CPI's North America Column Presents:

Antitrust and Tech: Europe and the United States Really Do Differ, and It Does Matter

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CPI COMPETITION POLICY INTERNATIONAL

June 2020

In *Antitrust and Tech: Europe and the United States Differ, and It Matters* (CPI Antitrust Chronicle, October 2019), Luke Froeb and I identified ten "hard-wired differences between the European and American enforcement regimes" that "make different outcomes easy to understand" and explain why "EC officials have not been inhibited in doing what they think best, but U.S. officials have been." We noted that no single difference "is decisive, and some might not matter much." Maria Coppola & Renato Nazzini have tried to minimize the differences and their significance, but they did not deny that outcomes differ or that EC officials have been less inhibited than U.S. officials.[2] Coppola & Nazzini noted substantial "transatlantic convergence" but did not deny that convergence is limited by hard-wired differences.

1. The European system is driven by competitor complaints. Coppola and Nazzini rightly observed that enforcement of EU competition law is not driven by complaints alone, but they also acknowledged that "complainants may choose to focus their efforts in Brussels." The reason is that complaining pays off much better in Europe than in the United States.

2. The European system is run by politicians. Luke Froeb and I observed that many EC Commissioners are career politicians. Coppola and Nazzini counter that we did not show that this "had a systematic, or indeed any, impact on past cases," but training, experience, and career aspirations are bound to have an impact. Placing U.S. state competition law enforcement in the hands of elected officials seeking higher office had a pronounced impact. Although the U.S. federal enforcement agencies are not insulated from politics, they are not run by politicians.

3. The European system was conceived of as regulation, not as law enforcement. The Sherman Act clearly was "conceived of" as law enforcement in that it condemned *mala in se* crimes and was meant to be enforced by generalist prosecutors, while the EU created an administrative system run by experts. Coppola and Nazzini objected to describing "the EU system of competition enforcement as 'regulation,'" but a system in which courts review administrative decisions is materially different from one in which courts adjudicate the cases in the first instance.

4. The European system is grounded in a skepticism of markets. Coppola and Nazzini ultimately concluded that Americans have "a greater faith in market forces" than Europeans, which is the point Luke Froeb and I were making. Coppola and Nazzini's protestation that "that enforcement in Europe is not guided by a skepticism of markets" is a semantic quibble.

5. The European system lacks the process of U.S. court proceedings. Coppola and Nazzini suggested that de novo court review in Europe negates the clear differences in enforcement proceedings. Court review in the EU, however, is profoundly affected by the absence of robust discovery rights, opposing experts, and cross-examination. Coppola and Nazzini pointed out that many U.S. cases are settled, but settlements reflect expected litigation outcomes. Companies have a right to adversary proceedings before a remedy in the U.S., but not in the EU.

6. The European system lacks the burden of proof of an adversarial system. Coppola and Nazzini seemed to agree with the claim Luke Froeb and I made that the burden of proof "means little" in

the EU "because the EC need not satisfy a neutral fact-finder that it has met its burden." Coppola and Nazzini note that the EU way of doing things is normal for an administrative system, but the point remains that U.S. plaintiffs must overcome heavy burdens, while the EC need not.

7. The European system does not impeach unsound theories. Coppola and Nazzini insisted that the EU does impeach unsound theories, but they identified no court decision focused on the soundness of economics. Nor are the Legal Service, Advocate Generals, and General Court equipped to detect unsound economics. Only the use of opposing experts, cross-examination, and a neutral arbiter provides assurances that unsound theories are impeached.

8. The European system maintains a low bar for anticompetitive effects. Coppola and Nazzini argued that Luke Froeb and I ignored the fact that EU law sets the bar differently for different conduct, but they did not suggest that the EU bar is ever set as high as the U.S. bar. Coppola and Nazzini also observed that the EU cases are inconsistent and unclear on the nature and height of the bar. That is so, and further convergence is possible.

9. The European system is receptive to leveraging theories. Coppola and Nazzini asserted that the EC's past tying cases involved instances of threatened monopolization of the tied product market, but that is difficult to accept as to the incorporation of Microsoft's media player. Nor do Coppola and Nazzini refute the contention Luke Froeb and I made that: "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."

10. The European system does not recognize competition on the merits. Luke Froeb and I opined that EU court "references to competition on the merits appear to have been a rhetorical device," while Coppola and Nazzini similarly opined that EU courts only say "what is not competition on the merits." Coppola and Nazzini argued that change in product design can be scrutinized in the United States, but they did not deny the point Luke Froeb and I made that "any genuine product improvement is lawful competition on the merits." Coppola and Nazzini cited the judgment of the High Court of England and Wales in *Streetmap*, but Mr. Justice Roth certainly did not hold that the product improvement at issue was privileged conduct requiring no justification.

Coppola and Nazzini confirmed the prediction Luke Froeb and I made that our "characterization will be seen by many as overly simplistic," but they have not called into question our explanation for different outcomes in single-firm conduct enforcement.

[1] Mr. Werden retired in 2019 after 42 years with the Antitrust Division of the U.S. Department of Justice.

[2] The European and U.S. Approaches to Antitrust and Tech: Setting the Record Straight – A Reply to Gregory J. Werden and Luke M. Froeb's Antitrust and Tech: Europe and the United States Differ, and It Matters, CPI Europe Column, May 4, 2020.