U.S./EU ANTITRUST FRICTION IN THE TIME OF BREXIT: TOWARD A ROSIER SCENARIO?

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I. INTRODUCTION

Although U.S. and EU antitrust rules share many elements, their historical roots are distinct and a variety of important tensions and inconsistencies persist between the two systems. Firms with operations in both jurisdictions are typically required to follow different legal advice and to operate differently in each. In many circumstances such firms can tolerate the added expense and business limitations without significant effects on their fundamental business models. Where there are important complementarities and cross-influences between U.S. and EU business conduct, however, the clash in antitrust rules can alter the fate of a business enterprise or an entire industry.

EU rejection of the proposed General Electric/Honeywell International combination – cleared by the U.S. following antitrust review – is a famous example. Nine- and ten-figure EU antitrust fines imposed on Microsoft and Intel, and a $14.5 billion "fine" against Apple (technically an EU command under its State Aid rules that Ireland assess additional taxes), plus threats of equally serious fines against Google and Qualcomm, raise questions on the U.S. side about the true content and objectives of the EU system. Looking back from the EU side of the Atlantic, U.S. assertions of jurisdiction over foreign parties and activities, when combined with U.S. criminal and civil remedies of great severity (incarceration, opt-out class-action treble-damage proceedings), are probably alarming to EU firms considering the antitrust risk inherent in U.S. operations following cases such as *Hartford Fire Ins. v. California*.[2]

As explained below, important differences between the two regimes have persisted for a half century, despite a variety of ongoing bilateral and multilateral efforts to harmonize international antitrust enforcement. Is this tension likely to continue? Two recent developments may disturb the current balance – Brexit, and the inauguration of an American President focused on international arrangements perceived to disadvantage U.S. economic prospects. Although it is impossible to predict which of many future scenarios seems most likely to play out, there is still cause for optimism that a Pareto improvement would result from the present configuration of forces on the field of international antitrust policy. This short article briefly speculates how the current picture could

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2 509 U.S. 764 (1993). The decision was noteworthy (and controversial) for its strong suggestion that U.S. antitrust liability attaches to conduct that is both legal and even encouraged by government policy in the home jurisdiction of the affected parties – i.e. that the doctrine of international comity was not even implicated where compliance in both jurisdictions was technically possible for the accused firms.

evolve into a rosier scenario – mutual U.S./EU progress toward shared antitrust objectives, standards, procedures and institutions.

II. U.S./EU ANTITRUST TENSIONS

The more serious differences in the antitrust rules adopted in the two jurisdictions are reasonably well identified at this point.

A. Collective Conduct

The EU has come a long way since 1962 when its institutional ancestor the EEC, implemented a formalistic and precautionary approach to potentially anticompetitive agreements. That approach required tens of thousands of agreements containing even minor and/or procompetitive restrictions to go through a lengthy and highly bureaucratic process of notification and (in some cases) exemption to determine their legality. Despite significant improvements since then, today's EU law and practice remain more opaque and less tractable than the U.S. where collective conduct is concerned.

1. The EU concept of "concerted practices" – conduct that can violate TFEU[3] Article 101 (the EU cognate of Sherman Act Section 1), but without distinct proof of "agreement" – creates a fuzzy edge to the legality of certain forms of conduct that remain clearly outside the reach of U.S. antitrust (e.g. unilateral business information disclosures, which in some cases are being treated by the EU as illegal "by object" – that is, without regard to analysis of competitive effect). Liability for collective conduct in the U.S. requires proof of "agreement" full stop.

2. Because EU rules embody a market-integration objective, territorial limitations that coincide with EU Member State borders are decreed illegal "by object." Recently it appears the EU is seeking to apply the "by object" classification to restrictions on internet sales, based on the sanctity of cross-border trade. By contrast, aside from classic "cartel" restraints, in the U.S. all territorial restrictions, vertical or horizontal, are lawful absent demonstrable anticompetitive effect.

3. EU antitrust law on vertical agreements bears noticeably greater skepticism than the U.S. toward exclusive arrangements and other intrabrand restrictions. U.S. antitrust law attends only to the horizontal effects of such restrictions, and has no concern with preservation of intrabrand competition as such.

4. Minimum vertical price agreements are still considered illegal "by object" in the EU. In the U.S. all vertical agreements – including those involving minimum price – are assessed according to proof of their competitive effect (despite lingering use of *per se* analysis of minimum vertical price agreements in some state antitrust rules).

B. Abuse of Dominance

Substantive differences are even more pronounced between TFEU Art. 102 and Section 2 of the Sherman Act.

1. The EU may (and does) prohibit a wide variety of pricing conduct by dominant firms without proof of individual exclusionary effects. This is the problem of the so-called "exploitative abuse" – a species of antitrust violation not recognized under U.S. antitrust rules governing unilateral conduct.

2. The EU recognizes "joint dominance," which (like the concept of "concerted practice") can obscure the boundary between unilateral and collective conduct. No "joint dominance" allegation is admissible under U.S. monopolization law, as distinct from "conspiracy to monopolize" where the element of agreement is explicit.

3. The formulation of comprehensible standards for unilateral conduct gives rise to difficult problems in any system of antitrust law. The U.S. has made some valuable progress in the explicit use of empirically based economic analysis to refine

3 Treaty on the Functioning of the European Union.

rules governing predatory pricing, "mandatory access" cases and a few other areas, although many ambiguities remain. The EU – and most notably its judiciary – lags the U.S. in this regard, preserving opportunities to challenge various forms of unilateral conduct under EU competition rules that are generally more readily defensible under U.S. standards.

C. Enforcement Institutions

Aside from the substance of antitrust rules, there are enormous practical differences in the U.S. and EU enforcement systems.

EU enforcement is conducted within a much less formalized or detailed legal framework compared to the U.S. In the U.S. – with limited exceptions (mostly cases subject to an on-the-record administrative hearing before the FTC) – contested antitrust allegations ultimately come down to the judgment of an Article III court, with two opportunities for review by higher Article III courts. Federal courts in the U.S. follow elaborate and strictly enforced safeguards to prevent any form of intrusion into the application of law to a clearly identified record composed under strict protections of litigants' rights of defense. There can be no intervention by any legislative and/or political authorities, government prosecutors are treated like other parties (i.e. no *ex-parte* contact is permissible by any party) and extensive rules of evidence and procedure (at trial and appellate level) protect against intervention by untested evidence and other influences, including political influences.

By contrast EU antitrust decisions are technically the province of its senior administrative body, the College of Commissioners, where there are far less clear rules of evidence and procedure, rendering the EU process more akin to legislative "lobbying." The process of investigation, "statement of objections," and composition and assessment of the record can be highly discretionary and separation of investigative/prosecutorial vs. adjudicative/decision making/remedial powers is observed minimally if at all. Even after the 2011 judgment of the European Court of Human Rights in *Meranini,* judicial review is heavily deferential to the Commission both as to fact assessment and application of law to fact, and so slow as to be of limited utility at all events.

As a result, those outside the Commission – litigants and the public – have far less opportunity to verify and test the basis for decisions. Compounding the doubts created by these weak procedural protections, the EU overtly promotes important non-competition values such as market integration within its competition rules and institutions. This adds to the difficulties of monitoring or assessing EU deviations from output-maximization objectives that are central to U.S. antitrust.

III. THE FIFTY-YEARS' TIFF: PERSISTENCE OF U.S./EU ANTITRUST FRICTION

The differences outlined above have persisted over many decades, despite long-standing multilateral and bilateral efforts to achieve greater approximation between U.S. and EU standards and procedures. The OECD – a Paris-based economic policy organization comprising 35 leading developed nations (descended from the committee that handed out Marshall Plan aid following World War II) – created "Working Party 3," predecessor to the current Competition Committee, in 1964, to "enhance the effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of co-operation among competition authorities of member countries."[4] Similarly, the International Competition Network is a "virtual organization" created in 2001 and now including every antitrust enforcement agency in the world (other than the three main Chinese agencies) aimed broadly at the same objectives as the original OECD WP3 mandate quoted above. Over the years since inception both organizations have produced a great number of thoughtful studies, surveys, guidance documents and "best practices" recommendations.

The U.S. and EU[5] (and EU Member States) are not only among the most prominent sponsors of and participants in OECD and ICN efforts, their antitrust agencies also have a long record of extensive formal and informal bilateral contacts. Their antitrust agencies have a variety of written cooperation agreements and a history of close and regular contact at many levels. Such cooperation occurs in the context of specific cases – e.g. coordinated "dawn raids" in international cartel matters, ac-

4 OECD, International Co-operation in Competition Law Enforcement p. 7n.6 C/MIN(2014)17.

5 Technically the EU does not have full OECD membership, but it is an active participant in proceedings of the OECD and its Competition Committee.

commodation of remedies for mergers and acquisitions subject to review in both jurisdictions – and also on policy questions raised during the course of participation in bilateral and multilateral fora. Yet these extensive cooperative efforts – no doubt productive and in many ways valuable and even essential – have not produced harmonization in the areas discussed above.

The reasons for these limitations on the decades-old process of ironing out the key differences are many, and would themselves merit a lengthy analysis. The focus here, however, is on whether recent and predictable future developments could produce a shift in the present equilibrium. As described in the next section, the possibility certainly exists. The alternative paths are numerous, and the likelihood that any will be taken is liable to be affected by other forces now on the loose in the field of international economic policy, which has assumed an attention-grabbing dynamism in recent months. But the situation is far from hopeless.

IV. U.S./EU ANTITRUST: CAN WE REDUCE THE GRATING?

Two major new elements (arguably traceable to similar political undercurrents – but that isn't the subject here either) inhabit the world of U.S./EU economic relations. First, the UK is leaving the EU, although there is little clarity about the end-game result. Second, there is a new U.S. Administration intent upon renovating America's international economic relationships (*inter alia*). Both Brexit and the Trump Administration remain novelties – the one not even formally initiated, strictly speaking, and the other less than a month old at this writing. So, predictions as to their future course and how they might ultimately come to bear upon a topic so discrete and technical as antitrust enforcement is extremely hazardous. The following thoughts are offered in the full appreciation of the current obscurity of the road ahead.

Historically the UK has played a leavening role in EU antitrust enforcement. In general, the UK is seen as a force for improvement in and more pervasive application of economics in antitrust enforcement. Possibly the UK's departure from the EU will dim hopes for further reconciliation of EU and U.S. antitrust models through these instruments, on the theory that if the UK is not "present" in EU antitrust debates, its views are unlikely to be of much effect. But one can foresee many complexities and related developments that might negate or overwhelm this simple logic as Brexit develops in practice.

The advent of the Trump Administration has already produced an apparent reversal in one very important policy aspect directly relevant to Brexit. Specifically, President Trump has reversed President Obama's "end-of-the-queue" threat to the prospect of a U.S./UK trade arrangement. As a result, there are plausible suggestions (reinforced in a broad sense by UK Prime Minister May's parlay with President Trump as his first state visitor) of an early focus on a U.S./UK bilateral trade agreement to revitalize the frayed "special relationship." The U.S. has sought to include a competition chapter in many key trade agreements discussed or concluded in recent years: U.S./Chile (2004), U.S./Australia (2005), U.S./Korea (2012), the Trans Pacific Partnership (the U.S. has withdrawn at this writing), and the Transatlantic Trade and Investment Partnership (the U.S. has also withdrawn at this writing).

The notion of improving trade agreements by incorporating protections from the misapplication of antitrust (through unsupportable substantive rules, the mixture of industrial policy or other non-economic goals with antitrust enforcement and/or failure to adopt procedures that provide adequate opportunities for defense against antitrust allegations) should fit comfortably within the Administration's broad rubric of vindicating U.S. interests in international trade. This allows some hope that negotiation of a U.S./UK trade bilateral agreement might consider inclusion of a competition chapter enshrining consensus on fundamental antitrust objectives, rules and processes. The U.S. and UK have similar antitrust traditions (even considering the accumulated influence of UK membership in the EU, which encouraged numerous forms of compliance with EU antitrust models). They also share common-law heritage and other fundamental notions of legal practice (e.g. attorney-client privilege) and procedure. Of course this is unsurprising given that the United States evolved from a collection of British colonies.

If an agreement were achievable, it might serve as a model for additional bilateral competition agreements involving each jurisdiction with others. What would be the EU reaction? The EU might turn inward, strengthening the unique pillars of its Ordoliberal antitrust tradition (a strong belief that the state must provide clear rules to guide economic operators while protecting

the social market economy), pursuit of non-economic objectives such as market integration, special protections for SME's and workers and special support for technology-based industry or other favored sectors. But there is a chance that a U.S./UK collaboration based on limitation of antitrust enforcement to economic objectives and formalized procedures providing greater accountability – if successful – might inspire the EU to follow an Anglo/U.S. approach.

V. CONCLUSION

The notion of a U.S./UK competition collaboration is of course a highly speculative proposition that would face numerous complexities and obstacles. How would the many areas of substantive difference be hammered out? How would the political institutions of both jurisdictions be persuaded to accept such a model for an operative set of legal rules and institutions – presumably in substitution for existing rules and institutions? Would such a regime apply only to U.S. and UK nationals, or would it extend to others? Even if such an agreement could be successfully negotiated and adopted, how would it be enforced? International dispute-settlement mechanisms receive no enthusiasm in U.S. trade and legal circles these days, yet it seems doubtful that such an agreement could have much impact without some way of resolving differences.

It is far too early to imagine how the current circumstances will evolve over coming months and years, and what effect they will have on U.S./UK and U.S./EU antitrust. But it is worth picturing what might be done to improve our antitrust systems, reduce the impact of multinational antitrust frictions, all to the ultimate point of enhancing the productivity of the global economy to the mutual benefit of the international community. It would be a great legacy of the current generation of antitrust enforcers, policy-makers, scholars and practitioners to outline a vision in which international conflict is reduced and economic growth prospects are enhanced. No harm in trying.