes the definition of a market can be cost-effective. The book also argues that economists (4) have never explicitly defined or consistently defined in use the concepts of predatory or oligopolistic conduct, (5) have failed to distinguish contrived oligopolistic conduct (which always involves anticompetitive threats and/or offers) from natural oligopolistic conduct (which does not involve such threats and/or offers), (6) have misanalyzed the determinants of the profitability of predatory and oligopolistic conduct of various kinds and, consequently, have underestimated the likelihood that such conduct will be profitable, and (7) have proposed incorrect tests for determining whether pricing is predatory or illegally oligopolistic and for determining whether investments are predatory. In addition, the book (8) explains why the standard economic analysis of the possible monopolizing character and competitive impact of conglomerate mergers is undermined (A) by its acceptance of limit-price theory, which incorrectly concludes that established firms that respond to effective potential competition do so by lowering their prices to deter entry, (B) by its failure to take account of the ability of established firms to expand their QV investments in the areas of

product-space in which they are already operating, and (C) by its failure to pay appropriate attention to the possibility that conglomerate mergers can facilitate cross-"market" predation and illegal oligopolistic conduct, (9) points out that not only the leverage "theory" of tie-ins and reciprocity (which asserts incorrectly that the exclusive or inevitable function of any tie-ins or reciprocity agreements employed by a firm that has [respectively] market power when selling one of the products involved or market power when buying one of the products involved is to enable that firm to use that power to lever itself into a position of market power when selling the other product[s] involved) but also various other, more-modern "foreclosure" accounts of vertical integration and its contractual and sales-policy surrogates cannot bear scrutiny, and (10) explains why various short-cuts that have been proposed for analyzing the monopolizing character and competitive impact of joint ventures are unacceptable.

Fifth, the book sets forth and justifies the interpretations of U.S. antitrust law and E.C./E.U. competition law as written that are correct as a matter of law. Its conclusions about U.S. antitrust law as written are: (1) the Sherman Act (A) promulgates the specific-anticompetitive-intent test of illegality delineated above and (B) applies to all business conduct other than natural oligopolistic behavior and unsuccessful attempts to enter into contracts that would have been formed with specific anticompetitive intent; (2) the Clayton Act (A) promulgates a version of the "lessening competition" test of illegality delineated above that combines that test with an "organizational allocative efficiency" defense, which is available when the conduct in question has a negative competitive impact but that impact was critically affected by the conduct's worsening one or more perpetrator-rivals' competitive-position arrays by improving the perpetrator's or perpetrators' competitive positions by increasing the perpetrator's or perpetrators' organizational allocative efficiency and (B) applies only to the contemporaneous charging of different prices to different buyers of the same commodity when the price-differences cannot be cost-justified or the lower price cannot be shown to have been charged to meet a rival price, to a seller's efforts to preclude customers from patronizing its rivals through contract or threat, and to mergers and acquisitions; and (3) the Federal Trade Commission Act promulgates an "unfair method of competition" test of illegality that is probably best interpreted (A) to have two branches—a specific-anticompetitive-intent branch and a tort-law-type "distortion of competition" branch—and (B) to cover all types of business conduct. The book also points out that none of these tests of illegality is coincident with the

economic-inefficiency test of illegality that many economists and (more surprisingly and distressingly) many U.S. academic antitrust lawyers claim the U.S. antitrust laws promulgate.

The book's conclusions about E.C./E.U. competition law as written are: (1) now-Article 101 of the E.C./E.U. Treaty (A) covers all agreements between undertakings, trade-association decisions, and concerted conduct and (B) prohibits such conduct if it (i)(a) manifests the perpetrators' specific anticompetitive intent and (b) does not satisfy now-Article 101(3)'s requirements for an exemption—*viz.*, that it yield a type of efficiency covered by the language of now-Article 101(3), afford Clayton-Act-relevant buyers a fair share of the net gains it yields the perpetrators and buyers "combined," and not generate any significant reduction in competition anywhere, (ii)(a) has the effect of imposing a net equivalent-monetary loss on a relevant buyer (or possibly a sufficiently important set of buyers) that was critically affected by its reducing the absolute attractiveness of the best offer that buyer (those buyers) received from an inferior supplier and (b) fails to satisfy the requirements for a now-Article 101(3) exemption listed after (i)(b) above, or (iii) "distorts competition" in the sense of that concept previously defined; (2) now-Article 102 of the E.C./E.U. Treaty (A) covers all types of business conduct committed by any firm that occupies a dominant position or (by acceptable interpretation) any set of rivals that are collectively dominant and (B) prohibits that conduct if it constitutes either (i) an exclusionary abuse of that dominant position—*i.e.*, if it manifests the perpetrator's or perpetrators' specific anticompetitive intent—or (ii) an exploitative abuse of that position—a concept not defined in the Treaty but that presumably relates to the percentage that the relevant buyers' buyer surplus constitutes of the sum of those buyers' and the perpetrator's or perpetrators' transaction surplus on their transactions with each other; and (3) the European Merger Control Regulation (EMCR) (A) covers all mergers and all full-function joint ventures (but not partial-function joint ventures) and (B) declares them illegal if they significantly impede effective competition (lessen competition in the Clayton Act's sense of that concept), though the EMCR should not be interpreted to incorporate the "organizational allocative efficiency" defense that I think correct as a matter of law to read into the U.S. Clayton Act.

The book comments on six features of the E.C./E.U. competition law as written that are worthy of note: (1) contrary to the near-unanimous consensus-view of E.C./E.U. competition-law officials and experts, it is correct as a matter of law to interpret now-Article 101 and now-Article 102 to cover all mergers and joint ventures; (2) the text of now-Article 101(1) clearly establishes

that any tendency of covered conduct to lessen competition by inducing subsequent illegal acts counts against its Article 101(1) legality—a conclusion that I assume should carry over to the application of the EMCR (the U.S. Clayton Act provides no guidance on this issue); (3) although the EMCR substantially reduces the consequences of the E.C./E.U. officials' erroneous conclusions that neither now-Article 101 nor now-Article 102 covers mergers, acquisitions, or joint ventures, it does not eliminate those consequences since the EMCR does not cover partial-function joint ventures and its test of legality does not have a specific-anticompetitive-intent branch; (4) the fact that now-Article 101(1) covers concerted conduct implies that, unlike any U.S. antitrust law, it covers natural oligopolistic conduct; (5) whether now-Article 101(1) covers unsuccessful attempts to enter into an agreement whose object or effect is to prevent or restrict competition depends on whether E.C./E.U. law contains a general statute prohibiting attempts to do anything whose successful completion is prohibited and on whether, if it does not, E.C./E.U. courts conform to or reject the practice of U.S. federal courts of refusing to read attempt provisions into statutes or treaties that do not explicitly prohibit attempts to engage in conduct whose "completion" they prohibit; and (6) as written, E.C./E.U. competition law prohibits neither predation by an individual firm that does not enjoy a dominant position nor contrived oligopolistic conduct by such a firm when its execution does not involve the making of an anticompetitive agreement (*e.g.*, involves only the making and carrying out of anticompetitive threats).

Sixth, the book describes and criticizes the way in which U.S. courts and the U.S. antitrust-enforcement agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission) have interpreted and applied U.S. antitrust law and the way in which the European Commission (the EC) and the E.C./E.U. courts have interpreted and applied E.C./E.U. competition law. Most importantly, the book criticizes the U.S. courts for (1) holding that a firm cannot be found guilty of monopolization unless it has been shown to possess market power prior to engaging in the allegedly-monopolizing conduct, (2) adopting various incorrect price/marginal-cost, price/average-variable-cost, and price/average-total-cost rules for assessing the predatory character of a firm's prices, (3) historically, holding that, although *concerted* refusals to deal are *per se* illegal, individual refusals to deal cannot be illegal (though U.S. courts have for a long time recognized that individual refusals to deal can also be predatory), (4) promulgating and applying a legally-incorrect "essential facilities" doctrine, which (roughly

speaking) declares that owners of so-called essential facilities have an antitrust-law obligation to make them available to rivals on reasonable terms (though the Supreme Court denies that it has ever endorsed the doctrine, it created the doctrine in a 1912 case, and both the U.S. Supreme Court and a number of lower U.S. courts clearly applied the doctrine in a significant number of later cases), (5) declaring that horizontal mergers that reduce competition in one market violate the Clayton Act even if they do not reduce competition overall, (7) basing their assessment of the legality of horizontal mergers primarily on the merging firms' market shares and the concentration of the seller side of the markets in which both merger partners are found to be operating, (8) accepting limit-price theory (which is indefensible) without fully realizing all of its legal implications, (9) in some conglomerate-merger cases and in failing-company cases, changing the baseline for competitive-impact assessment from (A) the legally-correct baseline of the state of the world that would have prevailed had the defendant done nothing to (B) the legally-incorrect baseline of the state of the world that would have prevailed had the defendant made the most-pro-competitive decision it would have found more profitable than doing nothing, (10) in some geographic-diversification conglomerate-merger cases, adopting the toe-hold-merger doctrine, which condemns conglomerate mergers or acquisitions involving an outside geographic diversifier and a medium or large incumbent that would not decrease competition relative to the *status quo ante* unless the outside firm can establish that it had made a reasonable but unsuccessful effort to identify a small incumbent it could profit by purchasing or merging with (as opposed to doing nothing)—a doctrine that is wrong not only as a matter of law in that it rejects the legally-required do-nothing baseline for competitive-impact measurement but also as a matter of economics in that it assumes incorrectly *inter alia* that, as a class, less-profitable toe-hold mergers will be more pro-competitive than the more profitable non-toe-hold mergers for which they would be substituted if the doctrine always led to such substitutions, (11) historically, accepting the indefensible leverage 'theory" of tie-ins and reciprocity (admittedly, U.S. courts seem increasingly to be ignoring this theory), (12) historically, holding vertical maximum-price fixing, vertical minimum-price fixing, and vertical territorial restraints and customer-allocation clauses to be *per se* illegal (though [A] over the past 20 years, the Supreme Court has rejected all these positions and now contends [still incorrectly but less so] that the legality of any such conduct depends on whether in the instant case the conduct increases inter-brand competition by more than it decreases intra-brand competition and [B] in the even more-recent past, the lower

U.S. courts have [correctly] concluded without executing the kind of empirical enquiry the Supreme Court instructed them to undertake that the exemplars of these kinds of conduct they have scrutinized are lawful) (this improvement in the way in which U.S. courts handle vertical practices largely eliminates the effect of another, parimutual-handicapping error they made in some of these cases—*viz.*, prohibiting well-established firms from engaging in the practices in question while allowing marginal established firms and potential competitors to use them to enable the marginal established firms to survive and the potential competitors to enter), (13) historically, holding (incorrectly) that long-term full-requirements are illegal if they fail a so-called "quantitative substantiality" test (though, more recently, the U.S. courts have substituted a so-called "qualitative substantiality" test that focuses on the share as opposed to the quantity of the sales that have been "foreclosed"—a move in the right direction to a position that, as the U.S. lower courts have recently begun to realize and take account of, is still too market-oriented in that it ignores the fact that not all sellers in a defined final-product or input market are equally-well-placed to supply any given buyer), and (14) holding incorrectly in a few cases that the Clayton Act applies to joint ventures.

The book also points out that, although, historically, the U.S. Antitrust Division and Federal Trade Commission made or "took advantage of" all of these judicial errors, (1) over the past 20 years, the "Agencies" have increasingly adopted non-market-oriented approaches to analyzing the competitive impact of horizontal mergers (though they [A] have not acknowledged the inevitable arbitrariness of market definitions, [B] continue to support indefensible approaches to defining antitrust markets, [C] continue to insist that market-aggregated data can play a useful role in the relevant analysis, and [D] have failed to develop an appropriate non-market-oriented approach to analyzing the competitive impact of horizontal mergers), (2) appear to have rejected limit-price theory, (3) seem to have rejected the leverage "theory" of tie-ins and reciprocity, (4) no longer challenge the use of resale price maintenance, vertical territorial restraints, or vertical customer-allocation clauses, and (5) probably recognize the deficiencies in market-oriented approaches to foreclosure analyses of different types of conduct. It is unclear whether the U.S. antitrust-enforcement agencies continue to believe that (1) firms should not be prosecuted for monopolizing or attempting to monopolize unless they possessed market power before engaging in the allegedly-illegal conduct in question, (2) the "essential facilities" doctrine is correct as a matter of law, and/or (3) the toe-hold-merger doctrine is correct as a matter of law. However, the

2010 Horizontal Merger Guidelines' treatment of the "failing company" doctrine implies that the Agencies continue to believe that it is appropriate to use a non-do-nothing baseline for measuring the competitive impact of mergers and acquisitions in "failing company" cases, which suggests that it may still believe that the toe-hold-merger doctrine would be correct as a matter of law if its economic premises were sound.

The book also provides an account of and criticizes various features of the European Commission's and the E.C./E.U. courts' (the Court of First Instance's [CFI] and the European Court of Justice's [ECJ]) interpretation and application of E.C./E.U. competition law. *Inter alia*, the book criticizes the EC and the E.C./E.U. courts for (1) implicitly assuming that the list that follows the words "in particular" in now-Article 101(1) of the E.C./E.U. Treaty is comprehensive and therefore limits the coverage of the Article to conduct that the list covers, relatedly (2) concluding that now-Article 101 does not cover mergers, acquisitions, or joint ventures (which would be incorrect even if the above list were properly deemed to be comprehensive since some mergers—*viz.*, those that lead indirectly to the fixing of prices or other terms or conditions of sale or purchase and those that lead to the sharing of markets or services of supply—are covered by some items in the list), (3) concluding for no reason that I can imagine that now-Article 102 (with its exclusionary and exploitative abuse tests of illegality) does not cover mergers, acquisitions, and joint ventures executed by a dominant firm, (4) adopting and continuing to use a market-oriented approach to predicting the competitive impact of horizontal mergers, (5) accepting and continuing to accept (the indefensible) limit-price theory (without recognizing many of its legal implications), (6) accepting and continuing to accept the (indefensible) leverage "theory" of tie-ins, (7) concluding that the Treaty is equally hostile to reductions in intra-brand competition as to reductions in inter-brand competition (an error that has been only partially mitigated in more-recent years by their realization that firms that are prohibited from using resale price maintenance or vertical territorial restraints to reduce intra-brand competition will respond by substituting other conduct that the law does not prohibit that is equally inimical to the goals that the E.C./E.U. authorities ascribe to the Treaty that they believe justify their conclusion that the Treaty is hostile to reductions in intra-brand competition—*only partially* mitigated because the failure of the E.C./E.U. authorities to appreciate the range of functions that the various types of conduct in question can perform causes them to misjudge the types of conduct that such firms will substitute for the prohibited vertical practices and to underestimate the likelihood that the

relevant firms will respond to such conduct's prohibition in ways that will prevent the prohibition from achieving its alleged goals), (8) in some vertical-practice cases, making the same parimutual-handicapping error that U.S. courts have sometimes made, (9) deeming predatory many refusals to deal that are not predatory, (10) overestimating the likelihood that and misanalysing the circumstances in which long-term requirements contracts will not reduce competition, and (11) assuming that R&D joint ventures and other sorts of R&D collaborations will never reduce competition. I hasten to add that the book also points out that the E.C./E.U. authorities have not made some of the errors that their U.S. counterparts have made: have not (1) adopted the erroneous price/cost tests for predatory pricing that U.S. courts have used, (2) reached the conclusions that the U.S. "essential facilities" doctrine favors to the extent that U.S. courts have done, (3) adopted the toe-hold-merger doctrine, (4) ignored the possibility that conglomerate mergers can facilitate cross-market predation and contrivance to the extent that their U.S. counterparts have done (one U.S. Supreme Court decision does allude to this possibility), and (5) ignored the deficiencies of market-oriented approaches to analyzing the "foreclosing" effect of long-term requirements contracts to the extent that the U.S. Supreme Court seems to have done (though the lower U.S. courts have recently handled such cases more satisfactorily).

Seventh, the book compares U.S. antitrust law and E.C./E.U. competition law both as written and as applied. Correctly interpreted as a matter of law, E.C./E.U. competition law differs from U.S. antitrust law in at least the following 6 respects: (1) unlike U.S. antitrust law, E.C./E.U. competition law does not cover predation by a non-dominant individual firm or exemplars of such a firm's successful contrived oligopolistic conduct that do not involve the making of an anticompetitive agreement; (2) unlike U.S. antitrust law, E.C./E.U. competition law does cover (as concerted conduct) natural oligopolistic conduct; (3) now-Article 101(3) of the E.C./E.U. Treaty promulgates an efficiency defense that is less generous to perpetrators than is either the Sherman Act's efficiency defense or the organizational-allocative-efficiency defense I believe (contestably) it is correct as a matter of law to read into the Clayton Act; (4) the efficiency defense that is implicit in the EMCR's "impeding effective competition" test of illegality is not so pro-defendant as the Clayton Act's organizational-allocative-efficiency defense; (5) although it is not clear whether the tendency of a merger to induce its participants and/or their rivals to engage in subsequent anticompetitive conduct is relevant to its legality

under the Clayton Act, the fact that now-Article 101(1)'s list of effects that covered conduct might have that would render that conduct *prima facie* illegal under that provision includes any tendency "(a) directly or indirectly to fix purchase or selling prices or any other trading conditions…[and] (c) [to] share markets or sources of supply" implies that any tendency of covered conduct to induce subsequent illegal behavior does count against the *prima facie* legality of a merger, acquisition, or joint venture under now-Article 101(1) of the E.C./E.U. Treaty; and (6) the E.C./E.U. Treaty contains no language that favors the conclusion that it requires the competitive-impact analysis it makes legally salient to be market-oriented (admittedly, although the U.S. Clayton Act does include language that favors such a conclusion, all things considered, I do not think it correct as a matter of law to interpret the Clayton Act to impose such a requirement).

Eighth, the book analyzes whether the mistakes that U.S. and E.C./E.U. officials have made or continue to make when interpreting and applying, respectively, U.S. antitrust law and E.C./E.U. competition law have caused U.S. antitrust law as applied to diverge from E.C./E.U. competition law as applied more or less than U.S. antitrust law as written diverges from E.C./E.U. competition law as written. This analysis reaches the following 4 major conclusions: (1) the exclusively-U.S. error of holding that a defendant cannot be found guilty of monopolization unless it has been shown to have possessed market power prior to engaging in the allegedly-illegal conduct under scrutiny makes U.S. and E.C./E.U. law as applied more similar than U.S. and E.C./E.U. law as written since U.S. law as written prohibits single-firm monopolization by firms that do not have a dominant position while E.C./E.U. law as written does not; (2) because, historically, both U.S. officials and E.C./E.U. officials made the mistakes of concluding that (A) the bodies of antitrust/competition law they were respectively charged with enforcing were as opposed to conduct that reduces intra-brand competition as they are to conduct that reduces inter-brand competition, (B) the parimutual approach to assessing the legality of resale price maintenance and vertical territorial restraints and customer-allocation clauses is legally correct, (C) the leverage theory of tie-ins is correct, (D) limit-price theory is correct, and (E) the same type of market-oriented approach to predicting the competitive impact of horizontal mergers is cost-effective and legally warranted, *historically*, these errors—made by both sets of officials—probably did not cause U.S. and E.C./E.U. competition law as applied to diverge to a different extent from the amount by which U.S. and E.C./E.U. competition law as

written diverged; (3) historically, the E.C./E.U. officials' mistake of holding that neither now-Article 101 nor now-Article 102 covers mergers or joint ventures caused E.C./E.U. competition law as applied to diverge far more from U.S. antitrust law as applied (particularly during the period in which U.S courts were assuming that virtually all horizontal mergers challenged by the government reduced competition) than E.C./E.U. competition law as written diverged from U.S. antitrust law as written (though the effect of this error was substantially reduced by the passage of the EMCR); and (4) the fact that, over the past 20 years or so, U.S. courts and antitrust-enforcement authorities have come far closer than have their E.C./E.U. counterparts to eliminating the errors delineated after "(3)" in this list implies that, on this account, over this period, the divergence between U.S. antitrust law as applied and E.C./E.U. competition law as applied has grown progressively larger than the pre-EMCR divergence between U.S. antitrust law as written and E.C./E.U. competition law as written. Of course, this increase in divergence between the two bodies of law as applied has been substantially offset if not more than counterbalanced by the passage of the EMCR, which largely eliminates the huge divergence between them caused by the erroneous conclusions of E.C./E.U. officials that neither now-Article 101 nor now-Article 102 covers mergers, acquisitions, or joint ventures.

Ninth, the book concludes by considering whether U.S. antitrust law as applied and E.U. competition law as applied are likely to converge or diverge in the near future. The book argues that, because E.U. officials tend to pay attention to and learn from U.S. practice, E.U. competition law as applied will come increasingly to resemble U.S. antitrust law as applied as E.U. officials progressively increase the extent to which they eliminate the errors that both they and their U.S. counterparts historically made but their U.S. counterparts have recently made more progress in correcting.