

Nicolas Charbit  
Carolina S. Malhado  
Ellie Yang  
*Editors*

Douglas H. Ginsburg

An Antitrust Professor  
on the Bench  
*Liber Amicorum*

Volume I

Alden F. Abbott, Margaret Artz, Anil Acar, Gary Born, Michelle M. Burtis, John DeQ. Briggs, Terry Calvani, James Cooper, Daniel Crane, Susan Creighton, David S. Evans, Eric M. Fraser, Jamillia P. Ferris, Damien Geradin, Ilene Knable Gotts, Gönenc Gürkaynak, John Harkrider, Joshua Hazan, Thu Hoang, Keith N. Hylton, Jonathan M. Jacobson, Bruce H. Kobayashi, Gregor Langus, Marina Lao, Vilen Lipatov, Ryan S. Maddock, Danielle Morris, Damien Neven, Barak Orbach, James F. Rill, Katarzyna Sadrak, Jana I. Seidl, Hal S. Scott, D. Daniel Sokol, Jacques Steenberg, Richard M. Steuer, Pablo Trevisán, Esra Uçtu, Nils Wahl, Joshua D. Wright

# DOUGLAS H. GINSBURG

## An Antitrust Professor on the Bench

*Liber Amicorum* - Volume I

Foreword by Joshua Wright

### Editors

Nicolas Charbit  
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Ellie Yang

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# Foreword

JOSHUA WRIGHT

It is our great honor and privilege to present this *Liber Amicorum* to Judge Douglas H. Ginsburg. I admit I also introduce this volume with some hesitation. For one usually introduces a volume such as this to mark the end of a distinguished career. And a distinguished career it has been. But as a significant beneficiary of Judge Ginsburg's scholarly endeavors at Scalia Law School, his guiding hand at the Global Antitrust Institute at George Mason University, and his friendship, I am particularly fond of the status quo.

Judge Ginsburg received a Bachelor of Science degree from Cornell University and his JD from the University of Chicago Law School. He then served as a clerk for Judge Carl McGowan on the D.C. Circuit and for Justice Thurgood Marshall on the Supreme Court. Following his clerkships, Judge Ginsburg began his career in academia at Harvard Law School in 1975.

Judge Ginsburg later became the Administrator of the Office of Information and Regulatory Affairs (OIRA) and then the Assistant Attorney General for the Antitrust Division of the Department of Justice. In 1987, he was nominated to the Supreme Court of the United States. Judge Ginsburg served on the D.C. Circuit Court of Appeals for more than 30 years, including as Chief Judge from 2001 to 2008. During this time, he also taught part-time at George Mason University School of Law. After taking senior status on the D.C. Circuit, Judge Ginsburg continued his career in academia teaching full time at NYU Law in 2012. He later returned to Scalia Law School at George Mason University, where he continues to serve as a

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Professor of Law and as the Chairman of the International Advisory Board of the Global Antitrust Institute.

A robust and full *Liber Amicorum* could focus exclusively upon Judge Ginsburg’s impactful role as a jurist, or his contributions as legal scholar, or his commitment to public service, or his mentorship as a teacher. This challenge in fully capturing Judge Ginsburg’s contributions in such a volume is to explore these dimensions of achievement individually as well as to take this opportunity to reflect upon their interactions.

The essays in this *Liber Amicorum* take up this challenge admirably. Practitioners, economists, and legal scholars explore the multiple dimensions of the footprint Judge Ginsburg has left in antitrust’s landscape. Some explore in depth the impact Judge Ginsburg’s opinions and scholarship have had in specific areas of antitrust jurisprudence: horizontal restraints, the intersection of intellectual property rights and antitrust, and international antitrust. Others focus more broadly upon how we should think about Judge Ginsburg’s intellectual legacy and public service. The *Liber Amicorum* ties together these multiple dimensions of production and service to recognize and appreciate the full fruits of Judge Ginsburg’s labors in the domestic and global antitrust community.

Judge Ginsburg is remarkably generous with his time and his wisdom with colleagues, students, legal academics, clerks, and practitioners alike. He is a source of advice and counsel for those who need it, of substantive intellectual feedback for those who seek it, and of mentorship for those fortunate enough to cross his path. The beneficiaries of his generosity range from antitrust luminaries and agency leadership around the world to aspiring law students. I would be remiss if I did not acknowledge the tremendous intellectual and personal debt I owe Judge Ginsburg as a colleague, co-author, co-venturer, and friend. I intend to run that debt even deeper in the years to come as I further benefit from Judge Ginsburg’s continued dedication and commitment to his work. And so I hope selfishly – but no doubt joined by the international antitrust community that benefits from Judge Ginsburg’s insights and wisdom – this *Liber Amicorum* is necessarily incomplete and leaves room for contributions yet realized.

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# Contributors

**Alden F. Abbott**  
*The Heritage Foundation*

**Margaret Artz**  
*WilmerHale*

**Anil Acar**  
*ELIG, Attorneys-at-Law*

**Gary Born**  
*WilmerHale*

**Michelle M. Burtis**  
*CRA International*

**John DeQ. Briggs**  
*Axinn*

**Terry Calvani**  
*Freshfields Bruckhaus Deringer*

**James C. Cooper**  
*George Mason University Antonin Scalia Law School*

**Daniel A. Crane**  
*University of Michigan Law School*

**Susan A. Creighton**  
*Wilson Sonsini Goodrich & Rosati*

**David S. Evans**  
*Global Economics Group*

**Eric M. Fraser**  
*Osborn Maledon*

**Jamillia P. Ferris**  
*Wilson Sonsini Goodrich & Rosati*

**Damien Geradin**  
*EUCLID Law*

**Hene Knable Gotts**  
*Wachtell, Lipton, Rosen & Katz*

**Gönenç Gürkaynak**  
*ELIG, Attorneys-at-Law*

**John D. Harkrider**  
*Axinn*

**Joshua Hazan**  
*Wachtell, Lipton, Rosen & Katz*

**Thu Hoang**  
*Wilson Sonsini Goodrich & Rosati*

**Keith N. Hylton**  
*Boston University School of Law*

**Jonathan M. Jacobson**  
*Wilson Sonsini Goodrich & Rosati*

**Bruce H. Kobayashi**  
*George Mason University Antonin Scalia Law School*

**Gregor Langus**  
*European Commission*

**Marina Lao**  
*Seton Hall University School of Law*

**Vilen Lipatov**  
*Compass Lexecon*

**Ryan S. Maddock**  
*Wilson Sonsini Goodrich & Rosati*

**Danielle Morris**  
*WilmerHale*

**Damien Neven**  
*Graduate Institute of International and Development Studies*

**Barak Orbach**  
*University of Arizona James E. Rogers College of Law*

**James F. Rill**  
*Baker Botts*

**Katarzyna Sadrak**  
*EUCLID Law*

**Jana I. Seidl**  
*Baker Botts*

**Hal S. Scott**  
*Harvard Law School*

**D. Daniel Sokol**  
*University of Florida Levin College of Law*

**Jacques Steenberg**  
*Belgian Competition Authority*

**Richard M. Steuer**  
*Mayer Brown*

**Pablo Trevisán**  
*Comisión Nacional de Defensa de la Competencia*

**Esra Uçtu**  
*ELIG, Attorneys-at-Law*

**Nils Wahl**  
*Court of Justice of the European Union*

**Joshua D. Wright**  
*George Mason University Antonin Scalia Law School*

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# Judge Douglas H. Ginsburg Biography

## Career

Senior Circuit Judge Douglas H. Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1986; he served as Chief Judge from 2001 to 2008. After receiving his B.S. from Cornell University in 1970, and his J.D. from the University of Chicago Law School in 1973, he clerked for Judge Carl McGowan on the D.C. Circuit and Justice Thurgood Marshall on the United States Supreme Court. Thereafter, Judge Ginsburg was a professor at the Harvard Law School, the Deputy Assistant and then Assistant Attorney General for the Antitrust Division of the Department of Justice, as well as the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. Concurrent with his service as a federal judge, Judge Ginsburg has taught at the University of Chicago Law School and the New York University School of Law. Judge Ginsburg is currently a Professor of Law at the Antonin Scalia Law School, George Mason University, and a visiting professor at University College London, Faculty of Laws.

Judge Ginsburg is the Chairman of the International Advisory Board of the Global Antitrust Institute at the Antonin Scalia Law School, George Mason University. He also serves on the Advisory Boards of: Competition Policy International; the Harvard Journal of Law and Public Policy; the Journal of Competition Law and Economics; the Journal of Law, Economics and Policy; the Supreme Court Economic Review; the University of Chicago Law Review; The New York

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University Journal of Law and Liberty; and, at University College London, both the Center for Law, Economics and Society and the Jevons Institute for Competition Law and Economics.

## **Education**

Judge Ginsburg obtained his B.S. degree from Cornell University in 1970 and his J.D. from the University of Chicago Law School in 1973.

## **Publications**

### **Books and Monographs**

GLOBAL ANTITRUST ECONOMICS - CURRENT ISSUES IN ANTITRUST AND LAW AND ECONOMICS (with Joshua D. Wright; Institute of Competition Law March 21, 2016)

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# Concentrated Benefits and Dispersed Costs Rent-Seeking by Incumbents Against Innovative and Disruptive Web Based Firms

JOHN D. HARKRIDER\*

Axinn

## Abstract

At a theoretical level, rent-seeking is likely where government action (or inaction) imposes concentrated benefits on a few and dispersed costs on many. Even though anticompetitive mergers and cartels lead to concentrated benefits on merging (or colluding) firms and dispersed costs on consumers, successful rent-seeking in these cases is relatively rare for three reasons. First, because firms are both producers and consumers, they are behind a Veil of Ignorance as to whether they will benefit (as a producer) or be harmed (as a customer) by a future anticompetitive merger or cartel and therefore prefer fair and objective rules. Second, fair and objective rules exist in the case of mergers (the Herfindahl-Hirschman index) and cartels (per se illegality). Third, agencies (at least in the United States) must bring their case to a common law court that has full discovery and a developed

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\* John Harkrider is a Partner at Axinn who regularly represents clients before the DOJ and FTC as well as European Commission. He would like to thank Alex Bergersen, Stacie Soohyun Cho and Daniel Bitton for their comments and assistance on this paper.

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common law of competition. This is important because courts are less susceptible to rent-seeking than other bodies of government.

These three protections are absent in cases involving product changes by allegedly dominant firms in Continental Europe, as firms have some expectation into whether they are likely to be a dominant firm (and are not under a Veil of Ignorance), and there is an absence of both fair and objective rules (to determine whether a product improvement is genuine). Rent-seeking is an even greater problem when the alleged product change is distributed over the internet, which exacerbates both the dispersion of costs and the concentration of benefits. This is especially true in Europe where judicial review of competition cases is more limited than in the United States.

These theoretical propositions will be examined empirically through two methods. First, this chapter will look at more than 400 cases against Uber, AirBNB and Amazon to determine whether courts are, in fact, a better guard against rent-seeking by incumbents. This examination shows that courts are less likely than industry agencies, legislatures and executives to impose significant limits on disruptive firms, though this difference is only true in the United States and England. Second, this chapter will look at the competition case against Google and conclude that at least one reason that the European Commission fined Google but the U.S. Department of Justice and Federal Trade Commission did not take action was because of the existence of judicial review in the United States.

## I. Introduction

Most intractable public policy issues arise when a government or private action imposes small costs on large groups of people or firms and confer significant benefits on a small number of people or firms. This problem of concentrated benefits and dispersed costs is reflected in yet unsolved public policy issues ranging from financial markets,<sup>1</sup> environment,<sup>2</sup> tax policy,<sup>3</sup> health care,<sup>4</sup> and defense contracting.<sup>5</sup>

The problem in each of these cases is not just that the issues are complex and difficult to solve, it is that the solutions that are presented to the government are almost always in the interests of a concentrated group. For it is the small group with potentially significant gains that has the incentive and ability to individually or collectively lobby government, present evidence and hire experts. In contrast, the large group of (potentially millions of) impacted consumers with small stakes typically fail to organize, and, even if they do, they frequently lack the sort of proprietary data that policy makers demand. As such, concentrated interests are able to engage in rent-seeking activity that imposes significant costs on the public.

Compared to other bodies of government, antitrust agencies are comparatively immune from such rent-seeking—especially when they restrict their enforcement activity to horizontal mergers and cartels. This may seem odd because unlawful mergers and cartels by definition impose significant costs on a dispersed group of consumers and supra-competitive benefits on a few. Yet rent-seeking is comparatively rare in these cases for three reasons:

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- 1 See, e.g., David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J.L. & Econ. 311 (1987) (“Modern public choice theory suggests that regulatory actions, including the decisions of the SEC, will divert wealth from relatively diffuse groups towards more coalesced groups, whose members have strong individual interest in the regulation’s effect.”).
  - 2 See, e.g., Mark Pennington, *Planning and the Political Market: Public Choice and the Politics of Government Failure* (2000).
  - 3 See, e.g., GARY MUCCIARONI, REVERSALS OF FORTUNE: PUBLIC POLICY AND PRIVATE INTERESTS (1995); Randall G. Holcombe, *Tax Policy from a Public Choice Perspective*, 51 NAT’L TAX J. 359 (1998).
  - 4 See, e.g., THOMAS R. OLIVER, GUIDE TO U.S. HEALTH AND HEALTH CARE POLICY (2014).
  - 5 See, e.g., Robert W. Degrasse, *Military Expansion Economic Decline: The Impact of Military Spending on U.S. Economic Performance*, 3 J. POL. ANAL. MANAG. 482 (1984).

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Concentrated Benefits and Dispersed Costs Rent-Seeking by Incumbents  
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- The existence of large customers who can internalize the costs of petitioning government and whose interests are almost perfectly correlated with the interests of the consuming public.
- The fact that ex ante (i.e., before a given merger is announced or known) firms are unsure as to whether they are likely to be consumers (who would be harmed) or competitors (who would benefit) with respect to any particular merger. Thus, they are under a Veil of Ignorance as to their future state and therefore, prefer ex ante rules that are fair and objective.
- Such fair and objective rules such as HHI thresholds and per se rules against price fixing exist and can be predictably applied.

All of these conditions are absent in the case of alleged exclusionary product changes by a so-called dominant firm selling a product used generally by consumers. For this reason, these cases are far more susceptible to rent-seeking.

- There are no large customers whose interests are necessarily correlated with the interests of consumers. To the contrary, in the case of alleged exclusionary product improvements, the complainants are typically competitors, not customers. These competitors may be equally harmed by an efficient product change as by an exclusionary one so their interests are not correlated with consumer welfare.
- Firms are more certain as to their future state in monopolization cases than in horizontal mergers because while any given firm has a relatively high probability of being a consumer or producer in the future, it has a low probability of being an alleged monopolist in the future. Thus, firms are not under a Veil of Ignorance as to their future state and have ex ante preferences for rules that protect them from efficient actions by large rivals.
- There are few objective rules to determine whether a product change is an improvement or not. And no objective way to tell whether the declining sales of competitors are due to a genuine product improvement or an exclusionary one.

The risk of rent-seeking before antitrust agencies (or any branch of government) is heightened when the alleged exclusionary product improvement is by disruptive firms with web-based models. This is because the internet can facilitate very small

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benefits to consumers that result in very big losses to incumbents. For example, the gains to an individual in terms of lower taxi prices and more taxi availability caused by Uber are much lower than the losses to fleets who own hundreds of taxi medallions (which are each potentially worth hundreds of thousands of dollars). Similarly, the gain to an individual user of AirBNB in terms of lower lodging prices is much lower than the collective loss to a large hotel company that loses thousands of bookings and potentially millions, if not billions, in profits. In other words, the internet frequently causes the harm (from an even genuine product improvement) to incumbent firms to be more concentrated and the gain to consumer welfare to be more diffuse.

While rent-seeking is common in the case of genuine product improvements by disruptive firms, there are several ways to protect against this harm. In particular, antitrust agencies should not only seek to rely upon objective evidence but also ensure there is judicial review of agency actions, including *de novo* factual review, full discovery as to evidence and intent, rules requiring standing, and judicial review, all before an impartial judge not employed by the agency.

There are a number of theoretical reasons to believe that courts are more effective than other branches of government to check against rent-seeking. In particular, United States' courts subsidize diffuse interests in the form of class actions, attorney's fees and treble damages, all of which give diffuse interests more power than other forms of government. Further, firms are frequently under a Veil of Ignorance as to whether they are likely to be plaintiffs or defendants, and whether as a plaintiff or a defendant they will be advantaged or harmed by a particular procedural rule. As such they want fair and objective procedural rules. As a result, litigation represents a more competitive process for the discovery of truth than before agencies, where complainants can cherry pick documents and data with little risk of their bias being discovered.

Empirical evidence supports the conclusion that rent-seeking is less effective before the judiciary. Specifically, a review of more than 400 regulatory challenges in both the United States and Europe against AirBNB, Uber and Amazon shows a marked difference between the success rate of such challenges at three branches of government: with challenges to disruptive firms only 10% successful in courts, but more than 50% successful in other branches of government. Notably, this pattern is reversed in continental Europe, where judicial challenges to disruptive

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firms are 80% successful. This raises the question whether civil law courts are as effective guard against rent-seeking as common law courts, especially given the lack of real discovery tools for civil law courts.

The worldwide antitrust case against Google also presents a test case of rent-seeking. Google is a disruptive company which threatens the profits of firms with more traditional business models. Because the benefits to Google users are small and dispersed on the internet, consumers typically do not petition government in favor of Google's product change even though their collective gain might be large. However, because these small benefits are aggregated through the internet, they result in very large losses for incumbents, thus motivating competitors to petition regulators to restrict the ability of Google to compete.

While Google has never lost a product design court case in the United States or Europe, complaints by its rivals resulted in a \$2.7 billion dollar fine by the European Commission, though not in the United States. At least one possible reason for no action by U.S. agencies is that they are unable to unilaterally sanction a firm for alleged exclusionary conduct; instead, they need to go to court, where there is de novo judicial review, and discovery as to complainant's motivations and evidence. In Europe, however, the EC has the right to unilaterally impose a fine, and while there is a right to appeal it is under a highly deferential standard and without liberal discovery.

## II. Towards a Positive Theory of Limiting Antitrust Enforcement

### 1. The Problem of Concentrated Benefits and Diffuse Costs

Because the problem of concentrated benefits and diffuse costs animates most of the concern about rent-seeking it is helpful to explore this concept in more detail.

Government action can be thought of as a supply of goods and services in response to demands from various constituencies.<sup>6</sup> Those constituent demands can be reflected

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6 See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) ("The 'interest group' theory asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare, whether 'welfare' is defined as wealth, utility, or some other version of equity or justice.").

in votes, lobbying, campaign contributions, expert analysis, facts, data, and many other inputs that help impact government action.<sup>7</sup> Public choice theory recognizes that not all impacted third parties have the same ability and incentive to bring their policy demands to the attention of the government. This is especially true when the gain (or loss) from a new law or regulation is enjoyed by a small group and the loss (or gain) is spread among a large group such as the consuming public.<sup>8</sup>

In such cases, the gains to each member of the small group from governmental action may be sufficiently large that members will individually and, at times, collectively invest in hiring lobbyists, lawyers, and experts to petition government for action. In contrast, the gains to each member of the large group may be sufficiently small that no individual member will expend resources to bring his or her concerns to the government and the organizational problems are so significant that the large group never collectively invests in petitioning government. Instead, the incentives for each member of the large group to free-ride off the investments of others is so strong that nobody takes action.

Mancur Olson observed in his 1965 book *The Logic of Collective Action*:

First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action, and the farther the group falls short of getting an optimal supply of the collective good, even if it should get some. Second, since the larger the group, the smaller the share of the total benefit going to any individual, or to any (absolutely) small subset of members of the group, the less the likelihood that any small subset of the group, much less any single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it; in other words, the larger the group the smaller the likelihood of oligopolistic interaction that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained. For these reasons, the larger the group the farther it will fall short of providing an optimal

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7 *See generally*, GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* (1989).

8 *Id.* at 23.

supply of a collective good, and very large groups normally will not, in the absence of coercion or separate, outside incentives, provide themselves with even minimal amounts of a collective good.<sup>9</sup>

Conversely, Olson noted that small industry groups tended to be very effective in obtaining government action that collectively benefit their members.

Whereas almost every occupational group involves thousands of workers, and whereas almost any subdivision of agriculture also involves thousands of people, the business interests of the country normally are congregated in oligopoly-sized groups or industries... [T]he organized and active interest of small groups tends to triumph over the unorganized and unprotected interests of larger groups. Often a relatively small group or industry will win a tariff, or a tax loophole, at the expense of millions of consumers or taxpayers in spite of the ostensible rule of the majority.<sup>10</sup>

The problem of concentrated benefits and diffuse costs is well known in public policy and it explains why government is frequently more likely to hear from (and take action on behalf of) small groups. This may be true even where the loss to the public is greater than the gains to the small group.

In 1989, Gordon Tullock provided an example to illustrate this concept:

Think of a steel company that has two possible ways of increasing its profits by \$20 million. The first is to build a new steel plant at a cost of \$100 million and take advantage of the improved efficiency. The second is to obtain from the government some special privilege, say, a ban on Korean steel, which will produce the same increase in profits. We would assume that the company would make the choice between these two investments solely in terms of the expense; hence, it would not invest in the new plant unless the cost of government influence came close to \$100 million. Of course, the marginal rather than the total costs would be brought into equality, but there does not seem to be any obvious reason why that would make a great difference. One would anticipate that the

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9 MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 48 (1965).

10 *Id.* at 143.

rent-seeking industry would invest about as much as it gains in dealing with the government.<sup>11</sup>

Consider, for example, a market where the only two domestic producers demand a \$1/unit tariff imposed on ten million units of imported goods. If the typical consumer purchases only one unit per year, the tariff would only cost each consumer \$1, while providing a potential \$10 million annual benefit to be split by the two domestic producers. In such a case, it is easy to see why the two domestic producers would be likely to hire lobbyists, experts, and lawyers to demand a tariff, while consumers would be silent.

Similar issues arise with tax loopholes that provide significant benefits for certain classes, while causing others to pay more taxes or suffer from reduced funding for schools and infrastructure;<sup>12</sup> pollution controls that require existing firms to retrofit their plants, while only imposing small (and immeasurable) benefits for consumers;<sup>13</sup> and financial regulations that cut the profits of certain financial institutions, but only create small (and hard to perceive) benefits for the general public.<sup>14</sup>

Obviously, horizontal mergers and cartels create concentrated gains for the merging parties and their competitors, but dispersed costs for their consumers. This raises the risk that competitors in particular will petition the government to stop efficient mergers and let inefficient mergers go through. But one reason that rent-seeking is blunted in these cases by the presence of large customers of the merging parties who are willing to internalize the costs of petitioning government. To be sure, such customers will attempt to use the threat of complaining to obtain concessions from the merging parties, such as lower prices through a new contract, but these customers will generally never actually stop an efficient merger as it is not in their interest to do so.

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11 GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 4 (1989).

12 See James M. Buchanan, *Tax Reform as Political Choice*, 1 J. ECON. PERSPECT. 29 (1987).

13 See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

14 See Lawrence G. Baxter, “Capture” in *Financial Regulation: Can We Channel it Toward a Common Good?*, 21 CORNELL J.L. & PUB. POL’Y. 175 (2011).



### A. *The Veil of Ignorance*

Rawls argued in *A Theory of Justice* that society is likely to choose fair and efficient rules if one imagines a hypothetical contracting moment between individuals who are ignorant as to their actual position in that society.

For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle. To represent the desired restrictions, one imagines a situation in which everyone is deprived of this sort of information. One excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices. In this manner the Veil of Ignorance is arrived at in a natural way . . . . [T]hese conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.<sup>15</sup>

The Veil of Ignorance is effective only where it is possible to choose objective rules to promote consumer welfare. This is not always true: for example, there is a debate as to whether raising the minimum wage will increase or decrease employment. As a result, the Veil of Ignorance does not provide an answer to whether we should raise or eliminate the minimum wage.

Thus, taking a step back, *A Theory of Justice* implies two requirements for effective public policy: first, that firms are in fact ignorant as to their future state (e.g., not knowing if they are likely to be a consumer or producer in a hypothetical future cartel or horizontal merger); and second, that there exist objective and fair rules that firms behind the Veil of Ignorance would support. These two conditions are not always met and where they are not, there is a heightened risk of rent-seeking.

These two conditions are satisfied in the case of horizontal mergers and cartels, which is one important reason why rent-seeking is less effective in those cases.

First, firms are unclear as to whether they are likely to be producers or consumers in the future with respect any relevant product impacted by a merger. Indeed, most firms produce products in far fewer markets than they consume. For example, a

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15 JOHN RAWLS, *A THEORY OF JUSTICE*, 18-19 (Harvard Univ. Press 1999) (1971).

firm that sells into a single product market is likely to consume in dozens—as almost all firms must purchase inputs into their output, as well as ancillary but necessary products like insurance, office supplies, technology, communications, energy, etc.

Second, there exist objective and fair rules in the case of horizontal mergers and cartels. For example, HHI and other concentration metrics set forth relatively predictable guidance for when mergers are unlawful. And in most cases, at least the methodology for market definition is relatively transparent. Similarly, per se rules against collusion are easy to administer and enforce.

Notably, these conditions are much harder to satisfy in the case of product improvement cases by so-called dominant firms, especially where they provide goods for free.

First, firms are generally clear as to whether they are likely to be a dominant firm in the future. Certainly, they know the probability of their future dominance is much lower than their probability of being a consumer or producer of an undefined product in the future. Further, they are able to define specific rules that only apply to certain sorts of alleged dominant firms: for example, while Bing or Kayak may hope to dominate their respective sectors in the future, they know they are unlikely to be a dominant generalized search engine in the future. Thus, they can petition for rules that apply only to generalized search engines, but do not apply to firms like them.

Second, as we discuss later, it is extremely difficult to develop objective rules for so-called dominant firms providing goods for free. It is difficult, for example, to define relevant markets in two-sided markets where one side of the market has no explicit price. Similarly, it is difficult to determine whether a product change is exclusionary or a genuine improvement. And, it is difficult to develop remedies to change the so-called dominant firm's business practice without hampering their ability to compete.

## ***B. The Problem of Remedies***

The existence of a market failure is a necessary but not sufficient condition for government intervention. Whether as a result of rent-seeking, or simply the difficulty of setting forth rules that are sufficiently flexible to allow for firms to continue to innovate, there is a risk that the government intervention will actually

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make the problem worse. For this reason, the question of whether government intervention is appropriate is ultimately an empirical question as much as a theoretical one.<sup>16</sup>

As Charles Wolf Jr. observed:

The essential rationale for public policy measures lies in specific failures of the market of itself to produce efficient or otherwise socially preferred outcomes . . . . However, this rationale provides only a necessary, not a sufficient, justification for public policy interventions. Sufficiency requires that specifically identified market failures be compared with potential nonmarket failures associated with the implementation of public policies.<sup>17</sup>

In the case of horizontal mergers and cartels, structural remedies are relatively easy to implement. And there is empirical evidence that such remedies are actually effective, especially when they are of an ongoing business and avoid interdependence between the divested entity and the merging firm.<sup>18</sup>

But remedies are difficult to implement in the case of alleged exclusionary product improvements. In many cases, the alleged monopolist is unquestionably an innovative firm in a quickly changing business. And this is true even if we accept that the alleged misconduct was exclusionary. For example, despite their alleged vices, nobody would dispute that Google, Intel and Amazon are innovative firms. Thus, when regulators impose restrictions on how these firms design their products, there is a very substantial risk that the restriction will have an unintended effect of preventing future legitimate innovations.

For this reason, in the case of alleged exclusionary product improvements, antitrust agencies need to be careful to make sure that the remedy in question does not create a problem that is worse than the initial exclusionary act. Specifically, they should

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16 Julian Le Grand, *The Theory of Government Failure*, 21 BRIT. J. POL. SCI. 423, 442 (1991) (“Whether a particular form of government intervention creates more inefficiency or more inequity than if the intervention had not taken place is ultimately an empirical question and one that is by no means always supported by the evidence.”).

17 Charles Wolf, Jr., *A Theory of nonmarket Failure: Framework for Implementation Analysis*, 22 J. OF LAW AND ECONOMICS 107, 138 (1999).

18 See Press Release, FTC Releases Staff Study Examining Commission Merger Remedies between 2006 and 2012, Federal Trade Commission (Feb. 3, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies>.

make sure that the government is not involved in product design. And they should make sure that the agency does not create a mechanism for the competitors to complain in the future under a lowered standard of proof and without the protections of a judicial process. And this is important because regardless of the lawfulness of the challenged act, competitors will have an interest in hampering the competitive viability of future product changes that genuinely improve consumer welfare.

This is especially true where the product change is disruptive. Recall the efforts of the governments of Britain, France and the United States to develop code to transport data over the internet through an organization called the International Network Working Group. They developed a standard called OSI. As described by the IEEE,

Thousands of engineers and policymakers around the world became involved in the effort to establish OSI standards . . . Soon other institutions, most notably the computer giant IBM and several of the telephone monopolies in Europe, hatched their own ambitious plans for packet-switched networks . . . [as] they were anxious to protect the revenues generated by their existing businesses. As a result, IBM and the telephone monopolies favored packet switching that relied on “virtual circuits”—a design that mimicked circuit switching’s technical and organizational routines.<sup>19</sup>

Incumbent firms, most notably the telephone monopolies, wanted to protect their profits from the disruptive internet. They formed a group called the International Telegraph and Telephone Consultative Committee (CCITT). Prominent engineers dropped from the group complaining about the “arm-twisting” tactics of “national monopolies.” One commented that members of the CCITT “do not object to packets switching as long as it looks just like circuit switching.”<sup>20</sup>

Vint Cerf, who was the President of the International Network Working Group resigned to work with Bob Kahn, and together they developed TCP/IP. At the same time, Governments around the world worked with the European Economic Community and governments throughout Europe and North America to develop their own standard. In fact, the Department of Commerce in the United States mandated that all computers purchased by the U.S. government use OSI standard by 1990.

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19 Andrew L. Russell, *OSI: The Internet That Wasn't*, IEEE Spectrum (July 30, 2013), <https://spectrum.ieee.org/tech-history/cyberspace/osi-the-internet-that-wasnt>.

20 *Id.*

Everybody knows the end of the story—in the United States, the internet was built on TCP/IP and the government drafted standards of OSI were never used.<sup>21</sup> In Europe, however, many of the countries instead used telecom protocols like X.25, thus bending to the will of the telecom incumbents who feared disruptive technologies.<sup>22</sup> And while the United States internet commerce thrived, it lagged behind in Europe.

The point here is simple—the government is neither knowledgeable nor nimble enough to design products. And when it does so, it is certainly going to be impacted by the commercial interests of incumbent firms—all of whom want to limit disruption to their business model.

## 2. The Role of Institutions and Rules

Rent-seeking can occur in three different types of institutions: the legislature that passes the laws, the agencies that apply them, and the judiciary that judge their application. Each of these institutions has different costs and potential benefits for petitioning activity.

This section will compare each type of institution both in the abstract and then in the following section we will look at the efforts by incumbents to impose costs on AirBNB, Uber and Amazon, all of which provide diffuse benefits for consumers but concentrated costs on hotels, taxis, and book publishers. How each institution has responded to complaints by taxis, the hotel industry, and publishing firms, tells us something important about their comparative receptiveness to rent-seeking.

### A. The Legislature

At first blush it might seem like concentrated interests have no advantage over diffuse interests when it comes to elected officials. In fact, one might think that the opposite were true, given that large groups have more voting power than small

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21 *Id.* (“OSI is a beautiful dream, and TCP/IP is living it.”).

22 The incumbent phone companies in France, Italy, Spain, Sweden and Germany all built networks based upon X.25. In 1990, France still had nine million terminals that ran on X.25 and roughly a million in 2012. *See generally*, Janet Abbate, *Government, Business, and the Making of the Internet*, 75 *THE BUS. HIST. REV.* 147, 161 (2001) (incumbent phone companies on Europe insisted upon X.25 “in an effort to lessen the American manufacturer’s dominance of the worldwide computer market.”).

groups. For example, in the case of social security, it seems rather clear that large groups are able to obtain transfer payments over the objections of smaller groups such as high-income taxpayers or bond holders who worry about inflationary pressures from public borrowing.

But a deeper analysis reveals that concentrated interests have more power than a rule of one-person one-vote would imply. In particular concentrated interests are able to:

- Reduce (a) information costs by advertisements and other forms of disseminating information<sup>23</sup> and (b) participation costs through mobilization of voters.<sup>24</sup>
- Finance candidates thus impacting both the slate of candidates as well as their probability of success.<sup>25</sup>
- Bring evidence to policy makers including hiring economists and policy experts to draft position papers and testify, and lawyers to draft legislation that may run thousands of pages.<sup>26</sup>

These efforts at rent-seeking are particularly effective when the economic issues are complex and the public has little information on the particular policy issues.<sup>27</sup> Consider, for example, agricultural subsidies. The impact of grain subsidies is not well understood by the public, which must sift through contradictory claims about how subsidies impact employment, the environment, and obesity. In addition, whatever benefits the elimination of agricultural subsidies has on the consuming public, they are likely to be very small and diffuse. In contrast, the benefits to

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23 See, e.g., Daniel J. Schwartz, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. REV. 1845, 1858 (2002); Kenneth M. Goldstein, *Interest Groups, Lobby, and Participation in America*, 126-27 (1999).

24 See, e.g., *id.*

25 See, e.g., Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 221-25 (2012).

26 See, e.g., *id.*, at 220, 225.

27 See, e.g., Neil W. Netanel, *Why has Copyright Expanded? Analysis and Critique*, in *NEW DIRECTIONS IN COPYRIGHT LAW* 4 (Fiona MacMillan, ed. 2008) (“In the first decade of the twentieth century, Congress faced the problem of updating and revising a law that was perceived as too arcane and complex for legislators to understand without expert assistance. To solve that problem, members of Congress prodded the Librarian of Congress to set up a series of meeting with representatives of industries with an interest in copyright. Those meetings and the intensively negotiated intra-industry agreements that followed shaped the Copyright Act of 1909.”).

agricultural companies are huge. In such cases, one would expect to see significant efforts by firms seeking to retain subsidies—through lobbying, campaign finance, and get out the vote campaigns—and little effort spent against subsidies.

In contrast, issues like social security are easy to understand for voters, and actually have significant (not small) benefits for a large group of individuals. Thus, they are able to mobilize through organizations like AARP.

### **B. Industry-Specific Agencies**

Government agencies are particularly susceptible to rent-seeking by concentrated interests. This is true because unlike the legislature or the judiciary, it is almost impossible for an individual member of the consuming public to participate either individually or collectively before an agency. This problem is exacerbated in the case of technical agencies that rely upon so-called scientific evidence such as models that measure pollutants (in the case of environmental protection) or prices (in the case of antitrust enforcement). Not only is such evidence expensive to collect and present, but it is uniquely in the hands of concentrated interests.<sup>28</sup> Simply put, consumers have no access to proprietary data used by agencies. Thus, the views of regular (not commercial) consumers have no utility as an input in decision making.

It is likely that regulated entities will in fact have a strong preference for a particular level and direction of enforcement. Take, for example, the case of an agency that regulates utilities or banks. These entities have strong ex ante preference for a particular level of enforcement because they regularly interact with the agency in a particular way - namely, as banks. Thus, they have a predictable preference for a given level of enforcement. Or, put more specifically, banks are not under a Veil of Ignorance as to whether they will benefit from a rule that benefits banks.

The same is not true in the case of an agency that does not always interact with firms in the same way. Consider, for example, the Securities and Exchange Commission, which mandates disclosure requirements for issuers. While issuers

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28 Anders Chr. S. Ryssdal, *Implementation of Second-best Solutions: The Judge or the Bureaucrat? A Lawyer's Perspective*, in COMPETITION POLICY ANALYSIS 74 (Einar Hope, ed. 2000) (“The root of the problem is that regulated firms rationally seek to bias their presentation of information in order to obtain whatever dispensations, clearances and administrative decisions that suit their commercial interests.”).

may generally want to have fewer disclosure obligations, most issuers are also buyers of other securities, and in those cases, want the issuer to have greater disclosure obligations. Because issuers are both buyers and sellers of securities, they have a strong interest in fair and balanced rules. Put more specifically, the reason that SEC regulations work is that firms are behind a Veil of Ignorance as to whether they will be buyers or sellers in any given future transaction.

But as discussed in previous sections, the ability of agencies to protect against ex post opportunism through fair and balanced rules will depend upon the ability to formalize these rules into objective guidelines. In the case of the SEC, they are able to develop objective rules such as a requirement that all material information be disclosed in a timely fashion in an understandable manner.<sup>29</sup> But not all agencies have the ability to develop objective rules—especially when their mandate is simply to do what is best. Nobody knows what that means, so agencies without objective rules have discretion and that leads to rent-seeking.

### ***C. Competition Agencies***

Antitrust enforcement, which is charged with improving consumer welfare, also raises the problem of concentrated costs and dispersed benefits. After all, mergers or industrial practices that allow firms to enhance or obtain market power, necessarily benefit only a small number of firms, while the costs of market power are spread over the consuming public.

Despite this fact, there are three reasons why antitrust enforcers in the case of horizontal mergers and cartels *generally* respond to the demands of the consuming public over the demands of firms that would gain market power from the challenged practice.

First, firms generally have no ex ante expectation as to whether they are likely to be harmed or benefited by aggressive or lax antitrust merger or cartel practices. This is to say firms are under a Veil of Ignorance as to their preference of a given set of antitrust rules.

Second, in many cases ex post opportunism is blunted by the presence of concentrated interests who are aligned with the interests of the general public. For example, a large merger between suppliers may increase prices not only for the consuming

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29 Securities Exchange Act of 1934.



public, but also for a small number of large customers. These large customers may be willing to invest in economists and other experts to voice their concerns to regulators. Conversely, competitors may also complain about a merger. This too is important because it is almost inconceivable that a competitor would complain about a merger that increased prices. Thus, the presence of competitors complaining, coupled with consumers not complaining, can provide important information about whether a merger is harmful or beneficial to consumers.

That is why the Veil of Ignorance is perhaps a more effective metaphor in antitrust than in other areas of public policy. For example, while it is impossible for a person of a certain religion, gender, or social status to forget their demographic characteristics, the opposite is true in antitrust—namely, it is not possible for a firm to have strong ex ante preferences for lax or aggressive merger enforcement.

Specifically, at any given point in time, firms do not know if they are likely to merge with a rival or be impacted by a merger between their suppliers. If their suppliers merge, they want aggressive antitrust enforcement to prevent their suppliers from increasing price; but if they (or their competitors) merge, they want lax antitrust enforcement so they can raise prices on their customers. Because firms are under a Veil of Ignorance as to their preference, they have a strong ex ante interest in fair and balanced antitrust rules that strike a middle ground.

This is true even of the largest firms in the world. Microsoft, for example, wants lax enforcement when it comes to its own deals, but has complained to antitrust agencies at times about the mergers and conduct of its rivals.<sup>30</sup> Similarly, Anheuser Busch wants lax antitrust enforcement when it comes to its own deals, but complained about a merger between its two leading glass bottle suppliers.<sup>31</sup>

As noted earlier, these protections are frequently absent when one moves beyond price fixing and horizontal merger enforcement. Consider, for example, a vertical merger that the merging parties argue will enable them to lower costs and increase innovation. It would not be uncommon for rivals to complain to regulators that

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30 See Mark Sweney, *Microsoft takes on Google with antitrust complaint*, GUARDIAN (Mar. 31, 2011), <https://www.theguardian.com/technology/2011/mar/31/microsoft-google-anti-trust-complaint>.

31 See Declaration of Vice President of Procurement submitted by Anheuser Busch in opposition to the merger of Ardagh and Verallia (Dec.9, 2013), <https://www.ftc.gov/system/files/documents/cases/131209anheusermtn.pdf>.

the merger will instead allow the merging party to foreclose access to a necessary input or otherwise raise their costs of doing business.

The regulator cannot use the fact that the competitor is complaining as evidence that *either* the merging party or the complainant is correct. And that is because the competitor's complaint is equally consistent with a fear of foreclosure as with a fear of competing with a more efficient rival. This is in contrast with a horizontal merger, where competitor complaints are a strong signal that the merger will lead to reduced prices, as a competitor is unlikely to complain about a merger that increases market prices.

This problem is exacerbated where there are no large consumers of the impacted product. In such a case, there is now no large customer whose interests are aligned with consumers.

Consider, for example, a claim that a large firm has engaged in a product improvement on a product provided via the internet and monetized by an advertising supported model. It is easy to imagine that the product improvement would bring only a small increment in utility to a given user, but potentially provide hundreds of millions of dollars in terms of potential lost profits to rivals who will now lose sales to a better product.

This is not to suggest, of course, that there should be no antitrust enforcement in the case of vertical mergers or alleged product improvements. To the contrary, one can imagine many circumstances where enforcement is proper. The difficulty is determining which ones.

It is in this context that judicial review of agency determinations is critical. This is true because common law courts are likely to determine efficient rules that help distinguish lawful product improvements from exclusionary ones.<sup>32</sup> This is especially true in the United States, where we subsidize access to the court by diffuse interests through treble damages, attorney's fees, and class actions. Thus, the common law develops with input from both concentrated and diffuse groups. Common law courts are also well situated to identify and prevent rent-seeking behavior through either standing rules that restrict competitor complaints as well as discovery rules that can efficiently determine a competitor's true motivation.

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32 See William W. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

Indeed, the common law is more likely to protect against rent-seeking than either the legislature or agencies, at least in the case of non-merger enforcement.

## D. *The Courts*

### i. *Common Law Jurisdictions*

Richard Posner has argued that “the process of common law adjudication itself leads to the survival of efficient rules.”<sup>33</sup> He argues that courts are less likely than legislatures to engage in rent-seeking, noting that:

[A]n institutional difference between courts and legislatures that is worthy of separate consideration is the greater reliance on the electoral process for the selection of legislatures than for the selection of judges. That process creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money or votes. . . . There is a close analogy to cartelization, an analogy reinforced by the fact that so much legislation seems designed to facilitate cartel pricing by the regulated firms. The analogy helps explain why consumers fare badly in the legislative process: they are too numerous to organize an effective ‘cartel’ in support or in opposition to existing or proposed legislation.<sup>34</sup>

There are a number of reasons why one might believe that the courts would be less susceptible to rent-seeking by concentrated groups than agencies and legislatures.

First, although litigation is expensive, Congress and the courts have developed a number of rules that enable access by diffuse consumer groups, including treble damages, class actions and attorney’s fees.<sup>35</sup> All of these protections are absent from legislative and agency petitioning and effectively subsidize participation by diffuse groups, thus overcoming a significant collective action problem.

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33 Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 778 (1981).

34 Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 732 (9th ed. 2014).

35 See Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from The American Experience*, 41 LOY. U. CHI. L.J. 629 (2010).

Second, discovery limits the ability of a competitor to falsely claim that it was harmed by practice.<sup>36</sup> For example, imagine a firm that is concerned that a rival has made an innovation that benefits consumers but will make it difficult for them to compete. That competitor may complain to an agency and provide the agency with evidence in the form of a declaration or response to a questionnaire that does not fully acknowledge how the practice actually benefits consumer welfare.<sup>37</sup> An agency may not conduct full discovery of the third party and (in the United States) will typically refuse to provide the subject of their investigation with an opportunity to examine the evidence against them.<sup>38</sup> None of this can occur in a court.

Third, courts have a number of protections that limit the possibility of ex post opportunism including stare decisis and appellate review.<sup>39</sup> Thus, it is more difficult to craft exceptions to rules that only apply in a particular case. Further, courts demand that plaintiffs have standing, which is to say they are injured by a reduction in competition, not an increase in competition.<sup>40</sup> Thus, there are more constraints on the ability of a single decision maker to bend to the interests of a well-financed litigant.

These institutional dynamics are reflected in the judicial decisions that strike down efforts of competitors to use government to limit competition.

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36 See, e.g., *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3rd Cir. 1988) (“[W]e hold that since there is evidence that Fox’s practice of overbooking is consistent with sound business practices and permissible competition in this case, it does not, standing alone, support an inference of willful monopolization. Therefore, we will affirm the district court’s grant of summary judgment in favor of Fox concerning their alleged violation of section 2 of the Sherman Act.”).

37 See, e.g., Gerwin Van Gerven & Melissa Gotlieb, *Data Gathering and Analysis: The Anatomy of a Merger Investigation in Europe*, 39 *FORDHAM INT’L L.J.* 1, 12–13 (2015) (“The most common tool to gather evidence is through written requests for information, which are typically sent nowadays by way of e-questionnaires and may be followed by supplementary calls and/or formal and informal third-party (telephone) interviews with a view to clarifying responses and gathering further information. Over the years, there has been a creeping increase in the length and detail of questionnaires sent to market participants, mainly customers of the notifying parties and to a lesser extent their (actual or potential) competitors and suppliers. Further, many such requests go unanswered or are answered in a very summary fashion. In particular, responses are often limited to a mere ‘yes’ or ‘no’ without any reasons provided to substantiate them, and they are thus of little value to the Commission’s investigation.”).

38 See U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL, III-30-32 & III-61-69 (5th ed. Nov. 2012), <http://www.justice.gov/atr/public/divisionmanual/index.html>.

39 See, e.g., Luca Anderlini, Leonardo Felli & Alessandro Riboni, *Why Stare Decisis?*, 17 *REV. ECON. DYNAMICS* 726 (2014).

40 See *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

Indeed, one of the most famous Constitutional cases, *Lochner v. New York*,<sup>41</sup> is an example of a court striking down an effort at rent-seeking. *Lochner* involved a New York law that limited the number of hours that baker employees could work. Although cast as a law to protect bakery employees, it was sponsored by large unionized bakeries who were losing sales to small non-unionized bakeries. The small bakeries could undercut the large bakeries by working longer hours, which was to the benefit of workers who wanted more money, and bakeries who wanted to undercut their rivals.<sup>42</sup> The law provided no ability of a worker to work overtime even at a higher wage. The Supreme Court held that the New York law was an unconstitutional infringement of the 14th Amendment right to contract. Understanding what the law was about is helpful in understanding why the court found it objectionable.

Recently, courts have understood the connection between economic liberty and consumer welfare and have struck down legislative efforts to protect incumbents. Consider *Craigmiles v. Giles*, where the Sixth Circuit struck down a portion of the Tennessee Funeral Directors and Embalmers Act that permitted only state licensed funeral directors to sell caskets.<sup>43</sup> This was a law that undoubtedly was sought by a concentrated group (funeral directors) who wanted to avoid competition from other potential sellers of caskets, thus harming both new entrants (who would need to spend years obtaining a license) as well as the general public (a very large group). The Sixth Circuit found that the law “was nothing more than an attempt to prevent economic competition” and that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”

The Ninth Circuit reached a similar result in *Merrifield v. Lockyear*.<sup>44</sup> That case involved a licensing requirement passed by the California legislature that required persons controlling mice, rats or pigeons to obtain a license, but exempted persons who were seeking to control bees or wasps. Although the legislature proffered a rationale based on the use of pesticides, the court found that the law did not in fact accomplish this objective. The court concluded “mere economic protectionism

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41 *Lochner v. New York*, 198 U.S. 45 (U.S. 1905).

42 See David E. Bernstein, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 23 (2011).

43 *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

44 *Merrifield v. Lockyear*, 547 F.3d 978 (9th Cir. 2008).

for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.”<sup>45</sup>

## ii. *Civil Law Court System*

While common law court systems in countries such as the United States and Great Britain have characteristics that may protect against rent-seeking, the same may not be true of civil law court systems found in Continental Europe.

First, civil law jurisdictions provide limited access to the Courts, sometimes limiting the ability of individuals to sue for damages. Because access to the Courts is more limited in civil law courts, there was no need for these courts to develop counter-measures to limit rent-seeking. For example, in the United States, the ability of firms to sue efficient rivals, necessitates the adoption of standing rules in both merger and non-merger cases that limit the ability of firms to complain about practices that benefit consumer welfare (but harm them). Similarly, the potential for rent-seeking can be limited by liberal discovery of the plaintiff’s documents. The need for standing requirements and liberal discovery rules is not as pressing in Civil Law jurisdictions because private plaintiffs have less of an ability to bring competition cases to court.

Specifically, in Civil Law jurisdictions there have historically been very few class actions<sup>46</sup> and damage awards in class actions were relatively rare and modest,<sup>47</sup> except in follow-on cartel cases.<sup>48</sup> In addition, there has been no provision for treble damages.<sup>49</sup> In France, for example, individual consumers do not have standing to sue for violations of competition law. Instead, complaints must be brought by

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45 *Id.* at 992, n. 15.

46 See Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 7 (2001).

47 See Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 306 (2016) (“Traditionally, Europe has relied almost exclusively on public enforcement of laws through robust regulatory apparatuses. The United States, in contrast, has historically used a mix of public and private enforcement.”).

48 See Mark Sansom, Anna Morfey, & Patrick Teague, *Recent Developments in Private Antitrust Damages Litigation in Europe*, ANTITRUST 33, 34-36 (Spring 2015).

49 See Nicholas Heaton, *The Introduction of Class Actions for Competition Claims in the UK*, ANTITRUST SOURCE (Feb. 2016).

consumer groups, of which only a limited number have been registered.<sup>50</sup> In Germany, individuals have the right to bring actions for direct damages but they do not have the ability to bring class actions.<sup>51</sup> In the Netherlands, it is possible for individuals to bring private actions, though most relate to price fixing cartels. Standalone claims relating to abuse of a dominant position are rare in the Netherlands.<sup>52</sup>

In addition, discovery is conducted differently in civil law countries. In a Common Law system, discovery is undertaken by the litigants themselves, each of whom, and their lawyers, has a clear economic interest in undermining the factual assertions of their adversary. That is not true in a Civil Law system, where discovery is undertaken by a judge, whose “incentive to exert himself to do a good job will be limited. In addition, if he is highly paid, the cost of search may be substantial.”<sup>53</sup> As Richard Posner notes:

In the adversarial process exemplified by the modern American civil jury trial, the evidence search is conducted separately by the lawyers for the opposing sides and presented to a non-expert, ad hoc, multi-headed tribunal for decision. Because trial lawyers are compensated directly or indirectly on the basis of success at trial, their incentive to develop evidence favorable to their client and to find the flaws in the opponent’s evidence is very great and, if it is a big money case, their resources for obtaining and contesting evidence will be ample. If the size of the stakes in a case is at least a rough proxy for the social costs of an inaccurate decision, there will be at least a rough alignment between the amount of search that is actually conducted and the amount that is socially optimal.<sup>54</sup>

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50 See Eric David & Noëlle Lenoir, *France: Private Antitrust Litigation*, GLOBAL COMPETITION REVIEW, <http://globalcompetitionreview.com/chapter/1067838/france-private-antitrust-litigation>.

51 See Albrecht Bach & Christoph Wolf, *Germany: Private Antitrust Litigation*, GLOBAL COMPETITION REVIEW (July 20, 2016), <http://globalcompetitionreview.com/chapter/1067842/germany-private-antitrust-litigation>. However, the ruling conservative party in Germany appears willing to support (or, at least, not oppose) class actions in response to allegations of cartel behavior between Volkswagen, Daimler, and BMW. See Stefan Wagstyl & Patrick McGee, *Germany prepares road for class action lawsuits against carmakers*, Financial Times (July 31, 2017), <https://www.ft.com/content/71992b3c-752a-11e7-90c0-90a9d1bc9691>.

52 Matthijs Kuijpers, *Actions for Damages in the Netherlands, the United Kingdom, and Germany*, 6 JECLAP 1, 10 (2015).

53 Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1488 (1999).

54 *Id.*

Put simply, “the adversarial system relies on the market to a much greater extent than the inquisitorial system does, and the market is a more efficient producer of most goods than the government.”<sup>55</sup>

Finally, there is less judicial review of competition cases in Europe than in the United States. That is because the General Court (GC) and European Court of Justice (ECJ), which listens to appeals from the EC, have been highly deferential in its review of EC dominance decisions.<sup>56</sup> For example, EU Courts have typically (but not always)<sup>57</sup> deferred to the Commission’s economic assessments on the grounds that the Commission is a specialized agency and therefore has more understanding of economic arguments than generalist judges. Moreover, while EU courts may have an obligation to fully review the evidence supporting the Commission’s decisions, the GC does not meaningfully discover evidence.<sup>58</sup> As a result, if the Commission does not conduct full discovery of the complainant’s files, then there is a substantial risk that the EU courts will not have full visibility to the legitimacy of the complainant’s claims. In short, the job of the EU Courts is “verifying whether relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of power.”<sup>59</sup> While this is certainly some level of judicial review, it is nowhere close to the full trial on the merits that exists in the United States if the DOJ were to bring a monopolization case.

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55 *Id.* at 1492.

56 See Damien Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?*, 36 EUR. L. REV. 457 (2011); Marco Botta and Alexandr Svetlicinii *The Standard of Judicial Review in EU Competition Law Enforcement and Its Compatibility with the Right to a Fair Trial Under the EU Charter of Fundamental Rights*, in PROTECTING HUMAN RIGHTS IN THE EU 107-127 (Tanel Kerikmäe, ed. 2014).

57 See Case T-210/01, *General Electric v. Commission*, paras. 450-462 (finding that the merged firm’s incentive to engage in mixed bundling was a “matter of controversy”).

58 See Gerard *supra* note 56.

59 Case C-42/84, *Remia BV and others v. Commission of the European Communities*, Judgment of the Court (Fifth Chamber) of 11 July 1985, para 34. See also Case T-201/04, *Microsoft v. Commission of the European Communities*, Judgment of the Court of First Instance (Grand Chamber) 17 September 2007, EU:T:2007:289, paras. 87-89.



### 3. Empirical Evidence of Comparative Rent-Seeking

#### *A. Antitrust and Rent Seeking Before Different Bodies of Government*

One way of determining whether agencies, the legislature, or the judiciary is more susceptible to rent-seeking is to look at the success rate of challenges to three disruptive firms: Uber, AirBNB and Amazon.

A disruptive firm is one whose business model or scale allows it to provide a competitive service at a lower price than incumbents. Disruptive firms frequently focus their efforts on markets where incumbents are protected by laws that allow them to earn supra-competitive profits usually by limiting output and raising entry barriers. For example, the profits of the hotel industry are protected by licensing and zoning requirements that limit the ability of new hotels to enter the market.<sup>60</sup> Similarly, the profits of the taxi industry are protected by medallion rules and other licensing requirements that limit the availability of taxis.<sup>61</sup>

But firms can be disruptive even where there is no explicit government law that protects their profits. For example, bookstores and publishers in the United States do not benefit from laws that protect their profits, though this is not the case in Europe.<sup>62</sup>

Disruptive firms challenge the profits of incumbents in a variety of ways. In some cases, they evade the licensing requirements that govern incumbents. This was

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60 See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 175-76 (2016).

61 See Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 128 (2013) (“Valuable taxicab licenses often are distributively unjust. They make it difficult for individuals with limited skills to work in an industry that has few natural barriers to entry, because drivers must either own or lease a costly medallion to drive a taxi.”).

62 For example, in 1981 France passed the so-called “Lang Law” at the urging of small bookstores. The law limits discounts on books to 5%. *Loi n° 81-766 du 10 août 1981 relative au prix du livre*. Similarly, in 2013 the French government passed an “anti-Amazon” bill that prohibits retailers from providing free shipping in connection with discounts on books. The French culture minister Aurélie Filippetti called Amazon a “destroyer of bookshops.” Ben Riley-Smith, *French lawmakers approve ‘anti-Amazon’ bill*, THE TELEGRAPH (Oct. 3, 2013), <http://www.telegraph.co.uk/technology/10352749/French-lawmakers-approve-anti-Amazon-bill.html>.

certainly the case of both AirBNB and Uber.<sup>63</sup> In other cases, they operate at a sufficiently large scale and use innovative distribution methods that allow them to undercut rivals, as was the case with Amazon.<sup>64</sup> And, as we will discuss in the next section, disruptive firms are sometimes able to use a different business model - such as an advertising supported model - that allow them to price their services to users well below incumbents.

One way to determine whether courts, executives, or legislatures are more susceptible to rent-seeking is to look at challenges to these firms brought by incumbents. Some of these challenges explicitly seek to restrict the output of disruptive firms to compete. For example, the Seattle City Council voted to place limits on the number of drivers that companies like Uber and Lyft can have operating at one time.<sup>65</sup> Similarly, the City of Santa Monica passed a law that prohibits the rental of a housing unit for less than 30 days.<sup>66</sup>

Other times, challenges seek to impose costs on new entrants, such as the D.C. Taxi Commission rule that prevented Uber from using the Uber app for cars like

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63 See Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215, 219 (2016) (“the rise of companies like Uber and Airbnb represents a reaction to urban regulatory regimes that exacerbate the frictions of urban life. These regulatory conditions can limit or skew the supply of urban amenities, giving value to the excess capacity that sharing economy firms exploit to fill demand for services like ride sharing and alternative accommodations. As a result--intentionally or not--many sharing economy companies have flourished through a kind of regulatory arbitrage that leverages local regulatory challenges.”).

64 See *Fulfillment by Amazon*, AMAZON SERVICES, [https://services.amazon.com/fulfillment-by-amazon/benefits.htm?ref\\_aa\\_art\\_btn&pf\\_rd\\_r=1073WFAHXMM54DFW5DRN&pf\\_rd\\_p=7a288442-773a-48f0-8d43-0cdc68e22aef](https://services.amazon.com/fulfillment-by-amazon/benefits.htm?ref_aa_art_btn&pf_rd_r=1073WFAHXMM54DFW5DRN&pf_rd_p=7a288442-773a-48f0-8d43-0cdc68e22aef).

65 Council Bill 118036, Ord. 124441:

AN ORDINANCE relating to companies and drivers of a new type of for-hire vehicle in order to create a pilot program for transportation network companies and affiliated drivers and vehicles: establishing minimum operating requirements for transportation network companies and affiliated drivers; imposing vehicle inspections; imposing a zero tolerance drug use policy for affiliated drivers; imposing minimum insurance requirements for transportation network companies and affiliated vehicles; requiring rate transparency for transportation network companies; and establishing licensing fees; raising the maximum number of taxicab licenses issued by the City; revising terminology; adding new sections and amending various Sections of Chapter 6.310 of the Seattle Municipal Code (Mar. 17, 2014).

66 Santa Monica Municipal Code, Ch. 6.20.

the Prius.<sup>67</sup> Similarly, the City of Miami Beach increased the fine for violations for the short-term rental law up to \$10,000 for a first offense.<sup>68</sup>

Still other times, challenges seek to limit the ability of disruptive firms to lower prices to customers. The French Legislature, for example, passed a bill that prevented internet booksellers from shipping into France for free in combination and prevented discount of more than 5% off the cover price.<sup>69</sup>

Courts are sometimes used as a check on efforts to raise costs on disruptive firms. For example, the Transport for London regulator sought to ban the Uber app from use in that city. The court ruled against the regulator, thus enabling the Uber app to be used.<sup>70</sup> This was a similar approach to a court in New York that dismissed a suit that would have required Uber drivers to buy medallions that can cost over \$1 million.<sup>71</sup> But, of course, other courts in Europe have protected taxi companies and harmed consumers as courts in Belgium, France, Germany, Italy and Spain have all banned Uber.<sup>72</sup>

## ***B. What the Data Says***

To test whether courts, legislatures, executives, non-competition agencies or competition agencies are more or less likely to succumb to rent-seeking, we looked at more than 400 challenges to AirBNB, Uber and Amazon in both the United States and Europe. These challenges ranged from outright bans to efforts to impose limits on use to efforts to impose costs on disruptive firms.

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67 Mila Mimica, *Taxi Commission Approves New Regulations*, NBC (Aug. 19, 2013), <http://www.nbcwashington.com/news/local/Taxi-Commission-Passes-New-Regulations-220289241.html>.

68 Miami Beach City Code (Sec 142-1111).

69 *French senators pass 'anti-Amazon' law to protect small retailers*, FRANCE24 (Jan. 1, 2014), <http://www.france24.com/en/20140109-french-senators-pass-anti-amazon-law-protect-small-retailers/>.

70 *Transport for London v. Uber London Ltd.*, [2015] EWHC 2918 (Admin), High Court of Justice (Oct. 16, 2015).

71 *Melrose Credit Union Montauk Credit Union v. City of New York*, 2015 WL 5320863 (N.Y.Sup.).

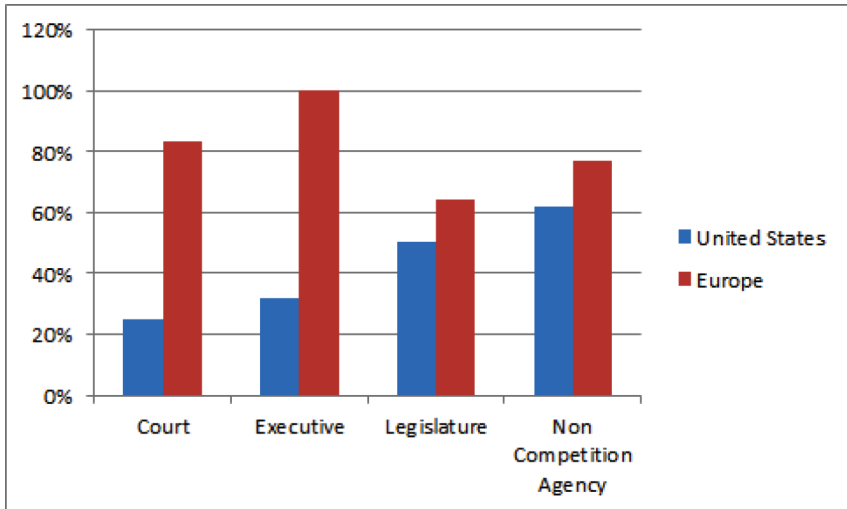
72 Georgios Petropoulos, *Courts should regulate Uber, not ban it*, LSE Business Review (March 3, 2016), <http://blogs.lse.ac.uk/businessreview/2016/03/03/courts-should-regulate-uber-not-ban-it/>.

**A summary of the raw numbers is found below in Table 1.**

Type of Body	Europe	United States
Court	12	19
Executive	1	56
Legislature	14	210
Non Comp. Agency	23	126
Competition Agency	6	1
Total	50	411

We also looked at the success rate of various challenges and found that there were differences both between different types of agencies as well as between nations. These differences are found in Table 2.

**Table 2**



The results are somewhat expected based on the rent-seeking analysis discussed above. In the United States, the courts are more protective of disruptive firms than other branches of government, and non-competition agencies are the least protective of disruptive firms. This makes sense because non-competition agencies fail both requirements of the Veil of Ignorance, namely, firms know what their ex-post preferences are, and there are no established objective and predictable laws

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governing the appropriateness of regulatory actions. Specifically, firms that are taxi cab companies always know that they will benefit from restrictions on output, including laws that impose costs on new entrants, or restrict or ban their ability to compete. This is very different than their position before a court, which relies upon more objective metrics for determining the legality of agency conduct.

Courts in continental Europe are far less likely to favor disruptive firms in their decisions than courts in the United States. Again, this is to be expected as civil law courts in Europe lack many of the protections found in the United States against rent-seeking such as liberal discovery and standing requirements and de novo review.

The importance of rigorous judicial review in Europe becomes clear when we look at cases brought against Google in the United States and Europe.

### **III. The Case against Google**

#### **1. Google as a Disruptive Firm**

It might seem odd to think of the one of the largest companies in the world as a disruptive firm. But market capitalization is not an appropriate measure of whether a firm is disruptive given that Uber, AirBNB and Amazon are all disruptive firms despite their financial girth. What makes these firms disruptive is the same thing that makes Google disruptive, they all undercut rivals in price and availability by using a different business model than incumbents.

The principal difference between Google and its rivals is that in many, but not all, cases it uses an advertising supported model rather than a subscription model to provide access to services or content.<sup>73</sup> As a result, consumers frequently do not pay for access to services or content that are otherwise made available for a price by its rivals. Further, Google is not only disruptive in terms of business model, it is sometimes simply disruptive in terms of innovation. For example, it may simply

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73 Alejandro Crawford & Lisa Chau, *Why Google's Business Model Works*, US NEWS & WORLD REPORT (June 25, 2013), <https://www.usnews.com/opinion/blogs/economic-intelligence/2013/06/25/why-googles-business-model-works>

have novel ideas about how best to provide information to consumers that incumbents, despite their ability to do so, have simply not undertaken.

The different ways that Google is disruptive can be illustrated through a few examples. In all of these examples, Google's innovation would have provided consumers with a better experience at a lower price. While this would normally have been applauded by antitrust regulators, in many cases regulators sought to challenge and prevent Google from making these innovations at the request of incumbent rivals.

Consider, for example, Google's acquisition of ITA Software, a company that developed a pricing and shopping engine called QPX. Google's expressed intent in acquiring this company was to make it "easier for you to search for flights, compare flight options and prices and get you quickly to a site where you can buy your ticket" in the same way Google organized images, newspaper articles, and other information.<sup>74</sup>

In response, rival online travel agents (such as Expedia) and Global Distribution Systems (GDS) (such as Sabre and Amadeus) claimed it would be unfair for Google to provide airline pricing and shopping information in response to user queries.<sup>75</sup> This coalition, originally named Faresearch (when it focused on airfares) and then renamed Fairsearch (as it broadened its complaints against Google), sought to block Google's acquisition of ITA or prevent Google from innovating in QPX without also giving those innovations to its rivals.<sup>76</sup>

The DOJ's investigation into the acquisition resulted in a consent decree that established firewalls and required Google to continue to provide QPX to its rivals.<sup>77</sup> The decree also included limitations on how Google could use information to improve the operation of QPX.

Another case involved the introduction of Google Maps in response to organic queries. The challenge was made by U.K. provider Streetmap, which provided online

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74 Marissa Mayer, *Taking off with ITA*, GOOGLEBLOG (July 1, 2010), <https://googleblog.blogspot.com/2010/07/taking-off-with-ita.html>.

75 See, e.g., *Consumers Deserve Straight Answers about Google-ITA*, FAIRSEARCH (Nov. 18, 2010), <http://fairsearch.org/consumers-deserve-straight-answers-about-google-ita/>.

76 See, e.g., *Letter from FairSearch.org to Member of Congress* (Nov. 16, 2010), <http://fairsearch.org/wp-content/uploads/2010/11/Fair-Search-Coalition-Letter-11-16-101.pdf>.

77 *United States v. Google Inc.*, No. 11-cv-00688 (D.D.C. Oct. 5, 2011)(final judgment), <https://www.justice.gov/atr/case-document/file/497636/download>.

access to a pdf map of the sort that users would find in a book.<sup>78</sup> While users could zoom in and out of the map and could move around, the map lacked the functionality of Google Maps, which includes interactive and constantly updated information for users. Such information might relate to hotels, driving routes, and local imagery via Street View. Streetmap complained that Google's decision to provide Google Maps information in the OneBox in response to user queries violated competition law. They preferred instead that Google provide only a blue link to Google and competing sites, but not provide any visual representation of a map in its search results.

This court ultimately ruled for Google, finding that Google providing users with a thumbnail map in response to queries was objectively justified and procompetitive.<sup>79</sup>

A third case involves Google's digitization of books. In broad terms, Google proposed to scan books at libraries and make their content available free of charge to users in response to search queries.<sup>80</sup> Books that were in the public domain would be made available in their entirety. In-print books for which permission was granted could have some content available. Where Google did not have permission from the copyright owner, it made only available a snippet of a few lines of text around a queried search term. Google's service seemed to enhance consumer welfare by making millions of books available in searchable form, and, in the case of out of print books, making books available to users that would otherwise not have been available in any realistic manner.

Publishers sued claiming that Google was engaged in copyright infringement.<sup>81</sup> This case was initially settled in a manner whereby Google would pay \$125 million to compensate copyright holders.<sup>82</sup> The Department of Justice, Antitrust Division, at the behest of publishers, expressed concern to the court about the proposed settlement

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78 *Streetmap.eu Ltd. v. Google, Inc.*, Case No: HC-2013-000090 (Royal Courts of Justice, Feb. 12, 2016).

79 *Id.* ¶ 84 (“I have concluded that introduction of the new-style Maps OneBox was intended to improve Google's offering in the market for general search. And it is indisputable that the display of a thumbnail map on the SERP in response to a geographic query indeed enhances the quality of the Google SERP.”).

80 See Press Release, *Google Checks Out Library Books*, GOOGLE BLOG (Dec. 14, 2004), <http://googlepress.blogspot.com/2004/12/google-checks-out-library-books.html>.

81 Complaint, *Authors Guild v. Google Inc.*, 05-cv-8136 (S.D.N.Y. Sept. 20, 2005).

82 Chris Snyder, *Google, Authors and Publishers Settle Book-Scan Suit*, WIRED (Oct. 28, 2008), <https://www.wired.com/2008/10/google-authors/>.

because, in part, “A global disposition of the rights to millions of copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement.”<sup>83</sup> The court rejected the settlement, but after a number of years, the Second Circuit held in favor of Google, finding that Google’s provision of snippets of copyrighted books constituted fair use.<sup>84</sup>

Finally, it is worth considering complaints regarding Google providing users with low resolution images of rights-managed works offered by firms like Corbis and Getty. Both of these firms, as well as others, provide users access to copyrighted images for a significant fee, sometimes well over \$1,000. Images licensed from Corbis and Getty are sufficiently high quality to be used in advertising campaigns and come with the copyright licenses that are required by publishers and exhibitors.

Getty (which now also distributes Corbis content) complained that Google was engaged in anticompetitive practices by making lower resolution images available.<sup>85</sup> Of some note, the images made available by Google were not substitutes for the images made available by Getty. Users of Getty are typically professionals who need high resolution images that are rights cleared. While expensive, Getty allows a quick purchase of a photograph with complete copyright license for prices ranging from \$500 to well over \$1,000. That same image may be available on Google, but it has much lower resolution and comes without a license. That means except in the case of public domain photographs, they cannot be published without a risk of copyright infringement.

As in this case, as well as in most cases, Google lowered search costs for consumers seeking to compare Getty to rights cleared high quality alternatives such as Shutterstock, PhotoSpin and Adobe Stock. Getty didn’t like the competition and complained.<sup>86</sup>

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83 Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild v. Google Inc.*, 05-cv-8136 (S.D.N.Y. Sept. 18, 2009).

84 *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), cert. denied sub nom. *The Authors Guild v. Google, Inc.*, 136 S. Ct. 1658 (2016).

85 Press Release, Getty Images to file competition law complaint against Google, Getty Images (Apr. 26, 2016), <http://press.gettyimages.com/getty-images-files-competition-law-complaint-against-google/>.

86 See Gary Shapiro, *Be Careful About Turning Image Search Into An Antitrust Complaint*, TECHDIRT (Nov. 18, 2016) (“Dumbing down search is a bad deal for consumers, and is neither required by nor consistent with sound competition policy. And even though these searches are lawful, Google and other search engines provide a simple tool to opt any image out of search. Getty’s



## 2. The European Antitrust Case against Google

The general discussion of how Google is a disruptive firm is a useful backdrop to understanding the Shopping case against Google in Europe. Like the cases discussed in the previous section, the European case is not about some broad anticompetitive course of conduct by Google across all markets. Rather it is about very narrow claims about how Google introduced product search capabilities that returned images and information about products such as running shoes and contact lenses. Similar to the complaints made against Google by Streetmap, Expedia, Getty, and the publishers, the product search complainants were incumbents who were concerned about Google offering a product to consumers that was competitive to theirs.<sup>87</sup>

The European case is perhaps the easiest to understand because it is set forth in some detail in the EC's public statements. In 2007, Google began to provide comparative product information to consumers who put in queries regarding certain products.<sup>88</sup> Consistent with paid ads, these results were at the top of the page above the algorithmic search results. Consumers who clicked on results went to a variety of different retailers. In 2011, Google updated its search rank algorithm to reduce the ranking of sites that it believed were “low-quality sites—sites which are low-value add for users, copy content from other websites or sites that are just not very useful” (the so-called “Panda” update).<sup>89</sup>

The Commission received complaints from content aggregators like Foundem, whose primary business was aggregating content on a variety of products and services, many of which were the same sort of items that Google and other comparative product search results provided. At the time, however, Foundem did

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letter acknowledges, but dismisses, this fact—because as everyone knows, it is image search that drives business to Getty and its competitors.”), <https://www.techdirt.com/articles/20161117/11034136073/be-careful-about-turning-image-search-into-antitrust-complaint.shtml>.

87 See Foo Yun Chee & Eric Auchard, *EU antitrust case against Google based on 19 complainants: sources*, REUTERS (Apr. 24, 2015), <http://www.reuters.com/article/us-eu-google-antitrust/eu-antitrust-case-against-google-based-on-19-complainants-sources-idUSKBN-0NF1YX20150424>.

88 Marissa Mayer & Jeff Bartelma, *Back to basics*, GOOGLE BLOG (Apr. 18, 2007), <https://googleblog.blogspot.com/2007/04/back-to-basics.html>.

89 Amit Singhal & Matt Cutts, *Finding more high-quality sites in search*, GOOGLE BLOG (Feb. 24, 2011), <https://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html>.

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not provide product reviews, did not always provide photographs, and did not return results to queries where the product was not spelled perfectly.<sup>90</sup>

A quick review of the European case reveals that it satisfies all of the conditions as to whether rent-seeking is likely.

First, none of the complainants were under a Veil of Ignorance as to their future state because none would likely ever be in Google's position in a generalized search market. Specifically, the European case was supported by a number of firms that were in niche markets with other competitors, including Expedia and TripAdvisor (who complained in Google/ITA), Streetmap (which brought the mapping case in the UK), BDZV and VDZ (German publishers) as well as aggregators such as Foundem and Visual-Meta.<sup>91</sup> The sole exception was Microsoft, which complained about the case, but did so by arguing for a specific rule that imposed obligation on general search engines with large market share that Microsoft certainly was not.<sup>92</sup>

Thus, all of these firms could be assured that they would never be harmed by a rule that imposed special obligations upon generalized search engines with large market share. So this was unlike a horizontal merger case or cartel, where potential complainants could not argue for a rule against mergers without fear that they would potentially benefit from a merger among competitors.

Second, even if firms were behind the Veil of Ignorance because they one day could be adversely impacted by a rule adopted by the European Commission and therefore wanted objective and fair rules, it was not clear that such rules exist.

To the contrary, product improvement cases in the internet involve very difficult issues that are not well defined. How does one define a relevant market in a two-sided market where the price of one of the two sides is free? How does one

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90 See, e.g., James Kanter, *Google Trying to Avoid Antitrust Fight in Europe*, NEW YORK TIMES (Feb. 21, 2011), <http://www.nytimes.com/2011/02/21/business/global/21google.html?mcubz=3>.

91 See Foo Yun Chee & Eric Auchard, *EU antitrust case against Google based on 19 complainants: sources*, REUTERS (Apr. 24, 2015), <http://www.reuters.com/article/us-eu-google-antitrust/eu-antitrust-case-against-google-based-on-19-complainants-sources-idUSKBN-0NF1YX20150424>.

92 *Adding our Voice to Concerns about Search in Europe*, MICROSOFT CORPORATE BLOGS (Mar. 30, 2011), <https://blogs.microsoft.com/on-the-issues/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe/>.

determine whether a product improvement actually benefits consumers? How does one determine that the proposed remedy does not, in fact, harm consumer welfare? All of these issues are difficult and uncertain, though we will suggest some objective metrics in the following section.

Third, there were no large customers of the product search<sup>93</sup> and individual users were notably and predictably silent. Simply put, users of Google product search had little to gain from expressing their views to regulators and without data, documents or other evidence, regulators had little to gain from listening to them. This is again in contrast to horizontal mergers involving goods that are bought by large firms who have the incentive and ability to bring their concerns to the attention of regulators who welcome the data, documents and other evidence that they are able to provide regulators.

Fourth, there is both limited judicial review and no independent discovery of the complainant's documents.<sup>94</sup> Thus, if there existed a document in the files of one of the complainants that acknowledged that consumers were likely to benefit from Google's product changes or admitted that the purpose of their complaint was to gain commercial advantage or that the evidence that they submitted to the Commission has been selective or biased, the Court would have no ability to discover those facts.<sup>95</sup>

### 3. Towards Objective Standards in Product Improvement Cases

Although one must be very careful about rent-seeking in product improvement cases, it is very important to recognize the possibility that some product changes may be exclusionary. Consider, for example, Microsoft's incorporation of Internet

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93 While there are large merchants that place Shopping ads, their interests are generally not aligned with the public. These merchants would likely prefer less competition, not more.

94 See Adriani Kalintiri, *What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement*, 53 Common Market L. Rev. 1283 (2016).

95 That is not to suggest that the ECJ never challenges the EC. Notably, the ECJ recently set aside a General Court decision upholding the €1.06 billion fine the EC imposed on Intel for abuse of dominance through the use of loyalty rebates. The General Court upheld the EC's decision without analyzing the EC's in-depth findings regarding the ability of a competitor that is as efficient as Intel to offer prices similar to those charged by Intel after rebates (instead, the court found that the rebates were illegal by their nature). The ECJ's decision requires the General Court to examine all of Intel's critiques regarding the EC's in-depth findings. See Case C-413/14 P, *Intel Corp. Inc. v. European Commission*, Judgement of the Court of 6 September 2017.

Explorer into its Operating System while at the same time making it difficult for users to switch to alternative products like Netscape.<sup>96</sup>

Although not well-understood at the time, this case was important because web based browsers had the potential to break the application barrier to entry that ensured Microsoft's market power in operating systems. To be more specific, rival operating systems had a difficult time gaining share because they did not have a large number of applications written for their operating system; while applications would not build for rival operating systems because they did not have enough customers. This combined with the fact that operating systems exhibit positive network effects—defined as a positive correlation between number of users and any given user's utility—to create an almost insurmountable barrier to entry.<sup>97</sup>

Web based browsers were important because they introduced competition from the cloud in a way that could disintermediate the operating system and open up competition. Cloud based applications are indifferent to operating system. Thus, for example, when you log into Adobe's Creative Cloud, you can use Photoshop or Premiere regardless of which operating system you are on.<sup>98</sup>

Netscape was one of the first web browsers and was a disruptive entrant that created grave concern for Microsoft, who recognized the threat presented by cloud based computing. Microsoft then bundled internet Explorer and as a result, Netscape's share fell from 90% to roughly 50% in a matter of months.<sup>99</sup> And then ultimately reached under 10%.<sup>100</sup>

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96 *See generally*, United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999).

97 *See* Findings of Fact, United States v. Microsoft Corp., No. 98-1233 (TPJ) (D.D.C. Nov. 5, 1999), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/11/iii-b.pdf>.

98 *See* Creative Cloud User Guide, ADOBE, <https://helpx.adobe.com/creative-cloud/user-guide.html?topic=/creative-cloud/morehelp/introduction.ug.js#>.

99 *Microsoft*, 84 F. Supp. 2d at 98.

100 Jonathan T. Tomlin, *Distinguishing the Illegal for the Legal in Antitrust Damages Calculations: Lessons from Netscape v. Microsoft*, 17 J. FORENSIC ECON. 223, 227 (2004).

Concentrated Benefits and Dispersed Costs Rent-Seeking by Incumbents  
Against Innovative and Disruptive Web Based Firms

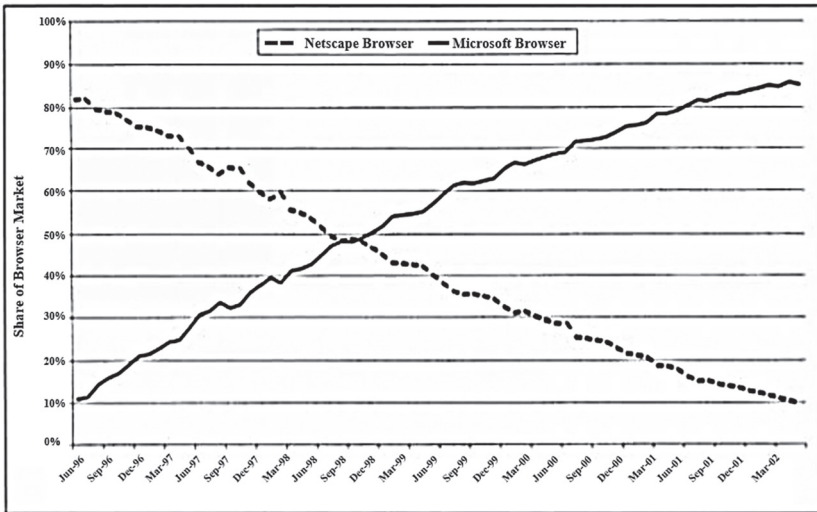


Figure 1. Netscape and Microsoft Browser Shares  
University of Illinois Data  
June 1996 – May 2002

This description of the Microsoft case is useful because it points to three objective criteria that might be used to identify monopolization cases that raise competitive concern. First, there needs to be a properly defined relevant market with identifiable barriers to entry. Second, there needs to be objective evidence that the conduct is actually exclusionary, in the sense that after the alleged act, the complainants' sales or market share actually fall. Third, there needs to be evidence that the alleged conduct is not actually preferred by a substantial number of consumers.

### A. Product Market Definition

Google operates in a two-sided market, where utility is determined both by demand from advertisers for ads placed on Google.com and consumers for search results and ads returned from their queries.<sup>101</sup> Significantly, while the utility for advertisers may be positively correlated with the number of consumers utilizing Google.com, the utility for consumers is not correlated with the *number* of advertisements. Indeed, while there may a positive correlation between utility for consumers and

101 See Peter T. Barbur, Kyle W. Mach, Jonathan J. Clarke, *Market Definition in Complex internet Markets*, 12 SEDONA CONF. J. 285, 289-91 (2011).

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the *quality* of ads, there is probably a negative correlation between utility for consumers and the number of ads. Put another way, holding ad quality constant, the more ads, the more unhappy consumers are—which is precisely why there is demand for ad blockers.<sup>102</sup>

Regardless, the fact that it is a two-sided market (even with weak network effects) means that market definition test must be done on both sides of the market.<sup>103</sup> In other words, it is necessary to look at both whether an increase in the price to advertisers would lead firms to switch to other advertising channels, as well as to see whether an increase in the price to consumers would cause them to switch their eyeballs to alternative ways of receiving the information.

To date, it seems like regulators have mostly focused on the first question, increasing the price to advertisers, but not on the second question, increasing the price to consumers. Part of the reason seems to be driven by the fact that use of Google’s search engine is free to consumers. Thus, it may seem more tractable to ask questions about a change in price to advertisers than to ask questions about a change in price to consumers, where the product is free.

But this ignores the fact that it is rather simple to ask consumers about a change in *quality* of search results. And this gets to price because holding price constant, a reduction in quality is an effective increase in price. As was noted in an OECD roundtable, “The SSNDQ test faces criticism that in practice it is unworkable, however, given the inherent difficulties of measuring quality alongside the existing complications of the applying the SSNIP test itself within real market situations.”<sup>104</sup>

Moreover, the question should be focused on the search in question—namely, the quality of the results of a product search. Limiting the question to the search in question makes sense on both sides of the market—in that both consumers and

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102 See Lara O’Reilly, *Ad blocker usage is up 30%—and a popular method publishers use to thwart it isn’t working*, BUSINESS INSIDER (Jan. 31, 2017), <http://www.businessinsider.com/pagefair-2017-ad-blocking-report-2017-1>.

103 See *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

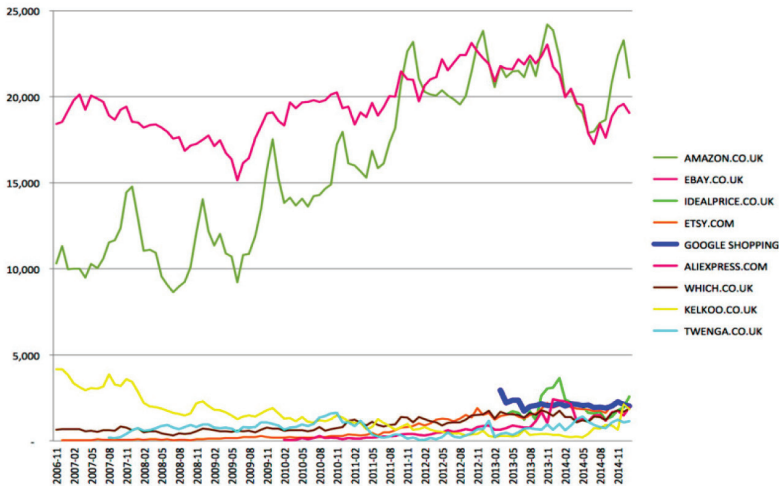
104 See OECD, *THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS* (“A more contentious issue, however, is the application of quantitative tools for market definition that focus primarily on quality effects. The SSNDQ test is posited as one means by which a quantitative focus on quality might be realised in relation to market definition. This measures the impact of a “small but significant non-transitory decrease in quality” in a manner equivalent to the SSNIP test’s assessment of price increases.”).

advertisers are looking for options for their particular demand. Further, it should be noted that Google runs an auction on each query—determining the bids that advertisers would pay for the keywords in the user’s query.<sup>105</sup> Thus, under the narrowest product market definition theory, the hypothetical monopolist test should be asked for the type of query at issue.

To define the relevant market, we should ask whether a *decrease* in the *quality* of Google’s *product search* results would lead users to go to alternative places to get product information. In this context, it is clear that the market should not be defined as general search engines, but rather to places where consumers get information about products.

The below chart provides some information on this question—as it indicates that the vast majority of consumers in the UK receive product information from Amazon and Ebay.<sup>106</sup>

Figure 2



The rejoinder to this chart is to argue that while consumers on Amazon.com and Ebay.com *could* be looking for information to compare the prices and product attributes

105 See *Auction*, AdWords HELP, available at <https://support.google.com/adwords/answer/142918?hl=en>.

106 Amit Singhal, *The Search for Harm*, GOOGLE BLOG (Apr. 15, 2015), <https://www.blog.google/topics/public-policy/the-search-for-harm/>.

of competing options, they are invariably looking to buy. The problem with this argument is that over 85% of the visitors to Amazon.com do not buy anything<sup>107</sup>—which would suggest that they are actually looking for information, not to purchase.

This makes sense because Amazon provides tremendous information about, not just the range of options and their prices, including from third party sellers, but also from users themselves. Indeed, there are millions of product reviews from users, ranging from no stars to five stars, or do not buy to love this product!

Given that more consumers use Amazon and eBay for product searches than Google, it would seem odd to exclude them from the market. This is especially true where the relevant question is: what would happen if Google were to decrease the quality of its product search results?

Thus, any rigorous effort to determine whether Google has market power in product search must both ask what would happen if Google were to decrease the quality of its product search results and take account of the fact that millions of Amazon and eBay users look at product and review product information but do not in fact buy products on the platform.

### ***B. Empirical Evidence as to Impact of Change***

In the Microsoft case, there were two factual based reasons to believe that Microsoft's conduct impacted Netscape. The first was the fact that it was not possible for users to easily circumvent restrictions on the ability of Netscape Navigator to reach consumers.<sup>108</sup> The second was the observed rapid decline of Netscape's market share.<sup>109</sup>

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107 See Stefany Zaroban, *Amazon Prime members convert 74% of the time*, DIGITAL COMMERCE 360 (June 25, 2015) (finding 13% conversion rate for non-Prime members), <https://www.digitalcommerce360.com/2015/06/25/amazon-prime-members-convert-74-time/>.

108 See *Microsoft*, 84 F. Supp. 2d at 111 (“Microsoft forced those consumers who otherwise would have elected Navigator as their browser to either pay a substantial price (in the forms of downloading, installation, confusion, degraded system performance, and diminished memory capacity) or content themselves with internet Explorer.”).

109 *Id.* at 98 (“Navigator’s share had fallen from around 80% at the end of 1996 to the ‘mid 50% range’ in July 1998 and that internet Explorer’s share had climbed to between 45 and 50% of the domestic market by late 1998.”).



Although it is generally believed that the core of Microsoft's exclusionary conduct was the bundling of internet Explorer and Netscape, that it is not the case. The core of the misconduct involved a series of agreements with retailers, OEMs and rivals to exclude Netscape from the market.<sup>110</sup> For example, the DOJ alleged that Microsoft pressured Intel to "stop developing or supporting" Netscape and explained to Intel that the purpose of its strategy was to "kill Netscape."<sup>111</sup> Further, the DOJ alleged that Microsoft used excessive incentives to get firms like Compaq to make Internet Explorer the default browser and threats to IBM, Gateway and others if they distributed Netscape.

The charges against Google relate to alleged bias rather than exclusion. The EC alleged that Google's Panda release caused Google's comparison product rivals to be ranked lower on the search results page than they otherwise would.<sup>112</sup> The idea that product ads would be at the top of the page should, however, be of no surprise—after all, Google places search ads at the top of the page.<sup>113</sup>

But the other issue with the EC's allegations is they don't appear to quantify the impact of the change. The fact that links to Foundem were now lower does not mean that they weren't clicked on.<sup>114</sup> This is in contrast with the absolute exclusion of Netscape Navigator on a PC. At times, Navigator wasn't on the PC<sup>115</sup> - which is not

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110 See Complaint, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. May 18, 1998) <https://www.justice.gov/atr/complaint-us-v-microsoft-corp>.

111 Plaintiffs' Joint Proposed Findings of Fact at para V.A.3., *United States v. Microsoft Corp.*, No.98-1232 (Aug. 10, 1999), <https://www.justice.gov/atr/us-v-microsoft-proposed-findings-fact-0>.

112 Fact Sheet, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*, EUROPEAN COMMISSION (Apr. 15, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-4781\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm).

113 See *Get your ads above Google search results*, AdWORDS HELP, <https://support.google.com/adwords/answer/1722087?hl=en>.

114 See, e.g., Geoffrey A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, in *THE NEXT DIGITAL DECADE ESSAYS ON THE FUTURE OF THE INTERNET* 341 (Berin Szoka & Adam Marcus, eds. 2010) ("[I]t is not even the case that SourceTool, Foundem, and other competing websites are absent from Google; it is, however, sometimes the case that these sites do not show up in the top few organic search results (and, often at the same time, Google's own competing product search results do). But if access to the top few search results is required to ensure the requisite access sought by Google's competitors, the relevant market has been narrowed considerably, creating a standard that can't possibly be met, no matter how 'neutral' a search engine's results.").

115 See *Microsoft Corp.*, 84 F. Supp. 2d at 111.

the same thing as being ranked higher. And looking down the page is not the equivalent of having to download new software on a 1990 era PC via a dial-up modem.

More importantly, it is very easy to directly navigate to Amazon.com. Indeed, 40% of e-commerce traffic is through direct navigation rather than utilization of a search engine.<sup>116</sup> Further, more than 50% of web traffic is through mobile devices,<sup>117</sup> where most searches are through mobile apps<sup>118</sup> like Amazon.com, which is the most popular e-commerce application in the US.<sup>119</sup>

Indeed, in 2016 more than 50% of U.S. product searches *began* on Amazon, as compared with roughly a third for Google and Yahoo, down about 20% from the prior year.<sup>120</sup> The same is true in Europe, where one-third of online consumers start on Amazon, nearly three times as many as start with Google.<sup>121</sup>

This brings us to the second piece of evidence. While Netscape experienced a rapid decline in market share, third party referral sites did not. Indeed, after the introduction of Panda in 2011, referrals to major publishers from Facebook grew by almost 30%, surpassing Google sites.<sup>122</sup>

Another source of possible evidence is a properly constructed event study. For example, Google might turn the objectionable part of its algorithm on and off and

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116 See Robert Allen, *Which are the most important e-commerce traffic sources?*, SMART INSIGHTS (Nov. 22, 2016), <http://www.smartinsights.com/ecommerce/ecommerce-analytics/important-e-commerce-traffic-sources/>.

117 See *Mobile and tablet internet usage exceeds desktop for first time worldwide*, STATCOUNTER (Nov. 1, 2016), <http://gs.statcounter.com/press/mobile-and-tablet-internet-usage-exceeds-desktop-for-first-time-worldwide>.

118 See *eMarketer Unveils New Estimates for Mobile App Usage*, EMARKETER (Apr. 11, 2017), <https://www.emarketer.com/Article/eMarketer-Unveils-New-Estimates-Mobile-App-Usage/1015611>.

119 See Liron Hakim Bobrov, *Top US E-commerce Mobile Apps and Web - January 2017*, SIMILARWEB (Mar. 13, 2017), <https://www.similarweb.com/blog/top-us-e-commerce-mobile-apps-and-web>.

120 Spencer Soper, *More Than 50% of Shoppers Turn First to Amazon in Product Search*, Bloomberg Technology (Sept. 27, 2016), <https://www.bloomberg.com/news/articles/2016-09-27/more-than-50-of-shoppers-turn-first-to-amazon-in-product-search>

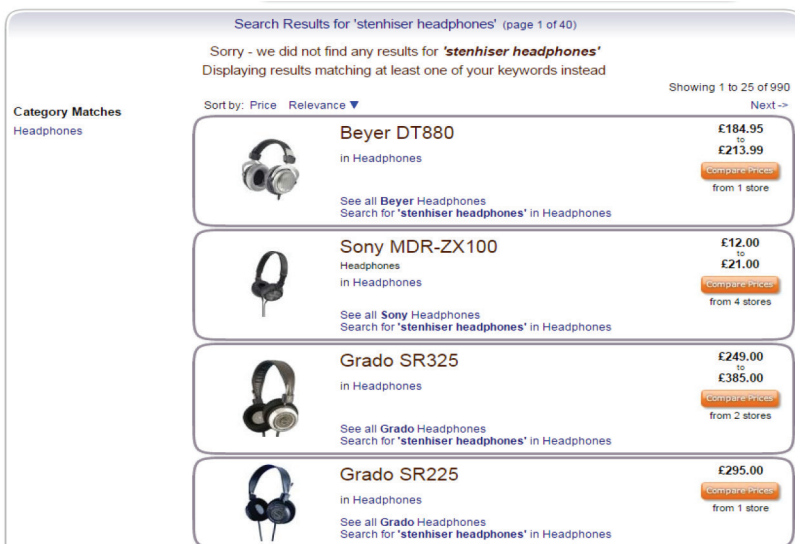
121 Kent Walker, *Improving Quality Isn't Anti-Competitive, Part II*, Google Blog (Nov. 3, 2016), <https://www.blog.google/topics/google-europe/improving-quality-isnt-anti-competitive-part-ii/>

122 See Martin Beck, *For Major Publishers, Facebook Referral Traffic Passes Google Again*, Marketing Land (Aug. 17, 2015) (citing data from Parse.ly, an analytics platform for major publishers), <http://marketingland.com/for-major-publishers-facebook-referral-traffic-passes-google-again-138969>.

regulators could study not only whether referrals to these sites went up or down and whether total traffic to these websites went up or down.

Taking a step back, while Foundem may claim that it was harmed by Google’s use of the Panda algorithm, it is equally (if not more) possible that it was harmed by competitive pressure from Amazon and others. Foundem was a small company that was run by a husband and wife who lived in the countryside.<sup>123</sup> Their site was basically a link farm, with static images, few product reviews, no detailed information on product attributes, no ability of consumers to buy their products on the site. It even required consumers to spell products exactly right—so a search for “Sennheiser headphones” would return no results, but a search for “Sennhieser headphones” would.

Figure 3



In contrast, both Google and Amazon allow for users to get answers to what they likely were searching for, even if they spell it incorrectly.

123 See Tom Fairless, *The British Couple Who Began Google's Antitrust Battle*, WALL STREET JOURNAL (Apr. 15, 2015), <https://www.wsj.com/articles/foundem-the-unlikely-instigator-of-google-antitrust-battle-with-the-eu-1429094448>.

Figure 4

Including results for *sennheiser* headphones  
Search only for stenhiser headphones

Shop for stenhiser headphones on Google Sponsored ⓘ






 Sennheiser HD 800 (Factory ... <b>\$1,200.00</b> Crutchfield	 Sennheiser HD 598 - ... <b>\$147.88</b> Jet.com	 Sennheiser HD 280 PRO ... <b>\$99.95</b> Jet.com	 Sennheiser HD 800 S ... <b>\$1,699.95</b> Moon-Audio.c...	 Sennheiser RS 110 RF ... <b>\$59.95</b> B&H Photo-Vi...
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Figure 5

Your search "**Stenhiser headphones**" did not match any products.

Did you mean: "[sennheiser headphones](#)"

 <a href="#">More options available</a> Sennheiser CX 300 II Precision Noise Isolating Earphones - Black 24 Mar 2009 by Sennheiser <b>£27.62</b> <del>£44.99</del>  More buying choices <b>£25.46</b> new (10 offers) Eligible for FREE UK Delivery <a href="#">See newer model of this item</a> ★★★★☆ • 1580	 Sennheiser HD201 Closed Dynamic Stereo headphones 17 Jul 2006 by Sennheiser <b>£16.99</b> <del>£24.99</del>  Get it by <b>Thursday, Jan 21</b> More buying choices <b>£16.37</b> new (9 offers) Eligible for FREE UK Delivery <b>#1 Best Seller</b> (in Portable Headphones) ★★★★☆ • 3120
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Moreover, Foundem was not just a product search site. It provided comparative product information on hotels, rental cars, and other products, all of which faced opposition from well-financed and innovative companies. There is simply no way to know whether they lost customers because they lost in the marketplace or because Google biased its results.

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## 4. Doing the Math

Vertical cases generally involve the arithmetic question of whether a gain from discriminating in favor of the competitive product would be worth a possible loss from customers switching away from the non-competitive product.<sup>124</sup> So, for example, if a hardware company were to acquire a software company, one might ask whether users being forced to only buy the software with the hardware would result in a net gain or loss: specifically, would the loss in profit from consumers switching away from the hardware be higher than the gain in profit from remaining consumers being forced to buy the software?

In the case of Google, the question might therefore be, would the gain in revenue from consumers clicking on Google product search be worth the potential loss of consumers switching to Amazon, eBay or others? And why would a user switch? Because the definition of bias is that Google is purposefully giving the user something other than what they want. That is to say, the result that is somehow pushed down the page better serves what the user wants than the result at the top of the page.

To believe that Google were to bias results, one must believe that it wanted to provide users with suboptimal results. This does not make a lot of sense. Google's business model is based on figuring out what people want. A theory that Google is intentionally biasing its results seems contrary to any effort to maximize the number of Google users.<sup>125</sup>

In undertaking this analysis, it is important to note that the loss may not just be of consumers undertaking product searches. After all, Google's reputation is built on providing the best answer to a user's question. If Google were to bias in favor of

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124 Policy Roundtables, *Economic Evidence in Merger Analysis*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 29-30 (2011), <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>.

125 Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151, 181 (2012) (“[W]ith respect to product search, Google does not sell retail goods, and does not profit directly from its own product search offerings (which compete with frequent complainant, Foundem), instead benefiting by increasing its customer base and the efficacy of paid advertisements on its search pages that include links to its own price comparison results. It is thus a tenuous claim, at best, that Google profits more by degrading its search results than by improving them.”).

its own results even though they were of inferior quality, by definition it would not be providing the best answer.

And this is important because it is not clear how Google could contain the damage—for if Google were to favor itself in product search, why not in travel, hotels, movies, maps, or any other result where, by hypothesis, Google provided inferior results? That’s the definition of bias - not just favoring oneself, but doing so in a manner that is not justified.

## 5. Judicial Review

The comparative analysis of rent-seeking against disruptive firms like Amazon, Uber and AirBNB suggests that judicial review is an important guard against rent-seeking. This is an important observation because while the United States antitrust enforcement agencies cannot impose fines or remedies without judicial approval, the EC is empowered to impose substantial fines without de novo judicial review of its findings.

Thus, it is significant that no court has found Google’s search and advertising practices to be anticompetitive, nor have they embraced the market definition articulated by the EC. For example, U.S. courts have rejected the conclusion that there is a search market that does not include firms like Amazon, eBay, Facebook and others. In *KinderStart*, the court stated, “there is no logical basis from distinguishing the Search Ad Market from the larger market for internet advertising.”<sup>126</sup> The court elaborated in a footnote, “To the extent that Plaintiffs may still ‘expend time and resources to find another means to secure Web traffic and reach and serve consumers,’ Google does not have the power to eliminate downstream competition.”<sup>127</sup> The court in *Person v. Google* similarly rejected the notion of an online search advertising market, writing, “search-based advertising is reasonably interchangeable with other forms of internet advertising.”<sup>128</sup>

In addition, no court has found that Google’s search and advertising practices have harmed competition. In *Google v. myTriggers.com*, an Ohio court dismissed allegations that Google preferenced its own content in search results for failure to allege

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126 *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057, 1, 6 (N.D. Calif. 2007)

127 *Id.* at \*11 n.11.

128 *Person v. Google, Inc.*, 06-cv-7297 at \*5 (N.D. Cal. June 25, 2007).

anticompetitive harm under the state’s antitrust laws. The court wrote, “While myTriggers identifies those favored by agreements with Google, myTriggers’ allegations do not contain any specific competitor other than myTriggers that has been harmed by Google’s alleged conduct.”<sup>129</sup>

European courts have reached a similar result when evaluating claims brought by private plaintiffs. In *Shark Systems v. Google Ireland*, the Hamburg Regional Court rejected the complainant’s argument that search advertising was unique, stating, “Applicant’s clients’ offer can also be found without such advertisement in the actual search result. So this is simply about an additional advertisement opportunity, which Applicant can also realize on the pages of other providers . . .”<sup>130</sup> Because of this, the court found that advertising in Google’s search results was not “indispensable” and denied the complainant’s request for an injunction, noting that the complainant had not met its burden of showing that Google has at least a 40% market share in a properly defined market.<sup>131</sup>

In *Verband Deutscher Wetterdienstleister v. Google*, the District Court of Hamburg rejected an abuse of dominance claim by a weather trade group challenging Google’s practice of displaying its own weather search results above organic results. The court analyzed the complexity in defining a market for search services, writing, “The problem lies in the fact that there is no trading relationship between [Google] and users of the search engine. Competition for users cannot be framed simply in terms of economic criteria. . . . The search engine is just a vehicle to generate advertising revenues.”<sup>132</sup> However, the court was able to leave this question open because it also found, “the existence of relative market power is not without doubt itself, since the applicant does not address that there are in fact effective competitors in this field, such as Twitter or Facebook, not to mention other search engines, some of which are vertical search engines.”<sup>133</sup> The court also noted that “there are numerous opportunities for online advertising and include offers from very strong

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129 Google, Inc. v. myTriggers.com, Inc., No. 09 CVH10-14836 at 9 (Ohio Com. Pl., Aug. 31, 2011).

130 Shark Systems IT GmbH v. Google Ireland Limited, Docket no.: 3 W 129/13 Kart (Hanseatisches Oberlandesgericht, Dec. 16, 2013).

131 *Id.*

132 Verband Deutscher Wetterdienstleister v. Google, Ref: 408 HKO 36/13 (District Court of Hamburg, Apr. 04, 2013).

133 *Id.*

providers such as Facebook and Twitter. Moreover, companies advertise on their websites independently of [Google].<sup>134</sup>

In *Webdeviin v. Google*, the Commercial Court of Paris noted that Google is “subject to a high competitive pressure because of the existence of social networks such as Twitter and Facebook; that Google faces competition from two international groups, Yahoo and Microsoft, which partnered with AOL for online advertising; [and] that there are other suppliers of online ads[.]”<sup>135</sup>

Other courts have rejected the very conduct for which the EC fined Google more than two billion dollars. In *Buscapé v. Google*, a Brazilian court explained that in displaying Google Shopping results above rivals’ shopping comparison sites, “no consideration should be given . . . to the claim that [Google] artificially includes Google Shopping in the first ranks of search results[.]”<sup>136</sup> This is because, “Google Shopping is not a ‘site’ to compare prices, but just a thematic search option within the generic search made available by Google Search” which “are the sites of merchants that [Google] understands best meet the quality and relevance criteria to fit the actual intention of the user who chose Google Search for that query.”<sup>137</sup>

In a recent challenge in a London court, *Streetmap.eu Ltd. v. Google, Inc.*, a rival online maps provider raised allegations similar to those raised by Google’s rivals in the EC investigation. Streetmap argued that Google was abusing its dominant position in the market for online search by displaying Google Maps in a thumbnail at the top of its search engine results page (SERP), while displaying rival online maps services in blue links lower down in the rankings. The court left open the question of whether Google was dominant, finding “on the assumption that Google held a dominant position, it did not commit an abuse.”<sup>138</sup> The court’s reasoning considered Google’s intention and the effect of Google’s conduct. The court found that the intention of Google’s conduct was to “improve Google’s offering in the

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134 *Id.*

135 *Webdeviin v. Google* (Tribunal de Commerce de Paris, May 17, 2011).

136 *Buscapé*, Lawsuit n° 583.00.2012.131958-7, at 4 (Court of Appeals of the State of Sao Paulo, Sept. 5, 2012).

137 *Id.*

138 *Streetmap.eu Ltd. v. Google, Inc.*, Case No: HC-2013-000090, ¶ 178 (Royal Courts of Justice, Feb. 12, 2016).



market for general search.”<sup>139</sup> With regards to the effect of the conduct, the court stated, “it is indisputable that the display of a thumbnail map on the SERP in response to a geographic inquiry indeed enhances the quality of the Google SERP.”<sup>140</sup> The court further found that the alternatives Google may have considered would have been overly burdensome and were therefore not required.<sup>141</sup>

## 6. Unintended Consequences

Google is a search engine that tries to give users what they want. When consumers put in a product related query, they want a number of things: information on product itself such what it looks like, how big it is, what are its specifications; product reviews by other purchasers; information on possible alternatives; and information on where to buy it and how much it costs.<sup>142</sup>

Google’s business model is designed to provide users with this information in the highest quality and most efficient manner possible. This generally means that in a product search Google wants to show you images, information, options and where to buy in a single result. That’s what Google product search is designed to accomplish. You see options, you click and you’re sent to a website where you can buy the product of interest.<sup>143</sup>

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139 *Id.* ¶ 84.

140 *Id.*

141 *Id.* ¶ 176.

142 See *About Shopping campaigns and Shopping ads*, AdWORDS HELP (“As a merchant, you can increase the quality of your leads by featuring product information directly in your ads to help shoppers make informed purchase decisions. This makes shoppers more likely to complete a purchase on your site.”), <https://support.google.com/adwords/answer/2454022?hl=en>; Julie Krueger, *Omnichannel Shoppers: An Emerging Retail Reality*, THINK WITH GOOGLE (Mar. 2015) (“according to our recent research, three in four shoppers who find local retail information in search results helpful are more likely to visit stores. Online-to-offline ad formats can improve the shopping experience for your customers, making it easy to see your store location, products, and available inventory from within the search ad itself.”), <https://www.thinkwithgoogle.com/marketing-resources/omnichannel/omni-channel-shoppers-an-emerging-retail-reality/>.

143 See Kent Walker, *The European Commission decision on online shopping: the other side of the story*, GOOGLE BLOG (June 27, 2017) (“When you shop online, you want to find the products you’re looking for quickly and easily. And advertisers want to promote those same products. That’s why Google shows shopping ads, connecting our users with thousands of advertisers, large and small, in ways that are useful for both”), <https://www.blog.google/topics/google-europe/european-commission-decision-shopping-google-story/>.

But the EC's government intervention will restrict Google's ability to give consumers what Google thinks they want. If Google thinks that consumers don't like product review sites, it will not be able to demote them. If Google thinks that consumers want comparative ads above algorithmic results, it will not be able to put them there.

All the available empirical evidence suggests that users want what they want as quickly as they can get it.<sup>144</sup> It is almost impossible to believe that users actually prefer blue links over photographs; link farms over vendor sites; multiple clicks over single clicks.

Importantly, Google is so interested in providing the best user experience that it charges a lower price for high quality ads than for low quality price.<sup>145</sup> This means that Google foregoes revenue on an individual transaction because it knows that user experience is positively correlated with repeat usage. The happier the user, the better off Google is.

Product comparison sites of the sort that complained to the EC about Google were nowhere near as efficient as Google. They required consumers to navigate to two sites—from Google to Foundem and then from Foundem to the seller.<sup>146</sup> And they didn't provide as much information on the product's quality.

The EC remedy will require Google to provide access to these comparative sites regardless of their quality. Moreover, by as explained by Search Engine land,

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144 See, e.g., Sunita Yadav & Dr. Om Prakash Sangwan, *Neural Network based Approach for Predicting User Satisfaction with Search Engine*, 18:5 INT'L. J. OF COMPUTER APPLICATIONS 17 (Mar. 2011) (survey identifying the four primary factors of search engine user satisfaction as (1) Response Time, (2) Up-to-date information, (3) Reliability, and (4) Search Result relevancy), <https://pdfs.semanticscholar.org/a0eb/77f1f38db145925f6d5b3c42d6fa64861490.pdf>.

145 See *About ad position and Ad Rank*, ADWORDS HELP, <https://support.google.com/adwords/answer/1722122>.

146 See Geoffrey A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, in THE NEXT DIGITAL DECADE ESSAYS ON THE FUTURE OF THE INTERNET 344 (Berin Szoka & Adam Marcus, eds. 2010) (“[I]t is difficult to see how relevant (and thus efficiency) could be well-served by a neutrality principle that required a tool that *reduces* search costs to inherently *increase* these costs by directing searchers to a duplicate search on other site. If one is searching for a specific product and hoping to find price comparisons on Google, why on earth would that person be hoping to find not Google's own efforts at price comparison, built right into its search engine, but instead a link to another site that requires other several steps before finding the information?”).

By letting price comparison sites advertise through Shopping, Google actually stands to make more money in the short term. More companies advertising in Google Shopping means more competition for traffic and therefore higher CPCs. Most aggregation services have millions of products available, giving them an astronomical number of search terms for which they could run. They're not shy about spending on digital advertising, either. I'd estimate that comparison price engines collectively spend more than 250 million euro/year on text ads in the EU. If CPCs from all these new players get too high, it could push out a lot of the small to mid-size retailers, making it impossible for them to compete. This would ruin the user experience even further and ultimately reduce competition in Shopping. Google was definitely thinking long-term when they decided to exclude price comparison sites from Shopping.<sup>147</sup>

## IV. Conclusion

Antitrust agencies in both the United States and Europe are well-intentioned, honest, smart and hard working. And the rent-seeking activity of competitors should never be taken as an indictment of these regulators. But they should take into account the incentives of the firms before them in evaluating the credibility of their arguments, especially in cases where rent-seeking is likely.

Such rent-seeking is likely when (i) there are dispersed benefits and concentrated costs from the challenged firm's conduct (and conversely dispersed costs and concentrated benefits from the government ending the challenged conduct); (ii) complainants are sufficiently sure as to their future state that they are confident *ex ante* that a particular rule will advantage them; (iii) there is a lack of easy to administer objective rules; and (iv) the interest of the complainants are not necessarily correlated with consumer welfare.

These conditions are satisfied in the case of product improvements by so-called dominant firms on the internet that have disruptive business models because (i) the internet enables disruptive firms to bring benefits to a very large group of

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147 Andreas Feiffen, *How the EU fine will ruin Google Shopping for the consumer*, SEARCH ENGINE LAND (June 28, 2017), <http://searchengineland.com/eu-fine-will-ruin-google-shopping-consumer-278045>.

consumers who by switching away en masse from incumbent firms create concentrated harms on incumbent firms; (ii) most firms are confident that there is a low probability that they will be a dominant firm in the future; (iii) it is very difficult to define two-sided markets where the effective price to consumers is free (as is the case in many disruptive firms) and even more difficult to determine whether a product improvement is genuine; and (iv) the complainants are typically incumbents who would be harmed by a genuine product improvement.

In such cases, objective evidence and meaningful judicial review of agency action is very important. Objective evidence is important because rent-seeking is more likely to occur in product improvement cases than in horizontal mergers. Thus, we need even more objective and fair standards, not less.

Meaningful judicial review of agency decisions is important because courts are a better guard against rent-seeking than other government agencies and have specifically adopted procedural rules designed to guard against rent-seeking such as discovery and standing rules. These rules evolved because (i) dispersed costs are subsidized through treble damages, attorney's fees and class actions and therefore diffuse interests have an easier ability to petition courts than other forms of government; (ii) even concentrated interests are generally unsure as to whether they will be plaintiffs or defendants in the future and therefore prefer fair and objective procedural rules; and (iii) such rules can be predictably applied by decision makers, through published opinions, *stare decisis* and appellate review. Thus, like in the case of horizontal mergers and cartels before agencies, courts have adopted rules that minimize the risk of rent-seeking.

Applying these principles to the real world, we find that courts are in fact less likely to protect incumbents seeking to raise the costs of disruptive firms like AirBNB, Uber and Amazon than other forms of government. But that is not necessarily true in Europe, where successful judicial challenges against AirBNB, Amazon and Uber occur with similar frequency as challenges before European executive and legislative branches.

We furthermore find that courts are also unlikely to find Google guilty of exclusionary product improvements. Specifically, every single court that has looked at claims of bias against Google has found that they did not violate competition laws. This is true in the United States as well as the U.K. and Europe.

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And this may explain why the EC found Google in violation of competition laws while the U.S. agencies did not. Simply put, the FTC and DOJ would need to prove their allegations in court, while the EC does not face the same level of judicial review. Now, this does not mean that the FTC or DOJ were motivated by a fear of losing. It simply means that the agencies were constrained by the fact that their decision would be evaluated in detail by a court. Thus, they would need to find evidence that would stand up in court and articulate theories that had support in the common law.

All of this matters because disruption itself matters. It is the process by which capitalism innovates and consumer welfare is enhanced.<sup>148</sup> Consumers benefit from lower book, transportation and lodging costs. There are losers to be sure. They are the publishers, the hotel companies and the taxi fleets. But there are other winners. The independent author who can now reach millions of readers even though publishers have passed on his or her manuscript. The small store that can now reach millions of consumers even though the big box retailers have said no. Yes, clerks in bookstores may lose their jobs. But workers in distribution centers have gained theirs.

Competition law is biased toward consumer welfare for good reason. Because if it is balanced between the interests of consumers and producers, it is without any sort of limiting principle. It forces regulators to balance interests, to exercise judgment between competing ideas with no idea of how to strike that balance. Should prices be higher so producers can make money? If so, how much higher? Rent seeking thrives in such ambiguity.

Competition law is one of the most important tools for enhancing consumer welfare, and therefore the welfare of a nation's citizens. It is not an accident that competition law is one of the first laws adopted by developing countries as they move towards the rule of law.<sup>149</sup> And the integrity of competition law is diminished when regulators move into areas where consumer welfare is confused with producer welfare, where

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148 See Joseph Schumpeter, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 83 (1942).

149 See Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 *LAW & CONTEMP. PROBS.* 4, 2, 12-13 (2016) ("Many of today's 130 plus competition law jurisdictions are newcomers . . . [a] nd many have enacted their first competition law or established a regulatory agency for its implementation while also attempting the difficult task of democratizing their political systems or liberalizing their economies.").

the regulator's interest seems more focused on protecting small businesses rather than their consumers.

And getting it wrong not only harms the legitimacy of competition law and consumer welfare, but it also harms producer welfare in a broader sense. And that is because firms like Google create opportunities for others. It permits consumers to search for small businesses. It disintermediates aggregators who largely show products from big producers, and allow small producers direct access to consumer wallets.

Firms like Google actually aggregate consumer interests, at times acting as a proxy for consumer welfare. And this is so not because Google is self-less. It is because it is selfish. It makes money when consumers are happy. This makes competitors unhappy. But that is not a sufficient reason for regulators to do their bidding.

In the end, it may seem odd to say that a firm such as Google is a victim of concentrated interests. It is, after all, one of the most profitable firms in the world. But competition agencies, to their credit, are generally not swayed by the size or resources of the parties before them. They are influenced by the evidence before them. And one of the most important pieces of evidence relied upon by enforcers—if not the most important pieces of evidence—are the views of complainants. When those complainants are consumers (and not also competitors) of the relevant product their views should be entitled to great weight. But when they are competitors (even if also consumers) of the relevant product, their views are just as likely (if not more likely) to reflect rent-seeking activity, especially when the target is a firm that is disrupting their industry.

# Concurrences Review

Concurrences is a print and online quarterly peer reviewed journal dedicated to EU and national competitions laws. It has been launched in 2004 as the flagship of the Institute of Competition Law in order to provide a forum for academics, practitioners and enforcers. The Institute's influence and expertise has garnered interviews with such figures as Christine Lagarde, Emmanuel Macron, Mario Monti and Margarethe Vestager.

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  - Legal Practice: Short papers for in-house counsels
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  - Books Review: Summaries of recent antitrust books
  - Articles Review: Summaries of leading articles published in 45 antitrust journals
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# e-Competitions Bulletin

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The Institute of Competition Law is a publishing company, founded in 2004 by Dr. Nicolas Charbit, based in Paris and New-York. The Institute cultivates scholarship and discussion about antitrust issues through publications and conferences. Each publication and event is supervised by editorial boards and scientific or steering committees to ensure independence, objectivity, and academic rigor. Thanks to this management, the Institute has become one of the few think tanks in Europe to have significant influence on antitrust policies.

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