Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms?

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Introduction

The modern dramatic expansion in the number of jurisdictions with competition laws has inspired various measures to promote international convergence upon superior norms. Government competition agencies today participate in a broad range of multinational, regional, and bilateral initiatives for which coordination and convergence are important aims. Amid abundant convergence-related activity, the relationship between the competition systems of the European Union (EU) and the United States attracts particularly close attention. More than any other single force, the interaction of the competition policy systems of the EU and United States deeply influences the convergence process within all of the multinational and regional networks. Owing to the unequalled capacity of these jurisdictions to project their competition policy preferences beyond their own borders, what happens in the EU and the United States does not stop there.

This article examines the relationship between the competition policy systems of the EU and the United States with an emphasis on the treatment of dominant firm conduct. The article first considers what type of convergence on competition policy norms we should hope to see between the EU and the United States – or among all of the world’s competition authorities. The article then sketches similarities and differences between the EU and US competition policy systems and reviews centrifugal and centripetal forces that promise to affect the extent to which the two systems converge or diverge in their future treatment of dominant firm conduct. The article closes by discussing possible paths for improvement in the EU–US relationship and for the attainment of better practices in competition policy.

Why does convergence or divergence between the EU and US systems matter?

For at least three reasons, differences between the EU and US competition systems can have considerable practical, economic significance. First, there is a high and increasing degree of interdependence between the regulatory regimes of individual jurisdictions. In many areas of regulatory policy, the jurisdiction with the most intervention-minded policy and an effective mechanism to enforce its commands has power to set a global standard. It is the rare multinational enterprise that does not operate in the EU or in the United States. For matters such as abuse of dominance, firms generally must tailor their behaviour to that of the most restrictive major jurisdiction with competition laws.

The second reason concerns the process of enforcement. Even when the EU and United States 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 United States spend substantial resources on technical assistance for new competition policy systems and for countries considering the adoption of new competition laws. By far, most of the 80 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 rely as much as the United States does on an adversarial prosecution model. Because the EU institutional platform is more compatible with the institutional arrangements in most civil law countries, many transition economies are inclined to look first to EU models in designing and implementing their competition systems. This condition means that EU, rather than US, norms tend to be more readily absorbed into the newer competition policy regimes.

The operating systems and applications of competition law

Experience with technical assistance programmes 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 that of the US) on more highly specified legal commands and emphasises 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 United States relies substantially on 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 institutional arrangements were destined to attain a dominant share. That dominance is likely to continue. The most interesting issue for the future development of global competition norms is the choice by individual jurisdictions of substantive analytical ‘applications’ and related investigative techniques to run on 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 United States has provided the principal analytical applications that most of the world’s competition law systems use today. The United States also has designed implementation applications, such as the use of leniency to detect cartels, that enjoy broad popularity around the world. Moreover, US applications such as the use of private rights of action and the imposition of criminal sanctions to punish cartels are scrutinised in many civil law countries, although the adoption of these applications will require civil law countries to make some important adjustments to their existing institutional arrangements.

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 United States account for the leading share of applications concerning substantive analysis and investigative methods, but a number of 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 candidate nations to conform their laws to those of the Community. This might be seen, in rough terms, as a form of tying analytical applications to an institutional framework. Even so, the EU’s own analytical applications often draw on concepts and experience from the United States. 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.

Diversification and convergence: normative principles

From a normative perspective, how should we regard the simple existence of differences between the EU and the United States with regard to substantive principles, analytical approaches and implementation techniques? Two normative principles seem appropriate. First, some degree of difference is not only inevitable but healthy. Complete homogeneity across individual systems would eliminate valuable experimentation. The history of competition policy has featured a continuing search for optimal substantive rules and implementation methods. This search has benefited from continuous, decentralised experimentation with respect to analytical principles (eg, DOJ’s adoption of revised merger guidelines in 1982), enforcement procedures (eg, the creation in the 1970s of the US system for mandatory premerger notification and waiting periods), investigation techniques (eg, the DOJ’s leniency reforms of the 1990s), and organisational innovation (eg, the UK Office of Fair Trading’s recent restructuring to integrate competition and consumer
Protection of the European Union or across other systems, individual authorities must work continuously to adapt to a fluid status quo. The second normative principle is that there should be mechanisms to promote adoption of superior norms. In a series of speeches presented during his chairmanship of the Federal Trade Commission (FTC), Timothy Muris presented a three-stage framework by which independent jurisdictions could realise the benefits of decentralised experimentation and promote the broad adoption of superior norms. By ‘superior norms’ I mean norms that (a) promote the accurate diagnosis of the actual or likely competitive significance of observed behaviour; 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 decentralised experimentation within individual jurisdictions. The second 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. I will have more to say below about what the EU and the United States can do with regard to the vital second stage of this process.

To the Muris framework I would add a fourth element. Notwithstanding differences that might exist at any one moment between the European Union and the United States or across other systems, individual jurisdictions should build institutional mechanisms that increase interoperability. This entails careful attention to enhancing channels of communication and discussion that link related functional units across agencies (ie, between DG Comp, 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),¹ 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 characterise its approach,² 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
- 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. Without a conscious process to identify and adopt superior ideas, decentralisation cannot fulfil its promise as a 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 out here, the process that generates transatlantic competition norms would be adaptable and evolutionary. In the field of competition law and in other areas of public policy, there is a tendency to speak of convergence on ‘best’ practices. I believe it is more accurate and informative to say that the objective is convergence on ‘better’ practices.³ 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.⁴ 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 operations should be a central element of future cooperation. The routine process of evaluation should focus on 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 type of inquiry would help ensure that each competition agency considers how it can upgrade its substantive standards and operational methods.

Similarities and dissimilarities in the substance of EU and US competition policy

The general trend of competition policy in the two jurisdictions has been toward common acceptance of substantive standards and the analytical concepts that support the implementation of those standards. Important areas in which the two systems have displayed substantial convergence include agreement on the goals of competition policy, the treatment of cartels and horizontal mergers, and recognition of the dangers of state-imposed restrictions on competition.

A noteworthy area of difference is the treatment of dominant firm behaviour. In general terms, EU doctrine and policy impose greater restrictions on dominant firms than the US competition law system does. In some respects, the formative statutory texts of the EU and the United States create a basis for differences in the treatment of dominant firm conduct. By their own terms and by judicial interpretation, the US antitrust statutes have no equivalent to the excessive pricing prohibition in Article 82. The Commission has not used its excessive pricing authority expansively, but the EU Member States have shown a greater willingness to apply this measure under their own competition laws. The bare terms of Article 82 also provide a less certain basis for determining that the prosecutor must show that denominated forms of abuse (eg, tying) had actual or likely anti-competitive effects.

The interpretations of Article 82 by the Court of First Instance (CFI) and the Court of Justice have tended to create a wider zone of liability for dominant firms than the decisions of the US courts under Section 2 Sherman Act. At the margin, US courts have tended to say that courts and enforcement agencies commit greater errors by intervening too much rather than too little. This perspective does not appear in EU jurisprudence or in speeches by EU enforcement officials.

In their technical findings and in their attitude, modern US Supreme Court decisions in cases such as Brooke Group,8 Trinko,9 and Weyerhaeuser10 have demonstrated greater scepticism about abuse of dominance claims than judicial decisions in matters such as France Telecom/Wanadoo,11 Michelin II,12 and British Airways.13 EU decisions in IMS Health14 and Microsoft15 show a greater inclination to condemn refusals to deal than modern US rulings such as Trinko. Unlike Brooke Group and Weyerhaeuser, the France Telecom/Wanadoo decision rejects the need to apply a recoupment test to resolve allegations of exclusionary pricing. A finding of dominance can occur in the European Union at or somewhat below a 40 per cent market share, while the US offence of attempted monopolisation usually treats shares below 50 per cent as being inadequate to establish substantial market power.

A major question for the two jurisdictions is how much an effects-orientated standard will become the common core of analysis in abuse of dominance matters. The EU discussion paper on dominance16 and speeches by EU officials indicate receptivity to greater express reliance on an effects test and to reduced emphasis on the category-based assessment sometimes evident in cases such as British Airways. Even in the context of what is called an effects test, outcomes often will hinge on the quantum and quality of evidence that a court demands before it is willing to find actual anti-competitive effects or to infer likely adverse effects. If there were broad EU–US agreement in concept on the value of an effects test, there still will remain the question of application. Consider how the courts of the two jurisdictions treated the tying claims involving Microsoft. The CFI treatment of tying issues said the court was focusing on the actual or likely competitive effects of the challenged conduct. Yet the CFI analysis of the tying claims only superficially resembles the treatment of tying allegations in the decision of the US Court of Appeals for the District of Columbia Circuit in 2001 on the DOJ complaint against Microsoft.17 Compared to the US Court of Appeals, the CFI appeared more willing to infer adverse economic effects from the fact of the conduct alone. In one sense, the courts of both jurisdictions applied an effects test, but the US courts’ application of the test imposed tougher evidentiary requirements on the plaintiff.
**Centrifugal and centripetal forces**

To see differences between the EU and the United States in the treatment of dominant firm conduct leads one to ask how the relevant trends in policy came to pass and whether they will persist. This section of the article identifies institutional and other forces that promise to foster a greater degree of convergence in the future and to highlight forces that are likely to retard convergence.

**Divergence: the centrifugal forces**

Discussions about EU and US competition law often default to a collection of familiar hypotheses to explain differences between the two jurisdictions. Thus, it is often said that the European Union protects competitors, the United States protects competition; the United States is beholden to the state, backward-looking Chicago School of Economics, the European Union embraces the progressive, forward-looking Post-Chicago School; the United States gave up on bringing abuse of dominance cases after 2000, the European Union is pressing ahead to keep this and other areas of competition law alive.

The conventional interpretations divert our attention from an examination of deeper, more persuasive explanations – many of them rooted in the institutional arrangements of the two systems – for why the two systems diverge. To see the underlying conditions more clearly is the first, necessary step to considering how and where the two systems might converge more completely on common standards. Below, I describe considerations that tend to be overlooked in conventional discussions about why the European Union and the United States diverge.

**Delegation of the decision to prosecute: the role of private rights**

In roughly the past 30 years, judicial fears that the US style of private rights of action – with mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions and jury trials – excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards. This is most evident in the progression toward more permissive treatment of dominant firm conduct. The intellectual roots of this development are as much (or more) rooted in the work of modern Harvard School scholars such as Phillip Areeda, Stephen Breyer and Donald Turner as they are in the scholarship of Chicago School scholars such as Robert Bork and Richard Posner.

EU competition law has evolved without the tempering force of these concerns. For most of the European Union’s history, the decision to prosecute in competition cases has been reserved to public authorities. Had the US private rights of action been more constrained (eg, by making treble damages discretionary rather than mandatory), my prediction is that US doctrine for abuse of dominance would more closely resemble existing EU standards. The persistent inclination of US courts to raise liability standards to offset perceived excesses of private rights creates what could turn out to be a permanent fissure between EU and US approaches to dominant firm conduct and other forms of business behaviour.

A major variable on this point is the possible future enhancement of private rights in the European Union. An interesting question for the future is whether and how much the EU modernisation programme (which dilutes the policy-making powers of DG Comp) and its efforts to encourage Member States to augment private rights will affect the evolution of substantive doctrine. EU policy-makers generally have disavowed the adoption of measures (such as mandatory trebling) that courts have seen to be sources of over-deterrence in the US system. Nonetheless, any expansion of private rights necessarily denies public authorities the gatekeeping function – in determining the type and ordering of cases to be prosecuted – that they have enjoyed in the past. It is possible that the courts of the Member States will regard private litigants as being, in at least some sense, less trustworthy custodians of the public interest than the public agencies.

**Dissimilar Procedures: Administrative versus Adversarial Models**

The EU model of policy-making relies chiefly on elaboration by an administrative body whose decisions are subject to judicial review. To some degree, the operations of the US FTC use the same model. For the US system as a whole (including the operations of the FTC), the bulk of key decisions, such as measures to impose sanctions for abuse of dominance, cannot be taken without judicial approval. In other words, where decisions to intervene have relatively powerful consequences, the US system gives the courts a more significant role in determining whether the prosecutors’ preferences will be fulfilled. This condition inclines the US agencies to demand a greater quantum and quality of evidence before deciding to prosecute.

By the same measure, the administrative model has made the EU more cautious in some instances about deciding not to intervene. Administrative practice in many civil law systems, and in the EU, compels public authorities to give reasons why they have declined to act on complaints lodged by citizens or juristic persons.
Although the Tunney Act procedures in the United States somewhat encumber DOJ’s capacity to settle cases, the US public agencies generally have much greater freedom to ignore third party complaints and decide not to prosecute.

ASSUMPTIONS ABOUT UNDERLYING ECONOMIC CONDITIONS

Decisions of courts and enforcement agencies in the US system to relax antitrust prohibitions may stem from assumptions about the operation of the US economic system. Important characteristics of the US system include relatively strong capital markets, comparatively few impediments to the formation of new business enterprises, and an effective mechanism for recycling the assets and personnel of failed firms back into the economy. The failure of a new business does not stigmatise the firm’s founders. These features give the US system a substantial degree of adaptability and flexibility.

These conditions may help account for the assumption, reflected in decisions by courts and enforcement agencies, to disfavour intervention in a wide range of disputes. US abuse of dominance doctrine and policy, for example, assumes a considerable capacity on the part of rivals, suppliers, and consumers to adapt, reposition, and otherwise protect themselves in the face of apparent overreaching by specific firms. By contrast, it is possible that, because EU officials perceive the economy of the Community and its Member States to be less flexible and adaptable, there is less confidence that market processes alone will provide a sufficient antidote, in the absence of public intervention, to offset seemingly anti-competitive business practices.

THE SOURCES OF AGENCY HUMAN CAPITAL

In the aggregate, the backgrounds of personnel of the EU and US public agencies differ in an important respect. In the leadership, management, and case-handling positions, a larger percentage of personnel in the US agencies have experience outside the civil service. The revolving door in the United States creates a circulatory process that routinely brings academics and private sector practitioners into the competition agencies to a greater degree than one sees in the EU. This condition means that the US agencies have a larger group of officials, from top management to relatively junior case handlers, who have worked in private firms. This element of experience can provide a stronger basis with which to make confident judgments about which arguments advanced by private firms have merit and which do not.

The mix of personnel in the European Commission and in the Member State competition authorities has been changing over time. One sees somewhat more acceptance of a revolving door process which, although it does not spin with the speed of the US system, has brought a larger number of personnel with academic and private practice experience into the EU agencies.

Convergence: the centripetal forces

Several phenomena tend to press the EU and the US competition policy systems together in their treatment of substantive antitrust issues. Some phenomena take place inside the competition agencies; some take place in interactions between the agencies; and some take place outside the government enforcement bodies. Many of the phenomena described here are interdependent, such that developments outside the competition authorities can have major effects on the agencies themselves.

CONSULTATION BETWEEN THE EU AND US COMPETITION AUTHORITIES

Using the three-level NTA framework of intergovernmental, transgovernmental, and transnational contacts introduced above, modern experience reveals considerable interaction between the EU and US competition agencies and an intensification of activity in this decade. Fuller mutual discussion about these and other matters would be valuable enhancements to the EU–US relationship.

Intergovernmental contacts have continued at the highest levels between the Commission and the US federal antitrust agencies. These include regular, formal EU-US bilateral consultations and a variety of other interactions. The EC Commissioner for Competition, the DG Comp Director General, DOJ’s Assistant Attorney-General for Antitrust, and the FTC’s Chairman played pivotal roles in the formation of the International Competition Network (ICN) in 2001 and have cooperated extensively in the past six years in the design and implementation of ICN work plans. Contact among high level EU and US officials is also commonplace at conferences and in discussions about specific policy matters. Measured by the sheer volume of contacts or the breadth and depth of discussions, the intergovernmental level of discourse in competition policy is more expansive today than at any period of the EU-US relationship.

The same expansion of EU-US interaction has
Familiar with the same body of industrial organisation knowledge. Students in these graduate programmes become familiar with the same body of industrial organisation literature. Owing to personal tastes and philosophies, instructors inevitably differ in the emphasis they give to specific topics and with respect to the policy preferences they articulate in class. Despite these differences, students emerge from these graduate programmes with a generally common intellectual framework and a roughly similar set of analytical norms. Above all, recipients of advanced degrees in economics are likely to share the belief that sound microeconomic analysis is an essential foundation for sensible competition policy.

In recent years, a number of competition authorities have adopted organisational reforms that elevate the role of economic analysis in the decision to prosecute. The Commission is one of these agencies. Earlier in the decade, DG Comp created the office of the Chief Economist and gave the holder of that office a direct reporting line to DG Comp’s top leadership. The Chief Economist (initially Lars Hendrik-Roeller and now Damien Neven) has a staff that now exceeds 20 economists. The establishment of a separate economics unit can become the instrument by which economic analysis exerts more influence in guiding the selection and prosecution of cases. Economic analysis and the preferences of economists are likely to assume increasing importance in the Commission’s investigation of proposed cases, the formulation of complaints, and the prosecution of alleged infringements. To the extent that economists’ perspectives become reflected more expansively in the work of DG Comp, as one predicts they will over time, the analytical approach that the Commission takes in deciding whether to bring cases probably will converge more closely on the approach that the DOJ and the FTC take.

A suggested agenda for the future: concepts and means

There are a variety of ways to build on existing forms of EU–US cooperation in competition policy to identify and promote convergence on superior norms. The discussion below outlines conceptual focal points for further cooperation and describes specific means that the EU and US competition policy communities might take to address these points.

Concepts

For all of the progress in cooperation achieved to date, there is considerable room for learning about basic forces that shape policy in the EU and the United States and therefore influence the transatlantic relationship. Discussions among government officials and within non-government networks tend to focus on specific
enforcement developments (e.g., the resolution in the EU and the United States of each jurisdiction’s Microsoft cases) or matters of practical technique and tend not to ask basic questions about the origins and institutional foundations of the systems. The discussion below suggests that the agenda for discourse inevitably must expand to incorporate examination of these considerations if cooperation is to be enriched and common progress toward better practices is to be achieved.

**Toward a Deeper Understanding of the Origins and Evolution of Both Systems**

The many recurring discussions about transatlantic competition policy often rest on a badly incomplete 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. European competition law specialists likewise often display a fractured conception of the origins and evolution of the US system—a conception often derived from the works of US scholars whose grasp of the actual path of US policy evolution is itself infirm. To move ahead, discourse at all three levels embodied in the NTA must look back for a richer understanding of competition policy history.

**Scrutinising the Analytical and Policy Assumptions in Specific Cases**

The modern EU–US relationship has featured important instances of disagreement and may do so again. One way for EU and US officials to understand and bridge differences is to engage in a careful mutual examination of the specific theories of intervention and an analysis of the evidence upon which each jurisdiction relied in deciding how to proceed. The 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). Discussions of this type for non-merger cases take place infrequently.

Detailed discussions of cases would help illuminate differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate trade-off 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 centre 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, there is a tendency for academics, enforcement officials, and practitioners 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 overlooks the important role that the design of institutions can play in influencing substantive results.

Consider, again, the possible impact of creating robust private rights of action in the US style. Since the mid-1970s, the US 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’. With some variation, courts also have given dominant firms comparatively greater freedom to choose pricing and product development strategies. Most of the critical judicial decisions in this evolution of abuse of dominance doctrine have involved private plaintiffs pressing treble damage claims. My hypothesis is that US antitrust doctrine would have assumed a more intervention-minded character had there been no private rights of action, or if the damage remedy in private actions had been less potent.

**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.20 Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behaviour 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.
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 summarised 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 United States in carrying out this type of assessment. The major institutional reforms introduced in recent years – modernisation, reorganisation of DG Comp, and the introduction of a new position of economic advisor – indicate the EU’s close attention to these issues.

Ex Post Evaluation

The EU and the United States routinely should evaluate past policy interventions and the quality of administrative processes. In every budget cycle, each authority should allocate some resources to the ex post study of law enforcement and advocacy outcomes. Beyond studying what it has achieved, a competition authority should choose selected elements of its enforcement process and methodology for assessment. 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.

Enhancement and Disclosure of Databases

The EU and the United States should prepare and provide a full statistical profile of their enforcement activity. The maintenance and public disclosure of comprehensive, informative databases on enforcement are distressingly uncommon in our field. Every authority should take the seemingly pedestrian but often neglected step of developing and making publicly available a database 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. A current and historically complete enforcement database would promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity.

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 recruiting and the development of a systematic training regimen for upgrading the skills of their professionals. A fuller programme of staff exchanges also might supply an effective means for improving the discussion at staff level and educating each agency about how the other builds capability.

Investment 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 has called ‘competition policy research and development’. 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.

Conclusion: Future International Relationships

Progress toward greater cooperation in the implementation of competition policy and the mutual adoption of superior norms between the EU and the United States is a genuine success story in the modern transatlantic relationship. Despite differences in philosophy, procedure, analytical technique and, occasionally, substantive outcomes, the past decade has featured important enhancements in measures by public and non-government bodies in both jurisdictions to improve cooperation in the formulation and implementation of competition policy standards governing transatlantic commerce. Moreover, the EU–US cooperation has provided important insights for building a framework of global and regional cooperation through multinational networks such as the ICN and the OECD. These efforts can foster...
widespread convergence on superior analytical concepts and implementation techniques. Progress to date has not been inevitable or automatic. Nor will progress toward common approaches to dominant firm conduct be so in the years to come. Past achievements have required a substantial commitment of resources to institution-building that does not show up in the usual roster of accomplishments – eg, case counts – by which public agencies most often are judged. Future improvements will depend on the willingness of agency leaders to provide these resources, and more. Good relationships in this area do not come cheap.

Resources will not be the only challenge for the EU and US competition agency leadership. The EU and US competition agencies cooperate extensively, yet they also compete for influence and recognition. The drive to be seen as the global leader in competition policy is an underlying source of tension that can sharpen the edge of disagreement about specific matters or larger policy issues. Despite these tensions, an interjurisdictional rivalry channelled in constructive directions can have useful consequences. A competition to attain superior substantive approaches and implementation techniques is a competition worth having.

The best practice in competition policy is the relentless pursuit of better practices. A basic implication of past work and the future programme suggested here is that the competition authorities must invest significant resources in the development and maintenance of the relationships as a dedicated objective even though such investments do not immediately generate the outputs – essentially, cases – by which competition authorities traditionally are measured. The success of the relationships requires investment in the type of overhead and network building that commentators, practitioners, and, perhaps, legislative appropriations bodies often view with some scepticism. Thus, one challenge is for the competition authorities to develop acceptance of a norm that regards these investments as valuable and necessary.

Competition agencies also must confront the question of how many resources, even in the best of circumstances, they can devote to the construction and maintenance of networks that provide the framework for international relations in this field. The European Union and the United States are engaged not only in their own bilateral arrangements, but also bilateral agreements with other jurisdictions, participation in regional initiatives, and work in multinational networks such as ICN and the OECD. The European Union and United States are major partners in all of these overlapping ventures, and every year each agency must decide, through its commitment of personnel, to ‘buy’, ‘sell’, or ‘hold’ its position in each venture. Each agency is aware that participation in these activities cannot be carried out effectively – namely, with good substantive results – except through the allocation of first-rate personnel. There is no point in trying to do this work cheaply.

The hazard is that the EU, the United States, and other jurisdictions may experience, or may now be encountering, some measure of international network or relationship fatigue. Thus, a further focus for consideration by the two jurisdictions, individually and jointly, is how best to devote their resources. In this decision, both agencies are likely to regard the transatlantic relationship as a top priority. This is true because of the importance of the relationship to the regulation of transatlantic commerce and because the EU and the United States always will have distinctive interests and common issues owing to their comparatively larger base of experience. Moreover, the EU–US relationship has served, in effect, as a bilateral testbed for substantive concepts and processes that can be rolled out in a larger multinational setting. Experience within the bilateral relationship has usefully informed EU and US decisions about what might be accomplished in the larger spheres. As the EU and the United States approach perceived limits on how much they can dedicate to this growing collection of international initiatives, the larger competition policy community will need to abandon a case-centric vision of what agencies should do and accept the need for institution building, at home and abroad, as a vital ingredient of sound competition policy for the future.

Notes
4 On leave from George Washington University Law School. Parts of this article are adapted from a paper titled ‘Competition Policy in the European Union and the United States: Convergence or Divergence’, which will appear in Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe (IESE Barcelona). The views expressed here are the author’s alone.


7 In part, this is an inevitable consequence of drawing on 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’ (2000) 14 J Econ Persp 43.


11 Case T-340/03, France Telecom SA v Commission [2007] ECR.


15 Case T-201/04, Microsoft v Commission [2007] ECR.


17 United States v Microsoft Corp, 253 F3d 34 (DC Cir 2001).


21 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’ (2006) 31 J Corp L 505.