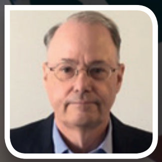
ANTITRUST AND TECH: EUROPE AND THE UNITED STATES DIFFER, AND IT MATTERS

BY GREGORY J. WERDEN & LUKE M. FROEB[1]



1 Mr. Werden recently retired after 42 years with the Antitrust Division of the U.S. Department of Justice. Mr. Froeb is William C. Oehmig Chair of Free Enterprise and Entrepreneurship at Owen Graduate School of Management, Vanderbilt University. Mr. Froeb, but not Mr. Werden, has consulted for the tech industry. Neither author received any funding for this paper, which they initiated on their own.

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The European Commission ("EC") and some national competition authorities in Europe have taken on tech giants in high-profile cases, and more cases are in the works. Activists and members of Congress call for action in the United States, although their calls typically are vague about what action should be taken and by whom. Without criticizing any enforcement action, or the inaction of any enforcer, we explore how Europe systemically differs from the United States in ways that affect enforcement against the tech giants.

Our main point is that numerous hard-wired differences between the European and American enforcement regimes make it very difficult for the United States ("U.S.") antitrust enforcement agencies to emulate their European Union ("EU") counterparts. Generally speaking, we do not favor changes to the U.S. regime to eliminate differences, and we do not expect any of the differences to be eliminated, but we leave these policy issues for another day.

This short article describes what we see when we lift the hoods on the antitrust enforcement machines of the U.S. and the EC. We focus on the machinery deployed in a single area of enforcement — what outside the U.S. is called "abuse of dominance," and what inside the U.S. is called "monopolization." But we note that merger and cartel enforcement produce substantially similar outcomes in the U.S. and EC despite structural differences.

We identify ten meaningful differences between the European and American antitrust enforcement systems. In describing each of them, we start by characterizing the European system. Our characterization will be seen by many as overly simplistic, but we aim to capture some essential truth, and we believe that each characterization does so. No one characteristic is decisive, and some might not matter much, but all combine to make cutting-edge enforcement actions against the tech giants likely in the EU under circumstances in which a successful enforcement action would be most unlikely in the U.S.

We do not contend that the EC is targeting U.S. companies. EC enforcement can give that appearance because the tech giants are U.S. companies. The U.S. produces vastly more unicorns than Europe — start-up companies that hit $1 billion in valuation. And a few U.S. tech companies have grown to such proportions that they significantly affect several categories of data for the entire U.S. economy. Nor is our point that the EC has been protecting EU-based companies from competition. As in the EC's case against Intel, the protected company can be a U.S. company.

The European system is driven by competitor complaints. A struggling competitor doing business in the EU and bumping up against an arguably dominant rival can seek to improve its prospects by complaining to the EC that its much-larger rival is abusing its position of dominance. Critically, the subject of the complaint need not be dominant in a market the complainant operates in, and we will come back to that. Some work must be done if a complaint is to be taken seriously, so there is a cost, but the market provides the lawyers and economists needed to effectively solicit government action. Casual empiricism suggests that complaining to the EC, although costly, is a good investment. Complaining can pay off in the U.S., but the U.S. antitrust enforcement agencies often leave it to the complainants to bring cases on their own. That has the potential to be a terrific investment because of the treble damages regime the U.S. has had since 1890, but investing in litigation under Section 2 of the Sherman Act is not the attractive investment it once was. For four decades, the courts have been tinkering with substantive and procedural law in ways that have made private monopolization suits more costly yet far less likely to succeed.

The European system is run by politicians. A major administrative department of the EC — a Directorate-General — is overseen by a Commissioner. Each of the 28 Member States appoints one, but the assignment of portfolios to Commissioners is within the power of the President of the Commission. Appointees tend to be political allies of the Member States' heads of government, and many Commissioners are career politicians. The Commissioner for Competition is among the most prestigious and powerful posts to which a Commissioner can aspire. Over the last few years, the incumbent has been Margrethe Vestager, a highly skilled politician and former member of the Danish parliament. The ultimate administrative decision-making body in an EC abuse of dominance case is the College of Commissioners, all 28 of these appointees. This decision-making structure seems calculated to elevate politics above technical merit. The Commissioners could not possibly familiarize themselves with the facts of every case, and just reading the proposed decisions would be a slog. Politics sometimes intrudes into U.S. antitrust enforcement, but the U.S. antitrust enforcement agencies most often are run by antitrust professionals.

The European system was conceived of as regulation, not as law enforcement. Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") use the phrase "shall be prohibited," which is legalese for "is prohibited." But that phrase also empowers an administrative agency. The EC, rather than the courts, does the prohibiting in Europe. EC regulation is light handed in many ways. For example, a prohibition decision in an EU abuse of dominance case states that a specific constellation of actions by the target company constitutes an infringement because it produces a certain result. The decision leaves it to the target firm to figure out how to make things right. In contrast, a contested court order in the U.S. contains a series of conduct mandates and prohibitions. Perhaps more fundamentally, conduct suppressing competition is not the only way to run afoul of Article 102 TFEU; an abuse can be "exploitative," e.g. excessive pricing, although such cases are uncommon. In both the EU and the U.S., it is rightly said that monopoly, without more, is not an offence, but that statement rings hollow in the EU because a monopoly has no right to charge monopoly prices. In the U.S., however, a lawful monopoly is free from any antitrust constraints on exploiting its power, e.g. by charging monopoly prices.

The European system is grounded in a skepticism of markets. Antitrust law in Europe was adopted at a time when several EU members had state-owned monopolies and most had a great deal of government control over their economies. The formation of the EU was a major step toward greater reliance on market forces, but it did not go all the way. The EU was created with a regulatory mindset, and its institutions were staffed by people who see their task as intervening in markets to garner greater benefits for consumers. Antitrust in the U.S. has varied over time with respect to the desirable extent of government intervention. A push in the direction of greater executive power created the Federal Trade Commission in 1914. And the 1960s and 1970s were a time of activist antitrust (in both Democratic and Republican administrations). But the prevailing mood for the past four decades has favored restraint. The great idea behind U.S. antitrust law was at the outset, and is now, that competitive markets serve the varied interests of the people, so U.S. antitrust law protects and preserves the competitive process. U.S. antitrust laws do not allow the government to tinker with the market when it might seem to be delivering less than it could, although some other laws do.

The European system lacks the process of U.S. court proceedings. EU antitrust enforcement has a lot of process; target companies have rights, which are respected. But these rights are quite different from the rights enjoyed by the targets of antitrust enforcement in the U.S. In some circumstances, Europeans legitimately argue that they protect defendants' rights better than the U.S. does. But in many ways the U.S. protects most what Europe protects least. Remedies and penalties that would be imposed by court order in the U.S. are imposed administratively in the EU, and they are imposed without an adversarial hearing, third-party discovery, or cross examination. This includes fines much greater that have ever been imposed by sentencing judges in U.S. antitrust cases. A right of appeal is granted, and it often is exercised, but conduct must be modified first. Critically, court review is not *de novo* in any sense; the courts do not go back to the raw evidence.

The European system lacks the burden of proof of an adversarial system. As a matter of form, the EC has a burden of proof, but that means little because the EC need not satisfy a neutral fact-finder that it has met its burden. The EC decides the meaning and sufficiency of its evidence. Judicial review can overrule the EC on the facts, but it does not take a fresh look to see whether the evidence proves what the EC has found. Most significantly, the courts grant the EC a margin of appreciation on the hard judgment calls, precisely where skeptical U.S. judges scuttle many plaintiffs. Plaintiffs lose a lot more often than they win in the U.S., and once they get past motions to dismiss, any loss results from the failure to carry a burden of proof. As in the Supreme Court's decision in *American Express*, a U.S. court is apt to assign the decisive burden to the plaintiff and to define it in a manner that makes it difficult to satisfy. The result was that American Express is free to engage in conduct known to increase fees paid by merchants. Credit card fees are much lower in Europe, where fees on some transactions have been directly regulated since late 2015, and fees on other transactions were capped earlier this year as a result of EC action under Article 101.

The European system does not impeach unsound theories. The U.S. litigation system aims to screen out half-baked and dead wrong ideas at the outset through application of the rules of evidence. For about 70 years, the prevailing test for admissibility of expert opinion in the U.S. was the general acceptance standard of *Frye*. Since 1993 the test has been the reliability standard of *Daubert*. In the Internet Age, reliability screening is all the more important because half-baked and dead wrong ideas are so quickly and widely disseminated. Moreover, expert evidence admitted by a U.S. court is subject to impeachment through cross examination. Nothing appears to screen out unreliable expert opinion at the EC, and nothing appears to prevent unreliable theories from being credited in EC enforcement proceedings. This makes EU enforcement more susceptible than U.S. enforcement to political winds and passing fads.

The European system maintains a low bar for anticompetitive effects. While Europeans loudly reject the charge that their system protects competitors rather than competition, they do not meaningfully distinguish between the two in the way they assess anticompetitive effects. Sufficient proof of harm to competition is apt to be is that a competitor lost business or lost opportunities to get business. The contrast to the U.S. system is stark; a plaintiff alleging harm only to itself is apt to have its complaint dismissed for failing to allege antitrust injury. Furthermore, the European courts have held that Article 102 TFEU has no *de minimis* threshold. These decisions were initially read to hold that an immeasurably small impact on the marketplace is sufficient to warrant imposition of a huge fine and a prohibition decision that induces a product redesign or modification in a way of doing business. In any event, no materiality test has yet to be asserted by a European court.

The European system is receptive to leveraging theories. Leveraging theories are variations on the theme of extending monopoly from one market into an adjacent market. In the U.S., such theories are legally cognizable only when monopoly is actually threatened in the second market. It is sufficient in Europe that competition is "distorted" in the second market. Whenever a tech giant seeks to monetize a platform by offering a related service, it can easily be found in violation of Article 102 TFEU because its dominant platform is seen to treat its own related business more favorably than it treats an independent business competing with its related business. The EU, thus, discourages efficient vertical integration.

The European system does not recognize competition on the merits. As a concept, competition on the merits has had a central place in EU jurisprudence because it has provided the theoretical benchmark for defining abusive conduct. But references to competition on the merits appear to have been a rhetorical device. Neither the EU courts nor the EC has ever declared any particular category of conduct to be competition on the merits — not even introducing a new product. Product improvement is perhaps the area in which recognizing competition on the merits matters most. In the U.S., courts hold that any genuine product improvement is lawful competition on the merits, but the EU does not subscribe to that view. While the U.S. errs on the side of caution when the conduct at issue provides tangible immediate consumer benefits, the EC is more confident in the accuracy of its judgment and evidences little fear of chilling legitimate competition from which consumers benefit.

These ten points of contrast between Europe and the U.S. do not guarantee different outcomes, but they do make different outcomes easy to understand. EC officials have not been inhibited in doing what they think best, but U.S. officials have been, and they will continue to be inhibited, even if they have a strong desire to act and a sound basis for action. Moreover, EC officials are inhibited, to some extent, if they desire to do nothing. The failure of the EC to act in a competition case must be explained in a published decision, which can be challenged by a third party. U.S. enforcers have no obligation to explain or defend inaction, except in congressional oversight hearings.

Since the 1990s, a major concern has been whether antitrust enforcement in the tech space is too slow to do much good, and this concern has merit. Several other points of contrast between the EU and the U.S. cause the impact of delay to differ between the U.S. and EU. From start to finish, a big case in the EU is likely much longer than a big case in the U.S., but remedial action is more front loaded. The EU approach has both upsides and downsides.

EC-style due process can take considerable time. For example, the EC started investigating Google in late 2010 but did not issue the shopping decision until mid-2017. Subsequent Google investigations have been shorter, but still took about three years. Major investigations by the U.S. antitrust enforcement agencies of the tech giants are reputed to be underway now, and past history suggests filing cases before the 2020 elections will be difficult. Of course, litigation of such cases to judgment would take years.

The court litigation that follows an EC antitrust decision takes even longer than U.S. antitrust litigation. The EC decision against Intel was announced in 2009. In 2014, the General Court upheld the decision without examining the EC's assessment of the actual exclusionary impact of the impugned conduct. In 2017, the Court of Justice of the European Union ruled that the General Court should have examined the EC's assessment of exclusionary effect, and sent the case back. There is no end in sight for the litigation. The ultimate decision could materially change the law, and Intel might even win. But Intel has had to comply with the EC's decision for the past decade.

Lengthy court proceedings nearly always preceded imposition of a contested remedy in the U.S. The U.S. case against Microsoft holds the speed record for the trial in a big antitrust case. It was filed in May 1998, and Judge Jackson issued his remedy opinion in June 2000. But Microsoft did not have to begin compliance pending appeal, and the appeals court rejected the remedy Judge Jackson crafted. On remand, the parties were pushed to compromise. Judge Kollar-Kotelly approved what they had come up with in November 2002, and the appeals court upheld her ruling in June 2004.

Another feature of European due process can cause remedies to make little sense when cases move slowly. A central feature of EC procedure is the statement of objections ("SO"). To protect the rights of target companies, EU law requires that they be served with a confidential SO detailing the EC's concerns and the factual basis for them. An SO can be superseded, but a final SO fixes the facts on which the case proceeds, no matter how long it takes. In the EU case against Microsoft, key facts about media players were hopelessly out of date when Microsoft complied with the EC's decision by offering a version of Windows without the Windows Media Player. That the key facts were no longer true was irrelevant in subsequent court proceedings.

The U.S. system has due process similarities to the European system, but the facts are not fixed as of the complaint; rather they are fixed as of the time of trial or the close of discovery. And most critically, the facts are fixed only for purposes of liability. Liability and remedy typically are closely connected in the U.S., and separate proceedings on remedy are atypical, but the imposition of remedy is a distinct judicial function in the U.S., governed by principles of equity adopted from English common law. In theory, and sometimes in practice, the court assesses the situation anew before ruling on remedy. If circumstances have materially changed from those of the liability determination, the changed circumstance are taken into account, which can have a profound effect on remedy.

One final note — one final point of contrast — is that judges in the U.S. were persuaded by Robert Bork that antitrust was unworkable without a single focus, which Bork called consumer welfare. Bork argued that antitrust was not enacted to address the myriad social issues that judges had invoked in their decisions, and at least that much of Bork's argument has persuaded judges. This matters in the tech space because the cries for action invoke myriad social issues. The tech giants might raise a variety of legitimate social concerns, but only competition concerns are within the domain of antitrust.

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