



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



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







