Bespoke Antitrust

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I. Introduction: Off the Rack or Couture?

Antitrust in the United States is usually referred to as the Magna Carta of free enterprise. It provides the ground rules for market capitalism with three basic broad almost constitutional statutes of general applicability. In the EU, the competition rules are embedded in the Treaty on the Functioning of the European Union a Merger Regulation. These competition rules are part of an acquis communitaire binding on the member states, their citizens through the doctrine of direct effect, the member states of the EEA and other preferred trading partners of the EU.

This article questions whether antitrust should be more one size fits all "off the rack" antitrust or should move more toward bespoke antitrust, consisting of specialized rules customized for the industry, defendant, or practice in question. Custom tailored rules and institutions normally fit and look better, but also cost significantly more than the mass produced equivalents. In the real world, the extra costs may well be worth it for a fancy dress or suit, but rarely so for casual shirts or jeans.

In the legal realm, the same trade off exists for the legal regulation of markets. The time and costs of exquisite tailoring must be compared to a mass-produced low cost garment that serves ordinary everyday needs.

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This article describes the under-appreciated trend toward bespoke antitrust law that we see happening today, We think that this trend shows up in case law, enforcement agency practice, and regulatory alternatives. We also look at existing and new proposals to create more bespoke antitrust rules and institutions to deal with the challenges of digital platforms and other dominant firm in the tech space. This, we believe, is a particularly important example of the trend toward more bespoke rules for competition law.

Our examination of current trends yields a cautious endorsement with a caveat. Bespoke antitrust is expensive in many ways and can threaten the rule of law by carving out exemptions for those willing to pay the price. A desire to carry through on every nip and tuck may end up with a garment only fit for the few.

II. How Much of U.S. Antitrust Law is Already Custom Tailored?

The off the rack provisions of U.S. antitrust law are Sections 1 and 2 of the Sherman Act which prohibit broad but definable categories of anticompetitive agreements and monopolization/attempted monopolization. In contrast, Sections 3 and 7 of the Clayton Act and Section 5 of the FTC Act are a bit more elastic and thus have a bit more tailoring at the waist.

A. The Rule of Reason as Customization

The question of bespoke versus one size fits all antitrust goes beyond the usual debates of which practices are per se unreasonable versus subject to a rule of reason analysis. What we mean by bespoke would encompass a case under either approach where the defendants usually (but perhaps the plaintiffs as well) would argue that the normal rules should not apply because of the unique aspects of the defendants, their industry, or perhaps a more macroeconomic crisis.

In per se cases, courts have rejected attempts to assert defenses that competition itself was inappropriate for a particular industry or would be ruinous, that a price fixed should be deemed reasonable, or that the agreement harmed competition, but was societally helpful in some other manner. At the same time, the courts have permitted defendants to argue that the competitive effects of a particular arrangement are not harmful to competition because of the special characteristics of the product, the industry, or the firms in question.

In true rule of reason cases, the analysis is truly bespoke since a court is normally required to consider:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopt-ing the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

However, even rule of reason cases can be decided in the "twinkling of an eye" if the plaintiff has plausibly alleged an unreasonable harm to competition and the defendant has no cognizable procompetitive efficiency to offer.

Recent antitrust rule of reason decisions have exacerbated this tendency to custom-tailor analysis to be "meet for the case." Good examples here are the *American Express* case, in which the Supreme Court tried to craft an approach to two-sided platforms that would apply to the payments industry without affecting others, and amateur athletics, where the court of appeals has recut anticompetitive restrictions on the compensation of "student athletes" by crafting less restrictive alternatives of the court's making.

B. Incipiency

There is another form of custom tailoring in U.S. antitrust beyond the debate where an agreement falls on the spectrum between per se and rule of reason and how the case should then be resolved. Congress tailored the antitrust laws to favor enforcement by designating certain provisions to catch anticompetitive practices in their incipiency or prohibit conduct which violates the spirit, rather than the letter of the antitrust law. Section 7 of the Clayton broadly prohibits mergers and acquisitions where the effect "may tend to" substantially lessen competition. Similarly, Section 3 of the Clayton Act prohibits certain practicing including tying and exclusive dealing where the effect also may tend to substantially lessen competition.

Section 5 of the FTC Act takes a different approach, prohibiting unfair methods of competition which includes violations of the letter or the spirit of any of the other antitrust laws and filling certain gaps in those statutes. Every time a court or agency interprets these statutes to be the same as the Sherman Act, they hand us a mass-produced outfit rather than the tailored item that Congress intended.

C. Regulation, Exemptions, and Immunities

As the discussion of the Clayton and Federal Trade Commission Acts indicates, Congress can direct the agencies and courts toward the customization of legal rules and enforcement. Beyond these antitrust statutes, such customization can take the form of standing up a separate regulatory body to control particular industries or sectors of the economy—banking, electric power and natural gas, telecommunications, ocean shipping, to name a few. Such regulation is said to recognize that some form of market failure makes it unlikely that normal market rules will control improper behavior. Agencies are then tasked with deciding, in varying degrees, the appropriate industrial structure of the industry, conditions of service, entry, and pricing,

Regulation is not expected to follow any set pattern; it can and does vary from industry to industry.

Congress also had customized antitrust through statutory exemptions and immunities, granted for a variety of industries, from medical schools to soft-drink bottlers to newspaper publishers. Some of these special exemptions are minor nips and tucks, like confirming rule of reason treatment for practices that would normally treated so by the courts, or immunizing conduct in the name of certainty that probably never violated the antitrust laws in the first place. Others are more substantial alterations with different rules of liability, remedies, procedures, and institutions.

The courts also sometimes enter the tailoring business by creating judicial immunities for such diverse accessories as the Noerr-Pennington doctrine, the state action doctrine, the non-statutory labor exemption, and a limited exemption for the business of professional baseball. Some of these alterations arguably improve the look of the outfit, most don't.

D. Remedies/Consent Decrees

Remedies in antitrust offer one of the most fertile fields for individualizing the law. Indeed, as the court of appeals wrote in *Microsoft*, the remedy must be "tailored to fit the wrong." This tailoring shows up in every aspect of remedies, from criminal punishment to injunctive relief, to consent decrees. The Sentencing Guidelines reject the undisciplined tailoring of punishment; they instead opt for guided tailoring. Criminal sentences and fines are calculated according to the amount of commerce affected, the role of the defendant in the conspiracy, whether coercion, threats or violence were used, acceptance (or not) of responsibility, cooperation (or not) with the government, and any past violations. Injunctive relief must be sufficient not just to prohibit the

unlawful conduct but restore competition to the affected market segments, which obviously can vary from case to case. Divestiture and other structural remedies must be effective, but not unduly harmful to the lawful operations of the businesses and the public interest. Consent decrees must be approved as in the "public interest," but that's hardly a check on the discretion that the district court has in approving whatever arrangement the parties come up with. Some of these consent decrees can end up providing a regulatory structure just for the "losing" defendants that may prove hard to dislodge, as the Justice Department's recent review of the ASCAP/BMI decree shows.

Merger remedies and consent decrees required the identification of which assets or stock will be divested, to whom, and on what timetable. In more complex arrangements, the respondents may also have to provide employees, raw materials, know how, software, and proprietary information about customers and competitors to a buyer preapproved by the competition agency and/or the court. Monitors may be required to ensure compliance with divestitures and any required firewalls for the merging parties. Complex arbitration or other alternative dispute resolution mechanisms may be required to resolve day-to-day disputes over pricing, access, or non-discrimination. Examples abound—Google ITA, Ticketmaster/LiveNation, Comcast/Universal, the complex effort to transform the Dish Network into a fourth major independent national mobile telecommunications network as a condition of allowing T-Mobile to acquire Sprint.

In civil non-merger remedies and settlements, the remedies are even more individualized. The cases are typically larger, lengthier and more complex with highly contentious remedies. The Bell System divestiture of the regional operating companies took over twelve years of time-consuming court attention and constant monitoring by the Justice Department and the FCC until Congress eventually passed the Telecommunications Act of 1996 providing a statutory and

highly customized pathway for new entry, the mandated cooperation of incumbent local phone providers with new entrants, and a pathway for incumbent local service providers to reenter long distance and eventually cellular markets.

The combined remedies in the Microsoft litigation around the world involved (depending on the jurisdiction) the offering of an operating system without a browser, the imposition of choice screens for access to web browsing, non-discrimination obligations, enhanced interoperability, provision of mountains of technical and interface information, the creation and funding by Microsoft of monitoring and compliance systems and repeated court hearings, a process that went on for nearly a decade.

E. Prosecutorial Discretion and Business Review Letters/Advisory Opinions

Competition enforcers also have a special power to allow arrangements by one company or industries to be treated differently than other parties. A decision to treat what might otherwise be a criminal per se offense as a civil violation (e-books) or vice versa (no poaching agreements) is a form of tailoring subject only to court review in the event the government or a private party challenges the conduct.

But an even greater power is the power to do nothing. If the agency does not proceed this inevitably shapes the law. In the U.S. it has been decades since cases have been brought against price discrimination, resale price maintenance, vertical non-price restraints (other than tying/exclusive dealing), criminal monopolization, conglomerate mergers, stand alone FTC Section 5 cases, and other theories and causes of actions that remain viable by statute or precedent. The ability to tailor the law to what seems most elegant to the tailor takes the form of DOJ Business Review Letters and FTC Advisory Opinions where the agencies indicate whether

they would or would not challenge a proposed agreement or course of conduct. More subtly, a well-crafted amicus brief or speech can change the fabric of the law even if the changes are not readily visible to an outside observer.

F. The Black Hole of Arbitration

Many highly customized antitrust decisions are hidden from public view altogether. The U.S. Supreme Court has ruthlessly enforced arbitration clauses in both business to business and busines to consumer contracts to require arbitration in lieu of litigation and require individual versus collective arbitration in the dispute resolution so indicates. This system of "private justice" replaces off the rack statutes and precedents with one-off arbitration proceedings conducted in private by arbitrators chosen pursuant to the rules specified in the agreement using procedures also specified by the agreement itself. The arbitrator need not be a lawyer, the award need not be written nor reasons given unless agreed by the parties. The tribunal, rules, the remedies, procedures, and the contents of the award need not conform the law of any of the jurisdictions which might have resolved the private dispute in question. By definition, this is bespoke antitrust on a contract-by-contract basis, but also normally hidden from view and never to be seen by the public.

On the consumer side, the very presence of the clause will often deter the filing of any arbitral claims. The expected value of such claims by consumers are negative. Too often, a consumer with a claim that may be meaningful to an individual is deterred by the costs and unfamiliarity of

arbitration against a well-resourced repeat corporate player and the possibility of a losing claim resulting in having to pay the corporation's legal fees.

III. Should U.S. Competition Policy Shop at Target or Hermes?

Every legal system has a combination of rules versus standards as well as simple categories versus complicated case by case systems for determining liability and remedies. The problem may be the U.S. is a shopaholic in the antitrust arena buying its mass produced and couture items rather indiscriminately. This section highlights some opportunities for more high fashion shopping that is available more often in jurisdictions outside the United States, but should be carefully considered in selecting the best wardrobe for the challenges that face contemporary competition enforcement.

A. Competition Rule Making

The Federal Trade Commission has the ability to engage in antitrust rule making but has done so only once. However, it now faces petitions to enact rules which would prohibit to varying degrees non-compete provisions in employment contracts and no poaching agreements between competitors. In addition, there have been proposals that the FTC use its rule-making power to adopt ex ante rules that would govern certain conduct in which the major tech platforms engage but which might be hard to attack through antitrust litigation. The EU has engaged in the related task of crafting block exemptions, de minimis limitations to the normal competition rules, and in past times granting individual exemptions and negative clearances.

B. Market Studies/Codes of Conduct

The competition tool kit for many jurisdictions also includes provisions for market studies in addition to specific enforcement actions. Think of this process as refurbishing an existing

wardrobe for new occasion and a new more in shape physique. In general, market studies assess whether competition in a market is working efficiently and identify measures to address any issues that are identified. These measures can include recommendations such as proposals for regulatory reform or improving information dissemination amongst consumers. They can also include the opening of antitrust investigations.

These analyzes are used to identify restraints to competitions which are not limited to outright violations of existing competition laws and are used for competition advocacy, pre-enforcement information gathering, ex-post assessments, law reform, and the creation of new legal regimes on an industry specific basis. A 2016 OECD survey indicated that 68% of jurisdictions surveyed had specific powers to undertake such surveys and another 26% relied on more general competition powers to do so. 87% of the respondents reported that recommendations to the government for changes in laws, regulations, or public policies were one of the potential outcomes for such inquiries. In some jurisdictions, the sectoral regulators have such powers either alone or in conjunction with the competition authority. On several occasions, the result has been the creation of a sectoral specific code of competition fine-tuned for industry characteristics and the nature of the competitive issues.

One example is the United Kingdom which, after an extensive market investigation of the supermarket industry, created an industry code of conduct with specific rules for supplier-supermarket relations, a dispute resolution procedure, and an ombudsman. Similarly, Australia has specific industry codes for competition for franchising, horticulture, groceries, wheat, and oil. Australia also has a separate statutory provision permitting the creation of access provisions to designated infrastructure.

In contrast, the United States competition agencies have more limited powers and appetite to conduct such studies and no current ability to consider whether antitrust enforcement actions or an industry specific code would be an appropriate response. The Justice Department has no statutory powers to require the production of business information outside of a specific enforcement action. This is extremely rare. In the 2016 OECD survey of sixty competition authorities, only the U.S. Justice Department and Hong Kong lacked the power to request such information.

The Federal Trade Commission has such powers, but chooses to use them in a more limited fashion. Section 46 of the FTC Act provides the Commission with the power to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, [exempting certain industries].... and its relation to other persons, partnerships, and corporations." While it is conceivable that Section 46 could be used to conduct broader market studies of concentrated or otherwise problematic industries and the contemplation of industry specific antitrust rules, the FTC has not chosen to do so in recent years. Since 2006, the FTC has used Section 46 to produce thoughtful reports on numerous important consumer protection matters and certain competition issues that cut across industry lines (patent trolls and merger remedies), but only one specific competition related study of a particular industry (generic drugs). This valuable study included proposals for legislative reform for vexing problems with the gaming of the system for the introduction and approval of generic drugs.

The United States experience with sector specific antitrust codes is largely limited to the 1921 Packers and Stockyards Act which was enacted because of Progressive Era concerns with the

imbalance of power between small livestock producers as sellers and the large concentrated (and often colluding) meat packers as buyers. Even here, government failure to update the regulations under this act for modern times and judicial reinterpretation of the Act to more closely track the general antitrust laws has made this experiment a highly criticized and mostly ineffective tool to achieve its intended purpose.

C. The Digital Markets Act and Similar Statutory Reform

Concerns over the power of digital platforms and other tech companies, has led numerous jurisdictions to consider whether specialized competition rules are necessary for these sectors. The EU is probably the furthest along in this regard with the proposed Digital Market Act (DMA) that would 1) allow third parties to inter-operate with the gatekeeper's own services in certain specific situations; 2) allow business users to access the data that they generate in their use of the gatekeeper's platform; 3) provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper; and 4) allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform. At the same time, the EU DMA would prohibit 1) treating services and products offered by the gatekeeper itself more favorably in ranking than similar services or products offered by third parties on the gatekeeper's platform; 2) preventing consumers from linking up to businesses outside their platforms; and 3) preventing users from un-installing any pre-installed software or app if they wish so.

Several of the proposed digital codes would include or focus on provisions that are competition adjacent, but not part of the traditional domain of antitrust rules. For example, Australia has proposed that digital platforms be required to pay for journalism shared by users. Japan has

begun the process of addressing abuses in digital platforms through new rules and guidelines under its abuse of bargaining power regime.

In the United States, the antitrust subcommittee of the House of Representatives Judiciary Committee, after a lengthy investigation of digital platforms, issued a 450 page report that called for comprehensive reform antitrust. The report had nearly 30 pages of statutory suggestions, but without specific legislative proposals.

Other jurisdictions have focused on modifying institutional design and enforcement techniques rather than comprehensive statutory or regulatory change. The UK CMA following its studies and reports has announced that it will be creating a new Digital Market Unit to better focus on more timely and effective enforcement of the existing laws.

IV. Some Caveats for Bespoke Antitrust

In recent years U.S. courts have become enamored of error cost analysis as a way to restrain antitrust enforcement when the benefits of antitrust liability seem uncertain. This has led to overly-cautious antitrust decisions that generally neglect the costs of false negatives.

Bespoke antitrust poses different concerns. The issue is not whether the outcome might be uncertain but whether the law itself has become too uncertain because it is always up for alteration. Rather than the cost of error, bespoke antitrust runs the danger of loss of uniformity (no pun intended), fairness, and access.

Uniformity in the application of law is a cornerstone of the rule of law. Like cases should be treated alike. Law with ever-modifying rules can be applied differently from case to case. Evaluating mergers in an extreme context-specific way can mean that some industries may be allowed to concentrate further (mobile telecommunications) while others aren't (health-care

insurance); or some industries may find their services highly regulated (perhaps digital platforms) while others get more freedom (tech industries with SEP licensing). Laws of general application can be applied in a non-uniform way, of course, but they are clearly intended to apply to all. Bespoke rules are not.

Loss of uniformity not only affects the fairness of the law, both in its perception and its application, but also affects deterrence, a matter not only for criminal enforcement but civil as well. When the law is up for particularized consideration, corporate counsel will likely be more probabilistic in their advice and companies more likely to go closer to the line on the assumption that they can get tailored consideration.

Bespoke rules are, by definition, more costly. This means that they are not available to all, just to those with resources. In the legislative arena we think of the effort to obtain bespoke rules in rent-seeking terms, generally viewing rent-seeking as socially costly behavior, but we don't usually remember that only those with rents to get can afford to seek them. Bespoke antitrust cannot be accessed by all and impose disproportionate burdens on newer and less well resourced enforcement regimes

Finally, bespoke antitrust rules can distort the institutions of antitrust enforcement themselves. Taking the time to tailor antitrust rules to specifics—and to litigate those specifics in highly-contested court proceedings—takes time and resources for antitrust enforcers. Fewer cases can be brought and enforcement may be more subject to capture as targets make concerted efforts to influence antitrust enforcers.

V. Conclusion – Tee Shirts and Tuxedos

The allure of bespoke couture antitrust rules custom made for the most important competition problems of the day is substantial. Such fashionable work looks terrific and can approach enduring works of art. But if done poorly are a waste of time and money and end up as objects of ridicule.

The question is not who wore it best, but how to build a collection of antitrust rules, procedures, institutions, and remedies for the everyday and special occasion needs of the real world. Most legal systems will need a mix of standard off the rack rules for the easy stuff and a mechanism for determining whether more tailored rules are necessary for special occasions. The more routine matters need the least tailoring and should be the subject of simple mass-produced rules and remedies. These includes rules of per se illegality for naked cartel behavior and related facilitating behavior as well as rules of per se legality (or nearly so) for non-hard core minor agreements not raising significant concerns by firms with negligible market power. It also suggests that courts are rarely the proper tailor to torture the fabric of the law in individual proceedings where the existing rules may not perfectly fit the parties, but the costs in terms of uncertainty are high and the benefits rarely visible.

The best case for bespoke antitrust, as in fashion, is the high stakes, but recurring special occasion. Where a persistent high stakes issue arises that will recur across time and jurisdictions, it may be time to invest in a higher quality garment more suitable for more than a single use. Even the simplest cost-benefit analysis suggests that not every industry or practice needs more complex specially tailored rules regardless of the special pleading or rent seeking behavior of the parties. Similarly, even if the industry or practice is more deserving, courts limited to hearing specific cases and controversies do not seem like the proper tailor for the occasion. Nor do most

competition agencies in choosing their dockets, remedies, and settlements seem the best tailor lest they abuse their discretion for either ideological or political reasons.

Democracy, accountability, and good fashion sense require a public process by an expert, but accountable, body. This could include well run legislative hearings or a thorough market study/inquiry by an expert agency or commission generating proposals for public comment and eventual legislative adoption geared toward the industries and practices where the most good can be done for the least expense in time and alterations. To do otherwise can lead to the antitrust equivalent of wearing an evening gown to a family picnic or a tee shirt to a black-tie event.