



# **COMPETITION POLICY IN THE EU & US: CONVERGENCE OR DIVERGENCE?**

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# MULTIPLICITY AND CONVERGENCE EFFORTS

- Multiplicity in the Past 50 Years
  - From 1959 (few laws) to more than 105 today
- Convergence Efforts
  - Multinational public agency efforts: e.g., OECD, ICN
  - Regional agency efforts: e.g., COMESA, ASEAN
  - Bilateral agency efforts: e.g., EU/US
  - Non-government networks: E.g., ABA, IBA, ACE



# WHY FOCUS ON THE EU/US RELATIONSHIP IN STUDYING CONVERGENCE/DIVERGENCE?

- Unequalled Influence on Global Standards
- Greater Expenditures
- Greater Experience Base
- Greater Outlays for International Engagement
- Largest Economies



# OVERVIEW

- Design of Competition Systems: Conceptual Model
- Normative Propositions About Convergence
- Model of Decentralization and Convergence
- EU/US Competition Policy: Status Quo
- Centrifugal and Centripetal Forces
- Suggestions for Next Steps
- Caveat: Personal Views
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# DESIGN OF COMPETITION SYSTEMS: CONCEPTUAL MODEL

- Two Elements: Operating System of Institutions and Policy Applications
- Today's World
  - Dominant operating system: EU
    - Public enforcement by expert administrative tribunal
  - The leading applications: varied sources
    - US 1982 and 1992 Merger Guidelines, leniency
    - Note: Some applications may run poorly on existing civil law operating systems (e.g., criminal enforcement)



# WHY DIFFERENCES IN EU AND US CHOICES MATTER?

- High and Increasing Regulatory Interdependence
  - The most intervention-minded major jurisdiction sets global standards to which companies must conform
- Costs of Dissimilar Procedures Where Substantive Standards Are Congruent
  - Higher cost of carrying out routine transactions
  - Example: Merger control



# CONVERGENCE: NORMATIVE PROPOSITIONS

- Some Differences Are Unavoidable and Desirable
  - Competition law as product of experimentation, assessment, adjustment
- Three-Stage Model for Convergence
  - Decentralized experimentation
  - Identification of superior techniques
  - Voluntary opting-in
  - Example: amnesty/leniency
- Achieving Interoperability on Ongoing Basis
  - Contacts: agency heads, case handlers, NGO



# EU/US COMPETITION POLICY: SIMILARITIES

- Policy Goals
  - “Consumer welfare”
  - “Effects-based” standards
  - Caution: very open-ended concepts
- Cartels
- Horizontal Mergers
- Skepticism Toward State-Measures that Suppress Competition





# EU/US COMPETITION POLICY: DIFFERENCES

- Abuse of Dominance
  - Definition of dominance
  - Identification of improper conduct
- Non-Horizontal Mergers
- Vertical Restraints: e.g., Resale Price Maintenance



# DIVERGENCE: THE CENTRIFUGAL FORCES – SOME FREQUENTLY STATED EXPLANATIONS

- EU Protects Individual Rivals as an End in Itself
- US System Was Hijacked by Chicago School in 1980s and Is Still Held Hostage
- EU Is Guided by “Post-Chicago” School



# EU/US DIVERGENCE: SOME ALTERNATIVE INSTITUTIONAL EXPLANATIONS

- Private Rights: The Chicago-Harvard Double Helix
  - Illustration: Abuse of dominance
- Administrative vs. Adversarial Enforcement
  - Evidentiary demands of court-based system
  - Limits on decisions not to prosecute
- Assumptions About Economic Conditions
  - Capacity of rivals, customers, suppliers to adapt
- Sources of Human Capital: Role of Revolving Door
- Divergence Among US Authorities



# INFRA-JURISDICTIONAL HARMONIZATION

- EU Model: ECN and EC Trumping Rule
- US Model
  - Decentralization
    - Two national authorities: DOJ and FTC
    - Member state competition authorities: State attorneys general
    - Private rights of action
  - Rationalization by
    - Judicial decisions
    - Statutory amendments



# POLICY FRAGMENTATION IN US

- DOJ and FTC
  - Abuse of Dominance Cases: 2001-2008
  - Section 2 Report
    - General standards, false positives/false negatives
  - Policy after January 20, 2009
- Supreme Court
  - No public agency abuse case since 1973
  - *Linkline*
  - *Rambus*
    - Definition of standards
    - Public administrative suits vs. private treble damage cases



# EU/US CONVERGENCE: CENTRIPETAL FORCES

- Increased Consultation Between EU/US Systems
  - Results manifest in merger control, IP guidelines, leniency, creation of ICN, refinement of OECD agenda
- Absorption of Common Body of Industrial Organization Economics
  - Common intellectual infrastructure
  - Absorption via agency design: e.g., DG Comp's CET
- Intensified Judicial Oversight: e.g., Merger Policy
  - Compare *AirTours* with *Arch Coal*



# SUGGESTED EU/US AGENDA: NEXT STEPS -- CONCEPTS

- Deeper Understanding of Origins and Evolution of Both Systems
  - Example: How Chicago-Harvard Double Helix reshaped US abuse of dominance doctrine from 1975 to present
- Scrutinizing Analytical and Policy Assumptions Governing Resolution of Specific Cases
  - Examples: Google/DoubleClick, Intel
- Focus on How Institutional Design Affects Doctrine
  - Example: Role of economists in decision to prosecute
- Understanding the Regulatory Archipelago and Interdependencies: e.g., with IP, Procurement



# NEXT STEPS: MEANS

- Periodic Reviews of Institutional Arrangements
- More Investment in Ex Post Evaluation
- Enhancement and Disclosure of Data Bases
- Assessment and Enhancement of Human Capital
- More Investments in Competition Policy R&D
- Broader Staff Exchanges
- More Collaboration on Individual Cases and Policy
  - Example: abuse of dominance





# CONCLUDING THOUGHTS

- Policy Goal: Creation of and Convergence Upon Superior Norms
- The Role of the (Mostly) Friendly EU/US Rivalry
  - Tensions
  - Detriments when focus of rivalry is to encourage adoption of one's preferences as end in itself
  - Benefits when the focus of rivalry is the production of superior norms

