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MULTINATIONAL ANTITRUST: LESSONS FROM THE U.S. EXPERIENCE

*Douglas H. Ginsburg**

COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE. By *Ky P. Ewing*. The Hague: Kluwer Law International. 2003. Pp. xxi, 456. $ 110.

The globalization of business has resulted in a host of new issues facing antitrust regulators. As they rush to meet the challenges presented by the vastly greater volume of international business transactions, the increasing consolidation of global business operations, and the rapid evolution of computing and communications networks, the regulators leave in their wake an increasingly onerous burden on businesses engaged in international commerce. There is little guidance available, however, to the antitrust neophyte who wants to become familiar with these developments. They, as well as legal and economic scholars, lawyers, and others already steeped in antitrust law — or as it is known outside the United States, competition policy — will find Ky P. Ewing's *Competition Rules for the 21st Century: Principles from America's Experience*[1] to be of great help.

Beyond its utility as a user's guide of sorts for regulatory authorities, *Competition Rules for the 21st Century* is a book about the development of antitrust in the United States. It is this latter aspect that serves as the basis for Ewing's policy prescriptions. He relies upon the U.S. experience in formulating several conclusions (or "lessons") designed to inform future antitrust policies.

The book is arranged as follows: Chapters One and Two present the challenges to antitrust arising from the increasingly global marketplace, in the course of which Ewing presents new survey data on the size of the antitrust authorities in different countries and the resources they devote to their principle activities; Chapter Three provides a historical examination of antitrust as it has developed in the United States; and Chapters Four and Five set forth the lessons Ewing draws from the U.S. experience. Ewing synthesizes history, case law,

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1. Ky P. Ewing is a retired partner of Vinson & Elkins LLP. He has also served as a Deputy Assistant Attorney General in the U.S. Department of Justice's Antitrust Division , and is a former Chair of the American Bar Association's Section on Antitrust Law.

and, as important, economic studies in formulating suggested guidelines for competition policy. The book is also a useful reference guide, with citations to hundreds of authorities and seven appendices ranging from detailed statistics about antitrust and competition spending across countries to reprints of economic studies.

I. THE INTERNATIONAL PROBLEM

Ewing identifies several specific problems facing courts and regulatory authorities entrusted with administering a national antitrust law in a global economy. Harmonizing such laws across countries is one of Ewing's primary concerns, as well it should be. Businesses currently face a maze of duplicative requirements in effecting multinational mergers and conflicting rules governing the conduct of their business activities. Not that attempts at international coordination have been lacking. Ewing reports several such efforts, including failed attempts some thirty years ago by the United Nations' Council on Trade and Development and its Technology Transfer Conferences to adopt competition codes, efforts by both the OECD and the WTO — although with slow progress — to harmonize competition policies, as well as the more recent and arguably more successful efforts of the International Competition Network ("ICN") to promote cooperation among national antitrust authorities (p. 51).

Ewing appears most optimistic about the work of the ICN because of its dedication to "antitrust only; antitrust all the time" (p. 51). The ICN has already adopted "Guiding Principles for Merger Notification and Review" and has recommended "best" practices concerning the "nexus" between the effects of a transaction and the reviewing jurisdiction (pp. 51-54). The continued success of this international joint venture is constrained, however, by the difficulties inherent in a collective effort of this magnitude.

For example, countries across the globe have different reasons for subjecting businesses to antitrust regulation; some countries are no doubt concerned with consumer welfare, but others may have adopted competition laws in order to raise costs to foreign rivals. In any event, maximizing the benefits of the group may not coincide with the desired outcome for any individual country.[2] The objectives of regulators in a transition or a developing economy, for instance, are likely to be quite different from those in a developed economy.

As a result, success is inextricably linked to the ability of the collective to convince some participants to adopt competition laws that, while harmonizing the global effort, may inflict greater costs

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2. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

upon them.[3] Although Ewing does not delve deeply into the mechanics of collective action, he recognizes the difficulty inherent in such efforts in stating that "real harmonization" is "a distant goal that will require extraordinary effort and willpower to achieve" (p. 71 n.87).

As Ewing points out later in the book (and as discussed later in this Review), the United States' century of experience with antitrust may be a powerful predictor of the pitfalls potentially facing the many newer competition regimes around the globe. These pitfalls include, to mention but a few, targeting "big business" at a substantial cost in terms of lost efficiencies; protecting small (and often inefficient) competitors merely because they are small; and using competition policy to redistribute wealth. Many of the lessons learned in the United States are applicable both to countries new to the regulation of competition and to countries that have been promulgating and enforcing such regulations for decades — indeed, the United States itself could and should (but too often does not) learn from its own failures and shortcomings in administering its antitrust laws.

For countries new to the field of antitrust, observation and study is far preferable to learning-by-doing; doing should be limited, at least at the outset, to such steps as are necessary to prevent practices that, in the experience of countries with a long history of antitrust enforcement, have been proven to be anticompetitive. A country should not, therefore, require premerger notification based solely upon a merging entity having derived revenues from that country, as do some of the countries Ewing examines (p. 32). This type of overreaching sacrifices consumer welfare for no apparent reason other than the government's desire to collect merger review fees.

Errors of over-enforcement are likely to be particularly costly in today's high-tech economy, where "information goods" and other forms of intellectual property account for an increasingly substantial portion of economic activity. Ewing makes this point in his discussion of network effects. Direct regulation of the competitive process — price controls, for example — in old-economy industries such as utilities, may impose costs upon both the producer and the consumer if the regulated price is set too low.[4] The cost to the producer is equal to the difference between the market-clearing price and the regulated price, multiplied by the quantity supplied, plus the producer's share of the deadweight loss attributable to units not produced. The burden of such costs, though, will not necessarily drive the firm from the market; it will more likely cause the firm merely to produce less than the

3. *See* Ronald N. Johnson & Gary D. Libecap, *Contracting Problems and Regulation: The Case of the Fishery*, 72 AM. ECON. REV. 1005 (1982).

4. *See generally* ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1971). Of course, there are also losses when the regulated price is set too high.

efficient quantity of output. Also, the firm's loss — aside from the deadweight loss, which is not recoverable — coincides with a corresponding gain to consumers from the lower price charged on the quantity actually supplied to the market. In markets for information, communications, and other network-based goods, however, the cost of a regulator's error may be much greater if it stymies innovation.

Information-technology industries, such as computer software, are often characterized by high fixed and low marginal costs — indeed, marginal cost may be close to zero. In such industries marginal cost is less important in determining firm behavior; competition may be for the market (or a sizable share of it) rather than within the market.[5] To the extent a regulated business cannot cover its fixed costs, it may disappear altogether, and with it, the innovations it may have been able to bring to the market. Ewing's advice to those countries now adopting competition policies — specifically, that they should look closely at the U.S. experience and its episodes of costly and often fruitless efforts to regulate competition — may not go far enough in light of the economics of new-economy industries. To the extent competition authorities in developing countries, and indeed developed countries such as the United States itself, can learn from these mistakes, they may avoid the potentially harsher consequences likely to result from failed regulatory policies in today's high-tech and, not incidentally, more globalized economy.

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Not surprisingly, the administration of an antitrust regime comes at a high price. It is difficult to determine the exact price, however, because many of the costs are unknowable (e.g., opportunities foregone due to a blocked merger or a prohibited business practice). For a lower bound, Ewing tries to calculate the worldwide observable costs of antitrust and to determine the distribution of resources as between merger review and anticartel enforcement in each country. Ewing draws three general conclusions from his analysis: (1) the globalization of antitrust rules is real; (2) the priority given to anti-cartel enforcement versus merger control varies significantly across countries; and (3) different countries devote starkly different percentages of their GDP to competition policy (pp. 21-29).

One of the most interesting statistics Ewing provides is the percentage of personnel working in "anti-cartel enforcement" as opposed to "merger and acquisition enforcement" (pp. 27-28). He reports that in the United States, thirty-eight percent of combined

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5. *See, e.g.*, CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY, 261-96 (1999); *see also* Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968).

Department of Justice and Federal Trade Commission personnel are engaged in merger-and-acquisition enforcement, versus only fourteen percent engaged in anticartel enforcement. This may at first seem an odd distribution; after all, cartel-busting is generally thought to be the most important and in fact the primary concern of antitrust.[6] Indeed, William Kolasky, until recently a Deputy Assistant Attorney General, has stated that "[d]etection and prosecution of hard-core cartels should be every competition authority's top enforcement priority."[7]

The implication of Ewing's calculation is that, at least in the United States, merger review enjoys an unduly prominent position in the hierarchy of antitrust enforcement activities. Further, Ewing identifies merger review as a growing phenomenon, practiced by most of the more than 100 countries that currently have competition laws (p. 30). And it is a high-cost activity. Ewing estimates the direct cost of global antitrust enforcement at nearly $11 billion per year, an amount which goes largely to pay the salaries of public- and private-sector lawyers, economists, and staff (p. 32). (Again, this figure does not capture the indirect costs arising from antitrust policies that prevent wealth-enhancing business combinations or practices.) Clearly, a large portion of the direct cost is attributable to merger review. Ewing finds this particularly disturbing in light of his estimate that "[l]ess than 1% of... global [premerger] filings result in any challenge to the transactions by governments" (p. 34). Significantly, he notes that the "United States got along quite nicely without a premerger notification law for 88 years, relying on the Sherman Act's Section 1" (p. 34).

Merger review presents problems in addition to its high direct cost. Ewing quotes practitioners, regulatory authorities, and academics, all of whom point to the increasingly difficult task merging entities face in coordinating and simultaneously complying with a score or more of premerger reviews in as many different countries (pp. 36-38). The number of countries reviewing a merger has increased in part because there are more countries that, like the United States, use an "effects" test, which requires a premerger filing whenever a merger "may" lessen competition in that country (pp. 19-20). Of course, actual effects are likely to be felt in many fewer countries, and in fewer still could there be any serious concern about an adverse effect upon competition.

The problem of conflicting competition policies is becoming significant, as was shown in 2001 when U.S. authorities approved the merger of General Electric and Honeywell — both U.S. companies —

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6. *E.g.*, RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).

7. P. 42 (quoting William J. Kolasky, North Atlantic Competition Policy: Converging Toward What?, Address at the BIICL Second Annual International and Comparative Law Conference (May 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/11153.htm).

only to have the European Union prohibit it. The experience of the GE/Honeywell merger review presents a good opportunity to explore the benefits of coordinated policies.[8] There is not yet in place, however, a forum to discuss such differences in regulatory postures and to weigh costs and benefits to the global economy. An unfocused, uninformed merger review is more likely in a framework relying upon uncoordinated country-by-country reviews.

Where and how, then, does one begin to reform the current hodgepodge of individualized premerger regimes? As previously stated, Ewing is optimistic about the ICN as a forum for reform because it has already taken important steps to coordinate merger review (pp. 51-58). As Ewing acknowledges, however, much work remains to be done. Further progress may be possible but will surely be limited by the unwillingness of any nation to cede its role in merger review to a supranational antitrust authority.[9] (The cession of such authority by member states of the E.U. is not indicative of the possibilities because it is part of a more general transfer of political power from national to supranational authorities.)

Ewing raises an alternative, and attractive, solution: refocus the attention of antitrust authorities upon ex post rather than ex ante review (p. 34), at least where harm to competition is uncertain (that is, in all but mergers that would create a monopoly or near monopoly). Such an approach would require multinational coordination only when a concern about competition actually arises, rather than in each instance in which it is thought a merger may have an effect.[10] Considering the low percentage of mergers that occasion any premerger enforcement effort — whether to reshape or to prohibit the transaction — and the high cost of premerger review, one has to wonder why the ex post approach has so widely been abandoned in favor of premerger review.[11]

Ewing is somewhat generous in attributing the emphasis upon premerger notification simply to "bureaucratic convenience" — i.e., the idea that it is easier to stop something before it happens than it is

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8. It is important to note, however, that even substantive coordination will not necessarily result in agreement; if the GE/Honeywell merger would have produced efficiencies in the United States but imposed significant welfare losses in Europe, then the merger review was properly concluded by both authorities.

9. Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 Antitrust L. J. 219, 225 (2000).

10. *See, e.g.*, 15 U.S.C. § 18 (2000) (prohibiting mergers or acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

11. In a footnote Ewing acknowledges but rejects concerns that ex post efforts are likely to be cumbersome and ineffective, and "may even hinder creation of useful deals out of fear of post-closing exposure." P. 64 n.43.

to undo it after the fact (p. 34). There is an alternative explanation: premerger review generates rents for both the public and the private actors engaged in it. Premerger review is particularly attractive to those whose livelihood depends upon antitrust practice because it creates work to be done for every transaction regardless of whether any harm to competition is likely. No finding of actual competitive harm is necessary in order to generate filing fees and to provide high levels of private and public employment, particularly for antitrust lawyers, who prepare and review the premerger notification papers. In addition, the fee-generating aspect of premerger review may be particularly attractive to those countries where little, if any, economic effect from a merger is likely, because their antitrust authorities need not even waste the filing revenues they receive by employing people to read the merger notifications.

Anticartel enforcement would also benefit from closer coordination across countries. Ewing rightly focuses upon the elusive distinction between a "bad cartel" and a "good joint venture" (p. 45). For instance, the adoption of a single communications protocol in an ATM network would provide the greatest benefit to consumers by allowing them to access their accounts from the largest possible number of locations; that is, positive network externalities would be maximized. As a result, it is likely that competing banks would try jointly to establish an industry standard — here a single communications protocol — in order to discourage wasteful, duplicative efforts and to deliver the greatest possible interoperability to consumers.

Ewing notes that, in the United States, courts are likely to apply a "rule of reason" analysis where collaborations may prove beneficial. He is concerned, however, that agency review may result in rejecting new practices "if there is any chance, however small, of an anticompetitive effect" (p. 45). This concern is likely to be amplified in the international arena, where the desire to protect domestic businesses may lead to a more intensive review of foreign collaborators and to the rejection of new technology standards.

II. THE U.S. EXPERIENCE

Our understanding of the problems relating to harmonization of international competition law, as set forth in Chapters One and Two of *Competition Rules in the 21st Century*, is informed by Ewing's detailed description of the U.S. experience in Chapter Three. After a brief overview of the history of U.S. antitrust law, Ewing traces the strange career of the "concentration thesis" in the United States — i.e., how measures of industry concentration came to be at the center of economic thinking, regulatory action, and court decisions. The concentration thesis gave rise to "presumptions," first adopted by the enforcement agencies and then given credence by the courts, that certain levels of industrial concentration would lead firms to behave in a nonrivalrous way, resulting in supranormal prices and profits. The approach was rooted ultimately in Joe Bain's industry studies of the 1940s linking concentration with higher levels of profitability, which suggested concentration as a key factor in the conduct and resulting performance of many industries.

The concentration thesis first gained widespread acceptance in U.S. antitrust law during the mid-twentieth century "merger wave." The increased levels of industry concentration brought about by those mergers quickly became the subject of criticism by both economic and legal scholars. By the 1960s, the concern with concentration, already prevalent in economic scholarship, had become deeply ingrained in the law; for example, in *Brown Shoe Co. v. United States*[12] and *United States v. Philadelphia National Bank*[13] the Supreme Court analyzed mergers almost exclusively in terms of their effects upon concentration in a relevant line of commerce (pp. 107-12). In 1968, when the Department of Justice adopted its first Merger Guidelines, they were likewise "firmly rooted in a structuralist approach" (p. 112).

The widespread adoption of the structuralist approach by courts and antitrust authorities may be understandable on the ground that it provided simple benchmarks by which to evaluate a merger for anticompetitive effects. The problem, however, as Ewing makes very clear in his review of the economic studies, is that the structural approach was, even in 1968, no longer widely accepted in economics scholarship — at least not as a reliable method for predicting an effect upon competition (pp. 129-44).

Ewing's examination of the concentration thesis highlights both the lag between economic scholarship and its adoption in antitrust law, and worse, the tendency of discredited economic ideas, once accepted, to persist in legal policy.[14] This persistence is evidenced by the regulatory authorities' continued reliance upon the structural approach in revising the Merger Guidelines even to this day and by the agencies' continuing reliance, in litigation of merger cases, upon economically antiquated cases such as *Philadelphia National Bank.*

What lesson, then, should the reader draw from Ewing's analysis of the concentration hypothesis in the United States? Ewing recommends dropping from the Merger Guidelines the "presumptions" — such as concentration levels above which enforcement is presumed appropriate — and other formalistic "numbers game" approaches that are implicitly based upon the "structure-conduct-performance" paradigm (pp. 147-48). But what should take their place? In

12. 370 U.S. 294 (1962).

13. 374 U.S. 321 (1963).

14. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991).

economics the structure-conduct-performance paradigm has given way to more sophisticated modeling of the firm's decisionmaking, such as noncooperative game theory.[15] Is it too soon to adopt game-theoretic approaches in government enforcement policy and perhaps thereafter in court decisions? What about the theory of network externalities? If Ewing's historical documentation of the lag between economic thinking and legal policy is any guide, then these questions may not be answered for many years.

III. LESSONS FROM THE U.S. EXPERIENCE

In the last two chapters of *Competition Rules in the 21st Century*, Ewing sets forth various lessons from the U.S. experience with antitrust. The successful implementation of his prescriptions by other countries is, of course, dependent upon preexisting local conditions, such as their form of government, level of wealth, and size of the public sector. But Ewing's lessons are probably instructive even if they cannot be adopted in their entirety due to local circumstances. Perhaps the most important lesson Ewing provides is set forth at the beginning of Chapter Four:

> No rational person charged today with writing the antitrust rules for the United States (or any other jurisdiction) would create the myriad laws, federal and state, that are now on America's statute books, enforceable by two federal agencies, 54 "state" attorneys general, and private persons, containing a bewildering number of exemptions and immunities granted at both the national and sub-national levels . . . under-girded by a growing "antitrust industry" of bureaucrats, lawyers, and economists (p. 165).

Many of Ewing's lessons, including the last clause of the passage just quoted, point to a single, perhaps unavoidable conclusion: the "antitrust industry" has shown an uncanny ability to replicate and proliferate itself. Ewing claims, seemingly against the weight of evidence and analysis in his book, that "the U.S. system works fairly well" (p. 165). Be that as it may, Ewing's depiction of the U.S. experience is at a minimum a cautionary tale, putting other countries on notice of the costly — indeed for some less robust economies, the potentially disastrous — consequences of making unwarranted interventions into the marketplace under the banner of promoting competition. This should be particularly relevant to transition economies and developing countries where, too often, it seems that officials, encouraged by foreign (usually U.S. and E.U.) regulatory authorities, believe the adoption of extensive and complex antitrust laws and policies is required for a competitive domestic marketplace.

15. *See generally* DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION (1988).

Those countries and others considering the adoption of U.S. or European-style antitrust laws first should look closely at the U.S. experience to determine whether market efficiencies can be achieved without creating a large antitrust industry.

Ewing justly criticizes presumptions used to characterize potentially efficient conduct as unlawful simply because of the unexamined possibility of a harm to competition. Indeed, many business practices that were first proscribed by courts as per se illegal — that is, as presumptively anticompetitive — without the benefit of a sophisticated economic analysis, are now routinely accepted as procompetitive or innocuous in most circumstances. For example, maximum resale pricing was at one time per se illegal but is now governed by the rule of reason.[16]

Ewing's discussion of presumptions focuses upon those that would tend to prohibit certain business practices. Presumptions need not have this restrictive character, though. For instance, one useful presumption, although rarely adopted by regulatory authorities or the courts, would deem new business practices acceptable absent a proven harm to consumer welfare. Indeed, Judge Easterbrook developed a set of presumptions along this line in his classic article, *The Limits of Antitrust*.[17] His proposed "filters" were designed to "screen out beneficent conduct" and pass to courts only those practices likely to raise prices and reduce output.[18] Further, the default action under Judge Easterbrook's approach was to allow a practice rather than to prohibit it, because a market may correct a market imperfection, but it usually cannot correct an error made by a court. Ewing's specific lessons from the U.S. experience, discussed below, might best be considered in this vein — that is, as default prescriptions for courts or regulatory authorities faced with uncertain or difficult questions either of fact or of economic analysis. Finally, it is useful, as I have suggested above, to view presumptions (at least those aimed at prohibiting mergers or business practices) as another way of sustaining the antitrust establishment and expanding its reach; the use of presumptions and simplistic benchmarks allows investigation and enforcement activities without the need to find actual harm to competition.

Ewing draws several "specific lessons" based upon the U.S. experience. His first is to "BELIEVE IN THE 'FREE MARKET' AND AVOID THE 'INTERVENTIONIST' APPROACH" to antitrust (p. 167). This obviously is not a prescription that is easily implemented, but it is wise counsel nonetheless. Markets are to a large degree self-correcting, whereas improvident political interventions in markets are

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16. State Oil Co. v. Khan, 522 U.S. 3, 22 (1997).

17. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

18. *Id.* at 39-40.

hard to correct.

Another of Ewing's specific lessons is to take care to "GET THE PURPOSE OF COMPETITION-POLICY RIGHT" (p. 170). He argues that efficiency, not competition, should be the goal of antitrust policy (p. 180). Manipulating antitrust law to achieve "fair" (meaning low) prices or to protect "small business" is sure to be inefficient. Correlatively, "big business" should not automatically be targeted for public control; large firms have grown large for a reason, and that reason is usually their superior ability to satisfy their customers.

Ewing ultimately settles upon the notion that it is efficiency that drives consumer welfare: competition is simply the usual means of achieving efficiency; it is not an end in itself. In support of this point, Ewing cites Lawrence Summers, who instanced high-tech networks as an area where efficiency requires us to rethink our views of competition and of the competitive process. Summers emphasized efficiency in stating that the need for common technology standards to take advantage of network effects "is as plausibly an argument against antitrust action, because it suggests that dividing those markets will reduce efficiency, as it is plausibly an argument for antitrust action on the grounds that monopoly power is more likely."[19] Although network economies do not as readily admit marginal-cost pricing as an appropriate measure of efficiency, it would be a mistake, as discussed in Part I, to say that competition is not necessary to achieve efficiency in network economies. Rather, competition may take a different form: instead of competing for market share based upon price or incremental quality advantages, firms may compete for all or nearly all of the market through more radical forms of innovation.

The U.S. experience with the concentration thesis, as described by Ewing and discussed in Part II above, sounds an important cautionary note as we consider the response of antitrust regulators to network and other new technologies. The structure-conduct-performance theory of economics, which has since been shown to be "spurious" (p. 101), is still relied upon by courts and the regulatory authorities. Current economic thinking about networks and information economics is still nascent and unsettled. At the very least, then, courts and regulatory authorities should be careful to avoid prematurely adopting some of these theories for, as Ewing's description of the concentration thesis suggests, they may be around much longer than they prove to be reliable.

Another of Ewing's specific lessons addresses the problems inherent in defining a "relevant market" (pp. 182-83). Before a firm can be identified as having market power, the contours of the market

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19. P. 182 (quoting Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001)).

must be determined. The standard approach consists of defining both a "product" market and a "geographic" market. Ewing finds fault with that approach because the methods used by regulators are inconsistent and often bear little relation to the competitive dynamics of the market in question (pp. 185-87). Ewing raises concerns that mechanical application of certain "rules of thumb," such as the "Small But Significant and Non-Transitory Increase in Price" ("SSNIP") test, mislead rather than inform regulators (pp. 188-90). The SSNIP test asks whether "there exist substitutes to which a consumer would switch in response to a small but significant (i.e., 5 or 10 percent) price increase in the product in question."[20] Ewing criticizes the SSNIP test because its seemingly rigorous application to the factually complex task of defining a market gives a false sense of accuracy to what is really no more than survey evidence (pp. 188-90).[21] Ewing advises regulatory authorities to look more closely at alternative ways of determining the relevant market, starting with those taught today in business schools (p. 191).[22] Business people, after all, have the greatest incentive to gauge accurately who their competitors are. If they err, they lose; if an antitrust regulator errs, we all lose.

IV. CONCLUSION

Competition Rules for the 21st Century: Principles from America's Experience concludes with ten "principles for crafting competition policy laws for the 21st century" (pp. 225-43). These principles summarize the main points of the book. They indicate a limited role for antitrust intervention in the marketplace, reflecting the complexity and uncertainty of economic systems, and a law that is applied, when necessary, in a focused, fact-intensive, and thoughtful manner. In practice, implementing such an approach will be difficult. As Ewing's description of the U.S. experience demonstrates, success in adopting efficiency-enhancing antitrust policies and enforcing them in their intended manner is likely to be difficult even if the pitfalls are known in advance. Those charged with implementing antitrust policies in the 21st century would be well-advised to keep a copy of Ewing's book close at hand.

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20. P. 188 (quoting United States v. Engelhard Corp., 970 F. Supp. 1463, 1467 (M.D. Ga. 1997) (quoting Post-Trial Submission of the United States at 8 (No. 6:95-cv-45))).

21. Similar critiques have been leveled at regulators' and courts' reliance upon more standard economic techniques of measuring market power, such as cross-elasticities, in a relevant market. *E.g.*, William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); *see also* Douglas H. Ginsburg, *The Goals of Antitrust Revisited*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 24, 25-26 (1991).

22. Ewing cites Michael Porter's "Five Forces/Diamond Approach" as one example. P. 191 (citing MICHAEL E. PORTER, ON COMPETITION (1998) and others).