

AN ENDURING ANTITRUST DIVIDE ACROSS THE ATLANTIC— CAUSES AND CONSEQUENCES

I. THE BASIC PICTURE

In two fundamental areas of competition law, America and Europe seem to be going in different directions. The American politicians and enforcers are enthusiastic and energetic about sending individual cartel participants to the penitentiary, while European politicians, criminal prosecutors and judges seem reluctant about doing so. Meanwhile, European competition authorities are enthusiastic and energetic about using competition law to curb abuses by dominant firms, while their American counterparts are cautious and concerned that such efforts will curb innovation and investment.

The consequences of such divergence are magnified because both enterprises and enforcers are operating in a global economy—where actions and consequences flow across oceans and borders with increasing ease. Yet the barriers to convergence on cartel participants and monopolies are deep seated. They are part procedural, part ideological, and part cultural. Differing politics and public psychologies are reflected in these quite different approaches to common issues.

The antitrust liberals and conservatives in the US agree that cartels are bad at any level—local, national, or international—and that severely punishing the individuals who actually conspire is critical to discouraging potential conspirators in the future. Thus, the leaders at the US Department of Justice (“DOJ”) proudly recite the dramatic increase in jail days served by antitrust felons¹ during a decade when there has been a dramatic decline in civil enforcement by DOJ. The attempt to imprison antitrust conspirators (including foreigners resident abroad) has been a continuing and growing trend, without serious controversy, over more than three decades during both Republican and occasional Democratic Administrations.

¹ Thomas O. Barnett, speech “Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement” (Feb. 29, 2008) (“Antitrust Update”), 7-8

Meanwhile, in Europe anti-cartel enforcement has been ever more aggressively pursued by the European Commission (“EC”) and more recently by the national competition authorities (“NCAs”) of the Member States. However, all EC efforts (and most NCA efforts) have been *administrative* proceedings leading to ever larger fines against *enterprises*. The wrongdoing individuals have generally gotten a free ride. Price-fixing and bid-rigging are not crimes under European law or the law of a majority of EU Member States; and the prosecutors and judges in those EU members that have adopted criminal sanctions (including the UK and Ireland) are proceeding *very cautiously* about prosecuting and incarcerating individuals. Thus, the practical risk of going to jail remains more theoretical than probable for the average European conspirator.

When it comes to “monopolies” or “dominant firms”, the coin is reversed. The EC and various NCAs are seriously concerned about punishing abuses of dominance and have undertaken significant numbers of investigations that have led to prohibition orders. The fact that the EC won three Article 82 appellate decisions before the European Court of Justice (“ECJ”) and the Court of First Instance (“CFI”) in 2007² tells a lot about its priorities and efforts. Thanks especially to Microsoft, the highest EU antitrust fines have been imposed for Article 82 violations.

Meanwhile, DOJ has not won a Section 2 appellate decision since *Microsoft* in 2001³ and it has not brought a significant Section 2 case during the Bush Administration. DOJ’s acceptance of very limited relief in *Microsoft*, after essentially winning on the merits in the DC Circuit stands in obvious contrast to the EC’s tougher (and more regulatory) approach to the same company. The leaders of the US agencies have expressed repeated concerns about chilling innovation and investment with excessive enforcement against dominant firms—and some sharp exchanges with EC officials have resulted. have developed no new significant Section 2 cases during this decade.

The differences between the DOJ and the EC may well be magnified by judicially-created “state action doctrine” in the US.⁴ This prevents the US agencies from pursuing some of the more obvious and arrogant monopolies in the American economy. The European Commission is not subject to any such bar when dealing with Member State-created monopolies (such as ports, postal services and “national champions”).

For reasons that I shall try to explain, I believe that neither side of the Atlantic has a monopoly on wisdom and that constructive diversity may well be preferable to some least common denominator convergence—even though diversity may increase the uncertainties for some enterprises, individuals, and their counsel. In

² *British Airways* in the ECJ and *Microsoft and France Telecom (Wnadoo)* in the CFI.

³ *US v. Microsoft Corp.*, 253 F.3rd 34 (DC Cir. 2001)

⁴ This began with *Parker v. Brown*, 317 US 341 (1943), where the Supreme Court upheld a state-created marketing monopoly for a product (raisens) that California accounted for over 90% of US production. in

any event, the divergent approaches to individual conspirators and dominant firms apparently rest on some fairly strong social and political traditions; and I do not see any broad political momentum to narrow the transatlantic divide on these major issues.

II. THE INTERNATIONAL ANTITRUST PENDULUM— INSTITUTIONAL LEADERSHIP AND MOMENTUM THEN AND NOW

The situation we face today ought to be seen in the context of the major shift in power that has occurred in the five decades since the Treaty of Rome created the framework for European competition law and enforcement. The US started off as the unquestioned king of the antitrust world, with a fairly aggressive and jurisdictionally expansive public and private enforcement that tended to raise periodic political hackles in Britain and elsewhere in Europe. Now, the tide has turned, and antitrust has become a world coinage—and aggregate antitrust enforcement is growing in Europe, while stabilizing or stagnating in the US. The EC is undoubtedly the most important competition enforcement agency in the world, and we see US politicians and officials raising objections to various enforcement activities that touch US enterprises.

I have lived through this dramatic swing in prominence and power. Let me offer a few quick snapshots that may help explain how we have gotten to where we are.

1961-62. I was working for a prominent solicitors' firm in London, a city where almost no barrister or solicitor would have called himself a competition lawyer. Local clients were not clamoring for antitrust advice. The EC enforcement effort was in its infancy dominated by the Germans who had the most interest and experience in the area. Regulation 17 was published (and translated unofficially into English in due course) to establish a "regulatory" system for filing agreements with the EC. The Commission's efforts seemed especially focused on promoting European market integration by eliminating vertical territorial restraints in distribution agreements (an effort the ECJ would uphold in its 1966 *Grundig-Consten* decision⁵). Meanwhile, this was a boom era in US antitrust. The DOJ *Electrical Equipment* prosecution had produced the first dramatic jail sentences for individual executives in major corporations, while the follow-on suits by electric utilities were generating an unprecedented flood of private antitrust litigation against General Electric, Westinghouse and other manufacturers. The *Grinnell* monopolization case was being tried in Rhode Island and shortly would produce DOJ's last big Section 2 victory in the Supreme

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Court.⁶ Finally, the “Government always wins” wave of merger decisions had begun with the Supreme Court’s populist and confusing *Brown Shoe* opinion.⁷

1976. I was just completing a wonderful decade at DOJ, during which Sherman Act offenses had been made felonies⁸, and monopolization cases against IBM and AT&T had been undertaken by the Antitrust Division. Congress enacted Hart-Scott-Rodino merger control system and doubled the the Antitrust Division’s budget. The first DOJ felony prosecutions were being brought (against domestic defendants) and jail sentences for individuals were being energetically advocated by DOJ. Meanwhile, in Europe the EC had secured an initial Article 86 victory in *Continental Can* in 1973 and other important abuse of dominance cases were underway.

1980. The US was still clearly the top dog in the antitrust world as a result of legislation, government enforcement and aggressive private plaintiffs; the DOJ *Uranium* grand jury investigation and the follow-on *Westinghouse* cases against the foreign producers generated major diplomatic disputes, a House of Lords decision in England and some antitrust blocking statutes in Europe, Canada and elsewhere. However, the “new antitrust majority” on the Supreme Court had begun what would become a long (and almost-unbroken) string of victories for antitrust defendants in private cases, with *Illinois Brick*, *Continental TV*, and *Brunswick* in 1977, and *Broadcast Music* in 1979. Meanwhile, in Europe the ECJ had given the EC important (and open-ended) Article 86 victories in *United Brands* and *Hoffman LaRoche*.

1984: A high level US-EC dispute erupted over whether EC could use Article 86 to force IBM to disclose interface standards for peripherals to its competitors in those markets. Meanwhile, DOJ’s ill-fated *IBM* case was dropped on the same day that its larger (and better) *AT&T* case was dramatically settled with a huge divestiture and an elaborate “regulatory” regime be administered by a District Judge (rather than the Federal Communications Commission) under the Modified Final Judgment. A year earlier, President Reagan had ordered DOJ to drop its *Transatlantic Ocean Shipping* investigation after a strong personal protest from British Prime Minister Margaret Thatcher. Meanwhile, anti-cartel enforcement was becoming a more important priority for the EC and would generate recurring cases especially in the chemicals industry.

1990: The EU adopted a comprehensive merger control system, based on a “one stop shopping” between the EC and the Member States. Meanwhile the US merger enforcement process had become much more *administrative* in style, few government merger cases were being litigated and the Supreme Court had not

⁶ *US v. Grinnell Corp.*, 384 US

⁷ *Brown Shoe v. US*, 370 US 294 (1962)

⁸ The maximum corporate fine had been increased to \$1m (from a derisory \$50,000), while the maximum individual jail sentence had been increased from 1 to 3 years. Converting the offense from a misdemeanor to a felony put increased pressure on judges to imprison violators.

decided a merger appeal since 1975 (two years after the last Government merger victory in the Supreme Court). State antitrust enforcement had become a significant political response to the Reagan era of limited federal civil enforcement; the state attorney generals, unconstrained by considerations of international diplomacy and comity (the way DOJ and FTC were) brought cases against foreign defendants that generated diplomatic complaints about “judicial imperialism” by US courts (as well illustrated by *California v. Hartford Fire*, involving several states’ challenge to Lloyds’ underwriting practices).

2000. DOJ won a broad victory before the District Court in *Microsoft*, after a fast ___month trial. DOJ’s dramatic divestiture plan (in which Microsoft would have been divided between an “operating system” company and an “applications” company) was accepted by the District Judge—inappropriately--without any serious hearing or study. (This broad DOJ approach would not be resurrected by the Bush Administration in 2001, after the initial divestiture decision had been vacated by the DC Circuit.) The DOJ’s new amnesty program (instituted in 1993) was generating international cartel investigations and prosecutions and fostering more close cooperation between DOJ, the EC and Canada.

2007: Europe has become the top dog on government civil enforcement. In this one year, the EC won three Art. 82 appeals—*British Air* in ECJ and *Microsoft* and *France Telecom (Wanadoo)* in CFI. Meanwhile, the US DOJ has not brought a significant Section 2 case or won a Section 2 appeal since *Microsoft* in 2001. Meanwhile, the US remains very much the top dog on the criminal side—with DOJ claiming to have obtained in 2007 orders for twice as many jail days for criminal violators (31,391) as it ever had before in any prior year.⁹ Also, the conservative majority on the US Supreme Court celebrated 2007 by deciding three important private cases narrowing antitrust laws and remedies, generally on the basis of principles advocated in DOJ/FTC amicus briefs supporting defendants¹⁰. Outside of criminal enforcement, antitrust law is simply becoming a narrower and less important factor in the US economy.

III. SOURCES OF CONVERGENCE

There has been a long history of good working relationships among the officials in different competition enforcement authorities. They have generally seen themselves as allies in promoting more open markets—which tends to make them quiet allies in the broader battles that each tends to face against the constituency-serving parts of its own government.

⁹ Thomas O. Barnett, speech “Antitrust Update” speech, *supra.*, 7-8

¹⁰ These decisions eliminated the longstanding per se prohibition on vertical price fixing, expanded antitrust exemptions in the regulated sector, and increased the pleading burden on private antitrust plaintiffs..has been widening the transatlantic gap by narrowing US antitrust law (*Leegin*, *Credit Suisse*, *Twombly* etc)

Close and ongoing staff-level coordination is a regular practice in cartel and merger investigations where multiple enforcers are involved; and these efforts are generally furthered by the antitrust cooperation agreements that have been entered into by many of the leading authorities. (To the extent that there are barriers to coordination, these tend to be generated by legal barriers to sharing confidential materials rather than the reluctance of officials to do so.)

International coordination is enhanced by a broadly shared vision that cartels are bad and that corporate participants should be heavily fined. Moreover, the foreign competition agencies without criminal enforcement authority do not tend to oppose the energetic DOJ efforts to prosecute individuals in international cartel cases. Also, the near universal adoption of amnesty programs as a principal way of uncovering cartels tends to foster inter-agency coordination, because the amnesty applicant has a strong incentive to go into *every agency* that might prosecute. Finally, the EC studying a *settlement system*, which would bring its cartel investigation practices somewhat closer to US DOJ.

Increasingly consistent views on horizontal merger enforcement seems to be present—as agencies try to bring both substantive standards and procedures for processing merger applications into closer alignment. This has been a particularly active area for the inter-agency International Competition Network (“ICN”). Transatlantic convergence is also being encouraged by Court of First Instance (“CFI”) decisions requiring more rigorous economic analysis and higher standards of proof by the EC when it makes a merger decision. (Of course, divergent results can occur in same transaction in different jurisdictions, because different agencies reach different conclusions based on different local facts or different presumptions or economic policies.¹¹)

Antitrust agencies are participants in various consensus-seeking institutions created by governments to encourage international dialogue and convergence on hard issues. The recently-created International Competition Network (“ICN”) is particularly devoted to this task in competition law, and the Organization of Economic Cooperation and Development (“OECD”) has long had a committee devoted to competition law issues. The ICN is actively engaged trying to reach closer consensus on how to deal with *exclusionary practices* by dominant firms. Bar associations and universities have also become sources of active discussions on convergence in sessions where government enforcers from different jurisdictions are regular participants.

A major source of transatlantic divergence—private antitrust litigation—also appears to be narrowing. The EC is actively promoting (and some Member States are adopting) new or expanded private antitrust remedies, and the effort has been given substantial encouragement by the ECJ’s liberal construction of

¹¹ In recent years, the US DOJ has seemed to be more conservative in bringing horizontal merger cases than many other agencies, as illustrated by its nonprosecution decisions in *Maytag-Whirlpool* and *Serius-XM Radio*.

key issues in its *Crehan v. Courage* decision. Meanwhile, the US Supreme Court has been raising the procedural and substantive barriers for private antitrust plaintiffs in the past few years.¹² These two trends seem likely to bring greater balance between private enforcement efforts across the Atlantic.

IV. SUBSTANTIVE SOURCES OF DIVERGENCE

The major sources of divergence appear to fall into four general categories which I have already mentioned. *First*, the basic political differences on the wisdom of incarcerating individuals for cartel violations probably reflects underlying social differences about *how evil* such conspiracies are. *Second*, different policies in dealing with particular practices by dominant firms (e.g., refusals to deal, loyalty rebates) reflect divergent views on how much weight to give “fairness”, “efficiency”, and “level playing fields” as ordering antitrust values. *Third*, that Section 2 of the Sherman Act, unlike Article 82 (and national laws modeled on it), has not been construed to provide an antitrust remedy against *abusive* conduct by dominant firms generates a huge divergence—which may be heavily driven by US concerns about private litigation. *Finally*, the EU and the US have adopted almost opposite approaches to the basic federalism question about whether competition law and enforcement should defer to state-created monopolies and market constraints; the European Commission has constant legal battles with Member States, while the US agencies have not even advocated legislation to eliminate (or even seriously narrow) the “state action” exemption created by the Supreme Court.

I shall return to all these issues in subsequent discussion.

V. PROCEDURAL SOURCES OF DIVERGENCE

At the end of the day, fundamentally different procedures seem to generate much more practical divergence than the substantive rules just alluded to. Basic procedures control both how laws are actually enforced and how the lawyers, administrators and judges tend to approach critical questions. Differences are very substantial within EU, because each Member State is fairly free to have its own system of courts, agencies, and procedures. More broadly, the civil law systems of Continental Europe differ in so many fundamental ways from the common law systems that prevail in the United States (as well as the UK and Ireland).¹³

¹² See *Associated General Contractors, Twombly v. Bell Atlantic, etc.*

¹³ For example, agency decisions not to bring an enforcement action can be subject to judicial review in Europe but not in the US. The UK seems to have borrowed this feature from the European civil law systems, and thus a number of OFT decisions not to proceed with an action (or a reference to the Competition Commission) have been overturned by the Competition Appeals Tribunal.

The drafters of the Sherman Act clearly intended to create a common law system of antitrust enforcement (rather than a detailed set of rules or an administrative system). Generalist federal judges applying vague statutes were left with huge discretion in defining legal wrongs. Both the Federal Government and private parties were given broad rights of enforcement, with private plaintiffs being offered extra bounties (of treble damages and one-way cost recovery) to encourage their participation. Many of the most far-reaching antitrust decisions have been in private cases.¹⁴ Today private antitrust plaintiffs are generating negative precedents, just as they generated expansive precedents 40-50 years ago.¹⁵

Because District Judges decide liability and relief, institutional caution is definitely part of the DOJ institutional psychology. See, e.g., *American Airlines and Oracle-PeopleSoft*. This encourages criminal pleas and civil consent decrees (rather than trials) as the way most DOJ investigations are disposed of. (The FTC has recently seemed more willing to bring innovative and close cases, but has not been doing particularly well on judicial fact finding or legal interpretations. See *Whole Foods, Schering Plough, etc*)

By contrast, the administrative system in Europe apparently enhances powers and discretion of enforcers to find both dominance and infringements. The European Courts seem to be giving the Commission more breadth in defining violations than the FTC or DOJ are now given by increasingly conservative US courts. Compare *British Airways* or *Microsoft* with *American Airlines, Schering Plough, etc*. (But EC factual determinations are getting closer CFI review than they had before, forcing changes in the Commission enforcement processes).

Competition law enforcement is part of a broader “competition portfolio” for the Commission’s DGComp (including most notably “state aids”) and this must affect the way the Commissioner and agency officials look at some key issues in antitrust cases. See the current *4-E.ON* Art. 82 case and the broader intra-EU dispute about separating electricity generation and transmission.

Having competition law enforcement in the hands of an *administrative* agency has some important institutional implications—because it tends to separate enforcement responsibility for any *criminal* competition law violations. These responsibilities tend to be placed in the hands of the normal state prosecutors (such as the Serious Frauds Office). These traditional prosecutors (with whom the competition agency may or may not have a close working relationship) may be more cautious--given either unfamiliarity with antitrust

¹⁴ Because fewer Government investigations now end up in trials, the DOJ/FTC role has increasingly become that of *amicus curiae* supporting the defendants in private cases.

¹⁵ *Eastman Kodak v. Image Technical Services* 504 US 451 (1992) appears to be the last Supreme Court victory for a private antitrust plaintiff.

issues, other priorities, or concerns about higher burdens of proof.¹⁶ By contrast, in the US, the civil and criminal enforcement functions have been combined in the DOJ ever since the Sherman Act in 1890; and the Antitrust Division does need the concurrence of the local United States Attorney to empanel a grand jury or bring a case in his district.

Limited use of oral evidence in civil law systems probably also makes it more difficult to prosecute many criminal cases. Even in European civil proceedings, damaging documents and other forms of evidence (including market share presumptions) are probably more important than in the US. (Assuming that European enterprises and individuals become more antitrust sensitive, it may become increasingly difficult to find the kinds of very damning documents that have been regularly used by enforcers in EC cases.)

VI. CARTELS

Punishing individual conspirators is not an issue that divides the enforcers. They all agree that cartels are serious evil that ought to be seriously punished and the European enforcers do not seem to object to the US efforts to apprehend and imprison non-resident alien conspirators. Rather the transatlantic divide on incarcerating price-fixers reflects some much broader social and political attitudes. There are some fundamentally different public perceptions about how evil cartels are and how seriously individual wrongdoers should be punished.¹⁷

In Europe, cartel activities (long assumed to be a way of life) are often viewed by the public and the politicians as a “*regulatory*” *problem* subject to regulatory remedies (i.e., fines and negative injunctions). Nor does there seem to be a sense that local businesses that rig local markets should be treated with equal severity. Nevertheless the dynamics may be changing in some parts of the EU. Criminal statutes have been enacted in a few important Member States (including the UK and Ireland) and some investigations and prosecutions are known to be underway--but actual competition law convictions and incarcerations still remain very few and far between.

For many Americans, imbued with the “robber barons” lore, price-fixing is seen as *covert theft*—and thus treating antitrust conspirators and other white collar thieves to jail is seen as the right remedy. Even so, It took the US society 70-80 years to broadly accept that *regular* prosecutions and imprisonments that may deter a serious proportion of the potential antitrust wrongdoers.

¹⁶ I understand that in Ireland the Competition Authority has recommended many more criminal cases than the Attorney General’s office has been willing to process.

¹⁷ This may help explain why so much public debate and controversy has been generated by the efforts (of the Home Office and the US authorities) to extradite a British citizen and resident in a DOJ cartel investigation. This particular case has gone all the way to the House of Lords (the UK’s highest court), which denied extradition based on antitrust law.

The crucial question in this area is: *who should be held responsible for what all agree is wrongdoing?* Should it just the enterprise (as is now the case under EU law)? Why shouldn't the society also punish the individual actors? Indeed, it is my experience that such illegal activities may often be hidden from the companies by their wrongdoing employees who are seeking promotions, reputation-enhancement, bonuses or other indirect gains from appearing to be more successful than they really have been as commercial actors or leaders (and thus the psychology seems similar to that so famously illustrated by the rogue traders at Barings and Societe Generale, who were apparently not the immediate beneficiaries of their fraudulent gambles).

The cartel conspirators to whom I have been most often exposed generally don't spend time worrying the corporate shareholders being socked with large fines and damages. They worry being exposed and punished themselves. Of course, it is important that the employing enterprise be punished too, in order to increase its incentives to educate, monitor and discipline employees—yet, beyond a point, increased corporate fines may have limited utility.

The secretive US grand jury system enables DOJ prosecutors to play individual witnesses off against each other and piece together criminal cartel cases even when documentary evidence is limited. Fear of incarceration seriously enhances individuals' incentives to (i) reveal a cartel in order to get amnesty and/or (ii) cooperate with an ongoing DOJ investigation and thereby obtain immunity or at least leniency.

The US comes down hard on individuals—now routinely obtaining significant jail sentences for cartel participants. However, this has only occurred in the last 25-30 years and been greatly assisted by the adoption of Sentencing Guidelines which have limited judicial discretion to treat “nice” white collar criminals more tolerantly.

The fundamental US conception of jail for white collar criminals as *deterrence vis-à-vis future violators* is less well accepted elsewhere (and may even be rejected in some places). In Europe, only a minority of Member States have criminal liability for individual cartel participants—even though most members impose criminal liability for embezzlement and other types of covert frauds. Even where criminal penalties for white collar crimes are provided, jail sentences are often less routinely imposed or as stringent compared with the US practice.

I am reasonably convinced that, for criminal laws against cartel participants to really matter, they must be enforced frequently and visibly. Having a criminal law is unlikely to be effective as a deterrent if prosecutions are so infrequent as to appear more like random lightning strikes than consistent enforcement.¹⁸

¹⁸ For example, the UK has still to bring its first criminal antitrust prosecution under a statute enacted in 2002; it has announced several criminal investigation—including an investigation of the international

VII. MONOPOLISTIC ABUSES

In the US and the EU we not only have different laws, we have different images of “monopoly”, and different perspectives and concerns that flow from them. Europeans often tend to think of sluggish state-created monopolies, and they have good reason to do so, because many state-created monopolies have been privatized as a single unit rather than being broken up into competitive pieces. Meanwhile, the modern American dialogue tends to focus on innovative companies like IBM, Microsoft, and Alcoa--which were arguably just too aggressive in some respects—rather than looking at the American counterparts of the kinds of monopolies that concern Europeans (e.g., the New York Port Authority or the Union Pacific-Southern Pacific Railroad).

A very fundamental difference is Section 2 of the Sherman Act, unlike Article 82 (and national laws modeled on it), does not provide an antitrust remedy against *abusive* conduct by dominant firms. In *Trinko*, the Supreme Court underscored that *exploitation* of a monopoly does not violate Section 2.¹⁹ This very basic difference means that liability is only possible where somebody is excluded (or severely penalized) in a market where the defendant is already dominant or threatens to become dominant. It seems to me that there is very little debate in the US over whether antitrust law is an appropriate or effective tool to regulate *abuses* by dominant firms (e.g., excessive pricing or refusals to provide interoperability information to those in dependent markets).

Different perceptions generate quite different policy concerns. In the US, one witnesses a recurring concern about over-enforcement of Section 2 chilling innovation, risk-taking, and investment. As that famous jurist, Learned Hand wrote in the *Alcoa* case: “A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry....The successful competitor, having been urged to compete, must not be turned out when he wins.”²⁰

This concern about over enforcement has since been increasingly articulated by the enforcers and judges appointed by the Republican Administrations that have dominated the Federal Government during most of the last four decades.

Meanwhile, Europe has generated increasing enforcement concern about providing effective remedies against monopolistic bullies and safeguarding small-but-efficient competitors; and the European courts have been frequently willing to accept fairly bright line prohibitions against dominant firms. The Commission has

Marine Hoses cartel, where the US DOJ has already charged 3 British nationals and one German (and entered into plea agreements which would be affected by what the UK does).

¹⁹ *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 US 398 at 407 (2004) (“*Trinko*”).

²⁰ *United States v. Aluminum Co. of America*, 148 F.2d 416, ___ (2nd Cir. 1945)

certainly used its Article 82 enforcement authority against state-legacy monopolies (such as public utilities and ports); but it has attracted much more international attention for its willingness to deal with global leaders (such as Microsoft and Intel), when the more conservative US enforcers had stood aside. Various EU national competition authorities have also been active investigating and challenging abuses of dominance, under national laws and under the Article 82 enforcement authority granted them by the EU's 2004 modernization regulation. Judging from all this activity, European enforcers do not share the pervasive US concern about over-enforcement against successful dominant firms.

The enforcement differences appear to be colored by different visions of appropriate economic policy. These start with serious differences on how much presumptive weight should be given to market shares in determining the threshold question of defining "dominance". Clearly market shares can be used to create legal rules that are more predictable but are also more likely to generate false positives; and for this reason US enforcement has moved steadily away from its earlier reliance on market shares in favor of very detailed analysis in assessing both mergers and alleged monopolies. Meanwhile, Europe seems closer to the enforcement thinking when I was in the government 30 or so years ago

More broadly, the American side has relied on so-called "Chicago School" economics that assumes that the goal of antitrust is to promote allocative efficiency in the society as a whole. It also assumes that enterprises are run by profit maximizers who would recognize that most predation and leveraging are irrational. Moreover, because they believe that markets are self-correcting, Chicago thinkers tend to see antitrust interventions directed at changing market structures as at best wasteful and at worst misguided. The European enforcers and commentators clearly start from a different economic perspective (sometimes labeled "post-Chicago") which relies more on game theory, dealing with dominant firms' strategies for forestalling or minimizing entry, and does not assume that ambiguous conduct is likely to be efficient. Thus, DG Competition would put the burden on the dominant firm to prove that an alleged infringement enhances efficiency, and "ultimately the protection of rivalry and competitive process is given priority over possible pro-competitive efficiency gains."²¹

However, I think the difference is driven at least as much, and maybe more, by long-standing differences in how Section 2 and Article 82 are actually enforced. Quite simply, the central role given to private plaintiffs and juries in the United States has bred long-term caution. Indeed, the US politicians, enforcers and courts have implicitly made the broad judgment that, when recurring *monopoly abuses* are likely to occur, then a sectoral regulator needs to be created to police situation(s)--rather than trying to rely on antitrust agencies and courts. Apparent reasons are often not articulated: sectoral regulatory regimes

²¹ DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses (2005)Para.

do not normally generate private treble damage litigation and sectoral regulators tend to be more predictable about not disrupting the status quo. This rationale seemed especially clear in the recent *Trinko* and *Credit Suisse* decisions²², where the Supreme Court recently introduced much greater deference to sectoral regulators because

“antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many courts to reach consistent results”²³

Finally, most judges do not like the idea of courts becoming ongoing regulators of future conduct by a defendant under detailed injunctive orders..

Other nations have not—and have no need to—follow the bifurcated US approach to monopolistic abuses where they have created an *administrative system* of competition law enforcement. In some jurisdictions, the competition authority and a sectoral regulator are given concurrent jurisdiction to enforce the competition laws (much as the FTC and DOJ have concurrent jurisdiction over Clayton Act enforcement). Moreover, in Australia, the same administrative agency, the ACCC, is both antitrust enforcer and telecoms regulator.

Administrators are generally more willing than judges to make and enforce the kind of “regulatory” judgments that are often needed to deal with monopolistic abuses under the competition laws. Thus it is hardly surprising that violations based on “monopolistic pricing” and “unreasonable refusals to deal” recur in EU antitrust jurisprudence, but not in the US.

Different psychologies about dealing with monopoly abuse are dramatically revealed in the *Microsoft* and *Intel* cases. Dawn raids have been used by the EC, as in cartel investigations. The EC’s regular use of very *large fines* to punish monopoly abuse stands in sharp contrast to the reality that the US authorities are limited to *prospective* remedies—namely, civil injunctions and divestiture.²⁴ The lack of time-sensitive sanctions has given Section 2 defendants strong incentives to drag out Government Section 2 cases almost indefinitely (e.g., *US v. IBM*).

Creating an effective equitable remedy for a monopolistic abuse can be a particularly acute problem. An administrative agency may well have (or think it has) the experience and staff necessary to create and enforce a “regulatory” remedy which a US District Court might well reject as being too complex to

²² *Trinko, supra* (2004); *Credit Suisse Securities (USA) LLC v. Billing*, 127 S.Ct 2383 (2007)

²³ *Credit Suisse* 127 S.Ct. at 2395,

²⁴ Section 2 violations can be criminal felonies just the way Section 1 violations are. However, there has not been a Section 2 criminal case since DOJ lost *Empire Gas* in 1976.

handle. (The trial judge in *US v. Microsoft* did not want to seriously confront the difficult remedy issues, and was reversed for his failure to do so.) By contrast, the US has made use of the basic *structural remedy—divestiture*—for monopolies (most notably *Standard Oil*, *United Shoe Machinery*, and *AT&T*), which is something that no European enforcer has dared to attempt for an Article 82 violation.

VIII. PRACTICAL CONSEQUENCES OF DIVERGENCE

The foregoing divergences have different significance for companies depending on the scope and scale of their operations around the world. Obviously, the biggest consequences are for companies with substantial operations in both Europe and the US.

First, potential international cartel participants may have to live with the risk of ending up in a US jail, if caught. These risks should grow if more extradition arrangements are generated with EU Member States. Hopefully, the resulting concerns will temper foreign individuals' willingness to participate (or at least make them more secretive in carrying out activities).

Second, cartel whistleblowers will rush first (or simultaneously) to the US where amnesty rewards are clearly greatest. In particular, amnesty against criminal prosecution of individual executives is an important incentive in the decision making process

Third, global monopolists may (1) have to refrain from doing some things that US law would permit and (2) be prepared to disclose proprietary information especially in network markets (e.g., on interface, interoperability and interconnection standards).

Fourth, antitrust objectors to dominant firm conduct will tend flock to Europe whenever jurisdictionally possible. They will presumably start with the enforcement agencies, but private actions may well take on greater importance in some major jurisdictions which choose to implement the EC's recommendations or other proposals on private remedies.

IX. WHERE TO FROM HERE? DIFFERING POLITICS, PREJUDICES AND PSYCHOLOGIES.

Competition is not necessarily a popular political cause among many elements in a democratic society. It tends to be disruptive of the existing interests of enterprises and their employees, while the consumers and innovators who benefit from more open markets may not be as acutely aware as they should be about the sources of their benefits. Thus the political balance can

often be struck strongly in favor of marginal farmers or a national economic icon vis-a-vis innovation, efficiency and change.

In Europe, of course, competition has been a central public goal for half a century since the Treaty of Rome, because it was seen as a way of breaking down public and private barriers to integration and efficiency. The political goals of *market integration* and *level playing fields* have caused the European Commission to see many straight competition law issues (including vertical restraints and monopolistic abuses) in somewhat more “political” terms than their US counterparts. At the same time, by curbing state aids and “national champions”, the EC has generated some stronger political opposition than the US agencies would be used to. Thus, President Sarkozy of France has succeeded in getting “unfettered competition” eliminated from the Preamble of the new EU Lisbon Treaty, while the French and German governments have strongly opposed to the EC effort to force structural separation between generation and transmission in monopoly utilities.

Antitrust has generated more moral fervor in the US than Europe. Populism has generally an important significant source of political support for creation and enforcement of antitrust law in the US. This momentum was most clearly evident in 1890 (with the near unanimous passage of the Sherman Act), in 1912-14 (with the Clayton Act and the FTC Act), and then again during Thurman Arnold’s tenure as AAG in the late 1930s, and finally in the mid-1970s when Sherman Act violations were made felonies and pre-merger regulation were enacted. Populism generates “fairness” versus “efficiency” issues—and “fairness” tends to have a broader political appeal than “efficiency”. Thus the political support for criminal anti-cartel enforcement remains strong, while it seems increasingly ambiguous in some other areas.

By contrast, many Europeans still tend to think of cartels as raising “regulatory” issues—even if cartels are no longer assumed to be an everyday way of life. This psychological reality politically supports imposition of larger administrative fines on *enterprises* engaged in cartel activities and other competition law violations. But this psychology also makes it hard to contemplate broad political or judicial support for energetic criminal enforcement and regular incarceration for those who conspire to cheat consumers. (The theft by cartel members from their victims is neither as clear nor quantifiable as the types of fraud and embezzlement that tend to be criminalized by EU Member States.)

At the same time, pressure from Brussels and local political support in some important Member States has generated stronger national laws (generally based on Articles 81-82), while stronger national enforcement agencies have been created or expanded. Aggressive arrogance by a seemingly dominant enterprise is likely to continue to generate more sympathy and potential response from

European citizens and enforcers than American enforcers who have a frequently-articulated concern about chilling innovation and punishing success.

X. SOME APPARENT CONCLUSIONS

European and international consumers have almost certainly benefited from the aggressive US approach to cartels. DOJ's highly-successful amnesty program has helped encourage whistleblowing and its aggressive approach to individual wrongdoing should have some deterrent effect on individuals operating in international markets outside the US. (Of course, in modern service economies many cartels involve local markets like construction and local transport, where the energetic US efforts to prosecute individuals would not have any effect in Europe.)

The US emphasis on jail for cartel participants does not seem to be a source of significant discord with other competition enforcement agencies. Rather the European enforcement authorities appear generally content to have the US serve as "global jailer" for international cartel participants—and thus increase amnesty applications and deterrence.

US consumers and competitors may well be gaining some immediate benefit from some EC enforcement activities vis-à-vis some globally dominant enterprises, at a time when DOJ Section 2 enforcement is virtually non-existent. The EC's effort to force Microsoft to disclose interoperability standards clearly has some immediate effect within the US and other countries outside the EU. The Commission's efforts may also have more impact within Europe if its successes encourage private Article 82 actions in some Member States—including even efforts by US-headquartered plaintiffs to challenge allegedly abusive conduct that current US law would not necessarily reach. How active Article 82 enforcement in these areas may affect the longer-term incentives and conduct of global leaders (or potential new entrants) in the future is more debatable, and certainly will be debated.

The European Commission's more aggressive approach to dominant firms may prove a lesser source of diplomatic discord with a post-Bush Administration in Washington than has been true recently. The more active that DOJ (or the FTC) becomes as a Section 2 enforcer, the more likely it is to seek greater cooperation and convergence with the EC on investigations and cases (as already exists cartels and mergers).

To conclude, convergence is generally better than divergence. But some divergence may be a positive—as a way of experimenting vis-à-vis new market realities, as well as a way of compensating for under- enforcement (or over-enforcement) in some quarters. Constructive divergence is consistent with a core principle of federalism—namely, to allow different governments to experiment on how to deal with ongoing problems and even to come up with

different solutions in some cases, provided that differences do not degenerate into disorder. Thus, coordinated enforcement efforts, recognition of comity and jurisdictional restraint by courts and enforcers are likely to be needed to keep antitrust divergence within constructive and reasonable bounds.