Federal Trade Commission

Convergence and Comity: Still Improbable?

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On previous occasions when I've been asked to discuss the prospects of convergence and comity between the United States and Europe I've been pretty dour. Over the four plus years that I've given the matter thought, I've cited six barriers to convergence.

The first is the difference in structures. As you know, the European Commission ("EC") is an administrative system. Subject to judicial review by what was then the European Court of First Instance (now the General Court) and the European Court of Justice, the EC decided not only whether a transaction or practice violated what was then Article 81 and/or Article 82 of the Treaty of Rome (now Sections 101 and 102

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respectively of the Treaty of Lisbon), but also what the fine or penalty for the violation should be.[1] Moreover, there was no right to cross-examination. Those for and against a practice (and their economists) just said so.[2]

By contrast, both the Justice Department and the Federal Trade Commission had an adversarial system. The Antitrust Division was strictly and solely a prosecutor. It challenged transactions or practices in a federal district court. All witnesses were subject to cross-examination in that court. The Federal Trade Commission was both a prosecutor and judge when it both challenged transactions and practices that it had reason to believe violated the antitrust laws and reviewed the decisions of its administrative law judges after those judges made a preliminary determination whether there was a law violation and what the remedy for the violation should be. However, the Commission, like the Justice Department, acted solely as a prosecutor when it sought an order from a federal district court enjoining the transaction pending the administrative trial. In both the federal district court and the administrative trial witnesses were subject to cross-examination.[3]

The second barrier to convergence was the difference in statutes. Most notably, Section 102 prohibited a firm from exercising a dominant position in the market. That meant that the EC needed to determine that the firm was dominant in the first place. But

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[1] Treaty on the Functioning of the European Union, Sept. 5 2008, 2008 O.J., arts. 101-02.

[2] J. Thomas Rosch, "Observations on Evidentiary Issues in Antitrust Cases," at 3 (June 19, 2009), *available at* http://www.ftc.gov/speeches/rosch/090619antitrustcases.pdf.

[3] J. Thomas Rosch, "The Three C's: Convergence, Comity, and Coordination," at 6 (May 10, 2007), *available at* http://www.ftc.gov/speeches/rosch/070510stgallen.pdf; *see also* J. Thomas Rosch, "Perspectives on Three Recent Votes" (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

under the language of the statute a firm might be dominant because there was a tight oligopoly (that was called "collective dominance"), and exercising a dominant position could include exploiting that position by, for example, charging supra-competitive prices. Section 2 of the Sherman Act, the United States counterpart to Section 102, prohibited a firm not only from monopolizing the market but also from "attempting to monopolize" it. That meant that the United States Agencies did not need to determine that the firm had a monopoly position in the first place. But under Section 2, the firm had to have monopoly power itself (there was no such thing as "collective" dominance or monopoly power), and a firm with monopoly power was free to exploit that power (by, for example, charging monopoly prices).[4]

The third barrier to convergence consisted of case law and guidelines applying the statutes. Under Section 101, resale price maintenance (where a supplier "fixes" its reseller's prices) was considered per se illegal. Under Section 1 of the Sherman Act, the United States counterpart to Section 101, by contrast, resale price maintenance was not per se illegal but was governed by the rule of reason after the United States Supreme Court's decision in the *Leegin* case.[5] However, under the guidelines governing Section 102's application, injury to a competitor could be considered injury to competition and hence consumer injury whereas under the case law governing Section 2 of the Sherman Act generally injury to a competitor could not be considered injury to competition and

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[4] J. Thomas Rosch, "The Path You Need Not Travel: Observations on Why Canada Can Do Without Section 5," at 2 (Feb. 4, 2010); *see also* Rosch, "The Three C's," *supra* note 3, at 1.

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

hence consumer injury. Thus, in addition to the statutes themselves, the case law and the guidelines respecting the statutes were different.[6]

The fourth barrier to convergence was a difference in culture and history. The EC challenged the establishment or support of so-called "national champions"—that is to say, firms that were dominant because they had been nationalized or which were heavily subsidized by one of the EU member states, generally in order to prop up employment. There were few, if any, such firms in the United States because of the lack of a similar history or culture.[7]

The fifth barrier to convergence was a difference in economics. Before I came to the Commission at the beginning of 2006, the EC had little in-house expertise or experience. Then it hired Lars-Hendrik Roeller as its Chief Economist. In short order, the EC not only embraced economics but arguably did so with a more open mind than the U.S. did. We in the United States were mostly wedded to the "Chicago School" of economics with its emphasis on static price theory. The Chicago School assumed that sellers and buyers generally act rationally to maximize their profits and bargains, that imperfect markets will therefore correct themselves rather quickly, and that a rational profit-maximizing seller would not engage in predation. By contrast, the EC was more hospitable to "post-Chicago School" thinking, which hypothesized that various kinds of

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[6] J. Thomas Rosch, "I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?" at 5, 16-17 (Sept. 8, 2007) (collecting cites); *see also* Rosch, "The Three C's," *supra* note 3, at 5; Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007).

[7] Rosch, "Observations on Evidentiary Issues," *supra* note 2, at 2.

predatory conduct might be rational and profit-maximizing.[8] The EC was also less concerned than we in the United States about fashioning predictable single firm antitrust rules upon which the business community could rely. That, in turn, led to single firm guidelines issued by the EC that were arguably as concerned about Type 2 error (under-enforcement of the antitrust laws) as they were about Type 1 error (over-enforcement).[9] (The concern in the United States that we must avoid unpredictability was somewhat ironic because in the 1960s the courts were severely criticized for applying predictable rules of per se illegality but by 2010 the courts were being severely criticized for not applying rules of per se legality.)

A sixth barrier to convergence was that in the EC an appeal by interested parties was available from an EC decision not to challenge a transaction or practice (for example the Sony-BMG appeal).[10] In the United States, there was no such right to appeal a decision by the Antitrust Division or the Federal Trade Commission not to prosecute. The only appeal was by the target or targets from the Agencies' decision to challenge.

A final, more subtle, barrier to convergence was that voiced by former Commissioner Mario Monti at the Spring Meeting of the American Bar Association's Spring Meeting in 2009. He noted there that the principal public law enforcement agencies in the United states—namely the Antitrust Division and the Federal Trade Commission—had disagreed publicly in 2008 about the Antitrust Division's issuance of

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[8] *Id.* at 2; Rosch, "I say Monopoly, You say Dominance," *supra* note 6, at 3-5, 11-15.

[9] Rosch, "The Three C's," *supra* note 3, at 4-6.

[10] To recall, in the Sony/Bertelsmann AG (BMG) joint venture, the Court of First Instance annulled the EC's 2004 clearance of the joint venture after a group of rival music labels appealed the EC's decision. Ultimately, the venture was approved after re-review by the Commission and the European Court of Justice set aside the judgment of the Court of First Instance.

guidelines for single firm conduct. He wondered aloud what kind of example that set for convergence between the Agencies and the EC.

But we are now in 2010, and my views are different today than they have been. I now suggest that these barriers are either dissipating or that they are lower than I had thought. Let me consider them one by one.

First, there still exists a basic difference between our architectures. The EC is still an administrative architecture and ours is adversarial. But the difference is less pronounced than it was because the EC has adopted a "devil's advocate" procedure. Pursuant to that procedure, two different teams debate whether a transaction or practice should be challenged before it is challenged. This is not the same as an adversarial system because cross-examination is still not allowed, but it is certainly a step toward our adversarial system.[11]

It also remains to be seen whether the EC would continue to be so strictly administrative. It has been severely criticized in the *Intel* case for being at the same time the prosecutor and the judge.[12] It is said that by being both the EC offends Europe's basis sense of human rights. As an American, I don't know how much weight to give this claim, given the ability of European appellate courts to overrule the Commission. But my European friends insist that it is not frivolous.

Second, there still exists a basic difference between our Sections 101 and 102, on the one hand, and Sections 1 and 2 of the Sherman Act, on the other hand. But EC guidelines and the case law applying Sections 1 and 2 have eroded the difference. More

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[11] Rosch, "Observations on Evidentiary Issues," *supra* note 2, at 2.

[12] Kevin J. O'Brien, *European Ombudsman Criticizes Inquiry Into Intel*, N.Y. TIMES, Nov. 18, 2009, *available at* http://www.nytimes.com/2009/11/19/technology/companies/19chip.html.

specifically, resale price maintenance is per se illegal in the EU in name only. The existence of an efficiencies defense to the practice, which was recently announced by the EC in guidelines, has effectively made it defensible (although, as I read the guidelines, the burden of justification is upon the firm or firms defending the practice).

Conversely, after the Supreme Court's *Leegin* decision, injury to consumer choice (as well as an increase in price) is now recognized as injury to consumer welfare in the United States. I say that because the *Leegin* decision permits consumers to choose between "no frills" buying from a discounter and buying at a higher price from a reseller offering pre-or post sale services along with sale of the product. Or, to put it in economic terms, a higher resale price may be justified by evidence that, despite the higher price, there has been an increase in output. To be sure, this has not been articulated as well in the United States as it has been in the EC's Section 102 guidelines, where injury to a competitor may be considered injury to competition if the former reduces consumer choice. But the *Leegin* decision is a step in that direction.[13]

Moreover, my prior thoughts about convergence predated any interest in Section 5, which is the FTC's basic law, which, according to our Supreme Court, goes beyond Section 1or 2 of the Sherman Act. I have said before that I think Section 5 permits the FTC (and the FTC alone) to protect consumer choice the way that the EC does.[14] I believe that is an important benefit of proceeding under Section 5,

Third, it can no longer be said that the EC alone is concerned about "national champions." Since the bailouts of Chrysler and General Motors, as well as the bailouts

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[13] *See supra* n. 6.

[14] J. Thomas Rosch, "Rewriting History: Antitrust Not As We Know It . . . Yet" at 14-16 (April 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf.

of AIG, Fannie Mae and Freddie Mac, it is apparent that the United States has its national champions too. And that does not even take into account the bashing that Toyota has gotten up on Capitol Hill and by the Administration.[15]

Fourth, any gap in economics (which the current EC Chief Economist, Damien Nevin, has insisted never existed) is certainly contracting. Hendrick said the other day that the EC now employs a full complement of economists similar to the Antitrust Division and Federal Trade Commission in the United States. Moreover, thanks to the post-Chicago School economists and to those developing Behavioral Economics, the United States antitrust Agencies can no longer be considered wedded solely to the Chicago School of economics. Post-Chicago School theories, respecting tying, exclusive dealing, raising rivals' costs generally and cheap exclusion as rational, profit-maximizing practices, abound today.[16] So do challenges to the assumption that sellers and buyers (especially buyers) act rationally[17] (though we have yet to see the development of an "organizing principle" as tidy as the Chicago School's assumptions that may be applied if it is assumed that sellers or buyers act irrationally. Moreover, I am not at all convinced that there has ever been a "gap" in the predictability of our rules respecting single-firm conduct. For at least a decade now in the United States—certainly since the *Microsoft* decision by the DC Circuit in 2009[18]—the legality of single firm conduct has been analyzed under a rule of reason instead of a rule of per se legality. What could be less

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[15] Peter Whoriskey and Frank Ahrens, *Toyota unsure if recalls suffice; U.S. Chief Faces Lawmakers*, WASH. POST, Feb. 24, 2010, at A1.

[16] J. Thomas Rosch, "Antitrust Law Enforcement: What to do About the Current Economics Cacophony," Bates White Antitrust Conference, at 8-9 (June 1, 2009), *available at* http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf.

[17] Rosch, "Rewriting History," *supra* note at 6 n.9.

[18] *United States v. Microsoft Corp.*, 253 F.3d 34, 59, 76 (D.C. Cir. 2001) (en banc).

predictable to the business community than how the rule of reason will be applied to a practice? I respectfully suggest that is about as clear as mud.

Fifth, similarly, I think I have exaggerated the importance of the right to appeal from a decision by the EC not to prosecute. To be sure, we still do not have that right in the United States. But we do have a Tunney Act procedure, pursuant to which a consent decree to which the Antitrust Division has subscribed, may be challenged in federal district court. We also have a procedure at the Federal Trade Commission pursuant to which interested persons can oppose Commission consent decrees at the Commission. Of course these procedures do not provide a right to appeal the Agencies' decisions to an appellate court, as in Europe. But they do provide an avenue for challenges to the Agencies' decisions to enter into consent decrees instead of challenging a transaction or practice in litigation.

Finally, I take Mario Monti's point that the 2008 flap between the Antitrust Division and the Federal Trade Commission made it hard to complain about the lack of convergence between the United States and the EC when the United States Agencies could not themselves converge on the 2008 Single Firm Guidelines issued by the Antitrust Division. But I think the flap between the Agencies has moderated since Christine Varney withdrew the Antitrust Division Guidelines last year.

All of this said, there still remain substantial barriers to convergence. However, they are different from the ones I have previously described. In no particular order, first, they exist because there are separate sets of antitrust law and antitrust law enforcement systems in the member states in Europe. Second, treble damage actions, including class actions and parens patriae actions can be brought by private plaintiffs and the 50 states in

the United States. Third, there are 13 federal appellate courts and 50 state supreme courts in the United States whereas there is a relatively unitary supervisory system by the UC and appellate process in the Europe. Each of these differences may create differences in substantive and procedural antitrust law enforcement that will continue to impede complete antitrust convergence across the Atlantic.