SUBSTANTIVE CRITERIA AND LEGAL STANDARDS IN RECENT ABUSE OF DOMINANCE DECISIONS IN HI-TECH MARKETS: EU VS. U.S. AND LESSONS LEARNED

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I. INTRODUCTION

The main objectives of this article are, first, to show the important role of differences in Substantive criteria or Standards[2] ("SSs") in explaining differences in the Legal Standards[3] ("LSs") adopted in Competition Law ("CL") enforcement in the EU vs. the U.S. Second, to discuss the important role of the Courts and the judicial review process in explaining how the EU and U.S. agencies choose their LSs. Third, to explain why in both jurisdictions (EU and U.S.) the rule of reason is not adopted in assessing abuse of dominance ("AoD") cases in hi-tech markets. Fourth, to discuss whether and how the recognition of the impact of potentially anticompetitive (exclusionary) conduct on innovation in hi-tech markets, such as that related to "digital platforms," should affect enforcement procedures.

To start with, we note that, following U.S. doctrine, we will think of LSs as lying along an analytical *continuum* the boundaries of which are the Strict *Per Se* ("SPS") LS (which we will call the "lowest" or "minimum" LS) and the Rule of Reason or Full Effects-Based ("FEB") LS (the "highest" or "maximum" LS).[4] As Jones and Kovacic (2017)[5] note "the general progression in U.S. doctrine has been toward recognition of an *analytical continuum* whose boundaries are set, respectively, by categorical rules of condemnation (*per se* illegality) or acquittal (*per se* legality) and an elaborate, fact-intensive assessment of reasonableness (Rule of Reason). These poles are connected by a range of intermediate tests that seek to combine some of the clarity and economy of bright-line rules with the greater analytical accuracy that a fuller examination of evidence can produce." The Modified *Per Se* ("MPS") and the Truncated Effects Based ("TEB") are LSs lying along the continuum between SPS and FEB and often recognized in antitrust decision discussions and the literature.[6] In summary and simplifying somewhat, under (strict) *Per Se* only conduct characteristics are examined and assessed; under MPS these are examined as well as market characteristics and extant market power; under TEB additional analysis establishing exclusionary or market power enhancing effects is undertaken; and under FEB the above are supplemented by additional analysis/evidence to establish the net effect of the specific conduct on some measure of welfare, taking into account potential efficiencies.[7]

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[2] *Criterion* for reaching decision about whether or not there is violation of law (i.e. criterion that governs antitrust case adjudication). In much of the economic literature this is assumed to be consumer welfare or total welfare. However, in practice many other criteria are used and often other criteria are dominant. See below for the EU case.

[3] Decision rule that describes *how* decisions are reached. How do we show that substantive criterion is (or is not) satisfied? Through an *inference* (*Per Se* LS) or not (effects-based LS)?

[4] We will not use lawyers' terminological distinction between "rules" and "standards" and consider *Per Se* and rule of reason (or effects-based) as alternative "legal standards."

[5] Jones A. & W. Kovacic (2017), "Identifying Anticompetitive Agreements in the US and the EU – Developing a Coherent Antitrust Analytical Framework," Antitrust Bulletin, 62(2).

[6] See Gavil A., W. Kovacic & J. B. Baker (2008), "Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy," West Academic Publishing, p. 358; Gavil Andrew (2008), Burden of Proof in U.S. Antitrust Law, in 1 ISSUES COMPETITION LAW AND POLICY 125 (ABA Section of Antitrust Law 2008); Hovenkamp, H. J. (2018), "The Rule of Reason," Florida Law Review, available at https://ssrn.com/abstract=2885916; Katsoulacos Y. (2018a), "A Note on the Concepts of Legal Standards and Substantive Standards (and how the latter influences the choice of the former)," DP available at http://www.cresse.info/default.aspx?articleID=3388. Katsoulacos Y. (2018b), "On the Choice of Legal Standards: a Positive Theory for Comparative Analysis," 2018b. DP available at http://www.cresse.info/default.aspx?articleID=3388. Jones & Kovacic, *supra* note 5.

A number of lessons have been learned from recent EU hi-tech AoD cases (*Intel, Google, QUALCOMM*), which we can summarize as follows:

1. The substantive standard (SS) (or, liability standard) in the EU is non-welfarist. Also, the main responsibility for the substantive criterion adopted lies with the European Courts – which are "charged with responsibility for interpreting EU law" (Jones and Kovacic, 2017).

2. The legal standards (LSs) are much closer to *Per Se* than to FEB (specifically, MPS Illegality).

3. The ECJ *Intel* decision is in the right direction but it is not going to lead to the adoption of a FEB LS.

Let us then turn to consider in detail the SSs and LSs in the EU and how they differ from those in the U.S.

II. THE SSS AND THE LSS IN EU AND U.S.: A COMPARATIVE DESCRIPTION

In the EU there are multiple goals guiding antitrust enforcement and, under the influence of a strong Ordo-Liberal tradition, the dominant SS is not welfarist: it is that of the impact of the investigated conduct on rivals (or, impact on the "competitive process"). In *Intel*, for instance, the GC 2014 Judgement on EC's Decision ((T-286/09) explicitly rejected the idea that the criterion of "non-disadvantaging rivals" is not the main criterion governing adjudication in the EU. And the 2017 ECJ Judgement did not contradict the GC on this point. References concerning the goals of European antitrust that confirm this point include Korah (2010), Blair & Sokol (2013), Wils (2014), Gifford & Kurdle (2015), Jones & Kovacic (2017).[8]

With regard to LSs in AoD cases, there is nothing new in the use of *Per Se* Illegality type legal standards in the EU in recent Article 102 cases. As Geradin & Petit noted in 2010, under a presumption of illegality, the assessment of abuse of dominance cases in the EU has relied on "old, formalistic legal appraisal standards, and (has shown) a reluctance to endorse a modern economic approach."[9] For another review and appraisal reaching the same conclusions, see Neven (2006) and the recent analysis of Ibanez Colomo (2016).[10] The latter's careful and extensive review of the *European Courts' choice of legal standard* in abuse of dominance cases shows that, for a large number of practices associated with such cases, the standard is one of *Per Se* Illegality while for the rest the standard is what we call here the TEB LS (which certainly falls short of FEB or rule of reason).

But there are a number of problems with the criticisms of EU enforcement in AoD cases:

1. First, the criticisms concentrate on the (*Per Se* type) LSs applied. But the choice of the substantive criterion is the more fundamental issue.

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[7] Consumer or total welfare. See, for example, Blair R. D. & D. Sokol (2012), "The Rule of Reason and the Goals of Antitrust: An Economic Approach," Antitrust Law Journal, 78 (2), 471 - 504.

[8] See Korah (2010), "The Reform of EC Competition Law: The Challenge of an Optimal Enforcement System," in *The Reform of EC Competition Law*, by I. Lianos & I. Kokkoris (eds), Kluwer Law International, The Netherlands; Blair R. D. & D. Sokol (2013), "Welfare Standards in US and EU Antitrust Enforcement," Fordham Law Review. Volume 81, Issue 5; Gifford D. J. & R. T. Kudrle (2015), "The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy," University of Chicago Press; Jones & Kovacic, *supra* note 5; Wils W. (2014), "The Judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance," World Competition, 37, no 4.

[9] Geradin D. & N. Petit (2010), "Judicial Review in EU Competition Law: a Quantitative and Qualitative Assessment," TILEC DP No. 2011-008.

[10] Neven, D. (2006), "Competition economics and antitrust in Europe," Economic Policy 21(48), 741-781. Ibanez Colomo P. (2016), "Beyond the 'more economic-based approach': a legal perspective on article 102 TFEU case law," Common Market Law Review, 53 (3). See also Papandropoulos P. (2010), "The implementation of an effects-based approach under art. 82: principles and application," Chapter 14 of "The Reform of EC Competition Law – New Challenges," edited by I. Kokkoris & I. Llannos, Kluwer Law International; Peepercorn Luc (2015), "Conditional Pricing: "Why the GC is Wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates," Concurrences Journal; On the recent EU *Intel* decision see Rey P. & J. S. Venit, (2015), "An Effects-Based Approach to Article 102: A Response to Wouter Wils," World Competition, 38, no 1: 3-30; Marsden P. (2010), "Exclusionary abuses and the justice of 'Competition on the Merits,'" Chapter 14 of "The Reform of EC Competition Law – New Challenges," edited by I. Kokkoris & I. Llannos, Kluwer Law International.

2. Second, and related to the above, the relation between the substantive criterion and the LSs adopted, and the influence of the former on the choice of the latter, is not clarified or properly taken into account.

3. Third, too much emphasis is placed on the EC, while not enough emphasis has been given to the role of the Courts and the judicial review process: however, for reputational reasons, the EC has to adjust to the standards adopted by the Courts.

4. Finally, the fact that AoD cases in hi-tech markets in the EU usually end-up with infringements while in the U.S. they end up with acquittals is often confused with the relative use of FEB LSs in these two jurisdictions. The truth is that in neither jurisdiction do we see use of FEB LSs in these cases, as we discuss further below.

Concerning the situation in the U.S., this can be summarized as follows:

(i) Up to the end of 1970s there were also many "goals" – including, importantly, that of protecting the competitive process – and monopolization cases were assessed using *Per Se* Illegality legal standards.

(ii) Since the end of 1970s, the U.S. Courts have accepted the view that antitrust law is a "consumer welfare prescription" (Jones and Kovacic, 2017). But it is worth noting that recently there have been quite a few voices that have argued that this should change, and the emphasis should return to the protection of the competitive process (e.g. Werden & Froeb, 2018 and Wu, 2018).[11]

(iii) With regard to legal standards, from the end of the 1970s, there have been two competing schools: the Chicago School arguing that the appropriate LS is that of Modified *Per Se* Legality (i.e. presuming legality even when significant extant market power has been established, and allowing the conduct) and the Post-Chicago School arguing for FEB (or Rule of Reason ("RoR")) (see, e.g. Padilla & Evans, 2005[12]).

(iv) In monopolization cases, especially perhaps in hi-tech/innovation – intensive markets, the FEB prescription has been losing – despite of the increasing number of voices that things should change.

Table 1: A summary: EU vs. U.S. in AoD cases

	Substantive Standard	**Presumption for dominant firms and approach to errors**	**Legal Standard**
EU	Non-disadvantaging rivals	Illegality (i.e. conduct assumed to have exclusionary effects, on average). Emphasis on false acquittals.	Mostly MPS Illegality
U.S.	Consumer Welfare	Legality (i.e. conduct assumed to increase consumer welfare, on average). Emphasis on false convictions	Mostly MPS Illegality

Ideology, the culture of competition, tradition, and the role and influence of economics and economists, explain the different substantive standards. But: what explains the different presumptions and types of legal standards and the fact that these are not FEB in either case?

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[11] Wu T., "After consumer welfare, now what? The 'protection of competition' standard in practice," CPI (April, 2018); Werden G. J. & L. M. Froeb (2018), "Back to School: What the Chicago School and the New Brandeis School get Right," Symposium on "Re-Assessing the Chicago School of Antitrust Law."

[12] Padilla, J. & D. S. Evans, "Designing Antitrust Rules for Assessing Unilateral Practices: a Neo-Chicago Approach," University of Chicago Law Review, Vol.72 (2005).

III. EXPLAINING THE DIFFERENCES IN PRESUMPTIONS AND LSS

In recent positive theory on the choice of LSs (Katsoulacos 2018a,b), the latter are adopted by Competition Authorities ("CAs") in anticipation of the standards that are adopted by appeal Courts, taking into account reputation-related concerns (CAs prefer not to have their decisions reversed or annulled by Appeal Courts) and implementation costs (higher LSs have higher implementation cost per decision reached). In turn, the Courts' choice of LSs is influenced by their SSs and, given the latter, by the Courts' priors concerning the implications of different LSs for decision errors, deterrence and administrability considerations[13]. As the theory establishes, non-welfarist SSs, for example using the criterion of "non-disadvantaging rivals," are more likely, ceteris paribus, to lead to the adoption of *Per Se*-type LSs (Katsoulacos, 2018a).[14] Positive theory offers a basis for explaining the differences in LSs in different countries and why LSs may be lower (closer to *Per Se*) than we would expect on welfare maximization grounds (Katsoulacos, 2018b).[15]

A. Explaining Different Presumptions

According to Table 1, conduct by firms with a dominant position, which is considered presumptively illegal in the EU, is considered presumptively legal in the U.S. Both positions can be right, if we consider the differences in SS in the two jurisdictions (first column of Table 1). Conduct that is considered on average to have exclusionary effects (and so is considered presumptively illegal under the EU SS) can simultaneously be considered, on average, not to reduce consumer welfare (and so is considered presumptively legal under the U.S. SS). In the latter case, the conducts are presumed to generate significant procompetitive effects (that are not considered or are not given significant weight in the EU).

B. Explaining Different LSs: The Importance of Differences in SSs

We note that under the "non-disadvantaging rivals" substantive criterion the *maximum* LS that can be chosen is lower than the FEB LS (or rule of reason), which is the maximum LS under the consumer welfare criterion. This becomes clear once we consider that under the first criterion we do not need to consider procompetitive effects or efficiencies and how they balance with anticompetitive effects. Also, and importantly, as noted above, recent theory shows that the likelihood of using an MPS LS is higher when the substantive criterion is "non-disadvantaging rivals" rather than consumer welfare (Katsoulacos 2018a). This is because the strength of the presumption of illegality under MPS is higher in the former case. In summary, *given the SS of EU Courts, it is natural to find that conduct by dominant firms is considered presumptively illegal and is assessed using the MPS Illegality LS.*

In the U.S., on the other hand, the SS of consumer welfare leads to a presumption of legality, but this is not so strong as to justify a *Per Se* (or, more accurately, MPS) Legality LS. In order to justify the choice of TEB Legality LSs (Table 1) we need to explain also why, in the U.S. too, a FEB LS (or RoR) is not used. We turn to this in Section 4 below.

C. Will the ECJ Intel Judgement Change the Situation in the EU?

The ECJ (2017) Judgement on *Intel* represents a move in the right direction. Interpreting the judgement in terms of the above discussion, the ECJ decision does ask the GC to move away from the MPS Illegality LS, towards *truncated effects-based illegality*, whereby it must be established, by *undertaking an AEC investigation for the specific case* (and *not* just relying on an inference as under MPS Illegality) that rivals are indeed disadvantaged. But, this is certainly not a request for a FEB LS (or RoR) that takes efficiencies seriously into account and undertakes a balancing test, given that the ECJ, as does the GC, also adopts the "non-disadvantaging rivals" SS under which, as indicated above, there is no scope for a FEB LS.

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[13] Katsoulacos & Ulph (2009, 2016a and 2016b) provide an analysis of the factors that influence the choice of LSs when the objective is that of social welfare maximisation – taking into account decision errors, deterrence effects and legal uncertainty. Katsoulacos Y. & D. Ulph (2009), "On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis," Journal of Industrial Economics; Katsoulacos Y. & D. Ulph (2016a), "Regulatory Decision Errors, Legal Uncertainty and Welfare: A General Treatment," International J. of Industrial Organization; Katsoulacos Y. & D. Ulph (2016b), "Legal Uncertainty, Competition Law Enforcement Procedures and Optimal Penalties," European J. of Law and Economics, 41(2). The Katsoulacos & Ulph analyses can be thought of as formalizing and generalizing Padilla & Evans (2005), *supra* note 12.

[14] Katsoulacos Y. (2018a), *supra* note 6.

[15] Katsoulacos Y. (2018b), *supra* note 6.

IV. EXPLAINING AVOIDANCE OF FEB (OR RULE OF REASON) (IN BOTH JURISDICTIONS)

From the above, the fact that FEB is not used in the EU is easy to justify. Under a "non-disadvantaging rivals" SS and a presumption of illegality for AoD practices, the maximum LS that could be adopted is that of a TEB Illegality LS. In fact, under the European SS an even lower LS, the MPS Illegality LS, can be justified[16] and this was indeed the position of the GC in the *Intel* case (but see also below), as well as the position in many other cases, for a large number of AoD practices, as identified in the recent study of Ibanez Colomo (2016).[17]

To explain the avoidance of FEB LSs in AoD cases in recent enforcement in the U.S. hi-tech markets, we provide two considerations. The first is that the discriminatory quality[18] of economic models and economic evidence in AoD cases may be considered by Courts to be lower than in mergers and vertical restraints. This has the implication that Courts may then prefer to use lower LSs than FEB, such as TEB LSs.[19] Agencies then follow the Courts and also adopt the lower LS, since the additional analysis and evidence examined under the higher standard, that involves an additional cost, will not be considered by the Courts. The second is that, even if the FEB LS is considered appropriate by Courts, the economic analysis, modelling and related evidence under FEB increases the disputability of the decisions reached by Agencies, thus making these decisions more likely to be rejected (or reversed, or annulled) when FEB LSs are used (Katsoulacos, 2018b).[20] This constitutes a very serious disincentive for the use of FEB by Competition Agencies (CAs) in AoD cases. This is because reputation-sensitive CAs must make decisions on LSs considering the risk of annulment under alternative LSs. This, plus the higher implementation cost of FEB, may lead them to choose *a lower* LS (such as a TEB) even when the Courts prefer FEB (Katsoulacos, 2018b).[21]

There is empirical evidence showing that, for conducts in which FEB LSs are used, the annulment rate is higher than it is for conducts in which *Per Se* type standards are used. Thus, for example, Neven (2006) looks at all the appeals against EC decisions in the period 1994 – 2006, and computes the proportion of cases in which the EC prevailed (so decisions were not annulled). He finds a success rate of Article 82 (AoD) decisions, that "have remained focused on form," of 98 percent which, as he comments, "is striking." For mergers and Article 81 cases focusing on effects the fraction is much lower – 75 percent. Neven considers this "probably the most important insight…(from his findings)….."[22] For a similar appraisal, using again evidence from the EU, see also Geradin & Petit, 2010.[23] Further, the evidence presented by Neven is confirmed with a much larger/updated dataset (that considers EC decisions from 1992 until 2016) by Katsoulacos et.al., 2018.[24]

The U.S. *Google* case perhaps best illustrates the importance of the above argument (relating to the incentives of agencies to avoid decision reversals in appeal Courts) for the situation in the U.S. Concluding its *Google* investigation in 2013 the FTC noted that "the law protects competition, not competitors" and that there was not enough factual evidence of alleged "search bias" to support a complaint. Kovacic (2018), interpreting the outcome, wrote that "Supreme Court rulings have given dominant firms more freedom (than in the EU) to control pricing, product development and marketing…" noting that "I believe that *the crucial factor that led the FTC to back down was its perception that Google ultimately would prevail in the Courts*. If U.S. doctrine resembled EU antitrust doctrine regarding dominant firms, there is a strong chance that the FTC would have brought its own case."[25]

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[16] Katsoulacos Y. (2018a), *supra* note 6.

[17] Ibanez Colomo, *supra* note 10.

[18] In terms of their ability to distinguish, for some conduct category, harmful to welfare from benign cases.

[19] As the theory of socially optimal legal standards suggests, which is the appropriate theory to apply for welfare maximising Courts (Katsoulacos & Ulph, (2009), *supra* note 13). Welfare optimal LSs are the LSs that minimise decision errors and adverse deterrence effects. Katsoulacos & Ulph (2009), *supra* note 13.

[20] Katsoulacos Y. (2018b), *supra* note 6.

[21] The likelihood of this happening is greatest when the alternative to FEB is TEB Legality: under the latter the CA will acquit the firm under investigation and thus avoid appeals (acquittals are usually not appealed) and potential reversal of its decision while incurring lower costs. Katsoulacos (2018b), *supra* note 6, shows that the CA may choose a lower than FEB LS even if the alternative is TEB (or MPS) Illegality.

[22] Neven, *supra* note 10.

[23] Geradin & Petit, *supra* note 9.

[24] Katsoulacos, Y., G. Makri & E. Metsiou (2018), "Antitrust Enforcement in Europe in the Last 25 Years: Developments and Challenges," Forthcoming in Review of Industrial Organisation.

[25] Our italics.

These remarks are consistent with our evaluation of EU – U.S. differences in recent high-tech AoD cases. Specifically, in the EU Courts need, for a finding of infringement, *only* to demonstrate exclusionary potential[26] for a conduct considered presumptively illegal. Given this, and that the presumption of illegality is considered to be sufficiently strong once dominance is established, the MPS Illegality LS is the optimal standard and the EC would have no incentive not to follow this. In the U.S., Courts require *for infringement* evidence of a reduction in consumer welfare (by the use of FEB) for a conduct considered presumptively legal.[27] Given this, as noted above, the TEB (or MPS) Legality LS is the optimal LS for the Agencies – attempting to show infringement through a FEB would be too risky in terms of the expected rate of annulment (and more costly).

V. COMMENTS ON THE IMPORTANCE AND IMPLICATIONS OF INNOVATION FOR ENFORCEMENT

One characteristic of hi-tech markets in recent antitrust enforcement in the EU and U.S., which has drawn a lot of attention, is that these markets are highly innovation intensive. It has been stressed by many authors that enforcement in innovation-intensive markets must be re-calibrated to preserve the incentive to innovate (by placing more weight on dynamic over static competition). The question is exactly what this re-calibration should involve.

It has been suggested by some that the current situation could be improved by abandoning, in the U.S., the consumer welfare SS and moving to a "protection of the competitive process" SS. For example, Wu (2018) writes that "this small change…would make antitrust far more attentive to dynamic harms."[28] Other prominent writers, such as Werden & Froeb (2018) also favor, more generally, a switch from consumer welfare to the "protection of the competitive process"[29] SS. Opposing views have, however, been expressed by, among others, Blair & Sokol (2012 and 2013), Coniglio (2017), Farrell & Katz (2007), Salop (2010), and Carlton (2007) – who favors a total welfare SS.[30]

We think that the starting point in discussions on whether/how innovation should affect enforcement practice, before advocating a switch in SS, must be to consider the question of how innovation is related to the intensity of competition. While this is a subject still open to additional theoretical and empirical analysis, there is a high degree of consensus that, according to existing knowledge, innovation in a market is positively influenced by competition intensity and that we are in general likely to be on the "upward part" of the inverted U-shaped curve (which relates innovation to intensity of competition according to empirical analyses) in the AoD cases under consideration here. This suggests that exclusionary conduct, which lowers competition intensity, is likely to lower total innovation in a market in the long-run. This is one factor that needs to be considered.

The other factor concerns the weight one gives to Type I vs. Type II errors. As noted above, traditionally in the U.S. there is more emphasis on avoiding Type I decision errors while in EU there is much more concern with Type II errors. One could argue that when thinking of "digital platforms" the European position is more accurate, given that in many of the cases with which we are concerned here, involving these platforms, tipping in the market has already occurred and this suggests that the impact of exclusionary behavior on competition is unlikely to be reversed by market forces (hence, making Type II errors presents a major problem – as the long-term harm from exclusion can be very substantial).[31]

These two considerations suggest that in the highly innovative digital platform markets it may be appropriate to switch the presumption regarding potentially exclusionary practices from a presumption of legality (as is currently the case in the U.S.) to a presumption of illegality (as is currently the case in the EU). If a consumer welfare SS is maintained, this then implies that one has to choose either the TEB Illegality LS, if we consider the presumption of illegality (i.e. a negative effect on consumer welfare on average) sufficiently strong, or the FEB LS if we consider that, relative to the strength of the presumption of illegality, the discriminatory quality of economic models and evidence is sufficiently high in terms of accurately distinguishing welfare-harmful from welfare-benign exclusionary conduct. Now, it may indeed be true that effects on consumer welfare in specific cases "might be difficult to demonstrate to a high standard of proof even when harm to competition is clear and substantial" (Werden & Froeb)[32] and agencies may thus wish to avoid adopting a FEB LS. Then, demonstrating infringement in such cases can follow one of two routes. Under the first, though consumer harm cannot be convincingly demonstrated in the specific cases investigated, an infringement finding is the outcome of a strong presumption that this will be the result as a consequence of the adverse effects on competition: in this route we maintain a consumer welfare SS and adopt a TEB Illegality LS. Or, if no strong presumption about the effect on consumer welfare can be formed for competition-reducing conduct, we can abandon the consumer welfare SS and adopt a "protection of the competitive process SS," as practiced in Europe and as advocated for in the U.S. by Werden & Froeb (2018) and Wu (2018).[33] Under this second route, the demonstration that the conduct affects adversely rivals or the competitive process is sufficient for an infringement finding.

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[26] Exclusionary potential (rather than reduction of consumer welfare) been the criterion that governs case adjudication.

[27] If conduct is considered presumptively legal, the only way to establish infringement is on the basis of a FEB LS.

[28] Wu, *supra* note 11.

[29] Werden & Froeb, *supra* note 11.

[30] See Blair & Sokol (2012), *supra* note 7; Blair & Sokol (2013), *supra* note 8; Carlton D. (2007), *Does Antitrust Need to be Modernized?*, (21 (3) J. Econ. Perspectives; Coniglio J.V. (2017), "Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism," CPI Antitrust Chronicle, (August 2017); Farrell, J. & M. L. Katz (2006), "The economics of welfare standards in antitrust'" CPI Journal, Competition Policy International 2(2); Salop S. (2010), "Question: what is the real and proper antirust welfare standard? Answer: the true consumer welfare standard," 22 Loyola Consumer L Review, 336. For a recent review see Katsoulacos Y., E. Metsiou & D. Ulph (2016), "Optimal Substantive Standards for Competition Authorities," Journal of Competition, Industry and Trade.

[31] On these two considerations, see also Caffara C. (2018), "On the need for a 'radical' manifesto for competition enforcement in digital space," mimeo.

VI. CONCLUSIONS

In this article we have stressed the implications for enforcement, of the European Courts adopting non-welfarist SSs. This influences their presumptions and choice of LSs in AoD cases: the former are presumptions of illegality and the latter are (mostly) *Per Se* Illegality LSs. The EC, in turn, chooses these LSs, anticipating the choice of the Courts and minimizing the cost of enforcement. Clearly, it does not make sense to criticize the EC for acting in anticipation of the Courts' choices. Nor does it make sense to criticize the Courts for a LS choice that is rational given their SS. But, on the assumption that welfarist SSs are most appropriate for CL enforcement, it may indeed make sense to criticize the EU Courts for continuing to use non-welfarist SSs. Having said that, our discussion of the implications for enforcement of recognizing the importance of innovation in hi-tech digital platform markets suggests that it may be more appropriate for the U.S. to base assessment of AoD cases in such markets assuming, as under European antitrust doctrine, that exclusionary conduct is presumptively illegal (rather than presumptively legal).

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[32] They point to the case of *Ohio v. American Express Co.*, 138 S Ct 2274 (2018). Werden & Froeb, *supra* note 11.

[33] Wu, *supra* note 11; Werden & Froeb, *supra* note 11.

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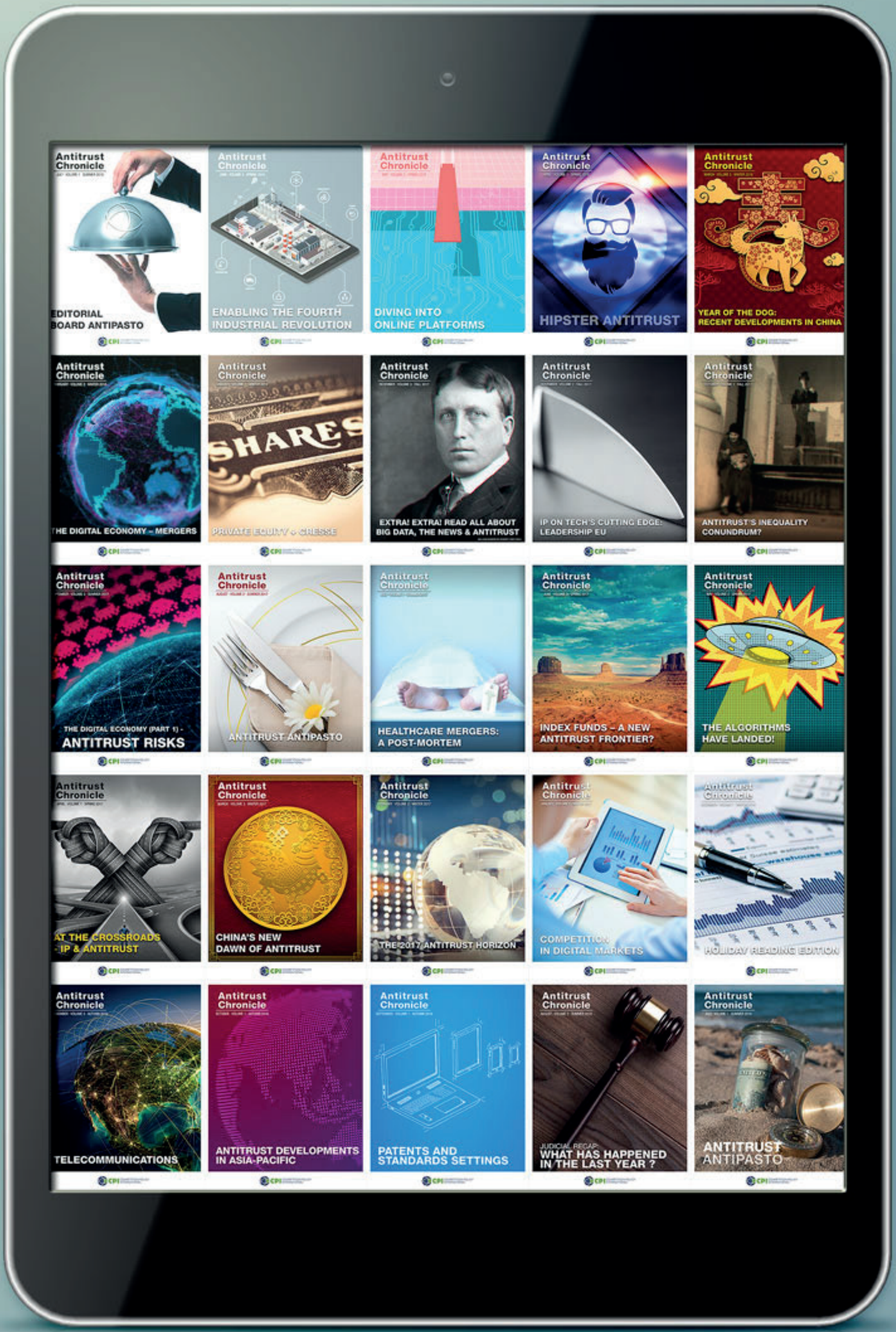
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