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Federal Trade Commission

U.S. – E.U. Convergence: Can We Bridge the Atlantic?

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[1] The views expressed here are my own and do not necessarily reflect the views of the Federal Trade Commission or

I. Introduction

Good evening and thank you for your warm introduction. It is a pleasure to address such a distinguished group. In preparing for this evening's speech, I was struck by the rich variety of possible topics. International antitrust has come of age. More than 120 countries today have adopted competition laws.[2] Coupled with globalization, such ubiquitous competition enforcement has led enforcers around the world to face questions of first impression together. Hence, a luxury of choice:

I could discuss the rich intersection of antitrust and IP, questions surrounding institutional design and due-process protections, disruptive innovation, merger-clearance procedures, international cooperation via the ICN, OECD, and UNCTAD, or many other issues. But instead I return to an issue at the heart of global antitrust, namely harmonization between the competition laws of Europe and America.[3] Always interesting, the issue of U.S.-E.U. convergence is especially apt today. Brexit threatens to deprive the European Union of a voice that favored market liberalization and competition.[4] We hear populist sentiments across the political spectrum in America. Meanwhile, the proliferation of technology has created a stream of new antitrust questions. Opportunities for further convergence, but also divergence, abound.

Commentators have long debated whether Europe and America are moving closer together or further apart. We have made big advances in reviewing mergers and clamping down on price-fixing conspiracies, where our collaboration is invaluable. U.S. and E.U. authorities have also taken similar approaches on some other recent issues. For instance, in *Huawei v. ZTE*, the CJEU explained what a FRAND-encumbered SEP owner must do before seeking an

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[2] *See, e.g.*, THE GLOBAL LIMITS OF COMPETITION LAW vii (Ioannis Lianos & D. Daniel Sokol eds., 2012).

[3] Commentators hotly debate the fact and cause of transatlantic antitrust divergence to this day. *See, e.g.*, DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY (2015).

[4] *See, e.g.*, *From Brexit to Brangst: German business leaders fear Brexit could lead to a less competitive Europe*, THE ECONOMIST, July 4, 2016.

injunction.[5] If the infringer does not express a willingness to license on FRAND terms or diligently respond to the patentee's offer, the SEP owner may seek an injunction.[6] In its consent decree in *Google-MMI*, the FTC similarly allowed Google to request injunctive relief on its FRAND-limited SEPs if the accused infringer did not commit to pay a FRAND-determined royalty.[7] The challenge, of course, is to determine who is a willing licensee.

Nevertheless, the E.U. and U.S. antitrust regimes differ in many significant ways. State-aid rules are unique to E.U. law, while the U.S. ban on monopolization finds no exact parallel in Brussels. The abuse-of-dominance standard in Europe is stricter and reaches further than American rules on exclusionary conduct. Excessive pricing can violate Article 102, but never the Sherman Act. U.S. law treats vertical restraints more leniently than E.U. law does. And, just ten days ago, the General Court held in *Lundbeck* that the European Commission can challenge pay-for-delay agreements as restrictions by object.[8] The U.S. Supreme Court in *Actavis*, by contrast, required the FTC to prove its case under the full-fledged rule of reason.[9]

And that is to say nothing about the different institutional and procedural frameworks of the antitrust regimes of America and Europe. Even recent actions reveal distinct approaches. Beyond the example of reverse-exclusionary payments, we see differences in how European and American antitrust enforcers approach issues of dominance in the new economy. On the topical issue of Google search, the FTC closed its investigation, while the European Commission has

[5] Case C-170/13, Huawei Techs. Co. v. ZTE Corp., 2014 E.C.R. __ [not yet reported], ¶¶ 60-69 (Nov. 20, 2014), http://curia.europa.eu/juris/liste.jsf?num=C-170/13. Note that a "SEP" is a standard-essential patent, which becomes "FRAND-encumbered" when its owner agrees to license it on fair, reasonable, and nondiscriminatory terms.
[6] *Id.*
[7] *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Comm'n Letter to Commenters, July 23, 2013, p. 2 n.4, https://www ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolaletter.pdf.
[8] Case T-472/13, Lundbeck v. Comm'n, 2016 E.C.R. __ [not yet reported], ¶¶ 354-55, 369, *passim* (Sept. 8, 2016), http://curia.europa.eu/juris/liste.jsf?num=T-472/13.
[9] Fed. Trade Comm'n v. Actavis, Inc., 133 S. Ct. 2223, 2237 (2013).

served two statement of objections.[10] And touching on the intersection of antitrust and consumer protection, there is the German Federal Cartel Office's decision to investigate Facebook under Article 102 for alleged data-privacy abuses.[11] As I stated in a recent article, I am skeptical that U.S. law would address such concerns under an antitrust theory.[12]

These departures raise questions about who is right, about extraterritorial effects, and about whether more learning will unify our competition-law systems. Many commentators argue that we need to do more to harmonize antitrust enforcement. But there is a nuance missing from this conversation. How people discuss divergence suggests a strong normative dimension. The implication is that stepping apart means a stumble. The reality is more complicated.

E.U. and U.S. competition authorities serve the public interest. Yet, despite our best efforts, we sometimes disagree. What can we learn from such divergence? We might expect to refine our methodologies to learn a better way. Jurisdictions

a restraint, practice, or acquisition that dissolves a market constraint. Standing alone, high prices may reflect the exercise of lawful market power, which antitrust law should respect to protect incentives to invest and compete. And, standing alone, high prices spur more competition by encouraging entry and output expansion. In those cases, I would not

Where does this leave us? Absent consensus on which precise goals that competition enforcement should serve, it is unclear whether E.U. and U.S. agencies and courts always ask the same questions. To talk of divergence when E.U. and U.S. authorities reach inconsistent rulings is thus to skip a step. The problem may be more fundamental than economic analysis or interpretation of facts. It may go to the definition of the antitrust mission.

B. *Should We Ask the Same Questions?*

So, E.U. and U.S. competition laws sometimes pursue distinct goals. Is there room for convergence here? The answer turns on why different objectives exist and whether they are susceptible to rapprochement through debate.

Europe's competition regime emerged as part of a larger socioeconomic movement whose aim was political. In integrating the economies of the original six Member States in 1957, and the—for now—twenty-eight states today, the European project seeks an "ever closer union" through economic ties. From the outset, E.U. competition law has promoted Member State integration. At times, that goal is in tension with economics, which promotes consumer welfare through static- and dynamic-efficiency gains.

The clearest example of this phenomenon lies in the law governing vertical restraints. In *Consten & Grundig*, the European Court of Justice famously refused to entertain economic justifications for giving a trademark-licensee exclusive selling rights in France.[23] The court could not accept the contractual impediment to cross-Member State trade. E.U. competition law thus takes a harder line against certain vertical restraints. Whether one thinks that law wise or not, distinct policy goals explain the different approaches.

Unique policy objectives also underlie the most serious area of divergence between U.S. and E.U. law: unilateral conduct. Here, the gap between our jurisdictions becomes more

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[23] Case C-56/64, *Consten & Grundig v. Comm'n*, 1996 E.C.R. 19, 357.

pronounced.[24] There is one respect in which the U.S. regime is the more demanding. It proscribes monopolization, while E.U. law does not.[25] Otherwise, E.U. competition law is quicker to find an undertaking dominant, prohibits conduct that U.S. law would not, and arguably imposes more draconian remedies. There may be some systemic reasons for this divergence, some of which flow from the basic goals of competition enforcement.

Europeans tend to view dominant firms suspiciously. The state has long played a bigger role in industrial policy in Europe than in America.

Historically, in naturally monopolistic markets involving utilities and common carriers, the U.S. granted one private firm a certificate of public convenience and necessity. Federal or state government would then regulate the entity's pricing through rate-of-return and later price-cap regulation. Sometimes that occurred in Europe, but there the more general practice was to fulfil public demand through state-owned enterprises. Following large-scale privatization in the 1980s and beyond, dominant firms emerged throughout Europe that did not attain their monopolistic positions by superior innovation, but by mere inheritance.

There sometimes seems to be less trust in the curative powers of free-market forces generally in Europe. However, the European Commission deserves credit for its on-going efforts to promote competition, including in markets where Member State governments do not share its enthusiasm. Nevertheless, a less sanguine view on the power of markets and competition, combined with skepticism of dominant undertakings, results in a strict enforcement regime under Article 102.

In that respect, a perhaps-unspoken goal of Article 102 enforcement is to rid markets of unfair conduct by powerful undertakings. I suspect that that objective holds true even in cases

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[24] *See, e.g.*, Josef Drexl, *Real Knowledge Is to Know the Extent of One's Own Ignorance: On the Consumer Hp rACy(7ketS power*

where the objectionable business practice has a tenuous impact on the competitive process itself. We can see this phenomenon in the language of Article 102 itself, condemning the "abuse" of a dominant position, and in the case law. In Europe, dominant firms have "a special responsibility not to distort competition."[26] The idea of distortion extends further than the closest parallel in U.S. law, which is the prohibition of actual and attempted monopolization.

U.S. law envisions a Darwinian process of competition. It is perfectly lawful for a monopolist to eliminate its rivals by competing on the merits. As Judge Easterbrook has observed, "antitrust law and bankruptcy law go hand in hand."[27] Europe appears to be less keen on this point, perhaps asking whether one can have fierce competition with fewer rivals. E.U. competition law may seek to guard competitors to promote its ordoliberal vision of a competitive market. That is, the goal may not be to protect competitors as an end in itself, but in furtherance of the supposition that more rivals mean more competition. In that respect, the objectives of U.S. and E.U. antitrust law again part company.

C. *What Room for Debate?*

This creates a quandary for commentators, including me. What works for one jurisdiction will not always be optimal for another. Countries have different economies, histories, and values. Nevertheless, there is room for robust debate on which values we should promote within modern antitrust policy.

It is fair to question the enforcement of competition laws against conduct that has an attenuated effect on the competitive process. And this is all the more so if we can agree, if only at a general level, that antitrust enforcement should only target dominant-firm conduct that harms the competitive process. At the margin, perhaps the E.U. and U.S. antitrust regimes will differ in

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[26] *See* Case 322/81, *Michelin v. Comm'n*, 1983 E.C.R. 3461, ¶ 57.

[27] Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 440 (2008).

other recent cases.[31] More generally, and although I cannot discuss any ongoing investigations, I can represent that the FTC actively investigates credible allegations of exclusionary behavior by dominant firms.

The FTC is not alone in these efforts. In 2005, the Justice Department succeeded in its monopolization case against Dentsply, which refused to supply its dealers if they carried rivals' goods.[32] That case is particularly notable because its prosecution crossed over from a Democratic to a Republican administration. And, of course, the DOJ has undertaken major monopolization actions in the past against companies like Microsoft and AT&T.[33]

III. Conclusion

In conclusion, E.U. and U.S. antitrust enforcers grapple with the same difficult issues. It is natural to suppose that a single right answer always exists. Under that view, divergence betrays an error—at least on one side—and convergence is a useful barometer by which to measure progress.

But divorced from its root cause, divergence or convergence may carry little standalone meaning. A disagreement may reflect inconsistent methodologies or something more fundamental, such as a different policy objective. To draw the right conclusion, one must ask the right question. And here there is room for debate and informed discussion. If we can settle on common goals, then we will make real progress. Of course, to be realistic total uniformity seems unlikely.

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[31] *See, e.g.,*

But there is clearly some progress that we can make. When one jurisdiction does not fully understand the other, the result may be less convergence. Thus, it is vital that we discuss our common goals, as well as our differences, in fora such as tomorrow's conference. Thank you.