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 prel

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

of AIG, Fannie Mae and Freddie Mac, it is apparent that the United States has its national

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 [illegible]

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.