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

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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).

[1] By "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, sif1.1(7.2yticaETBr.avemofer W)9.5hip.
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[2]This 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.

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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

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.

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[3] Kenneth 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.

[4] *See* 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.

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

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[7]William 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).

[8]In 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*.'"

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

[10]Neelie 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.

[11]The 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

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.

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[12] Case 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

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[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).

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

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

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

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

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

[26]*DC Competition Discussion Paper in the Application of Article 82 of the Treaty to*

[30]Case T-5/02,

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

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[32]This 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).

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 Douglas[35] 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

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

* 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

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 costs[36]), 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*,

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[36]Case 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

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[38]The 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.

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[39]The 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).

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

[41]For 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.

[42]The 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

[47]The 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*

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