A SHORT ESSAY ABOUT THE LONG TERM:

THE LIMITS OF ANTITRUST ANALYSIS AS APPLIED TO COMPULSORY IP LICENSING BY THE DOMINANT FIRM

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I. INTRODUCTION

This is a short essay about one aspect of a significant question on the cusp of the intersection between antitrust and intellectual property law: whether and on what terms courts and competition regulators should compel a dominant firm to license its powerful intellectual property to a smaller rival. As all possessed of even passing familiarity with the matter would know, this question has already generated substantial controversy, in no small measure because the relevant laws in the US and Europe provide markedly different answers to it, differences that have been highlighted and will doubtless be exacerbated by the recent decision of the European Court of First Instance in the Microsoft case.

This essay has modest aims. It will neither attempt to resolve the dispute about compulsory licensing, nor will it choose sides. It will not reformulate the question, and it will not comment on the rapidly growing body of commentary. Rather, it will describe the basis for the dispute, demonstrate that the opposing arguments are irreconcilable, and argue that these irreconcilable differences bear significantly on two fundamental issues in global competition law today: the prospect (and wisdom) of convergence between the laws of Europe and the U.S., and the choices that newer competition law regimes – such as those in China and India, for example – must face in fashioning substantive rules in areas where international consensus is absent.

This essay argues that the antitrust laws of the US and Europe differ in their approaches to compulsory licensing of IP not because they ascribe to different schools of economic thought, but because the different political and cultural beliefs that inform and animate their respective views lead them inevitably to different answers. These political and cultural beliefs have little to do with economics. Indeed, they are able to persuade precisely because economic theory lacks explanatory power in this area. The beliefs themselves reflect divergent opinions about the relative importance of the long term in antitrust analysis, about faith in the workings of complex regulatory regimes, and about confidence in the ability of markets to reach socially beneficial outcomes. And because these beliefs are primarily political – rooted, that is, in different historical experiences and cultures -- it follows that the legal rules that emanate from them are (a) unlikely ever to converge, and (b) contingent, appropriate that is for the systems that embrace them, but not necessarily for anyone (or everyone) else.

II. COMPULSORY LICENSING AND THE LONG TERM

"The long run", wrote John Maynard Keynes, "is a misleading guide to current affairs. In the long run we are all dead". Better to stimulate the economy now, Keynes concluded, than to wait for it to return to equilibrium in the longer term. An institutional preference for resolving difficult economic problems in the short run also underlies much of competition law analysis in the United States and Europe. Much, but not all. Thus, in both jurisdictions, regulators and courts assess the legality of competitor collaborations – contractual arrangements, joint ventures, and mergers – in part by comparing their past, present or near-term anti-competitive consequences with their immediate or near term benefits. Conduct of dominant firms that might harm competition is usually subject to the same form of analysis.

In one important area, however, the European approach diverges from that in the United States. In the U.S., a dominant firm possessed of powerful intellectual property can refuse to license that property to its rivals, or would-be rivals, even though access to the property is arguably necessary to foster or preserve competition in the short term. If it has previously licensed that property, the dominant firm can refuse to continue licensing it, as long as its refusal arises plausibly from the everyday desire to appropriate for itself the full value of its invention or creation, and even if the refusal would arguably impede competition in the short run.

In Europe, the dominant firm operates under a more intrusive rule. Although the applicable law appears similar in certain superficial respects to that of the U.S., IP licensing decisions come under much stricter regulatory and judicial scrutiny, which will only intensify following the recent decision of the Court of First Instance (CFI) in the

Microsoft case. Thus, although the dominant firm with powerful IP can normally refuse to license its property to rivals, it is required to license in "exceptional circumstances". The Microsoft ruling has significantly expanded the set of so-called "exceptional circumstances" to include relatively unexceptional situations in which smaller rivals demonstrate that they need access to the relevant IP in order to compete "effectively" with the dominant firm in a neighboring or secondary market, in which access to the IP would enable them either to develop a "new" product or to make "technical improvements" to their existing ones.

Even before the CFI's recent Microsoft opinion, this difference in approach to compulsory licensing was the subject of heated debate both within and between U.S. and EU antitrust circles [see issue of Antitrust Law Journal dealing with the IMS case]. The Microsoft case has provided additional fuel for the antagonists. For the most part, however, the argument has concerned itself with practical matters: is the U.S. law sensible? Can refusals to license do more economic harm than good? Are courts and regulators competent to define and administer workable standards for compulsory licensing in general and for remedial orders in particular? While these are certainly important questions, the discussion has thus far overlooked the fundamental factor accounting for the difference between the European and American views.

In important respects, antitrust law in the United States is animated by a deep-seated faith in the long term. A central tenet of this faith holds that a rule of law encouraging the possession and retention of monopoly power will create strong incentives over the long-term for vigorous competition, as each firm strives to become a monopolist, and – therefore – very few succeed. Those few firms that do succeed – lawfully – will in turn encourage others to continue trying, provided of course that the successful receive their just rewards [see Hand in Alcoa]. Another important article of faith holds that since innovation is the best engine of long-term economic growth, antitrust law should foster and protect incentives to innovate by allowing dominant firms with valuable intellectual property to realize the full value of their inventions. Those dominant firms will then continue to invest in invention, their rivals will need to invent to keep up with them, and – in the long term – social investment in invention will remain at usefully high levels, all to the benefit of consumers.

This faith in the long term comes with both a corollary and a cost. The corollary requires a minimum of regulatory intervention in the short term, since unwarranted intervention would, among other things, discourage future investment in invention and deprive society of the valuable long term benefits that it would otherwise receive. The cost comes in the short run, since an institutional reluctance to intervene in markets dominated by powerful firms necessarily results in consumers' paying more than they would under a more aggressive enforcement regime. But faith in the power of the long term requires the U.S. antitrust system to accept this short-term cost; which it does.

In contrast, the European competition regime does not trust so completely in the workings of the long term. Rather, in its approach to regulating the dominant firm, to merger review, and to the specific issue of compulsory IP licensing, it looks primarily to the short term needs of consumers. It is therefore less tolerant of dominant firms in general, more apt to challenge their conduct, and more skeptical of appeals to the social value of encouraging firms to strive for dominance and of ensuring long-term incentives to invest in innovation.

III. THE RELEVANT CASE LAW, AND THE RELEVANT DIFFERENCES, BRIEFLY DISCUSSED

Two strains of case law are relevant to this discussion. The more general pertains to the liability of the dominant firm for refusing to deal with its smaller rivals. The more particular covers the refusal of the dominant firm to license its valuable IP to smaller rivals. In both the U.S. and Europe, these areas of law are regarded as related but distinct.

A. The U.S. case law

In both areas, U.S. law divides itself into two parts, (1) refusals to begin a course of dealing (or licensing) and (2) refusals to continue a course of dealing already begun. With regard to the former, the law provides a simple and readily comprehensible rule. It imposes no duty whatever on the dominant firm either to initiate a course of cooperative conduct with its rivals, or to respond positively to its rivals' requests for cooperation. [see Colgate. Aspen, Trinko].

With regard to the latter, the law is somewhat more complicated. Prior to the Supreme Court's opinion in the Trinko case, the freedom of the dominant firm to discontinue a course of cooperative conduct with its smaller rivals was constrained – significantly in the view of some -- by the Court's ruling in Aspen Ski Co. That case upheld a finding of liability against a dominant ski resort which had ceased cooperating with its smaller rival in the sale of an all-area, six-day lift ticket, refusing even to sell its own lift tickets at retail to the smaller firm, on the grounds that (a) the cooperation had begun when the relevant market was competitive, (b) consumers preferred the market with cooperation to the market without, (c) the defendant's behavior could plausibly be characterized as predatory – "[t]he jury may well have concluded that [the defendant] elected to forego . . . short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor" (472 U.S. 585 at 608) and (d), and perhaps most importantly, the dominant firm had failed to offer a valid business justification – an efficiency defense – for its conduct. The Court's opinion in Aspen was controversial, and had more than its share of critics, but until Trinko it played an important if controversial role in antitrust jurisprudence.

Trinko limited Aspen, condemning it to a fate almost worse than death -- irrelevance. It located Aspen "at or near the outer boundary" of section 2 liability. It referred to its holding as "a limited exception" to the general right of a dominant firm to refuse to deal with its rivals (540 U.S. at 409). And it confined its future applicability to cases whose fact patterns neatly matched Aspen's own. In particular, the Court observed, the defendant in Aspen terminated "a voluntary (*and thus presumably profitable)* course of dealing", refusing to provide its competitor with "a product that it already sold at retail", facts that now seem – after Trinko, that is – essential to plausible refusal-to-deal claims, whose future in general has been cast into grave doubt.

The U.S. law regarding a dominant firm's refusal to license powerful IP to rivals is somewhat less clear, but not much. The Supreme Court has not ruled on the relevant issues, but a handful of Appeals Court decisions have. From these cases, several salient points have emerged. First, it seems clear – as it is with refusals to deal in general – that a dominant firm has no obligation to cooperate with rivals in the first instance, and can reject with impunity their requests for access to valuable IP. No reported case in the U.S. imposes antitrust liability for a unilateral refusal to sell or license a patent (cite to joint guidelines for the Licensing of IP, 1995 version, page 4). And several expressly decline to do so.

The most notable of these rulings is the Second Circuit's 1981 opinion upholding Xerox' refusal to license its plain-paper copying technology to SCM, which claimed that compulsory licensing would create competition in a market without any. Xerox had steadfastly refused to license its technology to SCM, a refusal vindicated on appeal: To rule otherwise, wrote the Court, "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system", 645 F.2d 1195, at 1209.

As to refusals to continue licensing IP to one's rivals, the law is not quite so clear. Among Circuit courts that have ruled on the issue, slight differences in opinion exist. Thus, in the Image Technical Services case, in which Kodak was sued for, among other things, having stopped licensing patented copier parts to its rivals in the after-market for service, the Ninth Circuit held that a monopolist's desire to exclude others from its lawfully obtained intellectual property "is a presumptively valid business justification for any immediate harm to consumers'", 125 F.3d at 1218. On the Ninth Circuit's view, plaintiffs could rebut the presumption of validity by showing – through proof of the monopolist's subjective intent -- that the claimed desire to exclude was "pretextual", a cloak for some different and noxious anti-competitive intention.

Three years later, on nearly identical facts, the Federal Circuit adopted a modified version of the Ninth Circuit's test, in a case brought against Xerox by rivals in a parts and service after-market. Though relatively small, the Federal Circuit's modification makes a world of difference. Its test eschews any inquiry whatever into the monopolist's subjective intention in refusing to license its rival. Thus, under this test, unless the monopolist has (a) obtained its IP unlawfully (that is, by committing fraud on the patent office, see Walker Process, 382 U.S. 172) or (b) brought "sham litigation" to enforce its patent (whether properly obtained or not; see Professional Real Estate Investor and Posner's opinion in Andrx case), its claimed 'desire to exclude others from using its intellectual property provides an unassailable defense to antitrust claims brought by disappointed rivals.

It is easy, too easy perhaps, to over-emphasize the difference between the Ninth and Federal Circuits' respective approaches to the issue of the monopolist's subjective intent. For one thing, focusing too closely on that issue can obscure the large common ground shared by the two opinions. Both make it very difficult for plaintiffs to prevail. Each recognizes the validity and importance of the monopolist's desire to use the exclusionary power in its valuable IP for its own benefit. And each creates a strong presumption favoring the use of that power and disfavoring rivals' attempts to interfere with it. For another, firms possessed of powerful IP and well-advised by counsel are not likely to run afoul of Kodak in the future. They can easily create a paper trail of bona fide memos and advices announcing the high importance attached to capturing all available benefits from valuable IP.

B. The European case law

Until recently, reasonable people could disagree about whether EU law regarding the ability of the dominant firm to refuse to deal with smaller rivals differed materially from its counterpart in the U.S. In general, that is, in cases not involving powerful IP, European courts had adopted a relatively strict version of the so-called essential facilities doctrine. Thus, a dominant firm possessed of powerful property (such as a fleet of trucks which were arguably indispensable for the nationwide home delivery of newspapers) was not required to afford a smaller rival access to that property, since the rival had failed to show – as the law required – that the denial of access "was likely to eliminate ***all*** competition on the part of the smaller firm" (Bronner 1997) (emphasis supplied) While not so protective of the dominant firm's interests as U.S. law, the requirements of (i) indispensability and (ii) the likelihood that, without access, all competition in the relevant market would be eliminated nevertheless provided the dominant firm in Europe with a healthy modicum of discretion.

As to the compulsory licensing of intellectual property, the pre-Microsoft legal regime approached access requests cautiously. After affirming in the Volvo case the inventor's exclusive right to refuse to allow others to reproduce its patented property, the ECJ expanded the rights of access-seekers, but gradually and only in "exceptional circumstances". In Magill, holders of what might be termed "weak" copyrights in separate, weekly listings of television programs were made to license their copyrighted material to a firm seeking to publish a new product that would collect all of the listings in one comprehensive guide. Four factors dictated the outcome: (1) the copyright holders were the only sources of the information indispensable to the compilation of a comprehensive guide; (2) their refusal to license "prevented the appearance of a new product"; (3) there was no good business justification for their refusal; and (4) through their refusal they effectively reserved for themselves – eliminated ***all*** competition in -- the market for weekly program guides.

The holding in Magill was ratified by the opinion in the IMS Health case, another dispute involving the refusal of a dominant firm to license "weak" but arguably indispensable copyrighted material to a smaller rival. The Court in IMS held that the refusal to grant a license to indispensable IP would constitute an abuse of a dominant position under the following circumstances: (a) the access-seeker "intends to offer a new product or service not offered by the copyright owner and for which there is potential consumer demand"; (b) the refusal "is not justified by objective considerations" [valid business justifications]; and (c) the refusal reserves the relevant market for the dominant firm "by eliminating ***all*** competition on that market".

The Microsoft opinion has changed European law dramatically by expanding each of the three criteria set forth in IMS. First, Microsoft interpreted the "new product" requirement broadly, allowing it to encompass potential improvements to rivals' existing products already competing in the same market as those offered by the dominant firm. Second, it held that unproven claims about the general tendency of sharing obligations to affect innovation on the margin were not sufficient to constitute an "objective justification" for a refusal to license. Rather, it held that such a justification required the dominant firm to "prove" the extent to which its incentives to invest in innovation would be weakened. And third, it changed the requirement that the refusal eliminate "all" competition in the relevant market, into one that asks whether the refusal eliminates "effective" competition in that market. Collectively, these changes create a large and uncomfortable gap between the now relatively permissive European regime and the relatively restrictive American one.

IV. GIVEN THAT EU AND US COMPETITION LAW BOTH AIM PRIMARILY TO PROTECT CONSUMER WELFARE, WHAT ACCOUNTS FOR THE DIFFERENCE BETWEEN THEM ON THIS ISSUE?

Since both regimes explicitly identify the protection of "consumer welfare" as the main objective of competition law, the very existence of such a significant difference seems fundamental, remarkable, and unsettling. The difference is fundamental because it suggests that there might be, for the very same conduct, different and competing time frames within which to assess consumer welfare. At the same time, it is remarkable because it implicitly asks -- even now, at this late and sophisticated point in antitrust history -- on which time frame the analysis should focus. And it is unsettling because the lack of consensus on such a basic matter suggests, among other things, that there are fixed limits to the ability of economic analysis to solve some of antitrust law's most pressing problems, and that perhaps one can and indeed must resort to some political calculus to answer these questions.

In this regard, the European approach focuses on the immediate and obvious benefits to consumers that flow from requiring dominant firms to license their valuable IP to smaller rivals. In the short term, smaller rivals can improve upon the relevant technology, and offer consumers a greater choice of products, or at least a greater quantity of roughly similar products at (necessarily) lower prices. Access to the dominant technology could well enable the smaller rivals to remain viably competitive in the short term and protect them from having to cede the market to the dominant player then and for the foreseeable future. Consequently, in the short term, prices will fall, output will rise, choice may expand, and dominance will be checked. Consumers benefit. While the European position would certainly acknowledge the possibility that compulsory licensing might at the margin dampen long-term incentives to innovate, it appears agnostic about this possibility, according it (non-dispositive) weight and only then when the dominant firm can "prove" that the licensing in question would weaken its incentives to invent.

In this area, the U.S. sees consumer welfare in an entirely different light. It postulates that in the long run consumers benefit enormously from innovation; that ongoing innovation requires a set of incentives and protections that enable inventors and would-be inventors to capture the full value of their inventions; and that legal rules that either discourage the incentives or weaken the protections thereby weaken incentives to invest in invention and thus run counter to consumers' long term interests. Put another way, the U.S. view rejects the notion that compulsory licensing truly serves consumer welfare. While it would admit – as it must – that compulsory licensing affords consumers with greater choice and lower prices in the short term, it insists that in the long run those benefits are fool's gold. Eventually, goes the argument, a regime that requires dominant firms to provide rivals with access to valuable IP will sap innovation incentives across the board – incentives not only of the incumbent dominant firm, but also of its smaller rivals and of would-be dominant firms now and in the future. In the long term, these weaker incentives will lead to fewer valuable inventions and a serious net loss of consumer welfare.

Three things about these different approaches should be clear. The first is that each relies on assumptions that economics cannot validate. The second is that their respective costs and benefits are incommensurable, so they cannot be usefully compared. The third follows from the first two: their foundations are political, historical and cultural, valid for each of them but not perhaps fully instructive for others.

Economics cannot help determine whether either the EU or the US approach to compulsory IP licensing is sensible. Of course, economics can confidently evaluate improvements to consumer welfare in the short term: compulsory licensing should yield greater choice and increased output. This is not problematic. The problem lies instead in attempting to conduct the trade-off between those short-term improvements and the supposed longer term harms. So, again, economics can confidently predict that compulsory licensing will reduce returns to invention and that therefore – on the margin – there will be less investment in invention in the future, a decrease likely to harm consumers. But how much less investment will there be? And how much less must there be before useful innovation is decreased? Is there a positive correlation between amounts invested in innovation and valuable invention? And what if there is currently over-investment in innovation? If so, then maybe decreased incentives would, over time, reduce investment to the socially efficient level.

But even if the long-term incentives of a more frequent compulsory licensing regime could be measured in some manner, other significant problems of measurement and comparison would remain. For example, the short term benefits of lower prices and greater choice are not readily commensurable with the long-term benefits of higher incentives to invest in invention. Investments do not always yield inventions, for one thing. For another, there are at least four types of relevant investors, each with a slightly different set of incentives: (i)dominant incumbents, (ii)smaller rivals (that would, under U.S. law, for example, have incentives to invent around, or over, the incumbent's IP), (iii) existing potential entrants into the relevant market, and other IP markets; and (iv) future and would-be inventors. Comparing all of these uncertain potential long-term losses to the more definite gains obtainable in the near term would almost certainly be an exercise in futility.

These observations cut three ways. First, they mean that the US bias in favor of protecting the dominant firm's incentives to innovate inevitably lacks an empirical foundation, and may even be misplaced. Second , they mean that the European tendency to compel licensing more frequently does not, because it cannot, weigh off the losses of the likely but unquantifiable disincentives to invest that flow from compulsory licensing. Consequently, except at the most basic level – that of identifying the very general incentive effects of the relevant legal rules – economic analysis is unhelpful. Third, if economic analysis does not dictate the choice of a legal rule in this area something else must, something non-economic -- in other words, something political.

This is, as noted above, a short essay. There is thus neither need nor space in this paper to rehearse the obvious and various historical differences between the U.S. and Europe that might account for their differing choices about how to treat the compulsory licensing of powerful IP. Nearly from its inception, the U.S. has enjoyed a national market in goods and services relatively free of local interference. The EU is still in the process of developing such a market. For a variety of reasons, over the past century markets have worked more effectively in the U.S. than in Europe. They have been fluid, and Americans in general seem to trust their workings. Over the long term, the U.S. has been inventive: from a social perspective, investments in innovation seem to have paid big dividends to society. Europe has had very different experiences with markets, with local protectionism, with dominant firms and with invention. Given these differences, and others, it would be odd indeed if the two legal regimes supplied identical rules to the resolution of problems whose answers are not apodictically ordained by economics.

This conclusion holds several important implications for larger issues central to competition law. Policy and enforcement. But before discussing them, it bears noting that the issue of compulsory licensing is not the only area of competition law whose questions are answered by resort to historical and cultural referents. The obligation of the dominant firm to license its valuable IP to smaller rivals is simply one of a much bigger set of questions pertaining to what kinds of behavior constitute an abuse of dominance, or monopolization. This large question can arise in many settings and business contexts, but in every case its resolution necessarily begins with certain basic assumptions about the dominant firm in general.

The U.S. not only accepts dominance , but welcomes it. The Supreme Court has recognized that the possibility of dominance creates incentives -- again in the long term – for every business to invest in assets that might enable it to achieve the monopoly rents available to dominant firms. Of course, if most firms compete to become dominant, then very few will actually succeed; and the result will be an economy that promotes consumer welfare. Markets can almost always be trusted to work But in those relatively rare circumstances when a firm does outstrip its rivals, its success will both identify it as a boon to consumers and serve as a pleasant reminder to others – in the long run – that large rewards can accompany dominance fairly earned. Moreover, if smaller firms cannot match the dominant firm's appeal to consumers , no tears will be shed on their behalf: in the long term, other challengers will enter the market, and the dominant firm, like so many before it, will lose its power to a rival with even more appeal to consumers.

Recently, the United States Supreme Court, without a dissenting voice, referred to the “mere possession of monopoly power” as “an important element of the free-market system”, observing that “the opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth”. [Trinko] Restated, the Court’s view tolerates certain short-run costs associated with the lawful possession of monopoly power, and imposes a significant burden on those who would complain about monopoly conduct, because it regards those costs (and that burden) as indispensable and unavoidable by-products of an incentive system crucial to the production of “innovation and economic growth”.

The EU is suspicious of dominance, rues its arrival, and encourages its demise. It defines dominance more broadly, and limits its exercise more strictly, than does the U.S. Opinions of important appellate courts do not contain -- as Trinko did – judicial praise for the beneficial economic role played by the dominant firm. There is less confidence that competition can undo dominance, and more fear that dominance will become and remain entrenched for the long term. Thus, as demonstrated by Microsoft, there is a preference in Europe for short term "fixes" to the "problem" of dominance, for regulation now rather than competition later, and for the preservation (and even the support) of smaller, less efficient rivals, in the hope that they can somehow check the power of the dominant firm and protect consumers from future abuse.

I have drawn these differences broadly, but they are no less real for that. Significantly, like the narrower dispute about the proper approach to IP licensing, these broader differences about the nature of the dominant firm and its relationship to the competitive process reflect views that arise largely from divergent experience with markets and dominant firms, and from the differing biases that those experiences have generated. And importantly, these differences exist and endure because in large measure economics offers no testable hypothesis about whether in the long run dominance should be encouraged or constrained, and thus lacks a coherent method for resolving them.

V. WHAT ARE THE BROADER IMPLICATIONS OF THESE DIFFERENCES?

First, the differences in approach are important. Among other things, they have significant practical implications for the enforcement of competition law, not just in Europe and the United States, but in the world at large. In product markets that are truly international, the most aggressive competition law regime can effectively create rules of world-wide application. Now that European law has made it relatively easier for smaller firms to compel dominant rivals to afford them access to valuable IP, it will be difficult if not impossible for jurisdictions with different views on this issue, and the companies doing business in them, to avoid the impact of the European rule. For practical reasons, dominant firms will not often adopt a range of country-by-country licensing practices, and European law will thus become the de facto rule in many jurisdictions that might otherwise prefer their own, distinct approach to this issue. To that extent, European law may create a significant negative externality, serving the short run interests of Europeans, but in the process imposing significant costs upon other countries' perceived interests.

Second, the differences in approach are irreconcilable. Antitrust analysis in the United States exalts the social and economic importance of the need to maintain, and even to expand, long-term incentives to innovate. They play a role that is at once powerful and unquestioned. Though it may be both distant and unknowable, the long term is very much alive in U.S. antitrust law. In Europe, the long term occupies a subordinate status. There seems to be no regulatory or judicial presumption that current legal rules will meaningfully affect incentives for long-term innovation. And indeed, the efficacy of such incentives is – in court – a matter that must be established by proof, rather than through an a priori presumption.

Moreover, the differences are irreconcilable because the values that explain them are incommensurate. The European regime places a high value on the short term benefits that consumers will likely realize from a rule of law that would sometimes afford smaller firms access to the powerful IP of their dominant rivals. The U.S. approach regards those benefits as detriments in sheep's clothing, seeing them as deeply corrosive of more highly valued long-term incentives to innovate. How can one reasonably compare the value of the short-term benefits favored by Europe to the value of the longer-term benefits preferred by the United States? Any attempt at such a comparison would require something akin to "judging whether a particular line is longer than a particular rock is heavy". [Scalia concurring in Bendix Autolite v. Midwesco Enterprises, 486 U.S. 888, 897 (1988)] Nor can one assess – except by resort to a calculus that is distinctly political – whether the short term benefits are somehow more important or desirable than those in the longer term. Measurement and comparison are simply not helpful. Without a useful metric, or a workable set of shared values, the different approaches cannot be reconciled.

Third, the fact that the differences are political – non-economic -- and irreconcilable suggests that the two regimes are highly unlikely to converge in the future on a means of resolving them. The differences are apt to be durable. And while the U.S. and EU, and other members of the world's antitrust enforcement community, have in recent years quite usefully adopted convergent approaches to the prosecution of international criminal cartels and the procedures for reviewing multi-jurisdictional mergers, there seem to be distinct limits to the possibility of future convergence around a resolution of the issues discussed in this Essay.

Finally, this analysis contains an important lesson for the world's new and emerging competition law regimes. By acknowledging that the two most developed systems disagree markedly in their approaches to the issues discussed here, and that they disagree for reasons of policy, history, and culture, I am suggesting that certain aspects of competition law – not by any means all or even most, but some – are contingent, and properly variable. Those aspects of the law do not admit of one "right" response, or perhaps of any "right" response. Rather, they admit of several responses, each contestable, all debatable, none paramount or universally conclusive.

VI. TWO CAVEATS AND A SHORT CONCLUSION

Any antitrust paper, such as this one, that expresses even mild doubt about the curative powers of economics is apt to attract criticism from those who believe that any aspersion cast upon the all-purpose utility of economics as the best and sole means of conducting antitrust analysis is one aspersion too many. But this Essay does not intend in any way to tear down the magnificent and powerful edifice so usefully constructed and developed over the past thirty years. No, economics can and does answer many of the most important questions that arise in competition law. But it cannot answer all of them.

A few significant questions – the ones discussed here, I would argue – lie beyond the competence of economics to answer. As to them, those few problems not amenable to economic analysis, it seems indisputable that the problem-solvers will necessarily draw on history and politics and culture, in order to formulate answers. This prospect is unsettling, because it is indeterminate and relative. But it is unavoidable (which may also be unsettling), since no better method for solving these problems exists.

Nor should this Essay be read as advocating carte blanche for new competition law regimes. As noted above, most of the problems arising in competition law can best be solved using accepted methods of economic analysis. In the large majority of cases, and for the vast majority of businesses, a competition law regime driven mainly by political principles and concerns would be confusing and inconstant, and could thus deter more competition than it protected. Newer competition law regimes should be encouraged to use all of the economic tools available to the more experienced regulators. But as to some issues – again, those discussed here, in which economics lacks explanatory power – developed competition law regimes seem to lack an objective basis for arguing that the history and politics of their own countries or regions should serve as the universal or international standard. As to those issues, newer regimes should presumably be free to develop their own answers on their own terms.

All of this is to say that there are limits to economics, even in a field as heavily and beneficially influenced by the discipline as competition law. Even after three decades of growing influence, during which economics has reshaped and refined competition law, some of the law's most important problems remain resistant to economic analysis. For those problems, politics and history – messy, individuated, idiosyncratic, and un-scientific – are the answers of last resort. But they have limits as well: no one answer fits all countries; different legal systems cannot completely converge; and the respective values of older systems and newer ones might conflict. So be it.