BESPOKE ANTITRUST

Harry First[*] and Spencer Weber Waller[†]

ABSTRACT: Antitrust laws in the United States, and competition rules in Europe, are usually set out in statutes of general applicability, written in broad, almost constitutional form. This is a "one size fits all" statutory style. There is another possible style of antitrust, which we call "bespoke antitrust." It consists of specialized rules customized for the industry, for a particular plaintiff or defendant, or for the practice in question.

In this article we describe the under-appreciated trend toward bespoke antitrust law. 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 firms in the tech space. This, we believe, is a particularly important example of the trend toward more bespoke rules for competition law.

We conclude with a cautious endorsement and a caveat. Bespoke antitrust is expensive in many ways and can threaten the rule of law by carving out exemptions if society (or the beneficiaries) are willing to pay the price. Nevertheless, there are important areas where targeted efforts are worth the price. Custom-tailoring has its rewards.

JEL Codes: K21, L40

I. Introduction: Off the Rack or Couture?

Antitrust law in the United States is often referred to as the "Magna Carta of free enterprise."[1] 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 in the Treaty on the Functioning of the European Union and the Merger Regulation. These competition rules similarly provide a broad framework of general applicability, 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.

We might call this style of antitrust "one size fits all" or "off the rack." There is another possible style of antitrust, though, which we call "bespoke antitrust." It consists of specialized rules customized for the industry, a particular plaintiff or defendant, or for the 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.

---

[*] Charles L. Denison Professor of Law, Co-Director, Competition, Innovation, and Information Law Program, New York University School of Law. Email: harry.first@nyu.edu. A research grant from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this article. This essay is dedicated to the memory of Tom Horton, whose talent, enthusiasm, and kindness knew no bounds.

[†] John Paul Stevens Chair in Competition Law, Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Email: Swalle1@luc.edu.

[1] U.S. v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

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.

In this article we describe 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 firms in the tech space, both in the United States and abroad. This, we believe, is a particularly important example of the trend toward more bespoke rules for competition law.

Our examination of current trends leads us to the question whether this trend is a good one. Our conclusion is a cautious endorsement of bespoke, but with a caveat. The caveat is that bespoke antitrust is expensive in many ways and can threaten the rule of law by carving out exemptions if society (or the beneficiaries) are willing to pay the price. A desire to carry through on every nip and tuck may end up with garments only fit for the few. A bespoke approach may thus work best with high-impact issues and industries where the benefits of careful tailoring may be highest.

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. 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 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 over which practices are per se unreasonable versus which are subject to a rule of reason analysis. What we mean by bespoke would encompass a case under either approach where the defendant argues (and sometimes the plaintiff agrees) that the normal rules should not apply to them because of the unique aspects of the defendant, its industry, or perhaps some macroeconomic crisis.

Whether a case is formally categorized as "per se" or "rule of reason," courts have avoided re-cutting antitrust rules in response to an argument that competition itself is inappropriate or ruinous for a particular industry, or that a price fixed should be deemed reasonable for the particular defendants who set it, or that the agreement harmed competition but was societally helpful in some other manner.[2] Nevertheless, the courts have permitted defendants to argue that a particular arrangement is not harmful to competition because of the special characteristics of the product, the industry, or the firms in question.

Justice Brandeis's explication of how to apply the rule of reason sets out what we see as the classic statement of a bespoke approach:

> To determine [legality] 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

[2] The argument for this approach is spelled out in National Soc. of Prof. Engineers v. United States, 435 U.S. 678 (1978).

> history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[3]

Recent antitrust decisions have only exacerbated this tendency to custom-tailor analysis to make it "meet for the case."[4] There are many examples: the Supreme Court's *American Express* decision, in which the Court tried to craft an approach to two-sided platforms that would apply only to "transaction platforms" in the payments industry without affecting others;[5] the Supreme Court's decision in *NCAA v. Alston*, in which the Court left undisturbed a lower court's re-writing of the terms of college football players' compensation, done under the cover of the "less restrictive alternative" doctrine;[6] or the D.C. Circuit's decision in *Microsoft*, in which the court adopted a rule of reason for tying, but only for the software industry.[7]

B. Incipiency

There is another form of custom tailoring in U.S. antitrust beyond the debate over 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 catching certain anticompetitive practices in their incipiency.[8] Section 7 of the Clayton Act broadly prohibits mergers and acquisitions where the effect "may" tend to substantially lessen competition.[9] Similarly, Section 3 of the Clayton Act prohibits tying and exclusive dealing agreements where their effect also "may" tend to substantially lessen competition.[10]

Section 5 of the FTC Act prohibits "unfair methods of competition,"[11] which courts have read to include violations of the letter or the spirit of the antitrust laws, thereby filling gaps in those statutes and preventing incipient violations of the Sherman Act.[12] When the courts or the FTC confine themselves to deciding Section 5 cases under the letter of the Sherman Act we get a mass-produced outfit rather than the tailored item that Congress intended. In recent years the FTC has most often resisted a more bespoke approach, particularly eschewing the discretion the Supreme Court gave it in 1972 to act as a "court of equity" and consider "public values" when deciding what is "unfair" in a particular case.[13] In 2022, though, the Commission moved toward some custom tailoring to deal with problems that might lie beyond the bounds of the Sherman and Clayton Acts. In a 2022 Policy Statement explaining its current view of Section 5, the Commission emphasized the scope of its authority to prohibit unfair methods of competition to attack incipient

[3] Board of Trade v. United States, 246 U.S. 231, 244 (1918).
[4] FTC v. California Dental Ass'n, 526 U.S. 756, 781 (1999).
[5] *See* Ohio v. American Express, 585 U.S. __, 138 S.Ct. 2274 (2018).
[6] NCAA v. Alston, 594 U.S. __, 141 S. Ct. 2141 (2021).
[7] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc).
[8] See generally, Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155 (2019)
[9] 15 U.S.C. § 18.
[10] 15 U.S.C. § 14.
[11] 15 U.S.C. § 45 (a).
[12] *See* FTC v. Cement Inst., 333 U.S. 683, 693 (1948) (purpose of the Act is to "hit at every trade practice . . . which restrained competition or might lead to such restraint if not stopped in its incipient stages").
[13] *See* FTC v. Sperry & Hutchison Co., 405 U.S. 233, 244 (1972). Compare FTC v. Qualcomm, Inc., 969 F. 3d 974, 986 n.11 (9th Cir. 2020) (decision confined to whether Qualcomm's licensing practices violated Section 1 and Section 2 of the Sherman Act; court did not consider whether there was a "standalone" Section 5 violation).

violations of the antitrust laws as well as practices that violate the spirit of the antitrust laws and that tend to affect competitive conditions negatively.[14]

Merger enforcement under the Clayton Act may be the paradigmatic example of bespoke antitrust. Although Section 7 applies generally to all mergers that affect interstate commerce, beginning in 1968 the Justice Department and the FTC have issued a series of increasingly complex enforcement Guidelines to explain which merger cases they might choose to bring and which cases they might not.[15] This custom tailoring of enforcement includes a notification process first adopted by statute in 1976, under which only certain mergers (those that exceed specified size thresholds) need to be notified to government enforcers.[16]

This means that non-notified mergers will almost never draw a government challenge, even if they violate the law. But the notification of a merger to the federal government doesn't mean that a challenge is likely either. In 2020, for example, of the 1637 mergers that were notified to the FTC and the Justice Department, only 48 mergers received a "second request" for more information (less than three percent).[17] Even fewer cases end up being litigated—in 2020, the FTC filed seven complaints, the Justice Department filed eight.[18] Finally, mergers that undergo this thorough review often involve transactions valued in the billions of dollars and multiple markets about which government enforcers need to learn. Not surprisingly, this is an expensive process for the government. The FTC in 2020, for example, spent nearly half its competition budget, and allocated nearly half its competition staff, to the merger review process that yielded seven lawsuits, a result it actually touted as a "record number."[19]

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.

---

[14] See Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf. *See also* FTC, Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf (July 9, 2021) (in withdrawing 2015 interpretation of Section 5; Commission intends to go beyond conduct that violates the antitrust laws).

[15] All versions of the merger guidelines, past and present, are available at https://www.justice.gov/atr/merger-enforcement.

[16] *See* 15 USC § 18a.

[17] *See* Fed'l Trade Comm'n, *HSR Transactions Filings and Second Requests by Fiscal Year*, https://www.ftc.gov/system/files/attachments/data-sets/hsr_transactions_filings_second_requests_by_fy_1.csv.

[18] Fed'l Trade Comm'n & Dep't of Justice Antitrust Div., *Hart-Scott Rodino Annual Report: Fiscal Year 2020* at 10, 13, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

[19] *See* Fed'l Trade Comm'n, *Fiscal Year 2020 Congressional Budget Justification* at 2 (March 11, 2019), https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy_2020_cbj.pdf.; Fed'l Trade Comm'n, *2020 Annual Highlights* at 4 (April 2021) (referring also to eleven deals that were abandoned in the face of staff recommendations to block them). *See also* Jonathan Kanter, Ass't Attny Gen'l, Dep't of Justice, Antitrust Div., *Respecting the Antitrust Laws and Reflecting Market Realities* (Sept. 30, 2022) ("We are litigating more than we have in decades. Since I was confirmed in November, the Division has challenged or obtained merger abandonments in six cases. Several other transactions were abandoned after parties were informed they would receive second requests…We will litigate more merger trials this year than in any fiscal year on record.").

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, railroads, air transportation, and ocean shipping, to name a few. Such regulation is said to recognize that some form of market failure makes it unlikely that normal market forces 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.[20]

Congress also has customized antitrust through statutory exemptions and immunities, granted for a variety of industries, from medical schools to soft-drink bottlers to newspaper publishers.[21] Some of these special exemptions are minor nips and tucks, like confirming rule of reason treatment for practices that would normally be treated as such by the courts,[22] or immunizing conduct in the name of certainty that probably never violated the antitrust laws in the first place.[23] Others are more substantial alterations with different rules of liability, remedies, procedures, and institutions.[24]

The courts also sometimes enter the tailoring business, crafting immunities that are not apparent from the text of the off-the-rack Sherman Act, such as the Noerr-Pennington doctrine,[25] the state action doctrine,[26] the non-statutory labor exemption,[27] and even a limited exemption for the business of professional baseball.[28] Much like any custom-tailoring job, though, these alterations are never finished. Further customization will be needed as the wearer "evolves" and its needs change. Bespoke may be singularly focused, but it's not "one and done."[29]

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."[30] This tailoring shows up in every aspect of remedies. When imposing criminal penalties, the Sentencing

[20] For the classic presentation of this type of regulation in the United States, see ALFRED E. KAHN, THE ECONOMICS OF REGULATION (1971).
[21] For a thorough review, see ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007).
[22] *See* 15 U.S.C. § 4301(requiring rule of reason for research joint ventures and standard setting organizations).
[23] *See* 15 U.S.C. § 4001 et seq. (creating system for granting export trade certificates).
[24] *See* 15 U.S.C. § 4001 et seq. (system for granting export trade certificates). *See* 15 U.S.C. § 37b (granting immunity for graduate medical matching programs).
[25] *See* Eastern RR Pres Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).
[26] *See* Parker v. Brown, 317 U.S. 341 (1943); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
[27] *See* Connell Constr. v. Plumbers & Steamfitters Union, 421 U.S. 616 (1975).
[28] *See* Federal Baseball Club v. National League, 259 U.S. 200 (1922), modified by Curt Flood Act of 1988, codified at 15 U.S.C. § 26b(2). The story of the baseball exemption is well told in STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION xii ("Scarcely anyone believes that baseball's exemption makes any sense.").
[29] *Compare* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) (won't interpret Sherman Act to "look behind the actions of state sovereigns") (granting immunity) *with* North Carolina Bd v. FTC, 574 U.S. 494 (2015) (looking at composition of state regulatory board; deciding it is not "sovereign" because members are market participants; state action immunity is "disfavored").
[30] United States v. Microsoft, 253 F. 3d at 107.

Guidelines reject an undisciplined tailoring of punishment; instead, they opt for guided tailoring.[31] Criminal sentences and fines are calculated according to the amount of commerce affected, modified by specified aggravating and mitigating factors—the role of the defendant in the conspiracy, whether coercion, threats or violence were used, the acceptance (or not) of responsibility, cooperation (or not) with the government, and any past violations.[32] This is an effort to make the punishment fit the crime.

When granting civil remedies, injunctive relief must be sufficient not just to prohibit the unlawful conduct, but must restore competition to the affected market segments, which necessarily leads to remedies that vary from case to case.[33] Divestiture and other structural remedies must be effective, but not unduly harmful to the lawful operations of the businesses and the public interest. When the Justice Department settles a case through the entry of a consent decree, a court must find that the settlement "is in the public interest,"[34] but courts are given only slight discretion to reject decrees whose terms the parties have negotiated and to which they have agreed.[35] Some of these consent decrees can end up providing a regulatory structure that applies only to the defendants and that may prove hard to dislodge later, as the Justice Department's efforts to review the ASCAP/BMI decree have shown.[36]

Negotiated remedies in merger cases provide some particularly dramatic examples of bespoke design. Merger consent decrees may require 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 enforcement agency and/or the court. Monitors or trustees may be required to ensure compliance with divestitures and any required firewalls imposed on 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.[37]

In the T-Mobile/Sprint merger, Justice Department enforcers went so far as to broker a deal with a non-party to the merger to convince that company to enter the market and try to replace the competition that would be lost as a result of the merger; this was followed by a complex consent

---

[31] *See* United States v. Booker, 543 U.S. 220 (2005) (making Sentencing Guidelines advisory, not mandatory, but requiring courts to take them into account).

[32] *See* United States Sentencing Comm'n, Guidelines Manual §§ 2R1.1, 3B1 (Nov. 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

[33] For a review of the legal standards for remedies in government civil cases, see Harry First, *Antitrust Remedies and the Big Tech Platform Cases* 13-17 in WASHINGTON CENTER FOR EQUITABLE GROWTH, JUDGING BIG TECH: INSIGHTS ON APPLYING U.S. ANTITRUST LAWS TO DIGITAL MARKETS (2022), https://equitablegrowth.org/wp-content/uploads/2022/12/Judging-Big-Tech-Insights-on-applying-U.S.-antitrust-laws-to-digital-markets.pdf.x`

[34] Antitrust Procedures and Penalties Act (Tunney Act), codified and amended at 15 U.S.C. § 16 (b-g).

[35] *See* United States v. SBC Comm'ns, Inc., 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (scope of review "sharply proscribed").

[36] *See* Makan Delrahim, Ass't Attn'y Gen'l, U.S. Dep't of Justice, Antitrust Div., "And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees (January 15, 2021), https://www.justice.gov/opa/speech/file/1355241/download.

[37] *See* John Kwoka & Spencer Weber Waller, Fix it or Forget It: A "No-Remedies" Policy for Merger Enforcement, Competition Policy International (Aug. 17 2021) (discussing cases and dissatisfaction with the remedies chosen) https://www.competitionpolicyinternational.com/fix-it-or-forget-it-a-no-remedies-policy-for-merger-enforcement/; Spencer Weber Waller, *Access and Information Remedies in High-Tech Antitrust*, 8 J. COMP. L. & ECON., 575 (2012).

decree and the appointment of a Monitoring Trustee with ongoing responsibility to supervise the conduct of the new T-Mobile/Sprint and the new entrant, Dish.[38]

In the Biden administration, however, there has been a desire to pull back from complex bespoke merger remedies. Its policy has been to try to stop more mergers from being consummated in the first place, litigating more cases in court where necessary.[39]

In monopolization cases the remedies often are even more individualized. Government monopolization cases today are fewer, larger, lengthier and more complex than merger cases, with highly contentious remedies sought and imposed. 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. Congress eventually passed the Telecommunications Act of 1996 providing a statutory and highly customized pathway for new entry, jointly administered by state and federal regulatory agencies and reviewed by the courts, and mandating that incumbent local phone providers cooperate with new entrants to ensure effective entry.[40]

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.[41]

The latest round of government monopolization cases in the United States have yet to reach the remedy stage, but the European Commission's recent cases have produced a new set of bespoke remedies to deal with dominant firm abuses—trying to correct distortions in Google's presentation of product shopping sites, trying to give consumers more choice of search engines by having Google present search engine choice screens, and securing an agreement with Amazon to restrict its use of non-public data that independent Amazon sellers generate, to regulate Amazon's "Buy Box," and to control how Amazon offers its "Prime" services to other sellers.[42]

E. Prosecutorial Discretion and Business Review Letters/Advisory Opinions

---

[38] *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 197-98 (S.D.N.Y. 2020) (describing settlement). For a good description of the Monitoring Trustee's responsibilities in overseeing relief in the Sprint/T-Mobile merger, see Memorandum Of Points And Authorities In Support Of Unopposed Motion Of The United States To Appoint Monitoring Trustee, United States v. Deutsche Telekom AG, Civ. No, 1:19-cv-02232-TJK, at 3-4 (D.D.C., filed 12/9/19), https://www.justice.gov/atr/case-document/file/1333916/download.

[39] Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium Washington, DC, ~ Tuesday, September 13, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

[40] For a discussion of the AT&T restructuring and its effects, *see* ROBERT W. CRANDALL, AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA (2010).

[41] *See* ANDREW I. GAVIL & HARRY FIRST, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY ch. 7 (2014).

[42] *See* Thomas Hoppner, *Google's (Non-) Compliance with the EU Shopping Decision* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700748; Michael Ostrovsky, Choice Screen Auctions, (STANFORD U. & NBER, Working Paper, Nov. 7, 2020), https://web.stanford.edu/~ost/papers/csa.pdf; Press Release, European Comm'n, Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

Competition enforcers also have a special power to allow arrangements by one company or by an industry to be treated differently than other parties or industries. A decision to treat what might otherwise be a criminal per se offense as a civil violation (e-books[43]) or vice versa (no poaching agreements[44]) is a form of tailoring generally immune from court review in the United States unless a prosecution involves some sort of highly improper discrimination.

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 the government has brought cases involving price discrimination, resale price maintenance, vertical territorial or customer non-price restraints, pure conglomerate mergers, or FTC Section 5 cases based only on a "standalone" theory and not on the Sherman or Clayton Acts as well. More to the point, this type of tailoring can be undone at any moment.[45]

Guidance provides another way to tailor the law to what seems most elegant to the tailor without taking any enforcement action. DOJ Business Review Letters[46] and FTC Advisory Opinions[47] allow the agencies to indicate whether they would or would not challenge a proposed agreement or course of conduct, or, sometimes, give the Agencies an opportunity to "guide" the parties to a course of conduct arguably not required by the law at all.[48] More subtly, a well-crafted amicus brief[49] or speech[50] can change the fabric of the law, even if the changes are not readily visible to an outside observer.

F. Competition Rule Making

The Federal Trade Commission has rule-making authority, but it has exercised it with regard to its antitrust jurisdiction only once.[51] President Biden's Executive Order, issued in July

---

[43] *See* United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (conspiracy among publishers to raise e-book prices) (not prosecuted criminally).

[44] *See* United States v. Patel, No. 3:21-cr-220 (D. Conn. Dec. 2, 2022) (rejecting defense argument that prosecution for no-poach agreement violates Due Process because the government had only announced its intention to prosecute such cases criminally in 2016, five years after the alleged conspiracy began).

[45] *See* Josh Sisco, Pepsi, Coke soda pricing targeted in new federal probe, Politico, Jan. 9, 2023 (reporting preliminary FTC investigation for price discrimination in violation of Robinson-Patman Act; most recent case settled more than 20 years ago).

[46] Antitrust Division, U.S. Dep't of Justice, Business Reviews, https://www.justice.gov/atr/business-reviews.

[47] Federal Trade Commission, Advisory Opinions, https://www.ftc.gov/policy/advisory-opinions.

[48] *See* Letter from Renata B. Hesse, Acting Ass't Attny Gen'l, to Michael A. Lindsay, Esq., Feb. 2, 2015 (reviewing standard setting organization's procedures with regard to the selection of SEPs for its standards; approving restriction on patent holders' ability to obtain injunctive relief from infringers; provision "will not be significantly more restrictive than current U.S. case law"), https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated.

[49] *See, e.g.,* Brief for the United States and the Fed'l Trade Comm'n as Amici Curiae in Support of Neither Party, Motorola Mobility LLC v. AU Optronics Corp, No, 14-8003 (7th Cir. Sept. 5, 2014) (arguing that Foreign Trade Antitrust Improvement Act should allow the government to bring an action even if private parties are barred); Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015) (accepting government position).

[50] *See, e.g.*, Bruce B. Wilson, Deputy Assistant Attorney Gen., Remarks before the Fourth New England Antitrust Conference, "Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions" (Nov. 6, 1970) (luncheon speech setting out Antitrust Division policy on when certain patent license restrictions would be considered per se unlawful), https://web.archive.org/web/20140124181601/http://www.rtlaw.com/licensing/pdf/13.pdf.

[51] *See* Discriminatory Practices in Men's and Boy's Tailored Clothing Industry, 16 CFR Part 412 (1968), 31 Fed. Reg. 14416 (Nov. 9, 1966) (rule enacted pursuant to Sec. 2, Clayton Act), rescinded, 59 Fed. Reg. 8527 (1994). *See also* National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (upholding rule requiring posting of

2021, however, sought to change the Commission's approach. The Executive Order, among other things, urged the Commission to consider rules to curtail the use of non-compete clauses and "other agreements" that unfairly limit worker mobility. The Executive Order also urged the Commission to adopt rules dealing with a number of practices in which the major tech platforms engage but which might be hard to attack through antitrust litigation, such as unfair data collection and "unfair competition in major Internet marketplaces."[52]

In 2023 the Commission took up the first suggestion, issuing a 216-page Notice of Proposed Rule Making to ban the use of non-compete clauses (clauses that have the "effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer").[53] The Commission justified its proposed rule because of the impact such clauses have on employee wages and on the ability of entrepreneurs to start new businesses.[54] The Proposed Rule is "bespoke" in the sense that it focuses on one particular practice that might affect competition for workers and their compensation. Even so, the Commission sought public comment for tailoring the rule further, perhaps limiting its applicability based on a worker's job function, occupation, earnings, or, specifically, exempting "senior executives" from the rule.[55] This shows that a bespoke rule can vary as well; it can be "one size fits all" or can be further tailored to fit distinct shapes and sizes.

G. The Black Hole of Arbitration

Many highly customized antitrust decisions are decided in arbitration and are hidden from public view altogether. The U.S. Supreme Court has ruthlessly enforced arbitration clauses in both business to business and business to consumer contracts to require arbitration in lieu of litigation and to require individual versus collective arbitration if the dispute resolution agreement so indicates.[56]

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 to by the parties. The tribunal's rules, remedies, procedures, and the contents of the award need not conform to 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 claim at all. The expected value of such a claim by a consumer is negative. Too often, a

---

octane ratings at the pump for gasoline sales) (rule enacted pursuant to Sec. 5, FTC Act). *See generally*, Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

[52] *See* Executive Order 14036 of July 9, 2021, Promoting Competition in the American Economy, 86 F.R.36987, 36992.

[53] *See* Federal Trade Comm'n, Non-Compete Clause Rule, Notice of Proposed Rulemaking (hereinafter NPRM), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf. The proposed rule carves out an exception for the sale of a business in certain circumstances, *see id*., § 910.3.

[54] *See* FACT SHEET: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.

[55] *See* NPRM, *supra* note 53, at 143, 150.

[56] *See* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); ATT Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

consumer with a claim that may be individually meaningful is deterred by the costs and unfamiliarity of arbitration against a well-resourced repeat corporate player and the possibility that a losing claim will result 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. This section highlights some opportunities for high fashion shopping that are available more widely in jurisdictions outside the United States, some of which the U.S. might want to consider when selecting the best wardrobe for the challenges that face contemporary competition law enforcement.

A. 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 one for reviewing and refurbishing an existing wardrobe for a new occasion and a more in-shape physique. In general, market studies assess whether competition in a market is working efficiently and propose measures to address any identified issues. These measures can include recommendations such as proposals for regulatory reform or improving information dissemination among consumers. They can also include the opening of antitrust investigations.

Market studies can identify restraints to competition 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. [57] 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.[58]

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.[59] 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.[60]

---

[57] *See* ORG. FOR ECON. CO-OPERATION & DEV., THE ROLE OF MARKET STUDIES AS A TOOL TO PROMOTE COMPETITION 8-10 (2016), https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf

[58] See Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123, 165-69. (2020).

[59] *Id*. at 166.

[60] *Id*. at 166-67.

In contrast, U.S. 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; the lack of such power is extremely rare.[61]

The Federal Trade Commission has such powers under Section 46 of the FTC Act, but has chosen to use them only in a limited fashion.[62] 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 done so. It 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, for example), but only one specific competition related study of a particular industry (generic drugs).[63] This valuable study included proposals for legislative reform to deal with the vexing gaming of the system for introducing and approving generic drugs.

The United States experience with sector specific antitrust rules 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.[64] Even here, government failure to update the regulations and enforcement under this Act has made this experiment a highly criticized and mostly ineffective tool to achieve its intended purpose. This is another area that the Biden Executive Order sought to fix.[65]

B. The Digital Markets Act and Similar Statutory Reform

Concerns over the power of digital platforms and other tech companies have 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 Digital Markets Act (DMA), adopted in 2022 to go into force in 2023.[66] In broad outline, the Act will 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

---

[61] *See id.* at 166 (2016 OECD survey of sixty competition authorities shows only U.S. Justice Department and Hong Kong lacked power to request such information).

[62] 15 U.S.C. § 46b (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.").

[63] Waller, *Omega Man*, *supra* note 58, at 167-68.

[64] *See* The Packers and Stockyards Act of 1921, *codified at* 7 U.S.C. §§ 181-229.

[65] *See* EO 14036, *supra* note 52, at 36992 (direction to Secretary of Agriculture). The Department of Agriculture subsequently proposed regulations to give poultry growers more information in their bargaining with dominant live poultry dealers, but the regulations have not yet been adopted. *See* USDA, Agricultural Marketing Service, Transparency in Poultry Grower Contracting and Tournaments 87 Fed. Reg. 34980 (Aug. 8, 2022) (proposed rule), https://www.federalregister.gov/documents/2022/06/08/2022-11997/transparency-in-poultry-grower-contracting-and-tournaments.

[66] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Official Journal. L 265/1, Oct. 12, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R1925&from=EN .

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 offers and conclude contracts with their customers outside the gatekeeper's platform. At the same time, the DMA prohibits 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.[67]

Several other jurisdictions have proposed or adopted digital codes that include or focus on provisions that are competition adjacent, but not part of the traditional domain of antitrust rules. For example, Australia has enacted legislation that requires designated digital platforms to bargain collectively with traditional news media outlets for the use of news content on their platforms, buttressed by compulsory arbitration to set royalties if an agreement is not reached.[68] Japan has issued Guidelines to control how digital platforms acquire or use consumers' personal information, based on the Antimonopoly Act's prohibition on the abuse of a superior bargaining position.[69] Most famously, the EU has adopted the General Data Privacy Regulation which has required online business serving the EU market to retailor their data privacy policies throughout the world.[70]

Other jurisdictions have focused on modifying institutional design and enforcement techniques rather than comprehensive statutory or regulatory change. The UK's Competition and Markets Authority, following its studies and reports, established a Digital Markets Unit within the CMA to begin work on a "new regulatory regime for the most powerful digital firms," bolstered by a new Data, Technology and Analytics unit (DaTA), composed of those with data engineering, data science, and data and technology market intelligence expertise.[71]

Reforms focused on digital platforms have also been proposed in the United States, but have not yet been adopted. The FTC has begun to consider issuing rules that would limit online commercial surveillance and data collection, but has not yet formulated specific rules.[72] The

---

[67] *See* European Commission, The Digital Markets Act: ensuring fair and open digital markets, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en. *See generally* Peter Alexiadis and Alexandre de Streel, *The EU's Digital Markets Act: Opportunities and Challenges Ahead*, 23 BUS. L. INT'L 163 (May 2022).

[68] *See* News Media and Digital Platforms Mandatory Bargaining Code, Act No. 21, 2021, https://www.legislation.gov.au/Details/C2021A00021; Damien Cave, Google is Suddenly Paying for News in Australia. What About Everywhere Else?, N.Y. Times, (Feb. 18, 2021); David Oxenford, Could Australian Decision Giving Broadcasters the Right to Collectively Bargain with Tech Companies Be a Preview of Things to Come in the US?, Broadcast Law Blog (Nov. 3, 2021), https://www.broadcastlawblog.com/2021/11/articles/could-australian-decision-giving-broadcasters-the-right-to-collectively-bargain-with-tech-companies-be-a-preview-of-things-to-come-in-the-us/.

[69] *See* Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions Between Digital Platform Operators and Consumers that Provide Personal Information (Dec. 17, 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf.

[70] Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L 119/1, May 4, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679.

[71] *See* https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy; https://www.gov.uk/government/collections/digital-markets-unit

[72] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 FR 51273, Aug. 22, 2022 (advance notice of proposed rulemaking), https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security.

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 of antitrust.[73] The report had nearly 30 pages of statutory suggestions, but without specific legislative proposals. That report was followed by the introduction in both the House and Senate of bipartisan legislation to implement the key provisions of the report and add additional antitrust reforms.[74] None of those bills was enacted into law, however, and legislative change awaits an uncertain fate in the next Congress.

IV. Some Caveats for Bespoke Antitrust

Bespoke antitrust seeks to tailor antitrust rules to specific situations or parties, arguably making the law a better fit for the competition problem presented. This should reduce the likelihood of error and thereby diminish the need to employ error cost analysis, which the courts have too often used to restrict antitrust enforcement.[75] Error cost analysis seeks to lower the cost of uncertain results; bespoke seeks to make the results more certain in specific cases.

But bespoke antitrust poses a different risk—not the risk of uncertain results but the risk that the law itself may become too uncertain because the law is always up for alteration. Rather than the danger of error, bespoke antitrust runs the danger of loss of uniformity (no pun intended), and along with it, the diminution of 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 (college and professional sports) while others get more freedom (streaming platform operators). 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 goal of both criminal and civil enforcement. 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 also are, by definition, more costly, as shown most dramatically in merger enforcement. This means that these rules may not be 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.

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

---

[73] Investigations of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

[74] For a good review of the House bills, see Randy Picker, *The House's Recent Spate of Antitrust Bills Would Change Big Tech as We Know It,* ProMarket (June 29, 2021), https://promarket.org/2021/06/29/house-antitrust-bills-big-tech-apple-preinstallation/?mc_cid=030fe72189&mc_eid=52fc9f2911.

[75] *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORD. L. REV. 2543, 2570-72 (2013).

can be brought and enforcement may be more subject to capture as targets make concerted efforts to influence antitrust enforcers. This can be a problem for all enforcement agencies, but a particular problem for less well-resourced agencies that may end up allocating their time and resources disproportionately to customized cases, with little left for important but run of the mill general enforcement.

V. Conclusion – T-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, they waste 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, as well as the special-occasion needs of the real world. Most legal systems will need a mix of standard off the rack rules 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 include 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 worthwhile to invest in a higher quality garment 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. Taking the time to lay out a pattern that will fit many cases, and needs only minimal tailoring before use, may lead to better garments. Sentencing Guidelines are a good example, focusing customization on a few salient details; competition rules, if not overly regulatory, could be another; good market studies, with targeted recommendations, a third.

Democracy, accountability, and good fashion sense require a public process by an expert, but accountable, body. Due process lets the public into the design process, which could include well run legislative hearings or a thorough agency-led market study geared toward the industries and practices where the most good can be done for the least expense in time and alterations. In this way we can get the antitrust garments to look and fit as best as we can and at the right price—no evening gowns worn to a family picnic and no T-shirts to black-tie events.