

Competition Policy in the European Union and the United States: Convergence or Divergence?

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Bates White Fifth Annual Antitrust Conference
Washington, D.C.
June 2, 2008

The views presented here are the author's alone and not necessarily those of the US Federal Trade Commission or any of its members. The author is grateful to William Kolasky, Mario Monti, Wouter Wils, and participants in conferences at the IESE Public-Private Research Center and the University of North Carolina Law School for very helpful comments and suggestions. As edited, the paper will appear in *Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe* (IESE Barcelona).

1. Introduction

From the late 19th century through the first half of the 20th century, the enforcement of statutes forbidding anticompetitive practices was an endeavor unique to the United States (US). In this period, a handful of other jurisdictions – for example, Canada in 1899 – had adopted competition laws, but none applied these commands in a manner that compelled domestic or foreign firms to take notice. To come ahead a quarter century to 1975, the few jurisdictions with actively enforced competition laws included the European Union (EU), Germany, and the US. Even at this time, questions of cross-border enforcement dealt mainly with skirmishes over the imposition of treble damages in private US antitrust suits upon foreign firms.

I doubt that in 1975 even the most ardent enthusiast for competition law imagined what would transpire in the coming decades. Who foresaw in 1975 that by 2007 the Soviet Union would dissolve, China would pursue far-reaching market-oriented reforms, and the European Union would include several former Soviet Republics and nations that once were known in the West as members of the Warsaw Pact? And who anticipated in 1975 that by 2007 most nations would turn to market-based systems to promote economic growth, or that the number of jurisdictions with competition laws would exceed 100?

The transformation of economic policy and the regulatory framework in individual states has coincided with advances in communications, finance, and transport that have intensified cross-border integration in the production and sale of goods and services. These developments have increased the interdependence of national or regional regulatory regimes. Decisions taken in one jurisdiction about a cartel, a merger, or an abuse of dominance can have substantial cross-border spill overs.

As a group, the world's competition systems feature noteworthy substantive and institutional similarities. Only an observer unfamiliar with the larger history of the evolution of national legal systems would find this shocking. At the same time, in an environment of ever greater economic and regulatory interdependence, there is broad awareness of how the substantial multiplicity of competition systems with dissimilar substantive standards, procedures, institutional arrangements, and capabilities can discourage business transactions that spur economic growth and can needlessly increase the cost of controlling anticompetitive conduct.

Recognition of the potential costs associated with the multiplicity of competition systems has inspired various measures to promote international convergence upon superior norms.¹ Many initiatives principally involve public authorities. These include voluntary multinational networks such as the International Competition Network (ICN) and the competition committee of the Organization for Economic Cooperation and Development (OECD); regional collaborations (e.g., the Andean Pact, CARICOM, and COMESA), and bilateral discussions

¹By “norms” I mean consensus views within a group about how members of the group – such as jurisdictions with competition laws – ought to behave. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Norms*, 71 ANTITRUST L. J. 377 (2003).

between individual competition agencies. These largely-public activities coexist with projects in a various non-government networks such as professional associations and academic organizations. Nongovernment advisors have played a vital role in the work of some of the public agency networks, such as the ICN.

Amid abundant convergence-related activity within all of these institutions, why should the level of convergence between the competition systems of the EU and the US be a specific focus of attention? More than any other single force, the interaction of the competition policy systems of the EU and US deeply influences the convergence process within all of the multinational and regional networks. This is a function of domestic expenditures (the EU and the US spend more money on public enforcement than other jurisdictions), outlays for international projects (the EU and the US spend the most on international networking and have the largest foreign technical assistance programs related to competition policy), experience (the EU and the US have a larger base of current and older cases and engage in substantial non-litigation policymaking activity), and economic significance (the EU and the US are the largest economic markets on the planet). This gives the EU and the US unequaled capacity to project their competition policy preferences beyond their own borders. What happens in the EU and the US does not stay there.

This paper examines the state of the relationship between the competition policy systems of the EU and the US.² Part 2 of the paper begins by discussing, as a normative matter, what type of convergence on competition policy norms we should hope to see between the EU and the US – or among all of the world’s competition authorities. Part 3 then offers a positive description of existing similarities and differences between the EU and US competition policy systems. Part 4 reviews centrifugal and centripetal forces that promise to affect the extent to which the two systems converge or diverge in the future. Part 5 discusses possible paths for improvement in the relationship and for the attainment of better practices in competition policy.

To foreshadow my overall assessment, I regard progress toward greater cooperation in the implementation of competition policy and the mutual adoption of superior norms between the EU and the US to be a genuine success story in the modern transatlantic relationship. Despite differences in philosophy, procedure, analytical technique, and, occasionally, substantive outcomes, the past decade has featured important enhancements in measures by public and non-government bodies in both jurisdictions to improve cooperation in the formulation and implementation of competition policy standards governing transatlantic commerce. Moreover, the EU-US cooperation has provided important insights for building a framework of global and regional cooperation through multinational networks such as the ICN and the OECD. These efforts can foster widespread convergence upon superior analytical

²This paper develops themes presented in two earlier papers: William E. Kovacic, *Competition Policy Cooperation and the Pursuit of Better Practices*, in *THE FUTURE OF TRANSATLANTIC RELATIONS – CONTINUITY AMID DISCORD* 65 (David M. Andrews et al. eds., 2005); William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 *AM. SOC. INT’L L. PROC.* 309 (2002).

concepts and implementation techniques.

Progress to date has not been inevitable or automatic. Nor will it be so in the years to come. Past achievements have required a substantial commitment of resources to institution-building that does not show up in the usual roster of accomplishments – most notably, case counts – by which public agencies most often are judged. Future improvements will depend on the willingness of agency leaders to provide these resources, and more. Good relationships in this area do not come on the cheap.

Resources will not be the only challenge for the EU and US competition agency leadership. The public agencies in the European Union and the United States cooperate extensively, yet they also compete for influence and recognition. The drive to be seen as the global leader in competition policy is an underlying source of tension that can sharpen the edge of disagreement about specific matters or larger policy issues. Despite these tensions, an inter-jurisdictional rivalry channeled in constructive directions can have useful consequences. A competition to attain superior substantive approaches and implementation techniques is a competition worth having.

2. Why Does Convergence or Divergence between the EU-US Systems Matter?

The interest in mapping out the EU and US competition policy systems stems from more than curiosity about comparative study. For at least three reasons, the differences today can have considerable practical, economic significance. First, there is a high and increasing degree of interdependence between the regulatory regimes of individual jurisdictions. In many areas of regulatory policy, the jurisdiction with the most intervention-minded policy has power to set a global standard. It is the rare multinational enterprise that does not operate in the European Union or in the United States. For matters such as abuse of dominance or mergers, firms generally must conform their behavior to the practice of the most restrictive major jurisdiction with competition laws. By any measure, the EU and the US are major jurisdictions – “major” in the sense of having the nominal authority and enforcement capability to compel fidelity to their demands.

The second reason concerns the process of enforcement. Even when the EU and US apply the same substantive standards and ordinarily reach the same assessment of the same commercial practice, differences in the procedure for investigations and agency decision-making can impose costs on affected enterprises. In the case of merger reviews, these costs include the time and out-of-pocket expense of complying with varied filing requirements and accounting for differences in the timing of government reviews. Where it is possible to achieve simpler, more common procedures, the EU and US agencies can reduce the cost of executing routine transactions without any reduction in the quality of their substantive analysis.

The third reason involves the development of new competition systems around the world. The EU and the US spend substantial resources for technical assistance for new competition policy systems and for countries considering the adoption of new competition laws. By far, most of the 80 or so jurisdictions that have adopted new competition laws in the past 30 years have

civil law systems. Their competition systems usually rely on an administrative enforcement model that resembles the EU regime. By comparison, few civil law countries have established competition systems that use the adversarial prosecution model employed by the US Department of Justice (DOJ). Because the EU institutional platform is more compatible with the institutional arrangements in most civil law countries, many transition economies have an inclination to look first to EU models in designing and implementing their competition systems. This condition means that EU norms, more than US norms, tend to be more readily absorbed into the newer competition policy regimes.

2.1. The Operating Systems and Applications of Competition Law

Experience with technical assistance programs and the adoption of competition policy systems permits us to derive a more general observation about the global development of competition policy. To use a computer technology metaphor, the operating system of a jurisdiction's competition laws consists of the institutional framework through which legal commands are formulated and applied. As noted above, most jurisdictions have civil law systems. This ensures that the EU institutional framework which relies (compared to the US) upon more highly specified legal commands and emphasizes policy development through an expert administrative body will be the most popular institutional model among the world's competition authorities. The US competition law framework is grounded mainly in a common law methodology. The US relies substantially upon openended statutory commands and the elaboration of doctrine through case-by-case litigation in the courts. By reason of history and modern practice, relatively few jurisdictions will embrace this model.

With respect to the operating systems of the world's competition laws, the EU's institutional arrangements were destined to attain a dominant share. That dominance is likely to continue. An interesting issue for global competition norms is the choice by individual jurisdictions of substantive analytical "applications" and related investigative techniques to run upon a chosen operating system. Where will countries look to obtain the basic applications that they will run through their institutional operating systems? In areas such as the treatment of cartels and horizontal mergers, the US has provided the analytical applications that most of the world's competition law systems use today. The US also has designed implementation applications, such as the use of leniency to detect cartels, that enjoy broad popularity around the world. Moreover, US applications such as the use of private rights of action and the use of criminal sanctions to punish cartels are receiving a close look in many civil law countries, although the adoption of these applications will require civil law countries to make some important adjustments to their existing institutional arrangements.

Thus, the EU enjoys a dominant share concerning the operating system for competition law, and the market for applications remains highly competitive. The EU and the US account for the leading share of applications concerning substantive analysis and investigative methods, but a number of jurisdictions have produced important refinements of EU or US applications for their own use. The applications have an open source element to the extent that individual countries often retain freedom to make adaptations suited to their own needs. The level of adaptation sometimes is constrained by the obligation that individual states owe to superior legal

authorities. For example, accession to the EU has required candidates to conform their laws to the those of the Community. This might be seen, in rough terms, as a form of tying analytical applications to an institutional framework. Even so, the EU's own analytical applications often draw upon concepts and experience from the US. Individual jurisdictions, large or small, have considerable capacity to shape the development of substantive applications by their own success in advancing the state of the analytical art.

2.2. Diversification and Convergence: Normative Principles

From a normative perspective, how should we regard the simple existence of differences between the EU and the US with regard to substantive principles, analytical approaches, and implementation techniques? Two normative principles strike me as appropriate. First, some degree of difference is not only inevitable but healthy. Complete homogeneity across individual systems – a harmonization that unified jurisdictions by doctrine and process – “drives out experimentation and diversity of our regulatory levers.”³ The history of competition policy has featured a continuing search for optimal substantive rules and implementation methods. This search has benefitted from continuous, decentralized experimentation with respect to analytical principles (e.g., DOJ's adoption of revised merger guidelines in 1982), enforcement procedures (e.g., the creation in the 1970s of the US system for mandatory premerger notification and waiting periods), investigation techniques (e.g., the DOJ's leniency reforms of the 1990s), and organizational innovation (e.g., the United Kingdom Office of Fair Trading's recent restructuring to integrate competition and consumer protection operations).

Insistence on uniformity across systems, or a requirement that innovations within individual jurisdictions proceed only after a broad consensus among the global community of competition authorities has been achieved, would stymie these and other valuable measures. Competition policy has a strong experimental aspect. Improvements in substantive standards are likely to be achieved by an incremental process of adjusting enforcement boundaries inward and outward, and by assessing the consequences of pressing for more or less intervention. Refinements in organizational structures and investigational techniques likewise require experimentation (should an agency's economists be located in a separate division that reports directly to the head of the agency, or should they reside in teams of case handlers?) and the observation of results. The only way to answer basic questions about substantive policy and implementation is to test alternatives, and that testing benefits from decentralization that does not require consensus-building across jurisdictions for every adjustment from the status quo.

The second normative principle is that there should be mechanisms to promote adoption of superior norms. In a series of speeches presented during his chairmanship of the Federal Trade Commission (FTC), Timothy Muris presented a three-stage framework by which independent jurisdictions could realize the benefits of decentralized experimentation and

³Kenneth Neil Cukier, *Governance as Gardening: A Report of the 2007 Rueschlikon Conference on Information Policy* 50 (2007) (quoting Professor Viktor Mayer-Schoenberger) available at <http://www.cukier.com/writings/Rueschlikon2007-infogov-cukier.pdf>.

promote the broad adoption of superior norms.⁴ By “superior norms” I mean norms that (a) promote the accurate diagnosis of the actual or likely competitive significance of observed behavior, and (b) promote the design of government intervention (by initiating a case, by performing a study, or by acting as an advocate before other public institutions) that corrects the problem at issue.

The first stage of the Muris framework consists of decentralized experimentation within individual jurisdictions. The second involves the identification of superior substantive standards and implementation methods. In the third stage, individual jurisdictions voluntarily opt in to superior norms. This framework anticipates and welcomes experiments that depart from the status quo and supplies the means for promoting the widespread adoption of superior approaches. I will have more to say below about what the EU and the US can do with regard to the vital second stage of this process.

To the Muris framework I would add a fourth element. Notwithstanding differences that might exist at any one moment between the EU and the US or across other systems, individual jurisdictions should build institutional mechanisms that increase interoperability. This entails careful attention to enhancing channels of communication and discussion that link related functional units across agencies (i.e., between DG Comp and the DOJ and the FTC) and connect related institutions outside the competition agencies. A useful approach to achieving the fourth element is suggested in the New Transatlantic Agenda (NTA)⁵, which was established in 1995. The NTA sought to improve the quality of regulatory policy and to reduce the cost of the regulatory framework governing transatlantic commerce by improving EU-US cooperation. As Professors Mark Pollack and Gregory Shaffer characterize its approach,⁶ the NTA seeks to strengthen EU/US regulatory coordination by enhancing:

- * *Intergovernmental contacts* among the chiefs of government and other high level public officials (such as agency or department heads);
- * *Transgovernmental contacts* on a day-to-day basis among lower level officials;

⁴See Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, July 23, 2002) (prepared remarks at the Annual Lecture of the European Foreign Affairs Review) *available at* <http://www.ftc.gov/speeches/muris/020723brussels.shtm>; Timothy J. Muris, *Merger Enforcement in a World of Multiple Arbiters* (Washington, D.C., December 21, 2001) (prepared remarks before the Brookings Institution Roundtable on Trade and Investment Policy) *available at* <http://www.ftc.gov/speeches/muris/brookings.pdf>.

⁵The New Transatlantic Agenda (1995), *available at* http://ec.europa.eu/external_relations/us/new_transatlantic_agenda/text.htm.

⁶Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 3, 5 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

and

- * *Transnational contacts* among non-government institutions and individuals, including academics and the business community.

Beyond providing a way to structure the routine interaction between the EU and US competition policy systems, the NTA's three-level approach provides a useful means for identifying superior norms – the second element of the Muris framework. Without a conscious process to identify and adopt superior ideas, decentralization cannot fulfill its promise as source of useful policy innovations. By promoting improved interoperability in routine operations and helping identify superior norms, this approach also can provide the foundation on which EU and US policy makers choose to opt in to such norms.

As sketched out here, the process that generates transatlantic competition norms would be adaptable and evolutionary. In the field of competition law and in other areas of public policy, there is a tendency to speak of convergence upon “best” practices. I believe it is more accurate and informative to say that the objective is convergence upon “better” practices.⁷ The development of competition policy in any jurisdiction is a work in progress. This stems from the inherently dynamic nature of the discipline. Lest they be frozen in time, good competition policy systems consciously evolve through their capacity to adapt analytical concepts over time to reflect new learning.⁸ To speak of “best” practices suggests the existence of fixed objectives that, once attained, mark the end of the task. Envisioning problems of substance or process as having well-defined, immutable solutions may neglect the imperfect state of our knowledge and obscure how competition authorities must work continuously to adapt to a fluid environment that features industrial dynamism, new transactional phenomena, and continuing change in collateral institutions vital to the implementation of competition policy.

Perceiving the proper role of EU and US competition agency officials to be the continuing pursuit of *better* practices can focus attention on the need for the continuing reassessment and improvement of competition policy institutions. A common commitment by EU and US competition officials to make the cycle of reassessment and refinement a core element of their operations should be a central element of future cooperation. The routine process of evaluation should focus on at the adequacy of the existing legislative framework, the effectiveness of existing institutions for implementation, and the quality of substantive outcomes from previous litigation and non-litigation interventions. This type of inquiry would help ensure

⁷William E. Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, in *ON THE MERITS – CURRENT ISSUES IN COMPETITION LAW AND POLICY* 195 (Paul Lugard ed. 2005).

⁸In part, this is an inevitable consequence of drawing upon the discipline of economics, which itself evolves over time, to formulate substantive rules and analytical techniques. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

that each competition agency consider how it can upgrade its substantive standards and operational methods. For each agency, the upgrade could take the form of increasing activity with respect to some practices and doing less with respect to others.

3. Similarities and Dissimilarities in the Substance of EU and US Competition Policy

I share the often-expressed view of EU and US competition officials that the general trend of competition policy in the two jurisdictions has been toward common acceptance of substantive standards and the analytical concepts that support the implementation of those standards. An overview of overall goals and specific areas of activity verifies that proposition and also underscores noteworthy differences.

3.1. The Objectives of Competition Policy

It is thirty years since Robert Bork's *Antitrust Paradox* underscored the importance of objectives to the operation of a competition policy system. "Antitrust policy," Bork wrote, "cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give."⁹

Modern discourse between EU and US government officials has featured many statements about the proper aims of competition law. The speeches of top agency leaders in both jurisdictions indicate broad agreement on the question of goals. Each jurisdiction accepts the broad proposition that the central aim of competition law is "the objective of benefitting consumers."¹⁰ Consistent with the single-minded focus on "consumer welfare," EU and US antitrust officials routinely disavow any purpose of applying competition laws to safeguard individual competitors as an end in itself. EU officials also have grown accustomed to hearing, by direct quotation or paraphrase, the U.S. Supreme Court's admonition that the proper aim of antitrust law is "the protection of *competition*, not *competitors*."¹¹

At one level, the apparent agreement on overall objectives would seem to be, and is, an important step toward achieving convergence between the two systems. A commitment to apply competition policy commands to improve consumer well-being forces the agency to consider to some extent how a proposed form of intervention will deliver benefits to consumers. This can be at least a mild discipline upon the exercise of agency discretion and a means to develop an

⁹ROBERT H. BORK, *THE ANTITRUST PARADOX* 50 (1978).

¹⁰Neelie Kroes, European Commissioner for Competition Policy, Antitrust in the EU and the US – our common objectives 1 (Brussels, September 26, 2007) *available at* http://ec.europa.eu/commission_barroso/kroes/antitrust_eu_us.pdf.

¹¹The much-quoted aphorism appears in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)).

internal norm that focuses on effects upon end users. At the same time, however, the concept of “consumer welfare” and the principle of protecting “competition, not competitors” are so open-ended that their true meaning in practice depends on how they are applied. It is a relatively barren exercise for EU and US officials to invoke these phrases without taking the further difficult step of achieving agreement on what these phrases mean.

The habit of EU and US officials to invoke consumer welfare and related expressions as a useful start to a larger and continuing discussion about the objectives of competition law. These phrases alone tell us much about the deeper levels of meaning that each jurisdiction attaches to them. By themselves, the phrases do not deny each jurisdiction considerable discretion to achieve varied policy ends through the process of interpretation and application.

3.2. Substantive Competition Policy

The general trend of EU and US competition policy in the past two decades has been in the direction of greater convergence with regard to the appropriate focus of government enforcement and the application of litigation and non-litigation policy instruments. This part of the paper discusses similarities and dissimilarities. Part 4 below examines the reasons for these developments. Part 4 describes centripetal forces that have tended to pull the EU and US systems together and centrifugal forces that draw the two systems apart.

3.2.1. Substantive Similarities

3.2.1.1. Cartels

Both the EU and the US treat cartels harshly. Speeches of EU and DOJ officials today depict cartels as the most serious form of anticompetitive behavior, and both institutions have devoted substantial effort to prosecuting offenders and to devising new techniques for detecting covert arrangements. Recoveries in the high nine figures occur today with some regularity. The modern trend in sanctions in both jurisdictions has been to increase punishments for violators, and two EU member states (Ireland and the United Kingdom) have adopted policies, like that of the DOJ, of seeking incarceration for individual offenders. There is a continuing debate within the European Commission and in the member states about the desirability of relying to a greater degree on criminal sanctions.

This is an area in which EU practice in the past decade has converged substantially upon US norms by a process of voluntarily opting in. Cartel enforcement is a major example in which the EU embraced techniques – most notably, leniency – that had been tested extensively in the US. More broadly, global acceptance of a powerful anti-cartel norm is a vivid illustration of the operation of the Muris framework for convergence: an initial period of decentralized experimentation (i.e., the US leniency enhancements of the early and mid-1990s), the identification of superior practices (e.g., through the deliberations of the OECD competition committee), and voluntary opting in (dozens of jurisdictions have adopted leniency programs).

3.2.1.2. Horizontal Mergers

Horizontal merger policy in the EU and the US reflects a substantial degree of similarity. The elaboration and revision of merger guidelines in both jurisdictions in the past 20 years has yielded extensive convergence on the analytical framework. Merger decisions by the courts of both jurisdictions – notably, *AirTours*¹² in the EU and *Arch Coal*,¹³ *Giant/Western*,¹⁴ *SunGard*,¹⁵ and *Whole Foods*¹⁶ in the US – have tended to press EU and US enforcement authorities to satisfy more demanding evidentiary standards and withstand closer judicial scrutiny of proof offered to demonstrate likely anticompetitive effects. *AirTours* and *Arch Coal* are both similar in their insistence that prosecutors show how the collaboration among firms in a coordinated effects case will unfold after the merger is completed.

3.2.1.3. State Intervention in the Economy

Competition policy in the EU and the US reflects a growing awareness of how various forms of government intervention can harm competition as severely as private restraints. Statements by the leadership of the enforcement agencies in both jurisdictions indicate that the EU and the US treat government-imposed barriers to rivalry as serious obstacles to competition. The common concern about anticompetitive government intervention has been manifest by the prosecution of cases, the performance of sector studies, and the initiation of advocacy projects.

Although EU and US enforcement officials have a shared suspicion of government restraints on competition, the EU system provides a more powerful platform to address such restrictions. The US has no counterpart to the state aids portfolio of the EU. Moreover, the EU has no exemption for decisions taken by member state public authorities that matches the breadth of state action immunity available under the *Parker*¹⁷ doctrine. Owing to the mutual distrust of EU and US officials about anticompetitive state intervention, I have classified this category of activity as an area of substantive similarity. Due to the stronger legal platform available to the EU to challenge such restraints, and the breadth of the *Parker* immunity in the US, this area also could have been included in the Substantive Dissimilarity section below.

¹²Case T-342/99, *Airtours plc v. Commission* 2002 E.C.R. II-2585, 5 C.M.L.R. 7.

¹³*FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004).

¹⁴*FTC v. Foster*, No. 07-352, 2007 WL 1793441 (D.N.M. May 29 2007).

¹⁵*United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172 (D.D.C. 2001).

¹⁶*FTC v. Whole Food Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

¹⁷*Parker v. Brown*, 317 U.S. 341 (1943).

3.2.2. Substantive Dissimilarities

3.2.2.1. Abuse of Dominance

In some respects, the formative statutory texts of the EU and the US create a basis for differences in the treatment of dominant firm conduct. By their own terms and by judicial interpretation, the US antitrust statutes have no equivalent to the excessive pricing prohibition in Article 82. The Commission has not used its excessive pricing authority expansively, but the EU members states have shown a greater willingness to apply this measure under their own competition laws. The bare terms of Article 82 also provide a less certain basis for determining that the prosecutor must show that denominated forms of abuse (e.g., tying) had actual or likely anticompetitive effects.

The interpretations of Article 82 by the Court of First Instance (CFI) and the Court of Justice have tended to create a wider zone of liability for dominant firms than the decisions of the US courts under Section 2 of the Sherman Act. At the margin, US courts have tended to say that courts and enforcement agencies commit greater errors by intervening too much rather than too little. This perspective does not appear in EU jurisprudence or in speeches by EU enforcement officials.

In their technical findings and in their attitude, modern US Supreme Court decisions in cases such as *Brooke Group*,¹⁸ *Trinko*,¹⁹ and *Weyerhaeuser*²⁰ have demonstrated greater skepticism about abuse of dominance claims than judicial decisions in matters such as *France Telecom/Wanadoo*,²¹ *Michelin II*,²² and *British Airways*.²³ EU decisions in *IMS Health*²⁴ and *Microsoft*²⁵ show a greater inclination to condemn refusals to deal than modern US rulings such as *Trinko*. Unlike *Brooke Group* and *Weyerhaeuser*, the *France Telecom/Wanadoo* decision

¹⁸*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹⁹*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁰*Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.*, 127 S.Ct. 1069 (2007).

²¹Case T-340/03, *France Telecom SA v. Commission*, 2007 E.C.R. ____.

²²Case T-203/01, *Manufacture Francaise des Pneumatiques Michelin v. Commission*, 2003 E.C.R. II-4071.

²³Case T-219/99, *British Airways PLC v. Commission*, 2003 E.C.R. II-5917.

²⁴Case C-418/01, *IMS Health GmbH v. NDC Health GmbH*, 2004 E.C.R. I-5039.

²⁵Case T-201/04, *Microsoft v. Commission*, 2007 E.C.R. _____.

rejects the need to apply a recoupment test to resolve allegations of exclusionary pricing. A finding of dominance can occur in the EU at or somewhat below a 40 percent market share, while the US offense of attempted monopolization usually treats shares below 50 percent as being inadequate to establish substantial market power.

A major question for the two jurisdictions is how much an effects-oriented standard will become the common core of analysis in abuse of dominance matters. The EU white paper on dominance²⁶ and speeches by EU officials indicate receptivity to greater express reliance on an effects test and to reduced emphasis on the category-based assessment sometimes evident in cases such as *British Airways*. If there were broad EU/US agreement in concept on the value of an effects test, there still will remain the question of application. For example, the CFI decision in *Microsoft* on tying issues stated that the court was focusing on the actual or likely competitive effects of the challenged conduct. Yet the CFI's analysis of tying claims superficially resembles the treatment of tying allegations in the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 2001²⁷ concerning the DOJ complaint against Microsoft.²⁸ Even in the context of what is called an effects test, outcomes often will hinge upon the quantum and quality of evidence that a court demands before it is willing to find actual anticompetitive effects or to infer likely adverse effects.

3.2.2.2. Vertical Contractual Restraints

EU and US vertical restraints policy has displayed an important degree of convergence over the past two decades, particularly in the current EU vertical restraints guidelines, which moved toward more tolerant treatment of such restrictions. Notably dissimilarities remain. Particularly after the Supreme Court's abandonment in the *Leegin*²⁹ case of the *per se* prohibition on minimum resale price maintenance, US doctrine now evaluates vertical contractual restraints under a rule of reason analysis. Tying arrangements nominally remain subject to categorical prohibition, but what the Supreme Court still calls a *per se* rule increasingly has come to resemble a variant of a reasonableness inquiry. By contrast, EU law relies more heavily on *per se* condemnation, with minimum resale price maintenance being one noteworthy example.

²⁶DC Competition Discussion Paper in the Application of Article 82 of the Treaty to Exclusionary Abuses, (2005), available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

²⁷*United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

²⁸*United States v. Microsoft Corp.*, Civil Action No. 98-1232 (D.D.C. filed May 18, 1998) (Complaint) available at <http://www.usdoj.gov/atr/cases/f1700/1763.htm>.

²⁹*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).

3.2.2.3. Non-Horizontal Mergers

Compared to US competition law and policy, EU policy creates more conceptual possibilities for intervention in conglomerate and vertical transactions. Looking forward, there are questions about how expansively these possibilities will be exercised. The CFI decisions in *Tetra Laval*³⁰ and *GE-Honeywell*,³¹ while they recognized the legitimacy of the European Commission's portfolio effects theories in principle, found that the Commission had failed to supply adequate proof to establish a violation. At a minimum, these decisions suggest that the Commission will be required to satisfy relatively demanding standards of proof when challenging a conglomerate merger.

4. Centrifugal and Centripetal Forces

This part of the paper seeks to do two things. The first is to offer some explanations for how the trends in policy came to pass. The second is to identify institutional and other forces that promise to foster a greater degree of convergence in the future and to highlight forces that are likely to retard convergence. In Part 5 of the paper, I will discuss means to reinforce processes that promote convergence.

4.1. Divergence: The Centrifugal Forces

Discussions about EU and US competition law often default to a collection of familiar hypotheses to explain differences between the two jurisdictions. Thus, it is often said that the EU protects competitors, the US protects competition; the US is beholden to the stale, backward-looking Chicago School of economics, the EU embraces the progressive, forward-looking Post-Chicago School; the US gave up on bringing abuse of dominance cases after 2000, the EU is pressing ahead to keep this and other areas of competition law alive.

I do not deny the appeal of these propositions to those of us who periodically must construct an easily-grasped narrative to organize academic papers, write newspaper articles, or script speeches. I do dispute their accuracy. I am convinced that the conventional explanations divert our attention away from an examination of deeper, more persuasive explanations – many of them rooted in the institutional arrangements of the two systems – for why the two systems diverge. To see the underlying conditions more clearly is the first, necessary step to considering how and where the two systems might converge more completely on common standards.

Below I describe four considerations that tend to be overlooked in conventional discussions about why the EU and the US diverge.

³⁰Case T-5/02, *Tetra Laval BV v. Commission*, 2002 E.C.R. II-4381.

³¹Case T-210/01, *General Electric v. Commission*, 2005 E.C.R. II-5575.

4.1.1. Delegation of the Decision to Prosecute: The Role of Private Rights

In roughly the past 30 years, judicial fears that the US style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards.³² This is most evident in the progression toward more lenient treatment of dominant firm conduct. The intellectual roots of this development are as much (or more) rooted in the work of modern Harvard School scholars such as Phillip Areeda, Stephen Breyer, and Donald Turner as they are in the scholarship of Chicago School scholars such as Robert Bork and Richard Posner.

EU competition law has evolved without the tempering force of these concerns. For most of the history of the Treaty of Rome, the decision to prosecute in competition cases has been dedicated to public authorities. Had the US private rights of action been more constrained (for example, by making treble damages discretionary rather than mandatory), my prediction is that US doctrine for abuse of dominance would more closely resemble existing EU standards. The persistent inclination of US courts to raise liability standards to offset perceived excesses of private rights creates what could turn out to be a permanent fissure between the EU and the US approaches to dominant firm conduct and other forms of business behavior.

The major variable on this point is the possible future enhancement of private rights in the EU. An interesting question for the future is whether and how much the EU's modernization program (which dilutes the policymaking powers of DG Comp) and its efforts to encourage member states to augment private rights will affect the evolution of substantive doctrine. EU policymakers generally have disavowed the adoption of measures (such as mandatory trebling) that are associated with overreaching in the US system. Nonetheless, any expansion of private rights necessarily denies public authorities the gatekeeping function – in determining the type and ordering of cases to be prosecuted – that they have enjoyed in the past. And it is possible that the courts of the member states will regard private litigants as being, in at least some sense, less trustworthy custodians of the public interest than the public agencies.

4.1.2. Dissimilar Procedures: Administrative vs. Adversarial Models

The EU model of policy making relies chiefly on elaboration by an administrative body whose decisions are subject to judicial review. To some degree, the operations of the US FTC use the same model. For the US system as a whole (including the operations of the FTC), the bulk of key decisions, such as measures to prevent the consummation of a merger, cannot be taken without judicial approval. In other words, where decisions to intervene have relatively powerful consequences, the US system gives the courts an earlier, more significant role in determining whether the prosecutors' preferences will be fulfilled.

³²This view is elaborated in William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 1 COLUM. BUS. L. REV. 1-80 (2007).

In some respects, the US reliance on the adversarial model imbues the US public enforcement system with greater caution in deciding to intervene. DOJ and FTC investigative techniques, for example, rely less heavily than the EU on responses to questionnaires and places greater weight on investigational hearings and depositions to gather and test evidence. Judicial control in the EU is hardly absent (witness the CFI decisions in 2002 in *AirTours*, *Tetra Leval*, and *Schneider*³³), but it is generally less intrusive and immediate as it is in the US model. On the whole, this inclines the US agencies to demand, perhaps, a greater quantum and quality of evidence before deciding to prosecute.

By the same measure, the administrative model has made the EU more cautious in some instances about deciding not to intervene. Administrative practice in many civil law systems, and in the EU, compels public authorities to give reasons why they have declined to act upon complaints lodged by citizens or juristic persons. As the CFI decision in *Sony/Impala*³⁴ demonstrates, third parties can obtain judicial review of certain decisions by the Commission to close a file in a merger case. Thus, if the Commission were to decide that positive efficiency effects dictated that a merger be allowed to proceed, Commission officials would need to be prepared to document the expected efficiency consequences. Although the Tunney Act procedures in the US somewhat encumber DOJ's capacity to settle cases, the US public agencies generally have much greater freedom to ignore third party complaints and decide not to prosecute.

4.1.3. Assumptions about Underlying Economic Conditions

Decisions of courts and enforcement agencies in the US system to relax antitrust prohibitions may stem from assumptions about the operation of the US economic system. Important characteristics of the US system include relatively strong capital markets, comparatively few impediments to the formation of new business enterprises, and an effective mechanism for recycling the assets and personnel of failed firms back into the economy. These features give the US system a substantial degree of adaptability and flexibility.

These conditions may help account for the assumption, reflected in decisions by courts and enforcement agencies, to disfavor intervention in a wide range of disputes. US abuse of dominance doctrine and policy, for example, assumes a considerable capacity on the part of rivals, suppliers, and consumers to adapt, reposition, and otherwise protect themselves in the face of apparent overreaching by specific firms. The same assumptions probably help explain the trend since the 1970s to disfavor intervention concerning vertical restraints – particularly in light of the expectation that distribution channels will be highly resilient and adaptable. By contrast, it is possible that, because EU officials perceive the economy of the community and its member states to be less flexible and adaptable, there is less confidence that market processes

³³Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071.

³⁴Case T-464/04, *Independent Music Publishers and Labels Association (Impala)*, 2006 E.C.R. II-02289.

alone will provide a sufficient antidote, in the absence of public intervention, to offset seemingly anticompetitive business practices. The many measures underway in the EU to liberalize markets – to facilitate capital formation, to promote broad acceptance of a competition culture, and to realize the Treaty’s longstanding aims for community-wide economic integration – gradually could change assumptions about the robustness and resilience of markets and induce a relaxation of restrictions on business conduct.

4.1.4. The Sources of Agency Human Capital

In the aggregate, the backgrounds of the personnel of the EU and US public agencies differ in an important respect. In the leadership, management, and case-handling positions, a larger percentage of personnel in the US agencies have experience outside the civil service. The revolving door in the US creates a circulatory process that routinely brings academics and private sector practitioners into the competition agencies to a greater degree than one sees in the EU.

I do not claim that this circumstance has immense effects. It does mean that the US agencies have a larger group of officials, from top management to relatively junior case handlers, who have worked in private firms. This element of experience can provide a stronger basis with which to make confident judgments about which arguments advanced by private firms have merit and which do not. A lack of this practical perspective can increase an institution’s general wariness about the motives for business behavior and the significance of specific business tactics.

The mix of personnel in the Commission and in the member state competition authorities has been changing over time. One sees somewhat more acceptance of a revolving door process which, although it does not spin with the speed of the US system, has brought a larger number of personnel with academic and private practice experience into the EU agencies. In slow and almost imperceptible ways, this can change the culture of enforcement inside the agency, as well as altering the perceptions and attitudes of private sector bodies which absorb personnel who have departed the public competition agencies.

4.2. Convergence: The Centripetal Forces

Various existing phenomena tend to press the EU and the US competition policy systems together in their treatment of substantive antitrust issues. Some of these phenomena take place inside the competition agencies; some take place in interactions between the agencies; and some take place outside the government enforcement bodies. Many of the phenomena described here are interdependent, such that developments outside the competition authorities can have major effects on the agencies themselves.

4.2.1. Consultation Between the EU and US Competition Authorities

Using the three-level NTA framework of intergovernmental, transgovernmental, and transnational contacts introduced in Part 2 above, modern experience reveals considerable

interaction between the EU and US competition agencies and an intensification of activity in this decade. To some extent, the intensification of cooperative activity has stemmed from the highly visible disputes between the two jurisdictions in the Boeing/McDonnell Douglas³⁵ and General Electric/Honeywell mergers and the perceived need to explore ways to avoid similar policy disagreements in the future. Based on past experience, it is possible – even likely – that publicly voiced disagreements over the disposition of the Microsoft matters in the two jurisdictions will inspire deeper contacts and discussions concerning abuse of dominance cases. Fuller mutual discussion about these and other matters would be valuable enhancements to the EU/US relationship.

Intergovernmental contacts have continued at the highest levels between the Commission and the US federal antitrust agencies. These include regular, formal EU/US bilateral consultations and a variety of other interactions. The EC Commissioner for Competition, the DG Comp Director General, DOJ's Assistant Attorney General for Antitrust, and the FTC's Chairman played pivotal roles in the formation of the ICN in 2001 and have cooperated extensively in the past six years in the design and implementation of ICN work plans. Contact among high level EU and US officials is also commonplace at conferences and in discussions about specific policy matters. Measured by the sheer volume of contacts or the breadth and depth of discussions, the intergovernmental level of discourse in competition policy is more expansive today than at any period of the EU/US relationship.

A recent, important dimension of the intergovernmental relationship that goes beyond competition policy alone deserves emphasis. In this decade, the FTC has undertaken extensive discussions with DG Comp, DG Sanco, and DG Internal Market to explore policy connections between competition policy and intellectual property and competition policy and consumer protection policy. This has been identified as an increasingly important concern in matters such as health care and nutrition, where decisions taken on issues such as advertising have significant competition and consumer protection implications. What we are seeing is the beginning of a new framework of regulatory relationships that recognizes the interdependency of what may have been conceived of as largely independent policy regimes. At the same time the FTC has expanded cooperation with EU Member States, such as the United Kingdom, that, like the FTC, combine the competition and consumer protection portfolios in one agency and have expressed an interest in promoting the integration of policymaking between these two disciplines.

The same expansion of EU-US interaction has taken place for what the NTA framework refers to as *transgovernmental* contacts. In recent years, the EU and US competition authorities have expanded the work plan of the existing staff-level merger working group and have established new working groups dealing with such matters as antitrust/intellectual property issues. The frequency of staff-level meetings, by teleconference or face-to-face meetings, also has increased to address a variety of matters within and outside the context of the formal working groups. For DOJ and the DG Comp, there has been a noteworthy expansion of interaction as DG Comp has implemented its own variant of the DOJ's leniency program for the

³⁵*Boeing/McDonnell Douglas*, Case IV/M.877, 1997 OJ L/336.

prosecution of supplier cartels. Regular staff-to-staff contacts also have increased dramatically in the context of joint work on ICN and OECD projects.

A similar intensification of activity can be documented for *transnational contacts*. Measured by the agenda of conferences and non-conference activities, the major professional legal societies – among them, the American Bar Association and the International Bar Association – have expanded the energy they devote to EU/US competition policy. Beyond activities sponsored by these bodies, there has been a noteworthy increase in the number of conferences and continuing legal education programs with a large transatlantic component that attract a substantial transnational audience of academics, practitioners, and government officials. The same can be said for trade associations, such as the International Chamber of Commerce (ICC), and academic bodies, including institutions such as the Association of Competition Economics (ACE) based in Europe. Collectively, these nongovernment networks have played a crucial role in educating the academics, the business community, and the legal profession about the foundations of competition policy in both jurisdictions and about current policy developments. By engaging government policymakers and participants from nongovernment constituencies in formal public debate and informal discussion, these bodies help formulate a consensus about competition policy norms and provide a key source of relational glue for the competition policy community. Their significance can be observed in the growing tendency of government-based networks, such as ICN and OECD, to include nongovernment parties in their work.

It is possible to trace a number of specific policy outcomes to the three levels of contacts (intergovernment, transgovernment, and transnational) sketched above. Though not a complete accounting, the following list includes noteworthy measures rooted in the expanded interaction between government and nongovernment parties across the two jurisdictions.

- * Enhancements in formal EU/US protocols involving merger review, including the coordination of premerger inquiries in both jurisdictions.
- * New EU guidelines on merger policy and intellectual property licensing that featured significant discussion with US competition authorities and nongovernment bodies (such as the internationally-oriented legal societies and business associations) and reflected, in a number of respects, contributions by the US agencies and by the nongovernment groups.
- * Continuing augmentation and implementation of the EU leniency program in ways that reflected substantial consultation and interaction with DOJ's anti-cartel unit.
- * Greater transparency in US practice for merger and nonmerger matters, including emulation in a growing number of instances of the EU practice of providing explanations for a decision not to prosecute where the enforcement agency has undertaken a substantial investigation.

- * The successful launch of a new multinational competition policy network (the ICN) and the healthy invigoration of the work plans of existing networks such as OECD.

The continuation of EU-US cooperation through these channels – high level agency contacts, operational unit contacts within the competition agencies, and contacts involving non-governmental bodies – will continue to operate as forces that tend to promote convergence over time. There also is reason to expect that such contacts will intensify. For example, the implementation of the 2006 SAFEWEB legislation will enable the FTC to engage in a regular program of staff exchanges and internships with DG Comp, the competition authorities of the EU member states, and with other competition agencies globally. I am convinced that a program that has a DG Comp attorney or economist resident in the FTC at all times and has an FTC attorney or economist resident at all times in DG Comp will improve each agency's understanding of the other institution and will help supply the human glue that binds the two bodies together.

4.2.2. Absorption of a Common Body of Industrial Organization Knowledge

With some variation, the world's elite graduate programs in economics offer a roughly similar curriculum in industrial organization economics. Students in these graduate programs become familiar with the same body of industrial organization literature. Owing to personal tastes and philosophies, instructors inevitably differ in the emphasis they give to specific topics and with respect to the policy preferences they articulate in class. Despite these differences, students emerge from these graduate programs with a generally common intellectual framework and a roughly similar set of analytical norms. Above all, recipients of advanced degrees in economics are likely to share the belief that sound microeconomic analysis is an essential foundation for sensible competition policy.

In recent years, a number of competition authorities have adopted organizational reforms that elevate the role of economic analysis in the decision to prosecute. The Commission is one of these agencies. Earlier in the decade, DG Comp created the office of the Chief Economist and gave the holder of that office a direct reporting line to DG Comp's top leadership. The Chief Economist (initially Lars Hendrik-Roeller and now Damien Neven) has a staff that now exceeds 20 economists. In the EU and in other jurisdictions, the establishment of a separate economics unit can become the instrument by which economic analysis exerts more influence in guiding the selection and prosecution of cases.

As this institutional reform takes root, economic analysis and the preferences of economists are likely to assume increasing importance in the Commission's investigation of proposed cases, the formulation of complaints, and the prosecution of alleged infringements. The economic learning of economists in the office of the Chief Economist will closely resemble the learning of economists in DOJ's Economic Analysis Group and the FTC's Bureau of Economics. To the extent that economists' perspectives become reflected more expansively in the work of DG Comp, as one predicts they will over time, the analytical approach that the

Commission takes in deciding whether to bring cases probably will converge more closely upon the approach that the DOJ and the FTC take.

4.2.3. Critical Judicial Oversight

At a conference in Brussels early in 2001, I watched a panel of EU practitioners offer the view that DG Comp enjoyed virtually unbounded freedom to set merger policy without the prospect of effective judicial review. One panelist called the CFI a “lap dog.” Another likened the Luxembourg to a “door mat.” Two members of the the lap dog/door mat tribunal were sitting in the audience, and I wondered what was going through their minds.

Commentators would not make the same assertions about judicial review in the EU today. The CFI decisions in *AirTours*, *Tetra Leval*, *Schneider* (including the recent CFI ruling on costs³⁶), and *GE-Honeywell* inspired a basic rethink of merger policy and, more generally, organization and process within the Commission. These decisions have had the effect of pressing EU merger policy closer to US merger policy, whose reach recently has been questioned severely in the *Oracle*,³⁷ *SunGard*, *Arch Coal*, *Giant/Western*, and *Whole Foods* decisions.

5. A Suggested Agenda for the Future: Concepts and Means

There are a variety of ways to build upon existing forms of EU-US cooperation in competition policy to identify and promote convergence upon superior norms. The discussion below describes conceptual focal points for further cooperation and describes specific means that the EU and US competition policy communities might take to address these points.

5.1. Concepts

For all of the progress in cooperation achieved to date, there is considerable room for learning about basic forces that shape policy in the EU and US and therefore influence the transatlantic relationship. Discussions among government officials and within nongovernment networks tend to focus on specific enforcement developments (e.g., the resolution in the EU and the US of each jurisdiction’s Microsoft cases) or matters of practical technique and not to ask basic questions about the origins and institutional foundations of the systems. The discussion below suggests that the agenda for discourse inevitably must expand to incorporate examination of these considerations if cooperation is to be enriched and common progress toward better practices is to be achieved.

Toward a Deeper Understanding of the Origins and Evolution of Both Systems. The many recurring discussions about transatlantic competition policy often rest upon a terribly

³⁶Case T-351/03, *Schneider Electric v. Commission*, 2007 ECR II-____.

³⁷*United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

incomplete awareness about how the EU and US systems originated and have evolved over time. A relatively small subset of the US competition policy community engaged in transatlantic issues is familiar with the distinctive path by which competition policy concepts developed within the EU member states and supplied the foundation for the EU competition policy regime itself.³⁸ European specialists in competition policy likewise often display a fractured conception of the origins and evolution of the US system – a conception often derived from the works of US scholars whose grasp of the actual path of US policy evolution is itself infirm. An accurate sense of where the policies originated and how they have unfolded is essential to understanding the influences that have shaped modern results in specific cases. To move ahead, discourse at all three levels embodied in the NTA must look back for a richer understanding of competition policy history.

Scrutinizing the Analytical and Policy Assumptions in Specific Cases. The modern EU/US relationship has featured important instances of disagreement and will do so again in the future. Amid the many discussions of cases such as *Boeing/McDonnell Douglas*, *GE/Honeywell*, and *Microsoft*, two things seem to have received inadequate attention. The first, which only the competition agencies can perform, is a careful, confidential examination of the specific theories of intervention and an examination of the evidence upon which each jurisdiction relied in deciding how to proceed. The side-by-side, behind-closed-doors deconstruction of the decision to prosecute (or not to prosecute) would seem to be a valuable way to identify alternative interpretations and test them in an uninhibited debate involving agency insiders (and, perhaps, experts retained by each agency to assist in the review of the case). Yet discussions of this type generally do not take place.

Even more general discussions of cases that occupy considerable attention at conferences and seminars infrequently come to grips with what appear to be differences in assumptions about the operation of markets and the efficacy of government intervention as a tool to correct market failure. Embedded in EU and US agency evaluations of the highly visible matters mentioned earlier are differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate tradeoff between short-term benefits of a challenged practice and long-term effects, and the robustness of future entry as a means for disciplining firms that presently enjoy dominance. Putting these and other critical assumptions front and center in the discussion, along with the bases for the assumptions, would advance the transatlantic relationship in the future.

Focusing on How Institutional Design Affects Doctrine. In discussing competition law, there is a tendency for academics, enforcement officials, and practitioners to focus on developments in doctrine and policy and to assign secondary significance to the institutional arrangements by which doctrine and policy take shape. As I have suggested above, this tendency can cause one to overlook the important role that the design of institutions can play in influencing substantive results. It is impossible to understand the development of EU and US

³⁸The preeminent account of this history is DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE – PROTECTING PROMETHEUS* (Oxford paperback ed. 2001).

competition law without considering the impact of:

- * Private rights of action and mandatory treble damage liability in shaping the views of US courts and enforcement agencies about the appropriate boundaries of substantive doctrine concerning antitrust liability.
- * The experience gained by European competition authorities in carrying out responsibilities for policing excessive pricing as an abuse of dominance in informing their views about the wisdom and administrability of measures that mandate access to specific assets.
- * The nature and timing of judicial oversight in merger control.
- * The internal organization of competition agencies, including the placement of economists within the agency organization chart and the procedure for their participation in the decision to prosecute.
- * The decision to accept a revolving door in recruitment – the manner in which the competition agency recruits professional personnel and the backgrounds of the agency’s professionals who work for the agencies and the parties who appear before the agencies.

Consider, again, the possible impact of creating robust private rights of action in the American style – with mandatory treble damages, with relatively permissive standards for the aggregation of class claims, and asymmetric fee-shifting in which only a prevailing plaintiff recovers its fees.³⁹ In establishing this variant of a private right of action, the jurisdiction must keep in mind the possible interaction between the operation of private rights of action and public law enforcement. If courts fear that the private party incentives to sue are misaligned with the larger interests of the public (put another way, when the courts do not trust the private plaintiff as much as they trust a public prosecutor) or they fear that the remedial scheme (e.g., mandatory treble damages for all offenses) deters legitimate business conduct excessively, the courts will use measures within their control to correct the perceived imbalance. The courts may “equilibrate” the antitrust system by constructing doctrinal tests under the rubric of “standing” or “injury” that make it harder for the private party to pursue its case; adjust evidentiary requirements that must be satisfied to prove violations; or alter substantive liability rules in ways that make it more difficult for the plaintiff to establish the defendant’s liability.

The first of these methods only governs suits by private plaintiffs. Of particular significance to public enforcement authorities is the possibility that the courts, in using the second and third measures listed above, will endorse principles that apply to the resolution of all

³⁹The discussion here is based in part on William E. Kovacic, *Public Participation in the Enforcement of Public Competition Laws*, in CURRENT COMPETITION LAW VOLUME II, at 167 (Mads Andenas et al. eds., 2004).

antitrust disputes, regardless of the plaintiff's identify. In the course of making adjustments in evidentiary tests or substantive standards to correct for perceived infirmities in private rights of action, courts may create rules of general applicability that encumber public prosecutors as much as private litigants.

This hypothesis helps explain the modern evolution of U.S. antitrust doctrine. Since the mid-1970s, the U.S. courts have established relatively demanding standards that private plaintiffs must satisfy to demonstrate that they have standing to press antitrust claims and have suffered "antitrust injury."⁴⁰ In this period, the courts have endorsed evidentiary tests that make it more difficult for plaintiffs to prove concerted action involving allegations of unlawful horizontal and vertical contractual restraints. With some variation, courts also have given dominant firms comparatively greater freedom to choose pricing and product development strategies.

Collectively, these developments have narrowed the scope of the U.S. antitrust system. Most of the critical judicial decisions in this evolution of doctrine have involved private plaintiffs pressing treble damage claims. Perhaps the most interesting area to consider the possible interaction between the private right of action and the development of doctrine involves the fields of monopolization and attempted monopolization law. Litigation involving exclusionary conduct by IBM provides a useful illustration.⁴¹ In the late 1960s, the Department of Justice initiated an abuse of dominance case that sought, among other ends, to break IBM up into several new companies. By 1975, roughly 45 private suits had been filed against IBM alleging unlawful exclusionary conduct and seeking treble damages against IBM. The sum of all damage claims in the private cases exceeded \$4 billion – a considerable amount at the time.

My intuition is that courts reacted to the private cases with apprehension and were ill at ease with the possibility that a finding of illegal monopolization would trigger the imposition of massive damage awards against IBM. The courts in these matters could not refuse to treble damages if they found liability, but they could interpret the law in ways that resulted in a finding of no liability. IBM paid settlements to a small number of the private claimants, but it achieved vindication in most of the private cases. The results in the private damage cases against IBM and several other leading U.S. industrial firms in this period imbued U.S. monopolization doctrine with analytical approaches and conceptual perspectives that viewed intervention skeptically.

My hypothesis about the American competition policy experience is that U.S. antitrust doctrine would have taken a somewhat different path had there been no private rights of action,

⁴⁰These requirements are described in ABA SECTION OF ANTITRUST LAW, ANTITRUST FUNDAMENTALS 838-69 (5th ed. 2003).

⁴¹For a discussion of the government and private suits against IBM in the late 1960s and in the 1970s, see William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1289-90 (1999).

or if the damage remedy in private actions had been less potent – for example, limiting recovery to actual damages, or permitting trebling only for violations of *per se* offenses such as horizontal price-fixing. Specifically, U.S. antitrust doctrine would have assumed a more intervention-oriented character if the power to enforce the American competition statutes were vested exclusively in public enforcement authorities, or if the private right of action had been circumscribed in one or more of the ways indicated above.

This raises the question of what will happen in the EU and its Member States if private rights of action grow more robust. My tentative prediction is that an expansion of private rights could lead judicial tribunals to adjust doctrine in ways that shrink the zone of liability. For example, an expansion in private rights of action could cause EU abuse of dominance doctrine to converge more closely upon U.S. liability standards governing monopolization.

Devoting Attention to Inter- and Intra-jurisdictional Multiplicity and Interdependency. Efforts to formulate effective competition policy increasingly will require EU and US competition agencies to study more closely how other government institutions affect the competitive process. To an important degree, both jurisdictions resemble a policymaking archipelago in which various government bodies other than the competition agency deeply influence the state of competition.⁴² Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behavior affects the entire archipelago. It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition.

To build this infrastructure requires competition authorities to make efforts to identify and understand the relevant interdependencies and to build relationships with other public instrumentalities. This is particularly evident in the relationship between competition policy and intellectual property.⁴³ Better coordination could limit inconsistencies between the two systems and ensure that both can more effectively encourage innovation and competition. While cooperation and convergence activities involving competition policy and intellectual property policy have grown more intense in recent years, to date they have tended to be intra-disciplinary. Few cooperation and convergence activities account for the interdependency of the competition

⁴²The dimensions and consequences of policymaking fragmentation within individual jurisdictions are analyzed in ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* (2002). See also William E. Kovacic, *Toward a Domestic Competition Network*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 316 (Richard A. Epstein & Michael S. Greve eds., 2004) (describing fragmentation of policymaking affecting competition in US).

⁴³See William E. Kovacic & Andreas Reindl, *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Policy*, 28 *FORDHAM INT'L L. J.* 1062 (2005).

policy and intellectual property regimes.

5.2. Means

Members of the EU and US competition policy community could use several means to address the conceptual issues outlined above. Most means involve a reorientation of bilateral activity to invest more expansively in a knowledge base that would inform routine discussions at all three levels of the NTA framework. Possible specific techniques are summarized below.

Periodic Comprehensive Reviews of Institutional Arrangements. Both jurisdictions at regular intervals should undertake a basic evaluation of the effectiveness of their competition policy institutions. In many respects, the EU stands far ahead of the US in carrying out this type of assessment. The major institutional reforms introduced in the past year – modernization, reorganization of DG Comp, and the introduction of a new position of economic advisor – indicate the EU’s close attention to these issues.

Key focal points for a parallel inquiry in the US ought to include the scope of coverage of the competition policy system, the adequacy of existing substantive rules and remedies, the type and consequences of public enforcement, the role of private rights of action, and the design and administration of public enforcement bodies. Such an assessment ought to involve participation of government officials, private parties, consumer groups, and academics. Given the continuing changes that confront competition agencies, the two systems should undertake this comprehensive assessment less than once per decade.

Ex Post Evaluation. The EU and the US routinely should evaluate its past policy interventions and the quality of its administrative processes.⁴⁴ In every budget cycle, each authority should allocate some resources to the ex post study of law enforcement and advocacy outcomes. Beyond studying what it has achieved, a competition authority should choose selected elements of its enforcement process and methodology for assessment. Rather than treating ex post evaluation as a purely optional, luxury component of policy making, we must regard the analysis of past outcomes and practices as a natural and necessary element of responsible public administration. Even if definitive measurements are unattainable, there is considerable room for progress in determining whether actual experience bears out the assumptions that guide our acts. One element of the process of examining past decisions would be the type of detailed case study mentioned earlier in this paper. An elaborate deconstruction of specific cases would provide an informative basis for analyzing differences in philosophy and substantive perspective and for

⁴⁴The potential contributions of ex post analysis of completed government interventions to the development of competition policy are examined in William E. Kovacic, *Using Ex Post Assessments to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

identifying variations in procedure.⁴⁵

Enhancement and Disclosure of Data Bases. The EU and the US should prepare and provide a full statistical profile of their enforcement activity. The maintenance and public disclosure of comprehensive, informative data bases on enforcement are distressingly uncommon in our field. Every authority should take the seemingly pedestrian but often neglected step of developing and making publicly available a data base that (a) reports each case initiated, (b) provides the subsequent procedural and decisional history of the case, and (c) assembles aggregate statistics each year by type of case. Each agency should develop and apply a classification scheme that permits its own staff and external observers to see how many matters of a given type the agency has initiated and to know the identity of specific matters included in category of enforcement activity. Among other ends, a current and historically complete enforcement data base would promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity.⁴⁶ For example, access to such data bases would give competition agencies greater ability to benchmark their operations with their peers.

Assessment and Enhancement of Human Capital. Continuous institutional improvement will require the EU and US competition agencies to regularly evaluate their human capital. The capacity of an agency's staff deeply influences what it can accomplish. The agencies routinely must examine the fit between their activities and the expertise of their professionals. The agencies could share views about developing a systematic training regimen for upgrading the skills of their professionals. For example, where the agencies are active in areas such as intellectual property that require special expertise, the agencies could explore whether they have acquired the requisite specialized skills – for example, by hiring some patent attorneys. The experiences of the agencies with entry and lateral recruitment – including the costs and benefits of the revolving door – would be useful focal points for discussion. A fuller program of staff exchanges also might supply an effective means for improving the discussion at the staff level and educating each agency about how the other builds capability.

Investments in Competition Policy R & D and Policy Planning. An essential element of continuous institutional improvement is the enhancement of the competition agency's knowledge base. In many activities, particularly in conducting advocacy, the effectiveness of competition agencies depends on establishing intellectual leadership. To generate good ideas and demonstrate the empirical soundness of specific policy recommendations, competition authorities must invest resources in what former FTC Chairman Timothy Muris has called

⁴⁵For a suggestion of the content of such a case study, see William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L. J. 805 (2001).

⁴⁶For a formative treatment of the value of good statistical records for the analysis of competition policy, see Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. ECON. 365 (1970).

“competition policy research and development.”⁴⁷ Regular outlays for research and analysis serve to address the recurring criticism that competition policy lags unacceptably in understanding the commercial phenomena it seeks to address.

Examining the R&D function is one element of exploring larger questions about how the competition agencies should set priorities and, within the larger competition policy community, about what competition agencies should do. The question of setting priorities is likely to assume greater importance in the EU as certain functions that once occupied considerable EU attention devolve to the Member States, freeing resources for the Commission to design new programs. The consideration of how we measure agency performance, and assess the mix of its activities, is a topic for a larger discussion within the competition community. For example, on the scorecard by which we measure competition agencies, there is continuing awareness that we should count the suppression of harmful public intervention just as heavily as the prosecution of a case that forestalls a private restraint.⁴⁸

6. Conclusion: Future International Relationships

The *best* practice in competition policy is the relentless pursuit of *better* practices. A basic implication of past work and the future program I have suggested here is that the competition authorities (and nongovernment bodies) must be willing to invest significant resources in the development and maintenance of the relationships as a dedicated objective even though such investments do not immediately generate the outputs – most notably, cases – by which competition authorities traditionally are measured. The success of the relationships requires investments in the type of overhead and network building that commentators, practitioners, and, perhaps, legislative appropriations bodies often view with some skepticism. Thus, one challenge is for the competition authorities to develop acceptance of a norm that regards these investments as valuable and necessary.

Competition agencies also must confront the question of how many resources, even in the best of circumstances, they can devote to the construction and maintenance of networks that provide the framework for international relations in this field. The EU and the US are engaged not only in their own bilateral arrangements, but also bilateral agreements with other jurisdictions, participation in regional initiatives, and work in multinational networks such as

⁴⁷The concept of “competition policy research and development” and its role in determining institutional capability are analyzed in Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2 COLUM. BUS. L. REV. 359 (2003).

⁴⁸Competition agencies must confront government restrictions on competition with the same commitment and determination with which they challenge private restraints. See Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective* (New York, N.Y., Oct. 24, 2003) (remarks before the Fordham Annual Conference in International Antitrust Law & Policy), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

ICN and the OECD. The EU and US are major partners in all of these overlapping ventures, and each year each agency must decide, through its commitment of personnel, to “buy”, “sell”, or “hold” its position in each venture. Each agency is aware that the participation in these activities cannot be carried out effectively – namely, with good substantive results -- except through the allocation of first-rate personnel. There is no point in trying to do this work on the cheap.

The hazard is that the EU, the US, and other jurisdictions may experience, or may now be encountering, some measure of international network or relationship fatigue. Thus, a further focus for consideration by the two jurisdictions, individually and jointly, is how best to devote their resources. In this decision, both agencies are likely to regard the transatlantic relationship as a top priority. This is true because of the importance of the relationship to the regulation of transatlantic commerce and because the EU and the US always will have distinctive interests and common issues owing to their comparatively larger base of experience. Moreover, the EU/US relationship has served, in effect, as a bilateral test bed for substantive concepts and processes that can be rolled out in a larger multinational setting. Experience within the bilateral relationship has usefully informed EU and US decisions about what might be accomplished in the larger spheres. As the EU and the US approach perceived limits on how much they can dedicate to this growing collection of international initiatives, the larger competition policy community will need to abandon a case-centric vision of what agencies should do and accept the need for institution building, at home and abroad, as a vital ingredient of sound competition policy for the future.