
US and EU Competition Law: A Comparison

ELEANOR M. FOX

On the surface, there appears to be much in common between competition law in the United States and competition law in the European Union. Article 85 of the Treaty of Rome,¹ which prohibits agreements that distort competition and, accordingly, agreements that fix prices, is roughly comparable to section 1 of the US Sherman Act (*US Code*, Vol. 15), which prohibits agreements in restraint of trade. Article 86 prohibits abuse of a dominant position and seems roughly comparable to section 2 of the Sherman Act, which prohibits monopolization and attempts or combinations to monopolize.

US and EC competition systems also have common objectives. Both seek to advance the interests of consumers and protect the free flow of goods in a competitive economy. Both seek to protect competitors' access to markets and protect to some extent consumer freedom of choice and seller freedom from coercion.

The respective competitive systems of the two areas have developed, however, out of different histories and different concerns, and upon closer examination, significant variations in law, policy, and enforcement become apparent.

Eleanor M. Fox is Walter Derenberg Professor of Trade Regulation at the New York University School of Law. The author thanks Robert Pitofsky for his helpful comments on an earlier draft of this chapter.

1. This is the treaty establishing the European Economic Community, 25 March 1957, Article 85. The Treaty on European Union (or, the Maastricht Treaty), adopted in 1993, did not alter the competition provisions in the Treaty of Rome.

Goals of Competition Policy

US competition policy derives from statutes enacted at different times in US history, and therefore the goals of these statutes are not identical. Overall, US antitrust policy is primarily designed to protect consumer welfare (i.e., produce a variety of products at reasonable prices), with modest elements of fairness (right of firms to be free of coercion) and of hostility to vast concentrations of economic power. Through much of its history, US enforcement agencies and courts were not very sensitive to claims of efficiency; they assumed that a robust competitive market would automatically be efficient. However, many contemporary commentators believe that efficiency claims are likely to be given more weight in the future.

Sophisticated economic analysis is a centerpiece of American antitrust enforcement. “Industrial policy,” defined here as overt efforts to strengthen domestic firms to serve goals other than competition and efficiency, such as successfully competing in global markets, has not had much influence on US antitrust law. Occasionally, industrial policy concerns such as promoting research and development influence competition rules, but those concerns rarely trump antitrust policy entirely. Fundamentally, competition has been the industrial policy of the United States.

In the European Union,² economic integration of the various member nations is a dominant objective of competition policy. The common market evolved from the perceived need to break down trade barriers between Western European nations, and Community policy therefore reflects as a cardinal principle the desirability of free movement of goods and people across member state lines. By contrast, the free movement of goods in the United States was achieved through a sympathetic interpretation of the commerce clause provisions of the US Constitution that effectively demolished local or regional preferences and state barriers.

While economics has a role in EU analysis, it is much less center stage than in the United States. The European Union is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of “fairness.” There is also a sense in the European Union that joint ventures, mergers, and other collaborations may be necessary to enhance technological development and therefore to allow European firms to compete effectively in global markets. Article 85(3) of the EC Rome treaty embodies these notions, providing that otherwise void agreements or combinations may be exempted where they “contribute to improving the production or distribution of goods or to promoting technical or economic

2. The Maastricht Treaty created the European Union (EU). The European Economic Community, now called the European Community (EC), is a constituent part of the European Union. The competition law remains in the EC Treaty of Rome.

progress . . .” as long as consumers enjoy a fair share of resulting benefits. While hard to judge, the language of the EC Rome treaty and EU enforcement policy seems to accept a larger element of “industrial policy” and of “fairness” than is accepted in the United States.

Systems of Enforcement

US enforcement of competition policy is both complicated and litigation-oriented. The statutes are in most cases concise, and the law has been made through judicial interpretation during a century of litigation. Opportunities for the federal government to make law or adjust policy by edict or guidelines are limited.

Complications in American competition policy derive from the fact that there are so many sources of enforcement and regulation. At the federal level, two agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC), have roughly coextensive jurisdiction, though the FTC has no criminal enforcement authority and the two agencies’ policies are not always congruent. States and private parties injured in their business and property also have access to the courts, and they frequently bring cases that go beyond or are flagrantly inconsistent with prevailing federal policy. Finally, competition policy is sometimes influenced by protectionist efforts of the Department of Commerce and the International Trade Commission, and regulations and subsidies emerge from a broad variety of departments and agencies (for example, the Department of Defense with respect to the defense industry and the Federal Communications Commission with respect to telecommunications).

Enforcement in the European Union is far more regulatory and bureaucratic. Much regulation is based on a system of notification and approval by negative clearance, individual exemption, or block exemption. Block exemptions exist for the most common types of contracts—for example, distribution contracts—and companies seek the advantages of the block exemption by molding their transactions to fit its rigid structure, which lists the clauses that are permissible and those that are not.

In many areas of law—merger enforcement is a notable example—the substantive standard contained in the relevant EU regulation may be similar to the standard of US statutes and guidelines, but enforcement in the European Union to date has been more lenient.

Enforcement against Cartel Behavior

US and EU law and enforcement attitudes are probably most similar in their hostility to price-fixing, market division, bid rotation, and other forms of hard-core cartel behavior.

In the United States, price-fixing and related behavior is treated as illegal per se, which means that practices such as price-fixing violate the law regardless of the market power of the participants, their motives, or purported business justifications.³

The assertion that price-fixing and related cartel behavior is treated with exceptional severity under American antitrust law is subject to a qualification. When the effect on price is indirect and the practices being challenged can contribute to efficiency (for example, through integration of resources), courts will take a “quick look” to determine whether the strict per se rule, as opposed to a more lenient rule of reason, should apply.⁴ The contours of this vague exception remain under consideration by the US Supreme Court, but in any event the US approach is not likely to undermine overall stringent treatment of hard-core cartels. Price-fixing and related practices often result in criminal penalties in the United States, and fines and damages to injured parties can be enormous.

The EU law against cartels is similar to US law. Cartels in the Community are covered by Article 85(1), which deals with market sharing, price-fixing and related practices. There are several EC exemptions that do not apply in US law. For example, there is some limited room for an exemption for crisis cartels (i.e., rationalization cartels in which there is chronic industry overcapacity) if the industry adheres to very strict conditions.⁵ Also, small and middle-size firms may enter into specialization agreements, agreeing to specialize in certain product markets and stay out of the markets of one another.⁶ Finally, collaboration among European firms is subject to a *de minimis* exception not present in US law.⁷

The major difference between US and EU cartel enforcement is in levels and quality of enforcement. Price-fixing and other cartel behavior usually fall within the province of the US Department of Justice and are commonly treated with criminal sanctions. A substantial staff in the Justice Department’s Washington office, as well as in regional offices in several major cities, is primarily devoted to detecting and challenging cartels.

The EC staff for cartel enforcement is very thin. There is no investigative staff and, as a result, cartels are normally uncovered, if at all, by complaint. In many parts of Europe, cartels were a customary way of life before the Treaty of Rome was adopted, and there is a serious ques-

3. The leading American case is *United States v. Socony-Vacuum Oil Co.* (310 U.S. 150, 1940).

4. Two cases exemplifying the approach are *Broadcast Music Inc. v. Columbia Broadcasting System* (441 U.S. 1, 1979) and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (472 U.S. 284, 1985).

5. See Synthetic fibers (Commission Decision 84/380, O. J. L. 207/17).

6. See Fine papers (Commission Decision 72/291, O. J. L. 182/24).

7. Regarding the *de minimis* exception, see *Volk v. Vervaecke* (case 5/69, 1969, ECR 295).

tion concerning whether EC law (which has no criminal component) and EC enforcement have reduced the level of secret cartels significantly.

Dominant Firm Behavior

Restrictions on business behavior designed either to achieve or maintain dominant power is an important element of competition policy in both the United States and the European Union. On closer examination, however, the definition of what constitutes a dominant firm and the types of conduct that constitute violations of law differ in the two jurisdictions.

While the controlling US statute is silent on the point and case law somewhat ambiguous, leading US cases appear to treat firms as holding monopoly power only if they control about two-thirds or more of a relevant market.⁸ Moreover, market power (even monopoly power) alone is not enough to violate American statutes; there must be an element of unacceptable conduct to achieve or maintain that position.

US law on the question of monopolizing behavior has changed markedly over the years. In early cases such as *United States v. Aluminum Co. of America* (148 F.2d 416, 2d Cir., 1945) and *United States v. Griffith* (334 U.S. 100, 1948), it appeared that virtually any conduct that had an exclusionary effect on actual or potential competitors would violate the statute—unless it could be defended, in the words of the *Alcoa* decision, as an example of “superior skill, foresight, and industry.” In recent years, American courts have backed away from such a stringent approach and generally allow firms to achieve or defend their legally acquired monopoly position through aggressive competitive behavior.⁹ Examples of conduct that go beyond acceptable behavior include “predatory” pricing (i.e., below-cost pricing en route to greater power), acquisition of direct rivals, long-term lease arrangements with penalty clauses if the customer switches to a challenger of the monopolist, and refusals to deal for no business purpose other than to injure a competitor.

In the European Union, Article 86 declares illegal “any abuse . . . of a dominant position within the Common Market” and goes on to indicate examples of dominant-firm abuse. The founders of the Community did not oppose bigness. Rather, they believed that European firms were often below optimum scale and therefore not large enough to achieve

8. Companies with only 30 or 40 percent of a market may “attempt to monopolize,” but conduct must be plainly anticompetitive and lacking in business justification to be deemed a violation, and it must predictably produce monopoly if allowed to continue to operate. For example, see *Spectrum Sports, Inc. v. McQuillan* (506 U.S. 447, 1993) and *Turner* (1975).

9. See, for example, *Telex Corp. v. IBM* (367 F. Supp. 258, N.D. Okla. 1973, *rev. per curiam* 510 F.2d 894, 10th Cir., *cert. dismissed*, 423 U.S. 802, 1975).

maximum efficiency or to compete with foreign-based multinationals, particularly those based in the United States. Therefore, the initial conception was to regulate power rather than to prevent its acquisition (Joliet 1970).

According to *Hoffman-La Roche v. Commission* (case 85/76, 1976, ECR 461, para. 38), a dominant firm under EU law is one that has the power “to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers.” A 40 percent market share, in the presence of significant barriers to entry, can constitute dominance, and a firm with 50 percent of a market or more is presumed to have dominance (*AKZO Chemie BV v. Commission*, case C-62/86, 1991 ECR I-3359)—a level substantially below the point that “monopolization” restrictions begin to apply in the United States.

Article 86 itself lists some examples of dominant-firm abuse, including the imposition of unfair purchase or sales prices, limits to production, application of dissimilar conditions to equivalent transactions, and extraction of supplementary obligations from customers that are not connected with the subject of the transaction.

In several respects, the conduct declared illegal under Article 86 would probably be legal if a US firm with monopoly power engaged in it. For example, a firm that legally acquires a monopoly position can sell at any price it chooses under US law and can intentionally limit production in order to drive up the price. That is so because US law is not regulatory (in the sense of direct regulation of price and output) but rather concentrates on preserving conditions, whereby free-market forces can constrain price and can induce optimal production.

EC case law demonstrates that conduct constituting “abuse” ranges beyond the four examples in Article 86. A dominant firm has broad duties to deal and may offend the law by not serving all demand.¹⁰ In other respects, standards of conduct may appear similar to those in the United States—for example, abusing a dominant position through predatory pricing or discrimination in price is illegal, but EC law has far looser standards for proof of either offense.¹¹

Dominant firms may escape what otherwise might otherwise be a violation of Article 86 by “objective justification” of their practices—e.g., that the conduct was important to serve the market (Gyselen 1989, 616, n. 49).

10. Höfner and Elser/Macrotron (case C-41/90, 1991 ECR I-1979). See also *Radio Telefis Eireann v. Commission* (cases C-241/91 P and C-242/91 P, 1995 ECR I-743) concerning the duty to license intellectual property when necessary to create a new product that consumers demand.

11. Compare *AKZO Chemie BV v. Commission* (case C-62/86, 1991 ECR I-3359) with *Brooke Group v. Brown & Williamson Tobacco* (509 U.S. 209, 1993).

Vertical Contractual Arrangements

US and EU differences of approach to antitrust regulation of contractual arrangements between suppliers, distributors, and customers reflect significant differences in competing policy considerations and in balancing goals of competition policy against goals of enforcement.

In the United States 20 or 30 years ago, regulation of a wide range of distribution arrangements was fairly restrictive of private firms' conduct. Not only were maximum and minimum resale price maintenance agreements declared illegal *per se*,¹² but stringent rules applied as well to division of customers and territories among distributors,¹³ exclusive dealing contracts,¹⁴ and tie-in sales.¹⁵ At least in part, these older rules reflected a concern for the preservation of fair opportunities for distributors to compete and to act independently of their suppliers. Distributors' freedom—viewed as freedom to respond to the market—was assumed to be consistent with consumers' interests.

In the 1980s, a “minimalist” school of US antitrust took the very different position that almost all vertical restraints were procompetitive. The animating notion appeared to be that such restraints were likely to prevent free riding on investments and services of full price distributors and, in any event, interbrand competition among rivals would adequately police any intrabrand restrictions applied. This minimalist approach was controversial, and in its extreme form is unlikely to prevail.

The most stable rule regulating vertical contractual arrangements in the United States declares agreements to set minimum resale prices illegal *per se*. There has been criticism of the rule in scholarship and some roundabout erosion by increasing the plaintiff's burden of demonstrating an “agreement” between a supplier and its customers and narrowing the category of resale price agreements.¹⁶ Nevertheless, there is strong congressional support for a rule against minimum vertical price-fixing (largely viewed as manufacturers' techniques for limiting the aggressive competitive activities of discounters) and no indication that the US Supreme Court will back away from its position that such activity is illegal *per se*.

12. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (220 U.S. 373, 1911) regarding minimum price-fixing and *Albrecht v. Herald Co.* (390 U.S. 145, 1968) regarding maximum price-fixing.

13. *United States v. Arnold, Schiwnn & Co.* (388 U.S. 365, 1967, *overruled*) and *Continental T. V. Inc. v. GTE Sylvania, Inc.* (433 U.S. 36, 1977).

14. *Standard Oil Co. of California v. United States* (337 U.S. 293, 1949).

15. *Northern Pacific Railway v. United States* (356 U.S. 1, 1958).

16. A good example is *Business Electronics Group Corp. v. Sharp Electronics Corp.* (485 U.S. 717, 1988).

A comparable rule of *per se* illegality for vertical customer and territorial allocation has been abandoned (*Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 1977). Conservative economic analysis has successfully made the case that such restrictions are often designed to protect the investment of distributors against free-riding challengers who make no comparable investment. As a result, US courts will not entertain a challenge to vertical territorial and customer allocation unless the manufacturer accounts for a very large portion of the market—probably at least 30 or 40 percent—and some courts may require a further showing that the other major competitors followed a similar plan and the effect was to facilitate producer cooperation. Therefore, few challenges to such arrangements have been successful in the last decade. Similarly, exclusive dealing contracts (providing that the supplier will not set up a second distribution outlet in a defined area) are treated under a lenient rule of reason and seldom successfully challenged.

Restrictions on tie-in sales in the United States have waxed and waned. In the 1950s and 1960s, the law was interpreted stringently against arrangements to force distributors or customers to take unwanted products, largely on grounds that it prevented competitors of the seller from competing on the merits for business in the tied product (*Northern Pacific Railway v. United States*, 356 U.S. 1, 1958, n. 24; *United States v. Loew's, Inc.*, 371 U.S. 38, 1962). The fenced-out competitors' right of access was equated with the consumers' right to choose. The market power of the firm that was coercing purchase of the unwanted product was often modest. At that time, most illegal tie-ins were invalidated under the modified *per se* rule. More recently, the law has eased so that, for the modified *per se* rule to apply, the tying firm must have substantial market power in the market for the tying product (again, probably at least in the 30 percent range; see *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 1984). The plaintiff's burden of demonstrating that there are in fact two products and that the defendant used its power over the first to force the second on buyers has become substantial. Still, a tie might be defensible or at least not subject to the modified *per se* rule if a defendant can show that the conduct is necessary to respond to the market (*Jefferson Parish*, 466 U.S. 2, 1984, 25, notes 41 and 42).

The US Supreme Court in *Eastman Kodak v. Image Technical Services, Inc.* (504 U.S. 451, 1992) reaffirmed its commitment to prohibit tie-in sales where the necessary conditions are met. The *Kodak* case is unique in that it concerned an intrabrand aftermarket (tie-in of services to spare parts), and the Court rejected conservative economic theory that competition in the interbrand original equipment market would guarantee responsive behavior in the aftermarket.

In the European Union, development of the law on vertical restraints was much influenced by the goal of assuring market integration among the nations of Europe. The influence of that objective is most apparent

in connection with territorial restraints. In the famous case of *Consten and Grundig v. Commission* (cases 56, 58/64, 1966, ECR 299), the European Court of Justice held that no firm may have airtight territorial restraints at member-state borders because such restraints impair the movement of goods across state lines. The Court of Justice affirmed the exclusion of evidence of interbrand competition and ignored arguments about the necessity of territorial restriction to prevent free riding on the investments of existing distributors (Bermann, Goebel, Davey, and Fox 1993, 634-35). Many other cases have reinforced the conclusion that tight territorial allocation at member-state lines is among the most egregious of restraints in the Union. Intra-Community export restraints, or agreements such as those for dual pricing (a higher price for goods to be exported), are illegal for the same reason—they block or discourage the flow of parallel imports (see *Distillers Co. Ltd. v. Commission*, case 30/78, 1980, ECR 2229). In other areas of the law, there is greater congruence between US and EU law. For example, in both, agreements to maintain resale prices are illegal.

Block exemptions cover exclusive distributorship and exclusive purchasing arrangements.¹⁷ Regulations state what clauses must be included and excluded to get the benefit of the block exemption. Selective distribution is not covered by block exemption but is generally allowed as long as the manufacturer does not restrict the number of distributors to be designated (*Metro SB-Grossmarkte GmbH & Co. KG v. Commission*, case 75/84, 1986, ECR 3021).

In the European Union, tie-ins and fidelity rebates are treated under Article 86—that is, as an aspect of dominate-firm behavior—and are normally illegal if they increase the share of the dominant firm and do not pass a stringent test of objective justification (*Hoffmann-LaRoche v. Commission*, case 85/76, 1976, ECR 461; *Tetra Pak International SA v. Commission*, C-333 94P, [1996] ECR I-__, 16 November 1996).

The European Union is reexamining its law on vertical restraints. The Commission adopted a Green Paper on vertical restraints in January 1997 and has asked for comments on four options: maintaining the current approach, widening the block exemptions, focusing the block exemptions, and reducing the scope of Article 85 (1).

Mergers and Joint Ventures

Prevention of mergers and joint ventures that threaten anticompetitive changes in market structure has been a centerpiece of American competition enforcement. Levels of enforcement have varied widely, from

17. Commission Regulation 83/83 O. J. L 173/1 (30 June 1983); Commission Regulation 84/83, O. J. L 173/5 (30 June 1983).

extremely lax in the 1920s and 1980s to exceptionally vigorous in the 1960s. Overall, many believe that the reason most American industries are less concentrated than counterpart industries in Europe and Japan is because of enforcement and the threat of enforcement of antimerger restrictions.

The history of enforcement against mergers in the European Union is entirely different. At the genesis of the European Community, there was no concern about mergers. The founders did not believe that bigness was a problem but rather were concerned about inefficient smallness resulting from the balkanization of markets (Bermann et al. 1993, chapter 24). Even as to bigness, the solution was thought to be regulation rather than deconcentration. Thus, mergers were often welcomed, especially cross-border mergers that could help integrate the Common Market. To the extent that the Community seriously considered merger enforcement, it focused upon a concern that mergers would lead to abuse of dominant power. Eventually, mergers were considered an appropriate concern for EC law. Only after many years were the member states prepared to cede sovereignty, and thus national policy initiatives necessary for a Community-wide merger policy. In 1989 the Council of Ministers agreed on a merger regulation¹⁸ still focused primarily on single-firm dominance. When the law applies, it supersedes member-state merger laws (Bermann et. al. 1993, 859-60), in contrast to the US system of dual federal-state enforcement.

American case law and guidelines with respect to mergers focus primarily on a concern that mergers might lead to undue concentration, which in turn would facilitate the exercise of market power. Market power is the ability-profitably to maintain prices above competitive levels for a substantial period and is thought to occur when barriers are high and either there are so few firms in the market with entry barriers that they can implicitly coordinate their actions or when a single firm unilaterally gains power.

US case law tends to find violations in three types of mergers:

- **Direct horizontal mergers between competitors.** Serious scrutiny begins where the combined market share of the merging parties is roughly 20 percent in a concentrated market with significant barriers to entry (US Department of Justice and Federal Trade Commission 1992).
- **Mergers between customers and suppliers.** Serious scrutiny starts when each firm accounts for 20 percent or more of the market and there are significant barriers to entry (*Fruehauf Corp v. FTC*, 603 F.2d 345, 2d Cir., 1979).

18. Council Regulation 4064/89, O. J. L 395/1 (30 December 1989), corrected, O. J. L 257/14 (21 September 1990), amended effective 1 March 1988, Council Regulation 1310/97 (30 June 1997).

■ **Conglomerate mergers.** Violations are effectively limited now to situations in which one of the merging parties would have entered the market of the other if the merger did not occur, or one of the parties exerted a procompetitive effect from the edge of the market, thus producing a potential horizontal problem (*United States v. Marine Bancorporation*, 418 U.S. 602, 1974). A substantial majority of merger actions involves horizontal mergers where there is a threat that concentration will lead to coordinated anticompetitive action.

At least in the older cases, there was no opportunity to claim efficiencies as a moderating factor.¹⁹ The American enforcement agencies are willing to take efficiencies into account in the exercise of prosecutorial discretion, but their overall attitude has been skeptical. Efficiency claims must be “merger-specific” (not achievable through some less anticompetitive arrangement) and must be verifiable. The efficiency gains must be sufficient to prevent any consumer harm.

When a company or one of its divisions is “failing,” restrictions on mergers and joint ventures are loosened. However, the definition of a failing firm or division under US law is extremely demanding. The firm must show that it is unable to meet its financial obligations in the near future (i.e., it is virtually in bankruptcy), that it could not reorganize successfully, and that there is no other buyer tendering a reasonable offer that would keep the firm in the market and create a less-severe danger to competition (US Department of Justice and FTC 1992; *Citizens Publishing Co. v. United States*, 394 U.S. 131, 1969). In court, it is rare that US firms can successfully assert a failing-company defense. As to situations in which there is chronic overcapacity (so-called “distressed industries”), there is no provision in US law or guidelines for more lenient antitrust treatment.

With respect to joint ventures, US law is generally lenient. When two firms otherwise unable to enter the market on their own join forces to create a new competitor, that transaction is probably legal. Problems arise principally when the two firms are already in the market and combine forces, perhaps claiming achievement of efficiencies, and try to characterize their combination as a joint venture rather than as a merger. It is mainly these joint ventures that have been challenged under American law. For some time, it was thought that a joint venture between a firm in the market or one committed to entry and another firm that appeared unlikely to enter but that remained a potential competitor might

19. In recent years, lower courts in the United States have been willing to entertain claims of efficiency, but no merger, otherwise illegal, has been allowed on the basis of an efficiency claim (*FTC v. Universal Health, Inc.*, 938 F.2d 1206, 1222, 11th Cir., 1991, and *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1289-91, N.D. Ill. 1989, affirmed 898 F.2d 1278, 7th Cir., cert. denied, 111 S. Ct. 295, 1990).

be actionable (*United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 1964). More recently, American courts have imposed so many preconditions on a challenge in the “one-in/one-out” situation—for example, the outside firm must be one of only a few entrants and would have a significant effect on competition if it entered independently—that violations of this sort are unlikely to be found (*Tenneco, Inc. v. FTC*, 689 F. 2d 346, 2d Cir., 1982).

The EC merger regulation, cited above, prohibits mergers that create or enhance “dominance” so as to substantially impair effective competition (Bermann et al. 1993, 862). Language regarding oligopolies or cartel-like behavior was consciously omitted from the regulation. Nonetheless, the issue of coverage remains an open one. In *Nestlé/Perrier* (case IV/M 190, Commission Decision 92/553), the Commission articulated and accepted a theory of oligopolistic dominance. This issue is now before the EC Court.

Efficiencies and economic progress are relevant in an examination of competitive effects under the merger regulation, but only if they are “to consumers’ advantage and [do] not form an obstacle to competition.” In the *de Havilland* case (Commission Decision 91/619, O. J. L 334/42, 5 December 1991)—the first merger struck down under the merger regulation—the Commission avoided the question of efficiencies. Without deciding whether efficiencies could be a defense, it examined the record in the case and concluded that the combined firms would produce no substantial efficiencies. The Commission’s approach is perplexing in that it referenced economies of scope without identifying them as such and expressed fears that realization of this advantage would disadvantage the single-line competitors.

The EC merger law has not yet squarely addressed a failing-company claim or a “distressed industry” claim. Political considerations seem to penetrate the EU decision-making process more easily and frequently than in the United States, and therefore it is more likely that industrial policy will creep into the decisions and influence outcomes, despite language that may appear, on the surface, faithful to the standards of the merger regulation.

As in the United States, joint ventures of various sorts are treated leniently under EC law. Cooperative joint ventures (those not treated as mergers) are rather liberally exempted under Article 85(3), although the Commission often exacts conditions, such as striking exclusivity clauses, that US law would not be likely to treat as anticompetitive. Exemptions are granted only for a term of years so that surveillance of cooperative joint ventures continues.

Under the stewardship of a talented merger task force (the staff in the Competition Directorate that analyze the mergers and make recommendations), EC merger law shows increasing sophistication. By the nature of the Commission system, however, the law is not insulated from

political influence, leading some contingents to advocate for an independent antitrust agency.

Predation

Price predation is a strategy to injure competitors by low prices, strategic exclusion, or other means of forcing rivals to bear costs that the predator does not incur itself, thereby enhancing or entrenching its market power. Almost all predatory pricing behavior involves extremely low pricing.

A definition of unacceptable predatory behavior has been far more controversial in the United States than in the European Union. Moreover, EU treatment of predation, consistent with EC law generally, suggests a concern to protect competitors as well as future consumers from both exclusionary and exploitative abuses.

Elements of predatory pricing ordinarily include pricing below some appropriate measure of costs and some indication of exclusionary or monopolistic intent. There is increased recognition in the United States that cases or rules restricting undesirably low pricing must be carefully considered so as to avoid law enforcement that chills or deters vigorous, aggressive pricing—that is, the essence of behavior that the antitrust laws are designed to protect.

To prove predation in the United States, many courts require evidence that the defendant charged prices below reasonably anticipated marginal cost. Because marginal cost is difficult to measure, many courts use average variable cost as its surrogate.²⁰ In some parts of the United States, prices above average full cost can still constitute a violation—particularly where there is evidence of intent to destroy competitors and/or high barriers to entry so that a predatory campaign is plausible.²¹

Even when prices are below some acceptable level, some US courts have concluded there can be no predatory pricing if actual or potential rivals are so numerous that a predator would not be able recoup its investment in low prices after some or all existing rivals are eliminated. A Supreme Court case—*Brooke Group v. Brown & Williamson Tobacco* (509 U.S. 209, 1993)—declares the ability to recoup an essential factor.

20. Marginal cost is the increment to total cost that results from producing an additional item of output (see *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 87, 2d Cir., 1981, cert. denied, 455 U.S. 943, 1982); variable costs are the sum of all costs that vary with output, excluding overhead, depreciation, taxes, and similar items (*Morgan v. Ponder*, 892 F.2d 1355, 1360, n.11, 8th Cir., 1989).

21. For a summary of applicable US rules, see *Barry Wright Corp. v. ITT Grinnell Corp.* (724 F.2d 227, 1st Cir., 1983).

In combination, these two tests—sales below average variable cost (at least in most jurisdictions) and a market structure conducive to recoupment—have made it extremely difficult for a plaintiff, whether government or private party, to win an antitrust challenge based on low pricing. The consensus appears to be that predation is not a promising area for aggressive law enforcement.

The European Union employs a different standard. In *AKZO* (1991 ECR I-3359), AKZO and its competitor, ECS, sold organic peroxide, the former primarily to plastics manufacturers and the latter for flour. When ECS started selling to AKZO's plastics customers, AKZO began to price low—sometimes below average variable cost—to ECS's flour customers in order to discipline ECS.

AKZO was found to have abused its dominant position. The Court's opinion indicated that such abuse can occur with a campaign designed to eliminate a competitor by pricing below average variable costs, or even above average variable costs but below average total costs. It was unlikely that ECS would have been eliminated and, even if it were, there was another important competitor in the market and AKZO probably could not have recouped its profits lost in the siege of predation. The EU court focused on the problem of eliminating or disciplining a competitor in contrast with US jurisprudence, which reflects the worry that legal "protection" against a competitor's low prices is likely to be costly to consumers, who are denied the advantage of low pricing. The reasoning and concerns of the Court of Justice in *AKZO* are confirmed in *Tetra Pak*, which held that recoupment is not a necessary element of a price predation case (*Tetra Pak International SA v. Commission*, C-333 94P, [1996] ECR I-__, 14 November 1996).

Enforcement Levels

In many respects, US and EC substantive law is quite harmonious. Cross-fertilization of thinking among scholars and practitioners across the Atlantic is likely to further this convergence. However, substantive law diverges at a number of points as noted; the enforcement system has many differences, and enforcement levels are quite different.

Even in the 1980s, when US enforcement was dominated by a "minimalist" enforcement attitude, there were over 500 lawyers and economists in the Antitrust Division of the Department of Justice and a similar number engaged in competition enforcement at the Federal Trade Commission. Enforcement against cartel behavior and large horizontal mergers has been constant. In the late 1980s during the Bush administration, and the 1990s under the Clinton administration, a broad range of antitrust enforcement activities has been resumed. In addition, state attorneys general and private parties continue actively to challenge anticompetitive

behavior. Even with sharp drops in private enforcement that have occurred over the last 20 years, there are still approximately 1,000 private treble-damage and injunction cases filed annually in the United States.

Compared with those in the United States, enforcement levels in the European Union, especially against cartels, are low. Competitors' complaints trigger most proceedings to the EC Commission, other than those involving mergers. All mergers that pass the high threshold of "Community dimension" are reviewed by the Commission, but there have been only about eight cases that have resulted in a flat prohibition order. A number of other cases involved consent arrangements where some portion of the merged assets were spun off or other relief was accepted.

There is no provision under EC law itself for private antitrust action, but Articles 85 and 86 allow suits in member states for damages or injunctive relief in accordance with whatever procedures and remedies the member-state law provides. Some EU officials and others advocate greater use of private actions.

Conclusion

In sum, US and EC competition laws have many similarities, but the substantive center of gravity of each is unique. EC competition law is derived from the impulse for market integration and is closely connected with the EC principle of free movement of goods and services across member-state lines. It seeks to preserve opportunities for small and middle-sized business, though it is also motivated by concerns for efficient businesses and for consumers' interest.

Moreover, analysis of cases in the European Union has been less technical than in the United States. The Commission and the Court readily presume dominance and increases in dominance without the kind of factual record that might be required in the United States.

The intensity of enforcement is much lower in the European Union than in the United States. Competitors' complaints and notifications of agreements are the principal triggers of official activity, and minimal resources are devoted to anticartel activity. Resources are devoted to mergers, but few challenges are made. This contrasts with the United States, where anticartel activity is much greater and many more mergers are challenged or subject to spinoff requirements.

Procedurally, the enforcement regimes are quite different. While both are affected by politics, in the United States enforcement is more likely to be influenced by the political philosophy current in the administration rather than direct interference in particular cases. In the European Union, enforcement activity and disposition of cases is more likely to be swayed by ad hoc political influences brought to bear by one of another

member state that perceives an interest in the outcome of the case or the competitive position of EU firms.

There is a perception in both the United States and Europe that EC Article 85 is underenforced with respect to cartels and cartel-like behavior. It is considered underenforced because 1) only the Commission has the right to grant an exemption, and therefore, as a practical matter, all agreement/combination cases must be funneled to it; 2) the Commission has limited resources; and 3) single damages with no significant discovery and the specter of a double bill for lawyers' fees provide no incentive for private parties to become effective private attorneys general. There is also a US perception that, beyond cartels, Articles 85 and 86 are both overenforced, deterring firms from taking aggressive action that could serve buyers. However, Europe perceives US antitrust as the captive of big business and Chicago free-market theory and as defaulting in its role to protect against abuses and to limit or regulate power.

The differences are not likely to be worked out by "pushing" the systems into greater harmony, but there are sufficient, important, substantive commonalities that can be maximized if and as the world demands more harmony in the laws governing global transactions.

References

- Bermann, G., R. Goebel, W. Davey, and E. Fox. 1993, Supp. 1995. *Cases and Materials on European Community Law*. Minneapolis: West.
- Gyselen, L. 1989. "Abuse of Monopoly Power within the Meaning of Article 86 of the EC Treaty: Recent Developments." In B. Hawk, *Fordham Corporation Law Institute*.
- Joliet, R. 1970. *Monopolisation and Abuse of Dominant Position: A Comparative Study of American and European Approaches to the Control of Economic Power*. Netherlands: Nijhoff.
- Turner, D. F. 1975. "The Scope of 'Attempt to Monopolize'." *Record Association Bar* (New York City) 30: 487.
- US Department of Justice and Federal Trade Commission. 1992. *Revised Merger Guidelines*. Washington.