
RESPONSE

ANTITRUST LAW IS NOT THAT COMPLICATED[†]

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In his comprehensive study *On the Relevance of Market Power*, Professor Louis Kaplow sets forth “a ground-up exploration of the proper role of market power” in competition law.¹ Kaplow’s thorough and insightful analysis of what he calls the three “channels of potential relevance”² sheds important new light on how understanding market power can aid the assessment of conduct that is alleged to be anticompetitive. It should be required reading for anyone engaged in the enforcement of competition law. But Kaplow focuses broadly on “competition law,” which encompasses both U.S. antitrust law and antitrust-type laws in other countries. His analysis is thus very abstract and does not appreciate the critical role that market power plays in U.S. antitrust law as a separate element of the antitrust offense.

I

The first channel of relevance in Kaplow’s analysis concerns how market power can “bear on the likelihoods of anticompetitive and procompetitive explanations for the act under scrutiny.”³ Kaplow agrees with the conventional view that low or no market power could mean that the defendant lacks the power to exclude rivals or injure competition and could therefore make an anticompetitive explanation of the conduct in question less likely to be correct.⁴ And he notes that less elastic market demand, which usually reflects greater market power, can increase the payoff to an anticompetitive strategy that raises rivals’ costs⁵ and thus make such a strategy more likely.⁶

Kaplow also, however, convincingly demonstrates that, in some circumstances and somewhat counterintuitively, market power can make an anticompetitive explanation of ambiguous conduct less likely to be

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¹ Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1305 (2017).

² *Id.* at 1304–05.

³ *Id.* at 1307.

⁴ *Id.* at 1329–30.

⁵ See, e.g., Steven C. Salop & David T. Scheffman, *Raising Rivals’ Costs*, 73 AM. ECON. REV. 267 (1983).

⁶ Kaplow, *supra* note 1, at 1341.

correct. Thus, for example, if greater ex ante market power — that is, preexisting market power that is not a consequence of the conduct in question — reflects high barriers to entry, anticompetitive exclusionary conduct is less necessary and, all else equal, less likely.⁷ Similarly, greater ex ante market power would imply greater sacrifice from a predation strategy and would thus, all else equal, make an anticompetitive explanation of allegedly predatory conduct less likely to be correct;⁸ and ex ante market power could make a procompetitive explanation more likely for a transaction that solves a double-marginalization problem.⁹

Ex post market power — that is, market power that reflects the consequences of the conduct in question — can also shed light on the relative likelihood of anticompetitive and procompetitive explanations for the conduct in question. For example, echoing Schumpeter,¹⁰ Kaplow explains that ex post market power could make a procompetitive explanation of the conduct more likely to be correct if the conduct entails a welfare-enhancing investment that requires a long-term payoff.¹¹

The second and third channels of relevance concern how market power can influence in complicated and sometimes conflicting ways the magnitudes of anticompetitive harm and procompetitive benefit from the conduct in question and could therefore shed light both on the parties' incentives and on the welfare implications of permitting or prohibiting the conduct.¹² For example, the higher the ex ante margin between price and incremental cost is, the greater will be the deadweight loss from a given decrease in output caused by the conduct in question;¹³ but a less elastic demand implies less output reduction for a given price increase.¹⁴ Also, higher ex ante market power implies less competitive constraint from rivals and therefore a lower price effect from raising their costs.¹⁵

Kaplow draws from his rich analysis, to which this brief summary does not do justice, important conclusions about competition law. The first is that competition law enforcers and courts “should consider an-

⁷ *Id.* at 1330, 1352.

⁸ *Id.* at 1352.

⁹ *Id.* at 1330.

¹⁰ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-91 (1942) (explaining that welfare-enhancing investments require “protecting devices” like patents, trade secrets, or long-term contracts).

¹¹ Kaplow, *supra* note 1, at 1330. Elsewhere, Kaplow notes that ex post market power could also imply greater returns to anticompetitive conduct. *Id.* at 1348; *see id.* at 1350 & n.103.

¹² *Id.* at 1307.

¹³ *Id.* at 1343.

¹⁴ *Id.* at 1344.

¹⁵ *Id.* at 1352.

ticompetitive and procompetitive explanations” for the conduct in question “side by side.”¹⁶ The likely welfare effects of the conduct cannot be understood unless both the probabilities and magnitudes of anticompetitive and procompetitive effects are considered, and the law thus goes awry when it first determines whether the conduct is anti-competitive and then, separately, assesses efficiency justifications.¹⁷

From this flows the central conclusion of Kaplow’s study: market power and conduct are not two elements that can prudently be assessed separately in siloed inquiries. To the contrary, market power and conduct need to be examined together in order to understand how market power might shed light on the welfare implications of the particular conduct at issue. Indeed, “market power is not a unitary concept: different senses or components of market power matter in different ways in different settings, and not always in the familiar direction.”¹⁸ So far, so good.

II

The implicit premise of Kaplow’s analysis is that competition law is about a broad standard that requires a multifaceted analysis for its application. The standard is something like this: conduct that reduces economic welfare is unlawful, and conduct that increases economic welfare is lawful. To make the case-specific factual and economic determinations required by this standard, Kaplow’s rich analysis is indispensable, and his insistence that an inquiry into market power can often aid assessment of the conduct at issue seems warranted. Market power, Kaplow thus concludes, should not be an independent element of competition law offenses.¹⁹

U.S. antitrust law, however, is not that complicated. It is, for good reasons, based upon a handful of rather simple rules whose application does not always require deep understanding of the implications of market power and often calls for a separate assessment of certain kinds of market power. To see this point, it is necessary to be explicit about three kinds of market power that Kaplow discusses, although with different notation and terminology. They are “ex ante market power,” that is, that which existed before the conduct in question; “ex post market power,” that is, that which reflects the consequences of the conduct in question; and “increased market power,” which is the increase in market power caused by the conduct in question and which is equal to the difference between ex post market power and ex ante

¹⁶ *Id.* at 1323.

¹⁷ *Id.* at 1327.

¹⁸ *Id.* at 1402–03.

¹⁹ *Id.* at 1404–07.

market power.²⁰ Increased market power could in principle be negative if the conduct in question caused a reduction in the defendant's market power.

Market power is a separate element of the offense under U.S. antitrust law.²¹ With a couple of refinements, U.S. antitrust law makes it illegal to cause an increase in market power by conduct that is not competition on the merits. For this purpose, "competition on the merits" means conduct that on balance increases output. Conduct can increase output by reducing costs or (quality-adjusted) prices or by increasing product quality or diversity and thereby shifting the demand curve to the right.

This principle has three distinct elements: (i) increased market power, (ii) conduct that is not competition on the merits, and (iii) a causal connection between the two.²² The principle does not reflect a judgment that market power or conduct that increases it is always bad. To the contrary, antitrust law recognizes, as does Kaplow, that market power can be an important aid to enabling firms to profit from costly investments in efficient conduct and that market power can be an important reward and thus incentive for successfully competing on the merits.²³ But market power is costly. It generally means higher

²⁰ There is also a fourth kind of market power, which might be called "but-for market power." That is the market power that would exist after the conduct in question but was not caused by the conduct. This could be different from both ex ante and ex post market power if market power would have changed during the period of the conduct in question because of market factors other than that conduct. *Cf., e.g., Rambus Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008) (finding respondent's new monopoly was not shown to have been caused by its allegedly anticompetitive conduct). For simplicity, this discussion assumes that but-for market power and ex ante market power are the same. Kaplow ignores but-for market power and thus seems to make a similar assumption. On that assumption, the increase in market power is equal to the difference between ex post market power and ex ante market power.

²¹ Kaplow grudgingly acknowledges this possibility when he says that "[i]t is often stated . . . that market power and the exclusionary nature of the act (for example) are two independent elements." Kaplow, *supra* note 1, at 1314. But he quickly leaves that notion behind with the incredulous comment, "can it really be that whether or not [market power] is ever so slightly above or below some particular level . . . is decisive regardless of whether our evidence on the net anticompetitive effects of the act under scrutiny is barely above [the required threshold] or massively so?" *Id.* at 1315.

²² These elements apply to collusion offenses, like cartels and joint ventures, which can create market power when firms that would otherwise compete collaborate instead. They also apply to exclusion offenses, which create market power by weakening or excluding rivals that would otherwise be more effective competitors. And they apply to mergers, which can injure competition by collusion (in the case of horizontal mergers) and exclusion (in the case of vertical mergers), although in the case of mergers the act is the merger itself and it is deemed not to be competition on the merits if it fails to create efficiencies sufficient to increase output.

²³ *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("[P]ossession of monopoly power . . . is an important element of the free-market system. The opportunity to charge monopoly prices . . . attracts 'business acumen' [and] . . . induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate,

prices and reduced output and often means diminished incentive to engage aggressively in welfare-enhancing conduct. Antitrust law thus embodies the simple idea that we will endure the costs of market power when they are the result of efficient conduct but not when they are the result of anticompetitive conduct, which is conduct that tends to cause an increase in market power for reasons other than competition on the merits. We do not want to reward or induce anticompetitive conduct by permitting the defendant to benefit from the resulting increased market power, and we do not want to pay the costs of increased market power that was not earned by competition on the merits.

The case for making an increase in market power an independent element rests on the ideas that market power is usually bad and that relatively simple rules can be applied and complied with at lower cost and with fewer errors than a legal regime that requires case-by-case assessment of the implications of market power or application of a broad, multifaceted standard. The requirement of ex post market power reflects an expectation that, absent such market power, the market will quickly correct inefficient conduct. Similarly, the requirement of increased market power embodies a judgment that the intrusive artillery of antitrust law enforcement, and the accompanying enforcement and compliance costs, should not be used, even for anticompetitive conduct, if the conduct does not have a sufficient impact on the market to increase market power.

It's actually not quite that simple. There are some refinements, but they are not inconsistent with the basic principle. For single-firm conduct, a violation requires not only an increase in market power, but also enough ex post market power to be called "monopoly" power.²⁴ This rule, too, reflects legal process considerations; the idea is that single-firm conduct is ubiquitous and the bar for prohibiting such conduct should be set rather high so that compliance costs and delays burden only conduct that has a high likelihood of reducing welfare by the creation of market power. Kaplow argues that this rule leads to absurd results. If monopoly requires market power of 100, he explains, conduct that increases market power from 10 to 99 would escape liability, but conduct that increases it from 99 to 101 would be unlawful.²⁵ Kaplow assumes away the real possibility — or likeli-

the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”).

²⁴ See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (“The percentage we have already mentioned — over ninety — . . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent [sic] is not.”).

²⁵ Kaplow, *supra* note 1, at 1368 n.148.

hood — that a tribunal would not condemn conduct that it actually understood to increase market power only from 99 to 101 and that it would find a defendant whose conduct had increased market power from 10 to 99 to have monopoly power (or perhaps would condemn the use of anticompetitive conduct in those circumstances by deeming it to be an unlawful attempt to monopolize²⁶). Kaplow's larger point that rules involve line-drawing is correct, but Kaplow overlooks the benefits that a simpler, even if crude, rule offers when enforcement and compliance costs are taken into account.²⁷

Some conduct is deemed to be unlawful per se — that is, without inquiry into its market power effects.²⁸ But this rule, too, reflects a categorical judgment about the welfare properties of the conduct that tends to increase market power without offsetting efficiency gains and the benefits of simple rules in terms of reduced enforcement and compliance costs.

There is arguably a different kind of refinement that causes some conduct to be deemed to be lawful even when it increases market power and has no static productive efficiencies. This conduct includes above-cost but profit-sacrificing price cuts and unilateral refusals to deal. But the rules that shelter these kinds of conduct also reflect legal policy concerns about legal rules that would require very difficult determinations of when above-cost prices are predatory²⁹ or the terms on which the defendant was supposed to or can be required to deal with a competitor in the absence of a suitable market benchmark.³⁰ More-

²⁶ See, e.g., *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993) (ruling that an attempt-to-monopolize offense requires proof of a “dangerous probability” of successful monopolization).

²⁷ See generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (discussing “the conditions under which greater specificity or greater generality is the efficient choice” for legal requirements). Professor Isaac Ehrlich and then-Professor Richard Posner describe a continuum between rules and standards and define a standard as “a general criterion of social choice.” *Id.* at 258. Kaplow himself has written about the choice between rules and standards, but his analysis focuses on a somewhat different distinction in which “efforts to give content to the law are undertaken before or after individuals act.” Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (emphasis omitted).

²⁸ See FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2 (2000).

²⁹ E.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (“As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”).

³⁰ E.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill suited.”); see also A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1264 & n.41 (2005).

over, these kinds of conduct offer other efficiencies. Above-cost price cuts increase output, reduce deadweight loss, and increase allocative efficiency.³¹ Similarly, refusals to deal can promote dynamic efficiencies by increasing rewards to lawful conduct that created the ex ante market power that is the source of the competitive concern.³² That these simplifying rules might not be optimally drawn does not mean that rules of this type should be jettisoned in favor of the kinds of standards Kaplow assumes.

Kaplow criticizes EU competition law for its siloed analysis of the market power or “dominance” issue and conduct issues but lauds the “clear suggestions that a sliding scale will be employed, wherein a stronger showing of dominance strengthens the case for liability.”³³ But EU competition law differs from U.S. antitrust law in important ways that limit its relevance in America. Among the differences are that EU competition law is enforced in a regulatory culture and primarily in a centralized administrative system that has been less influenced by the legal policy considerations that are so important to U.S. antitrust law.³⁴ Moreover, Article 102 of the Treaty on the Functioning of the European Union, which is the EU’s rough analogue of Section 2 of the Sherman Act, explicitly prohibits “abuse” of market power.³⁵ A violation requires the use — more precisely, “abuse” — of market power and thus requires the simultaneous assessment of market power and conduct in order to determine whether the conduct entailed an abuse of market power. That linkage comes with a price. It tends toward a focus on ex ante market power and toward giving little attention to whether there is or is likely to be increased market power.³⁶ And the linkage means that conduct by firms without ex ante

³¹ *E.g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.) (“[L]ower prices help consumers. . . . [P]rice cutting limits the ability of large firms to exercise their ‘market power’ . . . ; at a minimum it likely moves ‘concentrated market’ prices in the ‘right’ direction — towards the level they would reach under competitive conditions. . . . Thus, a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.” (citations omitted)).

³² *See Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 407.

³³ Kaplow, *supra* note 1, at 1372 n.152.

³⁴ *See* Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 ANTITRUST BULL. 129, 134–36 (2014) (showing that EU competition law enforcement is much more centralized and less affected by private lawsuits than is U.S. antitrust law).

³⁵ The Treaty makes unlawful “[a]ny abuse . . . of a dominant position.” Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 89. A dominant position is one with substantial market power.

³⁶ *See, e.g.*, Case 85/76, *Hoffmann-La Roche & Co. AG v. Comm’n*, 1979 E.C.R. 461 ¶ 7; Case T-286/09, *Intel Corp. v. Comm’n*, 2014 EUR-Lex CELEX LEXIS 547 ¶ 85 (June 12, 2014) (holding that conduct that is “by [its] very nature *capable* of restricting competition” is an unlawful abuse of dominance even if the conduct did not have that effect or was not likely to have that effect under the circumstances (emphasis added)).

market power is at least arguably beyond the reach of EU competition law, even if it causes ex post market power or dominance.³⁷

III

So where does all this leave us? Kaplow goes too far in arguing that market power should neither be a separate element nor be assessed separately from the conduct at issue and that market power cannot properly be used as a screen for summary judgment or motions to dismiss because the welfare implications of market power are ambiguous.³⁸ To be sure, Kaplow does acknowledge the use of increased market power (which he calls “the market power delta”) as a screening device, but he characterizes that as “act-based screening” because it is “tantamount to analyzing the effects of the allegedly anticompetitive act.”³⁹ That formulation, however, conflates two separate issues: (i) whether the act is of a type that both can injure competition and is not competition on the merits, and which therefore can be deemed to be anticompetitive, and (ii) whether the act actually did injure competition by increasing market power in the case at hand.

Under U.S. law, conduct that is deemed to be anticompetitive but does not fall into the narrow category of conduct that is per se unlawful is illegal only if it actually causes or is likely to cause increased market power. Thus, for example, a complaint alleging that a patent

³⁷ An example of such conduct is deception to a standard-setting body that results in the creation of a new technology monopoly. See, e.g., *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007); cf. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 778–80 (6th Cir. 2002) (finding unlawful physical torts such as removing a competitor’s products used to exclude the competitor). The European Commission recently obtained a settlement in a similar case, in which the patentholder agreed to restrictions on the terms on which it could license its technology. See European Commission Press Release Memo/07/330, Antitrust: Commission Confirms Sending a Statement of Objections to Rambus (Aug. 23, 2007), http://europa.eu/rapid/press-release_MEMO-07-330_en.htm [https://perma.cc/JS56-2LAG]. It is not clear whether cases of that type would be upheld if challenged in European courts. If so, it would probably be on the premise that exercising dominance obtained by wrongful conduct is itself an abuse. U.S. law has long engaged in similar gymnastics in the patent area. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177–78 (1965) (holding the conduct element of Section 2 of the Sherman Act satisfied by attempting to enforce a patent obtained by fraud).

³⁸ See Kaplow, *supra* note 1, at 1357–58. By contrast, Kaplow says with apparent approval that “[a]ct-based screening is actually quite prevalent.” *Id.* at 1359. Notably, he cites for this proposition a study of Section 1 Rule of Reason cases. *Id.* at 1359 n.125. The conduct issue in those cases, all or nearly all of which involve allegations of collusion by competitors, ultimately turns on the relatively straightforward question whether the conduct increased or decreased *the defendants’* output. Cases involving alleged exclusion of rivals, by contrast, raise the much more difficult question whether any increase in the defendant’s output caused by the conduct outweighs the resulting decrease in rivals’ output. See *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (describing a “balancing” test for exclusionary conduct).

³⁹ Kaplow, *supra* note 1, at 1361. Earlier, Kaplow says that, if we regard market power “as our best assessment of the act’s anticompetitive consequences, we would have collapsed the two inquiries [market power and conduct] into one.” *Id.* at 1334.

holder's deception induced a standard-setting organization to include its patented technology in the standard and thereby enabled it to gain monopoly power states a claim under the antitrust laws,⁴⁰ but a patent holder's similar deception does not violate the antitrust laws if it did not cause the creation of or an increase in the patent holder's monopoly.⁴¹ In both cases, the alleged deception was found or assumed to be anticompetitive conduct.⁴²

Kaplow correctly notes that assessing market power is often very difficult and that market power is not a useful screen if it cannot be assessed at early stages in the litigation.⁴³ But there are some situations in which market power or its absence can be readily determined and in which it is very difficult to determine whether the conduct is anticompetitive. For example, bundled or loyalty discounts, in which a firm charges lower prices to those who buy more than one product or who buy large amounts from the firm, have the potential to harm competition by disadvantaging rivals that are unable to match the discounts. Whether these discounts enhance efficiency or increase output often depends on difficult factual determinations. We can, however, quickly determine that a McDonald's "Happy Meal," a six-pack of spring water, and a "buy 2-get-1-free" offer for neckties do not violate the antitrust laws because it is easy to conclude that the firms offering those discounts do not have and are not likely to obtain market power. That market power might in many other instances be difficult to determine means that it might be used as a screen only infrequently, not that it can never appropriately be used as a screen.

Increased market power, and in unilateral conduct cases ex post monopoly power, are therefore properly regarded as separate elements of the offense. When used as separate elements, they can be assessed separately and used as a screen. If the plaintiff fails to allege ex post and increased monopoly power in a Section 2 case or increased market power in a Section 1 case (other than a per se case), the complaint should be dismissed. If it can be ascertained on summary judgment that such allegations are wrong, the motion for summary judgment should be granted. These uses of market power might appropriately be called market power's "channels of materiality."

The most valuable contribution of Kaplow's study concerns, therefore, not the market power element in U.S. antitrust law, but the conduct element. Kaplow has demonstrated the complex and often conflicting ways that ex ante market power (and, in the case of investments that require a long-term payoff, ex post market power)

⁴⁰ *Broadcom*, 501 F.3d at 303.

⁴¹ See *Rambus Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008).

⁴² *Broadcom*, 501 F.3d at 314; *Rambus*, 522 F.3d at 463-64.

⁴³ Kaplow, *supra* note 1, at 1359.

ought to inform the assessment of the conduct in question. In some cases — for example, burning down a rival’s factory — market power has no role to play in determining whether the conduct should be regarded as anticompetitive. But in many cases, understanding how ex ante market power or the prospect of ex post market power might affect the parties’ incentives and abilities can help courts and enforcement agencies understand whether ambiguous conduct is more likely procompetitive or anticompetitive. Understanding how ex post and sometimes increased market power can affect the relative magnitudes of benefits and harms from the conduct in question can help determine whether the conduct should be regarded as anticompetitive or procompetitive. For these assessments, it is necessary not only to consider the implications of market power but also, by “induction,” to consider the relevant kind of market power.⁴⁴

The analytical and economic findings in Kaplow’s study are correct. Benefits and harms from the conduct at issue should be assessed together, and ex ante market power (and sometimes ex post market power) are often critical components of that assessment. It is here, in the assessment of the separate conduct element of the offense, that one finds market power’s channels of relevance.

⁴⁴ *Id.* at 1321.