CPI's Europe Column Presents:

European Commission's rejection of the complaint). Incentives to become a formal complainant are influenced by these rights. This, however, works in the public interest. Complainants report alleged infringements that may be impossible or excessively difficult for the competition authorities to detect without any input from competitors or customers.

If, however, "driven" by competitors purports to suggest that the European Commission is "captured" by complainants or that the European Commission cannot run cases unless there are well resourced complainants, we believe this is incorrect. Suggesting complainants are the driving force for the cases against the tech giants ignores much of the European Commission's experience with these cases. In the *AdSense* case, for example, Microsoft withdrew its complaint more than two years before the European Commission issued an infringem

markets. It applies across the board, including to merger control. Furthermore, in practice, historically Competition Commissioners have s-2(ra)nn rpatlyal52(i)-4(n)-3(n)86ecs-2( )]TJE

, 438aincy 514dpeiion

What one could draw from these differences, however, is not any support for the claim that U.S. antitrust law was conceived of as "law enforcement" and EU competition law was conceived of as "regulation." These differences show, rather, different perceptions and underlying beliefs about the relative importance of type 1 versus type 2 errors and, more generally, different doctrinal approaches by different courts in different jurisdictions.

It is also instructive to recall, from a historical perspective, that in one of the drafts of the Treaty of Rome, the section on competition opened with a general prohibition on discrimination on grounds of nationality. That prohibition was then removed from the draft on the request of the German delegation, with the agreement of the other delegations, because the view was taken that discrimination on grounds of nationality had nothing to do with competition law.[17]

It would also be inaccurate to say that EU competition law is "regulation" because it is enforced by the European Commission and national competition authorities ("NCAs"), which are, by and large, administrative authorities rather than courts. The European Commission and the NCAs are required to enforce the competition laws through individual enforcement mechanisms, not to regulate markets. Furthermore, courts have jurisdiction to apply the very same prohibitions regardless of any prior decision by an administrative authority. A firm aggrieved by an alleged abuse of dominance may complain to the European Commission or go straight to court. The European Commission or the court will apply the law, and the decision-maker should not affect the result. Also, when the European Commission or an NCA adopts an infringement decision, that decision is reviewable by a court of full jurisdiction, that is, by a court having the power to review all aspects of the decision, in fact and law.

Finally, to extrapolate – as Werden & Froeb do - that EU competition law is regulation because it prohibits exploitative abuses, including excessive prices, and excessive pricing cases turn the enforcer into a price regulator, is methodologically incorrect. Exploitative abuses

Werden & Froeb argue that the European system is grounded in skepticism of markets. In fact, the European system is grounded in the creation of a single market, a concept firmly grounded in the belief that free trade and an open and competitive economy maximize overall welfare, against the background of a social and economic history that reflects a wariness of conduct by former state monopolies within their traditional areas of dominance. In the EU, from the outset, state monopolies, state-granted benefits and privileges, and state power coopted by private interests posed serious challenges to free and competitive markets. This history of state-run or directed economies impacts the European Commission's enforcement priorities: more than half of the European Commission's single firm conduct cases of the past two decades involve telecom, financial services, rail, and electricity, reflecting this economic past. This difference identified by Werden & Froeb is generalized, explaining that the U.S. protects competition, leaving unsaid the decades-old refrain that inevitably follows this statement: that Europe protects competitors at the expense of consumers. Scholars have noted that EU competition law protects the competitive process, stressing market access and the right to contest markets on the merits.[20] Guided by Post-Chicago school economics,[21] as Professor Eleanor Fox notes, EU competition enforcement reflects the belief that lowering barriers to entry and keeping a clear path for challengers is likely to make the market more dynamic and thus serve consumers better.[22] We believe that enforcement in Europe is not guided by a skepticism of markets, but by a marginally different set of beliefs about what rules and forms of intervention make markets work better and tend to optimize overall welfare.

It is also noteworthy that while U.S. law exempts certain forms of state action from the reach of antitrust law, by contrast, the activities of public entities in the EU are fully subject to competition law. EU competition law, through Articles 106 and 107, does not exempt state-owned enterprises or state granted privileges from the application of competition law. In the *Greek Lignite* case, for example, the European Court of Justice ("ECJ") repeated its well established case law, according to which a Member State may be found to have infringed Article 106(1) if its measures create a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position, or when those rights are liable to create a situation in which that undertaking is led to commit such abuses.[23] For state action to be compatible with EU law, the exclusive or special rights must be proportionate and not go beyond what is necessary to achieve the public interest objective.

In general, in the area of single firm conduct, the European Commission and Member States have been more inclined to intervene against single firm conduct, whereas in the U.S., single firm conduct enforcement has been more influenced by concerns about the effects of erroneous government enforcement. This does not mean, however, that Europeans are driven by a skepticism of markets or that, in the U.S., government enforcement against single firm conduct is absent. [24]

The institutional structure and enforcement process in the EU and the U.S. differ significantly, but both systems allow for a full review by independent courts. In the EU, the European Commission investigates a case, issues a statement of objections, and gives the targets the right to access to evidence the European Commission has relied upon (access to file), the opportunity to submit a written defence, and to request a hearing. The hearing before the European Commission is, of course, nothing like a trial before an impartial court. There is no cross-examination of fact and expert witnesses and no adversarial arguments. The hearing is before the same body that started the investigation, issued the statement of objections, and will ultimately decide the case. However, under EU law, this system requires that any aggrieved party must have a right of appeal before a court of "full jurisdiction," with the power to review the correctness, not just the lawfulness, of the decision on the facts and on the law. This is not the same as a common law trial, but it is a *de novo* review.[25]

At the Federal Trade Commission ("FTC"), when the Commission finds "reason to believe" that a party has engaged in an "unfair method of competition" and that a proceeding would be in "the interest of the public," staff can litigate cases either through administrative adjudication before an Administrative Law Judge ("ALJ") and the Commission ("Part III"),[26] or through federal court litigation before district courts. In the case of Part III adjudication, the first appeal, available to either complaint counsel (FTC staff) or respondents or both, is an appeal from the ALJ's initial decision to the Commission. The Commission reviews the ALJ's decision *de novo*, meaning that the Commission is not bound by the ALJ's evidentiary rulings, findings of fact or conclusions of law. The next appeal is only available to the respondent, who can appeal the Commission's decision to the federal courts. The Commission's findings of law are reviewed *de novo*, but they may be given s0 612 79(h)6(e)-4(y)3( )-6056nBT/F7 12 Tf1 0 0 1 72.024

Thus, the U.S. and the EU procedures differ, although it is notable that these differences are not specific to antitrust. They reflect the different legal systems of continental Europe and the United States. They share in common, however, that competition decisions are subject to a full review by independent courts.

One aspect not addressed by Werden & Froeb in this section, but referred to only in passing near the conclusion, is the length of the European Court proceedings. The authors reference the European Commission's *Intel* case, with the original decision in 2009, and, as of this writing, is still waiting for a final decision by the General Court after being remanded in 2017 by the ECJ. We note that it is possible for U.S. cases to be lengthy. In the FTC's *Actavis* matter, the FTC filed its original complaint in January 2009, which was dismissed by a district court, a decision then reversed by the Supreme Court in 2013, and remanded. The case concluded with a consent decree in February 2019, on the eve of trial, which was scheduled to begin in March. However, while we have not done an empirical examination to compare the timing between the original enforcement action and the final appeal in all cases, we agree that it appears in general to be considerably longer in the EU, which can impact a defendant's decision on whether or not to pursue an appeal, and thus may impact how defendants view, as a practical matter, their rights of defense.

As Werden & Froeb accept, the EU system does have a doctrine of the burden of proof,[27] even if, as they correctly state, in the administrative proceedings it is the European Commission itself that needs to conclude whether its own burden of proof has been discharged or not. From the perspective of a common law trial, this appears puzzling. In an administrative system, however, it is not unusual for the administrative authority to decide whether, following its own investigation, there is sufficient evidence that allows a determination whether the law has been infringed. The enforcer still must be satisfied to the required legal standard that an infringement has occurred, mindful that the evidence must be persuasive to the courts si0 1 72.024 294.53 Tm0 2he cal complan nod(n)6()5

and traditions and both have advantages and disadvantages. The EU system may have disadvantages, but one of them is not that it lacks the burden of proof of an adversarial system. It lacks a common law trial, but this is not the same thing.

In Werden & Froeb's article, this criticism of the European system boils down to the proposition that in the EU there is no mechanism to exclude unreliable economic evidence as there is in the United States under the *Daubert* rule.[30] It may be that all the world should adopt the *Daubert* rule, and we are open to a debate about its pros and cons. But the jump from being enthusiasts of the *Daubert* rule to saying that the European system does not impeach unsound theories is itself unsound. Many common law systems do not have a rule similar or equivalent to *Daubert*. For example, England, the country of origin of the common law, does not have it. Under English law, the reliability of the evidence, including expert evidence, is a matter for the jury or the judge if the trial is by a judge alone. Whether evidence is reliable or not is an issue of fact, not an exclusionary rule. It is not surprising, therefore, that an administrative system such as the European one does not have a *Daubert*-type of rule. But unsound theories can be and are impeached.

There are several stages in the administrative procedure that provide an opportunity for parties to challenge the European Commission's economic theories. There are internal checks and balances, such as advice by the Legal Service of the European Commission (completely separate from DG Competition), or by the Chief Economist's office (which provides an independent view). But, more importantly, whatever economic theory the European Commission relies upon, it must be able to withstand judicial review. While judicial review of matters of complex economic assessment has, historically, been deferential, it is now accepted that the General Court has unfettered jurisdiction to review economic evidence and assessments and set aside the decision under appeal if it disagrees with the assessment of the European Commission. This has happened, recently, in the *Servier* pay-for-delay case, in which the General Court disagreed with the European Commission's market definition and set aside the decision in part.[31] And it happened, famously, in three mergers cases in the early noughts, when the EU Courts set aside three merger decisions in short sequence in *Airtours*, *Schneider*, and *Tetra Laval*.[32]

There is also the important role of the Advocate General ("AG") in criticizim m k Ï 0

the expert has a responsibility to the court and not simply to the client. European judges and economic consultants explain that this tempers advocacy, and discourages

[1] *UHJRU\ - :HUGHQ /XNH 0)URHE ³$QWLWUXVW DQG 7HFK (XURSH DQG WKH Antitrust Chronicle, October 2019.

[2] 0DULD &RSSROD LV FRXQVHO LQ WKH 8 6)HGHUDO Trade Commission's Office of Policy Planning. SURIHVVRU RI (XURSHDQ FRPSHWLWLRQ ODZ DW *HRUJH 0DVRQ¶V $QWRQLQ here are her own, and do not reflect those of the Federal Trade Commission or any individual Commissioner. Renato Nazzini is SURIHVVRU RI ODZ DW .LQJ¶V &ROO

[28] See Prepared Statement of William E. Kovacic, U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Hearing on A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the U.S. an G (8 ³ . R Y D F L F 7 H V W L P R Q \ ´ ' H F ³ - X G L F L D O 2 Y H U 2 L W L J K W ´ D W

[29] The case law is well established. See, e.g. Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v. Commission, EU:C:2007:52, para 52; Case T-410/07 Siemens v. Commission, EU:T:2011:68, para 44 and Case T-445/14 ABB v. Commission, EU:T:2018:449, para 39.

[30] Under the Daubert rule, a trial judge, before admitting expert evidence, must satisfy herself that the evidence rests on a reliable basis and will assist the trier of fact to understand or determine a fact or issue: Daubert v

saying nothing, or very little, the US agencies have missed important opportu