Introduction

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We brought together a set of authors from law and economics to present ideas on various "limits" to antitrust law (broadly defined) in a more global context. The issues that the chapters in this book raise suggest a broader set of limits, some intrinsic to antitrust, others extrinsic. Our starting point was the intrinsic limits of competition law that Judge Frank Easterbrook highlighted in his seminal article *The Limits of Antitrust*. We consider, however, that Judge Easterbrook's points related to his concern about overenforcement of antitrust law and the risks raised by the specificity of the U.S. enforcement system, which combines a relatively centralized, easily controllable public enforcement system with a largely decentralized private enforcement system that provides important incentives for litigation of competition law disputes, sometimes with the sole aim to extract rents from the alleged competition law infringers. Such a combination is rarely the case in other jurisdictions, even in the European Union, where private enforcement of competition law is still nascent and, in any case, lacks the instruments facilitating the choice of litigation in the United States, such as treble damages, contingency fees, class actions, and extensive discovery. A proper discussion regarding the limits of antitrust should therefore aim to examine an array of circumstances, not exclusively institutional, that might affect the scope of the competition law exercise. We start from the traditional limits imposed by the antitrust law process before addressing other, broader limits of competition law relating to

competition economics, synergies with other areas of law, institutional design, and culture.

Part I: The Competition Law Process

Far from being just an area of economics, competition law should pay close attention to the process rules that constitute the backbone of its legal system and ultimately define its reach. In Chapter 1, George Priest provides historical context for Easterbrook's writing. Priest places Easterbrook's article within the Chicago School antitrust tradition. In particular, Priest suggests that two Chicago School thinkers, Aaron Director and Ronald Coase, laid the intellectual foundations for Easterbrook in two critical areas. The first was in the emphasis on conceptualizing the market, rather than more active antitrust enforcement, as a default mechanism for economic organization. That is, the market could self-correct for monopolistic behavior. The second foundation regarded the expectation of judicial error. The concern with judicial error focused on the fact that judges were more likely to make errors based on false positives ("Type I" errors of mistaken prosecution) than false negatives ("Type II" errors of insufficient prosecution). The complexity of competition law and the prospective nature of some of the analysis performed create some uncertainty over the extent of Type I and II errors.

In Europe, the limits imposed by process have taken on a new twist that is foreign to how antitrust has been practiced in the United States and extrinsic to competition rules as such. In Chapter 2, Arianna Andreangeli discusses Council Regulation No 1/2003, which conferred pervasive investigative powers upon the European Commission and also bolstered the cooperation between the European Commission and the National Competition Authorities. The regulation enlarged the array of tools at the Commission's disposal for competition matters. However, the stronger competition enforcement in recent years by the European Commission raises a number of issues about the position of the investigated parties as well as, more generally, their freedom to choose how to conduct themselves in the market. For a number of years, a lively and often strongly worded debate has been taking place as to the fairness of the European Commission's application of the competition rules. Some argue that the current mechanisms for competition enforcement would not secure compliance with the concept of "due process" as enshrined in European human rights standards and especially in Article 6(1) of the European Convention on Human Rights (ECHR). Andreangeli notes that the poten-

tial tensions between freedom of enterprise and the protection of genuine competition have become especially evident in the aftermath of the *Microsoft* case. In *Microsoft*, the Commission and the Court of First Instance were prepared to impose considerable limits on the freedom to contract and on the exercise of intellectual property rights enjoyed by a dominant undertaking. Given this position, Andreangeli addresses where to draw the boundary between, on the one hand, the pursuit of competition through administrative action and, on the other, the effective protection of business freedom and of freedom from disproportionate interferences with the undertakings' rights. The first part of her chapter focuses on the procedural aspects of this issue and considers the extent to which the current safeguards, prescribed by Council Regulation No 1/2003 and interpreted by the European Court of Justice, are sufficient to fulfill the standards of due process enshrined in the ECHR. The second part addresses the substantive question of whether the restrictions on the freedom of contract, and more generally on market freedom, imposed upon dominant firms by competition enforcement agencies are compatible with the rights contained in the ECHR.

Part II: The Economic Limits of Competition Law

Economic analysis drives competition law. To what extent, however, is economics a limit to antitrust? That is, has the competition law doctrine internalized advances in economics? The integration of economic analysis into competition law raises important questions on the extent to which it is possible to use in a legal context the existing economic methodology that developed in response to the internal economic discipline concerns. Economic analysis may set limits to the ability of competition law to come up with optimal legal rules that are administrable. The next few chapters explore issues within this theme.

In Chapter 3, Anne-Lise Sibony reflects on factors that limit imports from economics into competition law. Leaving aside well-known limitations that are inherent in economic science as well as practical limitations that stem from unavailability of data, this contribution focuses on limits that characterize the importing process itself. Taking the view that there are generally several different ways of importing any given economic insight into the law, Sibony looks at the technical choices that an importer of economics (court, competition authority) faces. Going back to basic legal categories of interpretation and proof, this analysis highlights trade-offs that have to be made between different importing techniques, each with its own limitations.

In Chapter 4, Jeffrey Harrison highlights the complexity of integrating economic concepts in legal outputs with a study of the application of competition law to monopsony. To some extent the U.S. monopsony antitrust law analysis is the mirror image of the analysis of monopoly and collusion among sellers. Two particular problems, however, complicate monopsony analysis. The first is the possibility that sellers can be forced onto an all-or-nothing supply curve. The outcome is exploitation of input providers without losses in allocative efficiency. The second problem is identification of the proper parties to bring private actions when they are permitted. In these respects, Harrison argues that the concepts of antitrust injury and standing must be applied in the context of sellers and not the more typical case of buyers.

In Chapter 5, Herbert Hovenkamp emphasizes the diversity of economic theory by addressing the role of transaction cost economics (TCE) within antitrust. He identifies at one extreme the "structural" school, which saw market structure as the principal determinant of poor economic performance. At the other extreme was the Chicago School, which also saw the economic landscape in terms of competition and monopoly, but found monopoly only infrequently and denied that a monopolist could "leverage" its power into related markets. Since the 1970s, both the structural and Chicago positions have moved toward the center, partly as a result of TCE. As Hovenkamp notes, a distinctive feature of TCE is that transactions occur with a limited range of partners depending on limits of knowledge and previous technological commitment, or asset specificity. The question of who trades is at least as important as the terms of trading. TCE analysis of contractual restraints also recognizes that one threat to consumers is double marginalization, which can occur when market power is held by separate firms with complementary outputs.

Antitrust is relevant in two ways. First, private arrangements can minimize double marginalization, justifying practices such as tying in markets characterized by single-firm dominance or product differentiation. Both tying and bundled discounts operate as a kind of "reverse leveraging," benefiting consumers. Second, transaction costs sometimes explain why private contracting is inadequate for addressing double marginalization problems and, thus, they justify antitrust intervention.

Hovenkamp then explains how TCE has also reinvigorated the link between conduct and exclusion, as illustrated by the Williamson/Areeda-Turner dispute over predatory pricing and the rise of the antitrust literature on raising rivals' costs (RRC). The RRC literature has attempted to restore a meaningful conception of anticompetitive exclusion without a return to the excesses

of the structuralist school. Nevertheless, Hovenkamp suggests that one comparative advantage of both structuralism and the Chicago School was their simplicity. For the structuralists, concentration explained everything and inferences were drawn in favor of condemnation. Within Chicago School analysis the impossibility of leveraging and the mobility of resources explained everything and inferences were drawn in favor of exculpation. Hovenkamp concludes that TCE analysis is more specific to the situation, however, demanding close scrutiny when significant market power either is present or realistically threatens.

Part III: Competition Law and Its Synergies with Other Areas of Law

This part explores the interaction of competition law with other areas of law that pursue different objectives and in some instances may limit or expand its scope. These chapters explore the characterization of competition law as separate from regulation. In some cases competition law may be a substitute and in other cases it may be a complement. In yet another set of cases, other forms of regulation may create constraints on the effective functioning of competition law.

In Chapter 6, D. Daniel Sokol notes that Easterbrook focused only on competition problems that were specifically within the realm of antitrust law. In doing so, Easterbrook overlooked government-created restraints on competition. This, Sokol argues, was a mistake, as the real limit of antitrust is that antitrust enforcement (particularly public enforcement) may not reach the type of conduct that is most harmful to economic growth and development—anticompetitive government regulation. Sokol's chapter explains the causes and dynamics of anticompetitive government regulation. He then explores both the potential and the limits of antitrust to address the behavior. His chapter concludes with suggestions for how competition authorities might want to prioritize the kinds of competition advocacy interventions that have a high likelihood of success to reduce the anticompetitive impact of government restraints.

Damien Gerard (Chapter 7) also focuses on government restraints. His chapter's more narrow focus is on state action. He argues in the European context that the key test in assessing the legality of public restraints (as opposed to private practices) ought to be whether they infringe the internal market provisions rather than the competition law rules of the Treaty on the Functioning

of the European Union (TFEU). Indeed, he writes that the internal market provisions are best suited to achieve the right balance between the pursuit of allocative efficiency and the necessary deference to Member States' (albeit limited) sovereignty. In turn, they effectively prevent protectionist behaviors while preserving Member States' ability to pursue redistributive objectives. Hence, he argues that it is time to depart from the state action doctrine as developed by the EU courts and thus to consider public restraints through different lenses other than private practice. To reach this conclusion, Gerard undertakes a three-stage analysis. First, he provides an overview of the state action doctrine as developed in the EU and contrasts it with the position adopted in the United States. Second, he highlights the main pitfalls of the state action doctrine and their origins. Third, Gerard suggests a new approach to public restraints and tests it against past cases.

In Chapter 8, Daniel Crane suggests a significant change from existing antitrust practice. The limit of antitrust may be antitrust law itself. Thus, Crane suggests shifting some of antitrust's responsibility to intellectual property law in areas where there is overlap. Much of the judicial retrenchment of antitrust liability norms in the United States in the last quarter century has been motivated by concerns over antitrust's institutional and remedial structure. Treble damages, lay juries, attorney-fee shifting, and other features create a concern that overly zealous antitrust enforcement will chill beneficial competition, as Easterbrook noted. There is also a perception that courts are ill equipped to police dominant firm behavior, for example, by limiting the prices a monopolist charges or the quality of its service, or by imposing the terms and conditions upon which it must deal with rivals. Crane argues that intellectual property law can address many of the issues that antitrust cannot (or will not) address in IP-intensive industries. For example, by shifting from property rules to liability rules for intellectual property rights, courts can police market power without imposing an affirmative obligation to deal or (usually) directly engaging in rate regulation of dominant firms.

One natural area of overlap in competition and regulation is in the area of consumer protection. Indeed, many competition agencies also have a consumer protection function. In Chapter 9, Paolisa Nebbia argues that while the assumptions and the aims of competition and consumer protection laws are substantially different, parallel remedies under each set of rules may, in some cases, be available. Her chapter identifies a number of situations where a claim may be couched in terms of both a competition law and an unfair commercial practice. She then examines whether, in practice, any similarity

between the two types of claims can justify common approaches at the enforcement level.

Part IV: Competition Law and Institutional Design

By now it should be clear that the economic sophistication of competition law, the complexity of its enforcement, its interaction with other areas of law, and the process limits imposed by the legal system should be taken into account in designing appropriate institutions for an effective implementation of competition law. The chapters of this part examine that design.

Focusing on institutional design, Javier Tapia and Santiago Montt (Chapter 10) discuss the allocation of power within a competition system between the enforcement body with primary jurisdiction over competition matters on the one hand and the reviewing courts or tribunals on the other. First, they address the basic set of questions that emerge from an institutional analysis. At the most basic level, institutional design must answer whether there should be a unified administrative decision maker, or if there should be separation between enforcement and adjudicatory functions. As a corollary, if there is a separate body in charge of deciding competition law violations, should the adjudicatory body be a specialized tribunal, or should it be the courts of general jurisdiction? Second, what are the characteristics that the reviewing court should have?

Based upon these questions, the chapter identifies four models of judicial scrutiny that fit well in comparative practice. The remainder of the chapter focuses on two of those models in more detail based upon a case study of the Chilean competition law system. Tapia and Montt conclude that despite a still-limited knowledge of institutional design, judicial review would benefit from a deferential standard of review applied by courts in relation to a competition authority's expert decisions.

Frédéric Jenny (Chapter 11) also focuses on institutional design. During the 1990s, competition law expanded in a great number of countries, and major efforts have been undertaken in the context of various international organizations (such as the Organisation for Economic Co-operation and Development and the International Competition Network) to promote a convergence of views on the goals of competition law and to define best practices for competition authorities. Because the 1990s were a period of rapid economic expansion, deregulation, and privatization, a generally held view was that competition authorities should be independent of both businesses and

governments. It was also commonly accepted that competition authorities should have a dual role: the role of competition law enforcers and the role of competition advocate. Jenny notes that this model worked reasonably well until the middle of the first decade of this century as competition authorities became respected enforcers of competition laws. Nevertheless, this model had some critics in countries where there was a concern that the government itself, either through direct intervention as a supplier of goods or services or as a drafter of restrictive regulations, was a major source of competition problems. When the economic and financial crisis hit, Jenny argues, government intervention became much more widespread and ubiquitous than before. Government interventions included fiscal stimulus packages and grants of state aid, the promotion of bank mergers or recapitalization schemes, the reinforcement of financial regulations, and the adoption of restrictive international trade measures. Jenny notes that the concern about competition shifted somewhat from anticompetitive practices by business firms to unwarranted and shortsighted government interventions in market mechanisms.

Jenny suggests that the model of competition authorities as institutions independent of the executive branch of government focused mostly on anticompetitive practices of firms. Indeed, under such models, competition authorities, not being part of the government, have been largely left out of the policy debate. In some countries, the competition authority, even though it is independent, may provide public opinions and, therefore, has some ability to let government or parliament know which general direction it considers the most compatible with competition law and policy. But being outside of government means that competition authorities are not consulted on a range of issues that may affect the competitive environment and are not in the drafting room when restrictive policies are being finalized. Whether this is a good or a bad thing is open to debate, and the answer partly rests on an assumption about the respective roles of law enforcement and advocacy in shaping a more competitive environment for the future. Jenny concludes that the model of a competition authority independent of the executive, but in charge of both antitrust enforcement and competition advocacy, may need to be revised. Therefore, according to Jenny, a better model would separate the functions and include an independent enforcer and an administrative body in charge of competition advocacy.

In Chapter 12, Ioannis Lianos highlights a less-examined limit to competition law—that of implementing effective and proportional remedies. The focus is not, as in Easterbrook's article, on the definition of the scope of liabil-

ity and process rules that limit the discretion of competition authorities, but on the remedial phase of competition law enforcement. There is an inherent tension between the objective of efficiency in competition law enforcement and the limited power competition authorities have to adopt far-reaching remedies that would appear disproportional with regard to the competition law violation identified. The recourse to economic analysis offers a flexible tool to competition authorities eager to redesign the market process so as to promote effective competition. However, the rule of law and basic requirements of corrective justice may limit the discretion of competition authorities to adopt remedies and may consequently limit the scope of competition law. Lianos examines the application of what he terms "discretionary remedialism" to EU competition law, in particular by focusing on the enforcement of Article 102 TFEU on the abuse of dominant position. He defines "discretionary remedialism" as the view that courts (or competition authorities) have discretion to award the "appropriate" remedy in the circumstances of each individual case rather than being limited to specific (perhaps historically determined) remedies for each category of causative events. He notes that principles of discretionary remedialism separate the issue of liability from that of remedy. Lianos opposes this view. His chapter begins with an examination of the relationship between the liability and the remedy phases of an Article 102 proceeding in general. He then integrates the issue of discretionary remedialism and the distinction between the liability and remedial phase with the broader debate on the relation between efficiency and distributive justice from one side and corrective justice from the other side. Next, he examines the importance of discretionary remedialism in the context of antitrust. In this context, he illustrates why it is important to limit discretionary remedialism's effects by exploring the objectives pursued by competition law remedies. He argues that a coherent theory of competition law remedies is incompatible with a sharp dichotomy between liability and remedy. The emergence of a remedial proportionality test in EU competition law demonstrates also the necessary logical connection between the remedy and the liability phases. The final part of the chapter explores whether and how the remedial proportionality test will operate in the context of an "effects-based approach" under Article 102 TFEU.

Part V: Competition Law and Culture

In Chapter 13, Thomas Cheng questions whether economic concepts that underpin competition law doctrines are culture-specific. Most microeconomic and industrial organization theories have been developed in Western countries. It is possible that the validity of these concepts diminishes when economic actors behave differently across cultures. Cheng notes that divergence across cultural norms means that firms and consumers may behave differently from country A to country B. Cheng focuses his analysis on two areas of competition law—cartels and vertical restraints. After explaining how some traditional assumptions about behavior in each setting may vary based upon culture, Cheng suggests that cultural considerations may require fine-tuning of competition analysis and enforcement under some limited circumstances. In doing so, he explains that cultural variations may undermine the feasibility of a one-size-fits-all approach to antitrust that some scholars and policy makers have embraced in recent years.

Also on the topic of culture, Ki Jong Lee (Chapter 14) examines the role of culture in competition law within an Asian context. His chapter examines the correlation between national cultures and competition policies in searching for measures to promote convergence of competition policies in Northeast Asia. Lee's chapter presents evidence on culture-competition correlation. He then discusses the implications of the correlation for the convergence of competition policies. He concludes with some suggestions to promote competition law and policy convergence within Asia. He advocates the promotion of competition-friendly values at a regional level to push for the convergence of competition policies. In the long run, Lee argues, competition authorities need to undertake measures directly focusing on citizens' values beyond the traditional scope of competition advocacy.

In Chapter 15, Julián Peña points out some common limits to the development of competition law in Latin America. These common limits are cultural, political, economic, and institutional. Peña analyzes each of these limits to assess the challenges faced by implementing competition laws and policies designed for a different context without making the necessary adjustments to the reality of each country (or the region as a whole). His chapter is a cautionary story of good intentions that have created ineffective policies because competition law has not been calibrated to the reality of Latin America.

Overall, we believe that this book reflects a broader understanding of what limits there are to competition law. Indeed, titling the book *The Global Limits*

of Competition Law reflects the reality that after over one hundred years of operation in the United States, "antitrust" has become global. The context and dynamics of competition law and policy share some common themes around the world but also suggest some differences based on a number of different assumptions about legal regimes, economics realities, and institutional designs.