COMPETITION POLICY IN THE EUROPEAN UNION AND THE UNITED STATES: FOCAL POINTS FOR FUTURE TRANS-ATLANTIC COOPERATION

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Abstract: The past three decades have featured remarkable growth in the number of jurisdictions with competition laws – from roughly thirty in 1989 to over 130 today. Amid this period of stunning change, there is an important constant: the relationship between the competition systems of the European Union and the United States is the most important ingredient of the global competition law framework. The EU/US relationship is not only significant for transatlantic commerce but also for the development of global competition law substantive standards and procedures. This Article discusses methods that would serve make an already strong relationship still better. Enhancements will serve the vital purpose of enabling the two jurisdictions to fulfill the special responsibility inherent in their position as the world’s two leading competition systems.

1. INTRODUCTION

November 2019 marks the 30th anniversary of the fall of the Berlin Wall. This extraordinary event catalyzed political developments that spurred the adoption of market-oriented reforms in many countries that previously had relied mainly on central economic planning to organize their economies. The dramatic expansion in the number of competition law systems – from roughly 30 in 1989 to over 130 today – is a direct consequence of the transformation.

Amid this astonishing period of policy and institutional upheaval, the global system of competition policy remains anchored by two jurisdictions: the European Union (EU) and the United States (US). The EU/US duopoly of global influence is contested increasingly by the emergence of other powerful national systems (e.g., China) and multinational coalitions (e.g., BRICS). Nonetheless, the EU and the US still exert unmatched influence over the development of global competition law norms. Their influence stems from several factors: large domestic expenditures for competition law enforcement (the EU and the US spend more...
money on public enforcement than any other jurisdictions), substantial outlays for international engagement (the EU and the US spend the most on participation in regional and global international networks and have the largest foreign technical assistance programs related to competition policy), unmatched experience with case-handling and other policy tools (the EU and the US have a larger base of experience with cases and non-litigation policy instruments), and formidable economic significance (the EU and the US are two of the world’s largest economies). This gives the EU and the US unequalled capacity to affect competition policy beyond their own borders.

Their uniquely influential position makes the EU and the US each other’s most important international partner. They have a deep stake in the creation of competition law standards and implementing institutions that improve economic performance in the transatlantic region and across the globe. Their outsized experience and resources give them a special responsibility to engage other jurisdictions in the development of sound global principles and implementation mechanisms.

For decades, EU and US competition authorities have recognized their common cause and devoted considerable effort to building good relationships among themselves and with the larger global community. Notwithstanding occasional confrontations, the two jurisdictions never have lost sight of their shared interests and the necessity for extensive cooperation. The tensions that sometimes (and inevitably) emerge when two major systems strive for preeminence have arisen as a byproduct of what has been, and is, a mostly friendly rivalry. If great regulatory systems compete to devise better analytical techniques, procedures, and programs, and they seek recognition for doing these things better than anyone else, it is a competition worth having.

The achievements to date of transatlantic competition policy cooperation are admirable and impressive. At the same time, the urgency to do still better becomes more evident by the day. The already difficult challenges facing EU and US policymakers (nothing about building competition policy systems in the post-World War II era has been easy) are quickly growing more complex and demanding. The two competition regimes today face probing questions about their aims, methods, and effectiveness, including their ability to address commercial and political phenomena in sectors marked by exceptional technical dynamism. Both jurisdictions operate in environments marked by acute social unrest and political instability. The current leaders of the European Commission’s Directorate for Competition (DG Comp), the Antitrust Division of the Department of Justice (DOJ), and the Federal Trade Commission (FTC) are not the first to deal with the consequences of economic and political upheaval, but they can say with conviction that the tasks before them are as daunting as any their predecessors ever faced.

A still deeper program of EU/US cooperation can improve the future prospects of success for each jurisdiction to surmount the challenges described above. This Article suggests how to build such a program on a foundation already set by decades of transatlantic collaboration. The Article first sketches the state of the relationship between the competition policy systems of the EU and the US in the treatment of dominant firms. This discussion identifies why
cooperation between the EU and US regimes is a vital subject of attention. The Article then discusses possible paths for improvement in the EU/US relationship and for the attainment of better practices in global competition policy.  

2. THE EU/US RELATIONSHIP IN COMPETITION POLICY

For very good reasons, the relationship between the competition law regimes of the EU and the US is a crucial subject of scrutiny for comparative law scholars and practitioners, alike. First, the level of coherence achieved between the two systems has considerable practical economic significance. There is a high and increasing degree of interdependence across the regulatory regimes. 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.

The second reason concerns the process of enforcement. Even when the EU and US apply the same substantive standards and ordinarily reach the same assessment of the same commercial practice, differences in the procedure for investigations and agency decision-making can impose costs on affected enterprises. In the case of merger reviews, these costs include the time and out-of-pocket expense of complying with varied filing requirements and accounting for differences in the timing of government reviews. Where it is possible to achieve simpler, more common procedures, the EU and US agencies can reduce the cost of executing routine transactions without any reduction in the quality of their substantive analysis.

The third reason involves the development of new competition systems around the world. The EU and the US spend substantial resources for technical assistance for new competition policy systems and for countries considering the adoption of new competition laws. By far, most of the 100 or so jurisdictions that have adopted new competition laws in the past 30 years have 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 of Justice (DOJ).  

In many respects, the US Federal Trade Commission employs the administrative policymaking model commonly found in civil law regimes.
with the institutional arrangements in most civil law countries, many transition economies have an inclination to look first to EU models in designing and implementing their competition systems. This condition means that EU norms, more than US norms, tend to be more readily absorbed into the newer competition policy regimes. In many ways, the US is likely to find that the EU is an important conduit for the transmission of its own preferences with regard to substantive standards and process.

2.1. The Operating Systems and Applications of Competition Law

Experience with technical assistance programs and the adoption of competition policy systems permits us to derive a more general observation about the global development of competition policy. To use a computer technology metaphor, the operating system of a jurisdiction’s competition laws consists of the institutional framework through which legal commands are formulated and applied. As noted above, most jurisdictions are civil law systems. This ensures that the EU institutional framework which relies (compared to the US) upon more highly specified legal commands and emphasizes policy development through an expert administrative body will be the most popular institutional model among the world’s competition authorities. The US competition law framework is grounded mainly in a common law methodology. The US relies substantially upon open-ended statutory commands and the elaboration of doctrine through case-by-case litigation in the courts. By reason of history and modern practice, relatively few jurisdictions will embrace this model.

With respect to the operating systems of the world’s competition laws, the EU’s institutional arrangements were destined to attain a dominant share. That dominance is likely to continue. An interesting issue for global competition norms is the choice by individual jurisdictions of substantive analytical “applications” and related investigative techniques to run upon a chosen operating system. Where will countries look to obtain the basic applications that they will run through their institutional operating systems? In areas such as the treatment of cartels and horizontal mergers, the US has provided the analytical applications that many competition law systems use today. The US also has designed implementation applications (such as the use of leniency to detect cartels) that enjoy broad global popularity. Moreover, US applications such as the use of private rights of action and the use of criminal sanctions to punish cartels are receiving a closer look (and more adoptions) in many civil law countries, although the use of these applications requires civil law countries to make some important adjustments to their existing institutional arrangements.4

Thus, the EU enjoys a dominant share concerning the operating system for competition law, and the market for applications remains highly competitive. The EU and the US account for the leading share of applications concerning substantive analysis and investigative methods, but a number of

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4 For example, in a civil law country, the establishment of a criminal enforcement regime requires a high degree of coordination between the competition authority (usually an administrative agency) and the public prosecutor (a member of the executive branch of government).
jurisdictions have produced important refinements of EU or US applications for their own use. The applications have an open source element to the extent that individual countries often retain freedom to make adaptations suited to their own needs. The level of adaptation sometimes is constrained by the obligation that individual states owe to superior legal authorities. For example, accession to the EU has required candidates to conform their laws to those of the Community. To some degree, the EU ties 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? 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.” The history of competition policy has featured a continuing search for optimal substantive rules and implementation methods. This search has benefitted from decentralized experimentation concerning 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), policymaking instruments (e.g., the development of the United Kingdom’s markets regime), and organizational innovation that seeks to achieve an ideal mix of substantive mandates (e.g., the combination within the Australia Competition and Consumer Commission of responsibility for antitrust, consumer protection, and various elements of public utility access regulation).

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 often occur through incremental adjustments in enforcement practice. 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

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alternatives, and testing benefits from decentralization that does not require consensus-building across jurisdictions for every adjustment from the status quo.

The second normative principle is that there should be mechanisms to promote adoption of superior norms. As Chairman of the US Federal Trade Commission (FTC) from 2001 through 2004, Timothy Muris proposed a three-stage framework that different jurisdictions could use to realize gains from decentralized experimentation and promote broad adoption of superior norms. By “superior norms” I mean standards that (a) promote the accurate diagnosis of the actual or likely competitive significance of observed behavior, and (b) promote the design of government intervention (by initiating a case, by performing a study, or by acting as an advocate before other public institutions) that corrects the problem at issue.

The first stage of the Muris framework consists of decentralized experimentation within individual jurisdictions. The second phase involves the identification of superior substantive standards and implementation methods. In the third stage, individual jurisdictions voluntarily opt in to superior norms. This framework anticipates and welcomes experiments that depart from the status quo and supplies the means for promoting the widespread adoption of superior approaches. Section 3 below addresses what the EU and the US can do in their own relationship to perform the vital second stage of this process.

To the Muris framework, one might add a fourth element. Despite differences that might exist at any moment between the EU and the US or across other systems, individual jurisdictions can improve the performance of competition laws globally by building institutional mechanisms that increase interoperability. This entails careful attention to enhancing channels of communication and discussion that link related functional units across agencies (i.e., between DG Comp and the DOJ and the FTC) and connect related institutions outside the competition agencies. A useful approach to achieving the fourth element is suggested in the New Transatlantic Agenda (NTA), which was established in 1995. The NTA sought to improve the quality of regulatory policy and to reduce the cost of the regulatory framework governing transatlantic commerce by improving EU-US cooperation. As Professors Mark Pollack and Gregory Shaffer characterize its approach, the NTA seeks to strengthen EU/US regulatory coordination by enhancing:

* Intergovernmental contacts among the chiefs of government and other high level public officials (such as agency or department heads);

* Transgovernmental contacts on a day-to-day basis among lower level officials; and

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*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 full 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 here, the process that generates transatlantic competition norms is adaptable and evolutionary. In competition law and other policy domains, there is a tendency to speak of convergence upon “best” practices. It is perhaps more accurate and informative to say that the objective is convergence upon “better” practices. 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. 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 own operations and a focal point for cooperation 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 inquiry would help ensure that each competition agency considers 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.

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10 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).
2.3. EU/US Cooperation: Progress to Date

A diverse collection of mechanisms has built strong links between the EU and the US competition policy systems. Some measures have developed through the interaction of competition agencies; some take place in interactions between the agencies; others operate outside the government enforcement bodies. The interagency devices and external phenomena are interdependent; for example, developments outside the competition authorities can have major effects on the agencies themselves.

Using the three-level NTA framework of intergovernmental, transgovernmental, and transnational contacts introduced above, modern experience has featured considerable interaction between the EU and US competition agencies and an intensification of activity over time. At times, the intensification of cooperative activity has stemmed from relatively rare public clashes between the two jurisdictions. Even the most severe disagreements have tended to accentuate efforts to avoid similar policy disagreements in the future. There is a basic awareness among EU and US enforcement officials that the disintegration of transatlantic cooperation would have grave consequences not only for the two jurisdictions but also for global competition policy generally.

Intergovernmental and transgovernmental contacts between the EU and US authorities provide the principal foundation for the EU/US relationship. EU and US case teams routinely discuss merger and non-merger matters of common concern. These discussions often involve a discussion of theories of harm and supporting evidence, as well as matters of timing and remedies. Experience gained from regular interaction on cases in turn informs the cooperative role that the two jurisdictions have played in international organizations responsible for promoting global acceptance of superior standards. One major example of this cooperation was the effort played by the EC Commissioner for Competition, the DG Comp Director General, DOJ’s Assistant Attorney General for Antitrust, and the FTC’s Chairman in the formation of the International Competition Network in 2001. EU and US competition agency officials and case handlers have worked together over the past two decades to design and implement the ICN’s work program.

My own experience is that, for the United States, the greatest interagency friction is not between the EU and the US, but rather between the DOJ and the FTC, and between the DOJ and the attorneys general of the US states. In my time as a senior FTC official from 2001-2004 and 2006-2011, the FTC had a better working relationship with the European Commission than it did with the Department of Justice. Today, the fractious DOJ/FTC relationship increasingly emerges as a barrier to effective US participation in international relations with the EU and other jurisdictions. Foreign officials easily observe the policy fractures that separate the two US federal agencies (and, in notable instances, separate the members of the FTC board). This condition
complicates efforts to determine what the policy of the “United States” is and to chart a course for cooperation on various matters.

Over time, the institutional quarrels within the United States promise to become an ever more formidable obstacle to effective cooperation between the US and its foreign counterparts. Take the example of engagement between competition agencies and regulators in other policy domains. There is a growing awareness among many competition policy institutions of the interdependence between antitrust law and other disciplines, such as consumer protection and privacy. In a number of settings, we are seeing the emergence of a new framework of regulatory relationships that recognize the interdependency of what may have been conceived previously as largely separate policy regimes. Engagement across the various policy domains tends to be more natural and appealing to multi-function agencies, such as the FTC, whose mandate encompasses antitrust, consumer protection, and privacy. The DOJ Antitrust Division, which enforces antitrust law exclusively, is more wary of these connections and tends to resist efforts, at home and abroad, to explore possibilities for policy integration across domains.

A similar intensification of activity can be documented for transnational contacts. Over the past thirty years, measured by the agenda of conferences and non-conference activities, the major professional legal societies – among them, the American Bar Association and the International Bar Association – have expanded the energy they devote to EU/US competition policy. Beyond activities sponsored by these bodies, there has been a noteworthy increase in the number of conferences and continuing legal education programs with a large transatlantic component that attract a substantial transnational audience of academics, practitioners, and government officials. The same can be said for trade associations, such as the International Chamber of Commerce (ICC), and academic bodies, including institutions such as the Association of Competition Economics (ACE) based in Europe. Collectively, these nongovernment networks have played a crucial role in educating the academics, the business community, and the legal profession about the foundations of competition policy in both jurisdictions and about current policy developments. By engaging government policymakers and participants from nongovernment constituencies in formal public debate and informal discussion, these bodies help formulate a consensus about competition policy norms and provide a key source of relational glue for the competition policy community. Their significance can be observed in the growing tendency of government-based networks, such as ICN and OECD, to include nongovernment parties in their work.

It is possible to trace a number of specific policy outcomes to the three levels of contacts (intergovernment, transgovernment, and transnational) sketched above. Though not a complete accounting, the following list includes noteworthy measures rooted in the expanded interaction among government officials and among nongovernment parties from the European Union and the United States.

*Enhancements in formal EU/US protocols involving merger review, including the coordination of premerger inquiries in both jurisdictions.
Continuing augmentation and implementation of the EU leniency program in ways that reflected substantial consultation and interaction with DOJ’s anti-cartel unit.

Greater transparency in US practice for merger and nonmerger matters, including emulation in more instances of the EU practice of providing explanations for decisions not to prosecute where the enforcement agency has performed a substantial investigation.

The successful development of a new multinational competition policy network (the ICN) and the enhancement of the work plans of existing networks such as Organization for International Cooperation and Development and the United Nations Commission on Trade and Development.

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 augment links between the two jurisdictions and promote acceptance of superior analytical techniques and procedures.

3. POSSIBLE FUTURE ENHANCEMENTS IN EU/US COOPERATION

There are various ways to build upon existing forms of EU-US cooperation to strengthen the transatlantic relationship and improve competition policy. The discussion below describes possible focal points for further cooperation and describes specific means that the EU and US competition policy communities might take to address these points.

3.1. Concepts

One focus of attention would be to build a deeper common understanding about basic forces that shape policy in the EU and US. Discussions among government officials and within nongovernment networks tend to address specific enforcement developments (e.g., the disparate results of the EU and US inquiries involving allegations of improper exclusionary conduct by Google) or matters of practical technique and not to ask basic questions about the origins and institutional foundations of the two systems. The discussion below suggests how greater attention to these formative considerations would enrich the EU/US relationship.

Toward a Deeper Understanding of the Origins and Evolution of Both Systems. Discussions about transatlantic competition policy often rest upon a badly limited 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.12 European specialists in competition policy likewise often display a fractured conception of the origins and

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12 Informative accounts of this history include David J. Gerber, Law and Competition in Twentieth Century Europe – Protecting Prometheus (Oxford paperback ed. 2001).
evolution of the US system. 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.

Reconstructions: Scrutinizing the Analytical and Policy Assumptions in Specific Cases. The modern EU/US relationship has featured different outcomes in specific matters and will do so again. Amid the many discussions of policy differences, two things have received inadequate attention. The first is a detailed confidential examination by the agencies of the specific theories of intervention and an examination of the evidence upon which each jurisdiction relied in deciding how to proceed. A side-by-side, behind-closed-doors deconstruction of the decision to prosecute (or not to prosecute) would be a valuable way to identify alternative interpretations and test them in an uninhibited debate involving agency insiders (and, perhaps, experts retained by each agency to assist in the review of the case).

Even more general discussions of cases that occupy considerable attention at conferences and seminars infrequently come to grips with what appear to be differences in assumptions about the operation of markets and the efficacy of government intervention as a tool to correct market failure. Embedded in EU and US agency evaluations of the highly visible matters mentioned earlier are differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate tradeoff between short-term benefits of a challenged practice and long-term effects, and the robustness of future entry as a means for disciplining firms that presently enjoy dominance. Putting these and other critical assumptions front and center in the discussion, along with the bases for the assumptions, would advance the transatlantic relationship in the future.

Focusing on How Institutional Design Affects Doctrine. In discussing competition law, academics, enforcement officials, and practitioners tend to focus on developments in doctrine and policy and to assign secondary significance to the institutional arrangements by which doctrine and policy take shape. This tendency can cause one to overlook how the design of institutions can influence substantive results. It is impossible to understand the development of EU and US competition law without considering the following:

*How the US system of private rights of action has shaped 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, the availability of class claims, and asymmetric fee-shifting in which only a prevailing plaintiff recovers its fees. In establishing this variant of a private right of action, the jurisdiction must keep in mind the possible interaction between the operation of private rights of action and public law enforcement. If courts fear that the private party incentives to sue are misaligned with the larger interests of the public (when the courts do not trust the private plaintiff as much as they trust a public prosecutor) or they fear that the remedial scheme (e.g., mandatory treble damages for all offenses) deters legitimate business conduct excessively, the courts will use measures within their control to correct the perceived imbalance. The courts may “equilibrate” the antitrust system by constructing doctrinal tests under the rubric of “standing” or “injury” that make it harder for the private party to pursue its case; adjust evidentiary requirements that must be satisfied to prove violations; or alter substantive liability rules in ways that make it more difficult for the plaintiff to establish the defendant’s liability.

The first of these methods only governs suits by private plaintiffs. Of particular significance to public enforcement authorities is the possibility that the courts, in using the second and third measures listed above, will endorse principles that apply to the resolution of all antitrust disputes, regardless of the plaintiff’s identify. In adjusting evidentiary tests or substantive standards to correct for perceived infirmities in private rights of action, courts may create rules of general applicability that encumber public prosecutors as much as private litigants.

This hypothesis helps explain the modern evolution of U.S. antitrust doctrine. Since the mid-1970s, the U.S. courts have established relatively demanding standards that private plaintiffs must satisfy to demonstrate that they have standing to press antitrust claims and have suffered “antitrust injury.” In this period, the courts have endorsed evidentiary tests that make it more difficult for plaintiffs to prove concerted action involving allegations of unlawful horizontal and vertical contractual restraints. With some variation, courts also have given dominant firms comparatively greater freedom to choose pricing and product development strategies.

Collectively, these developments have narrowed the scope of the U.S. antitrust system. Most of the critical judicial decisions in this evolution of doctrine have involved private plaintiffs pressing treble damage claims. Perhaps the most interesting area to consider the possible interaction between the private right of action and the development of doctrine involves the fields of monopolization and attempted monopolization law. Litigation involving exclusionary conduct by IBM provides a useful illustration. In the late 1960s, the Department of Justice brought a suit against IBM, alleging that the company had engaged in unlawful restraint of trade in violation of Section 1 of the Sherman Act. The suit was filed in federal court, and IBM was ordered to pay treble damages and to cease and desist from its anticompetitive practices. The case was significant because it established the precedent that a private antitrust plaintiff could recover treble damages and that a public interest could be served by the private litigant.

of Justice initiated an abuse of dominance case that sought, among other ends, to break IBM up into several new companies. By 1975, roughly 45 private suits had been filed against IBM alleging unlawful exclusionary conduct and seeking treble damages against IBM. The sum of all damage claims in the private cases exceeded $4 billion – a considerable amount at the time.

The federal courts appear to have reacted to the private cases with apprehension and seemed ill at ease with the possibility that a finding of illegal monopolization would trigger the imposition of massive damage awards against IBM. The courts in these matters could not refuse to treble damages if they found liability, but they could interpret the law in ways that resulted in a finding of no liability. IBM paid settlements to a small number of the private claimants, but it achieved vindication in most of the private cases. The results in the private damage cases against IBM and several other leading U.S. industrial firms in this period imbued U.S. monopolization doctrine with analytical approaches and conceptual perspectives that viewed intervention skeptically.

US antitrust doctrine might well have taken a somewhat different path had there been no private rights of action, or if the damage remedy in private actions had been less potent – for example, limiting recovery to actual damages, or permitting trebling only for violations of per se offenses such as horizontal price-fixing. Specifically, U.S. antitrust doctrine would have assumed a more intervention-oriented character if the power to enforce the American competition statutes were vested exclusively in public enforcement authorities, or if the private right of action had been circumscribed in one or more of the ways indicated above. This raises the question of what will happen in the EU and its Member States if private rights of action grow more robust. The expansion of private rights in the EU could lead courts to adjust doctrine in ways that shrink the zone of liability.

Devoting Attention to Inter- and Intrajurisdictional Multiplicity and Interdependency. Efforts to formulate effective competition policy increasingly will require EU and US competition agencies to study more closely how other government institutions affect the competitive process. To an important degree, both jurisdictions resemble a policymaking archipelago in which various government bodies other than the competition agency deeply influence the state of competition. Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behavior affects the entire archipelago. It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition.

To build this infrastructure requires competition authorities to make efforts to identify and understand the relevant interdependencies and to build relationships with other public bodies. Better coordination could limit inconsistencies between the two systems and ensure that both can more effectively encourage innovation and competition. While cooperation and convergence activities involving competition policy and intellectual property policy have grown more intense in recent years, to date they have tended to be intra-disciplinary. Few cooperation and convergence activities account
for the interdependency of the competition policy and intellectual property regimes.

3.2. Means

Members of the EU and US competition policy community could use several means to address the conceptual issues outlined above. Most means involve a reorientation of bilateral activity to invest more expansively in a knowledge base that would inform routine discussions at all three levels of the NTA framework. Possible specific techniques are summarized below.

Periodic Comprehensive Reviews of Institutional Arrangements. Both jurisdictions at regular intervals should undertake a basic evaluation of the effectiveness of their competition policy institutions. In many respects, the EU stands far ahead of the US in carrying out this type of assessment. The major institutional reforms introduced since 2000 – modernization, reorganization of DG Comp, and the introduction of a new position of economic advisor – indicate the EU’s close attention to these issues.

Key focal points for a parallel inquiry in the US ought to include the scope of coverage of the competition policy system, the adequacy of existing substantive rules and remedies, the type and consequences of public enforcement, the role of private rights of action, and the design and administration of public enforcement bodies. Such an assessment ought to involve participation of government officials, private parties, consumer groups, and academics.

Given the continuing changes that confront competition agencies, the two systems should undertake this comprehensive assessment less than once per decade.

A Common Program of Ex Post Evaluation. The EU and the US routinely should evaluate their past policy interventions and the quality of their enforcement processes.14 In every budget cycle, each authority should allocate some resources to the ex post study of law enforcement and advocacy outcomes. Rather than treating ex post evaluation as a purely optional, luxury component of policy making, we must regard the analysis of past outcomes and practices as a natural and necessary element of responsible public administration. Even if definitive measurements are unattainable, there is considerable room for progress in determining whether actual experience bears out the assumptions that guide our acts.

The process of evaluation provides many opportunities for EU/US collaboration. One fundamental issue is to address the question of how best to measure agency performance. For example, what methods might be developed to determine how specific agency decisions affected prices, quality, innovation, entry, or other economic variables? How does the very fact of opening an investigation or issuing a complaint affect behavior in the industry? Individually and jointly, the EU and US competition authorities also could choose selected elements of their enforcement processes and analytical methodologies for assessment.

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14 The potential contributions of ex post analysis of completed government interventions to the development of competition policy are examined in William E. Kovacic, Using Ex Post Assessments to Improve the Performance of Competition Policy Authorities, 31 J. CORP. L. 503 (2006).
One valuable way to examine past decisions would be the type of joint EU/US detailed case study mentioned above. An elaborate deconstruction of specific cases would provide an informative basis for analyzing differences in philosophy and substantive perspective and for identifying variations in procedure.\(^{15}\)

**Enhancement and Disclosure of Data Bases.** The EU and the US should prepare and provide a full statistical profile of their enforcement activity. The maintenance and public disclosure of comprehensive, informative data bases on enforcement are distressingly uncommon in our field. The EU and US could lead efforts internationally to encourage each competition authority to take the seemingly pedestrian but often neglected step of developing and making publicly available a data base that (a) reports each case initiated, (b) provides the subsequent procedural and decisional history of the case, and (c) assembles aggregate statistics each year by type of case. Owing to their larger enforcement experience and sophistication in data reporting, the EU and US agencies could inform the development of international standards for classifying and reporting matters. Such a system would permit an agency’s own staff and external observers to see how many matters of a given type the agency has initiated and to know the identity of specific matters included in category of enforcement activity. Among other ends, a current and historically complete enforcement data base would promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity.\(^{16}\) Rather than being seen in isolation, the development of the fuller context provides a better understanding of the causes and consequences of observed behavior and of enforcement programs. For example, access to such data bases would give competition agencies greater ability to benchmark their operations with their peers.

**Assessment and Enhancement of Human Capital.** Continuous institutional improvement will require the EU and US competition agencies to regularly evaluate their human capital. The capacity of an agency’s staff deeply influences what it can accomplish. The agencies routinely must examine the fit between their activities and the expertise of their professionals. The agencies could share views about developing a systematic training regimen for upgrading the skills of their professionals. For example, where the agencies are active in areas such as intellectual property that require special expertise, the agencies could explore whether they have acquired the requisite specialized skills – for example, by hiring some patent attorneys. The experiences of the agencies with entry and lateral recruitment – including the costs and benefits of the revolving door – would be useful focal points for discussion. A fuller program of staff exchanges also might supply an effective means for improving the discussion at the staff level and educating each agency about how the other builds capability.

**Common Investments in Competition Policy R & D and Policy Planning.** An essential element of


continuous institutional improvement is the enhancement of the competition agency’s knowledge base. In many activities, particularly in conducting advocacy, the effectiveness of competition agencies depends on establishing intellectual leadership. To generate good ideas and demonstrate the empirical soundness of specific policy recommendations, competition authorities must invest resources in what former FTC Chairman Timothy Muris called “competition policy research and development.”\(^{17}\) Regular outlays for research and analysis serve to address the recurring criticism that competition policy lags unacceptably in understanding the commercial phenomena it seeks to address.

Examining the R&D function is one element of exploring larger questions about how the competition agencies should set priorities and, within the larger competition policy community, about what competition agencies should do. The question of setting priorities is likely to assume greater importance in the EU as certain functions that once occupied considerable EU attention devolve to the Member States, freeing resources for the Commission to design new programs. The consideration of how we measure agency performance, and assess the mix of its activities, is a topic for a larger discussion within the competition community. For example, on the scorecard by which we measure competition agencies, there is continuing awareness that we should count the suppression of harmful public intervention just as heavily as the prosecution of a case that forestalls a private restraint.\(^{18}\)

The EU and US competition authorities could use joint projects to perform key policy R&D tasks. Such projects might include carrying out joint market studies, convening joint hearings to explore specific industry phenomena, and engaging agency staff in common authorship of working papers.

Secondments. The EU and US competition authorities might consider a regular program of staff exchanges that ensures that, at all times, each institution will host one employee from its foreign counterpart. For example, having a DG Comp attorney or economist resident in the FTC at all times, and having an FTC attorney or economist resident at all times in DG Comp, has great promise to improve each agency’s understanding of the other institution and will help supply the human glue that binds the two bodies together.

4. CONCLUSION: FUTURE INTERNATIONAL RELATIONSHIPS


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\(^{18}\) Competition agencies must confront government restrictions on competition with the same commitment
competition authorities (and nongovernment bodies) must invest resources in developing and maintaining the relationships even though such investments do not immediately generate the outputs (notably, cases) by which competition authorities traditionally are measured. The success of the relationships requires investments in the type of overhead and network building that commentators, practitioners, and, perhaps, legislative appropriations bodies often view with some skepticism. Thus, a major challenge is for the European Commission and the US competition authorities to develop acceptance of a norm that regards these investments as valuable and necessary.

REFERENCES


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