The University of Oxford
Centre for Competition Law and Policy

The Competition Law & Policy Guest Lecture Programme - Paper (L) 02/05

A BRIEF COMPARISON OF EUROPEAN AND AMERICAN ANTITRUST LAW

Alden F. Abbott

Visiting Fellow, All Souls College, Trinity Term 2005

(On leave from the U.S. Federal Trade Commission)

I. Introduction and Overview

I am delighted to be here once again. Today I would like to present my rather idiosyncratic comparative perspective on European and American Antitrust law. My presentation today will focus on general themes, rather than specific case law development. I will note, of course, the impact of Antitrust Modernization in Europe and other key recent developments. I will seek to "stand above the fray" and convey my sense of broad antitrust enforcement philosophies in Europe and the United States – how they are similar or different, how they are converging or diverging. My comparative analysis will follow the same general format as my first lecture, addressing in order agreements among firms, issues related to monopolies, merger enforcement, antitrust immunities and defenses; enforcement by subsidiary governmental organs, and private enforcement. Once again, let me state that the views I will express in this lecture are attributable solely to me, and should not be taken to represent the views of the Federal Trade Commission, any individual Commissioner, or any other U.S. government official.

II. Substantive Antitrust Doctrine

Before turning to specific comparisons, I should note that cooperation between the American federal antitrust authorities and the European Directorate of Competition, already well-established, continues to grow apace. U.S. and European antitrust enforcers consult on an ongoing basis in assessing mergers filed with their respective jurisdiction. Such cooperation involves both discussion of possible theories of competitive harm and the sharing of information, as appropriate. Merging parties frequently find it to their advantage voluntarily to allow confidential information to be provided by American agencies to their European counterparts. American and European antitrust enforcers have annual senior level meetings to compare notes. Furthermore, staff level European and U.S. policy officials – lawyers and economists – have employed teleconferences and e-mail to compare views on major substantive areas of antitrust analysis, including merger policy and the intellectual property antitrust interface. Furthermore, enforcement agencies informally exchange preliminary drafts of guidelines and other forms of policy guidance. This allows comments to be taken into account at an early stage, and enhances mutual understanding of approaches to major policy issues. In addition, Europeans and Americans benefit enhance their ties by participating on various working groups of the International Competition Network – an informal international network of public and private antitrust experts that seeks to promote best practices and facilitate "soft convergence" in antitrust enforcement. What's more, we increasingly contribute to each others' professional and academic conferences. For example, a senior EC economist spoke at a February 2004 joint FTC-Justice Department Workshop on the U.S. Horizontal Merger Guidelines. Finally, I should note that Europeans and American economists increasingly read and are informed by the same literature on antitrust economics and industrial organization. In sum, although differences remain in the two enforcement regimes, European and American antitrust enforcers to a great and increasing extent "speak the same language" in carrying out antitrust analysis.

A. Agreements Among Firms

Let us begin our substantive comparison with contracts that unreasonably restrain trade, addressed in the United States by Section 1 of the Sherman Act. To recap last week's lecture, under American antitrust law, a very small category of "naked" agreements among competitors, which yield no possible efficiencies and are only directed at reducing competition – for example, cartel-inspired price fixing, market division, and big rigging – are deemed illegal *per se*, without regard to their actual effects. All other agreements among firms are analyzed under the "antitrust rule of reason," which calls for a weighing of the efficiencies created by such an arrangement against its anticompetitive effects. Short form, "quick look," or structured rules of reason are employed as alternatives to "full blown" rule of reason analysis in appropriate cases. For example, when an agreement appears facially anticompetitive, the burden immediately would shift to defendant to put forth an efficiency justification. Plaintiff must demonstrate actual anticompetitive impact under rule of reason analysis – a mere theoretical claim that competition will be suppressed does not suffice.

Article 81 of the Treaty of Rome is, of course, the European analogue to Section 1 of the Sherman Act. Article 81(1) prohibits agreements affecting trade between member states "which have as their object or effect" the "prevention, restriction, or distortion of competition within the common market." Article 81(2) voids agreements that are caught by Article 81(1). Article 81(3), however, exempts restrictive agreements that contribute to improving the production or distribution of goods or to promoting technical or economic progress; that allow consumers a "fair share of the resulting benefit"; that are indispensable to the attainment of these technical, economic, or consumer benefits; or that do not eliminate competition. Traditionally, in applying Article 81(1), EC antitrust enforcers focused on parties' economic freedom rather than consumer welfare, leading to an overemphasis on block exemptions as a means of passing antitrust muster. Thus, restrictive agreements were deemed void unless they qualified for a particular block or individual exemption – a marked contrast to the American procedure of presuming an agreement lawful unless it is proved to be anticompetitive. Accordingly, in Europe, antitrust counselors had an incentive to devise agreements that would fall within the contours of a block or individual exemption, rather than agreements that would make the most competitive sense to the participants. The American approach, I would submit, was less regulatory and more conducive to competitive vigor than the European approach.

The European Antitrust Modernization of 2004 is, however, bringing the European and American approaches into closer harmony. Most significantly, reliance on registrations of restrictive agreements has been eliminated and replaced by what is essentially a case-specific rule of reason analysis, assisted by the issuance of Article 81(3) Guidelines. Significantly, those Guidelines specify that the Article 81(1) prohibition applies only to an agreement that "restricts actual or potential competition that would have existed without the agreement." This focus on the competitive process, as opposed to the effects of restrictive contractual clauses on "competitive freedom," is far more in line with the American approach. The Guidelines' statement that for agreements restrictive "by object" it is "unnecessary . . . to demonstrate any actual effects on the market" is a rough approximation to an American-style *per se* standard. Furthermore, the Guidelines' statement that agreements restrictive "by effect" must injure "actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability" both reflects the American understanding of what harm to competition means, and the American concern that harm to competition is real, rather than merely theoretical. Also generally in line with the recent American focus on the actual effects of an arrangement is the requirement that asserted benefits from a restrictive arrangement be real and verifiable and must neutralize a perceived anticompetitive threat to consumers. In short, although the Guidelines are not identical to the American rule of reason, which eschews reliance on the application of specific regulatory guidance, their animating philosophy is very much in keeping with contemporary American antitrust analysis.

Vertical restraints analysis is the one area where the differences between American and European approaches to restrictive contracts have been most significant. Prior to the U.S. Supreme Court's 1977 *GTE-Sylvania* opinion, which I alluded to last week, American antitrust law generally viewed contractual restraints on distribution, such as clauses imposing exclusive territories, as *per se* violative of antitrust law. European law, although generally distrustful of such restraints, was more accommodating than U.S. law. For example, group exemptions such as Regulation 67/67 in 1967 and Regulation 1983/83 in 1983 provided safe harbors for broad categories of exclusive dealing agreements. *Sylvania*, however, eliminated the American *per se* prohibition against non-price vertical restraints and required they be analyzed under the rule of reason. Subsequent lower court applications of *Sylvania* gave rise to very few findings of federal antitrust liability, suggesting to some commentators that a virtual rule of *per se* legality had replaced the *per se* prohibition of vertical non-price restraints.[1] Moreover, although resale price restrictions in theory remained *per se* illegal in the United States, U.S. Supreme Court decisions in the 1980s, combined with the "*Colgate*" doctrine that gave firms broad authority unilaterally to terminate dealers, sharply limited the scope for successful resale price maintenance suits under

---

[1] It should be noted, however, that non-price vertical restraints occasionally have been attacked as devices used to facilitate horizontal collusion among direct competitors in an industry. For example, under certain circumstances, "airtight" exclusive dealing arrangements might be imposed by colluding dealers on manufacturers as a device to allow dealers to policy their cartel. Concerns of this sort, however, are properly viewed as the use of vertical contracts to help reduce horizontal competition.

federal law.[2]

With this "role reversal," American law now treats these restraints more favorably than European antitrust law. This role reversal is in large part due to the injection of "Chicago-style" analysis into American antitrust law, which stresses the potential efficiencies of restrictive vertical agreements. European law, meanwhile, continues to reflect concerns that many classes of vertical restraints – particularly those that are organized under national lines – interfere with the realization of the European Single Market. It also may reflect skepticism with some of the efficiency explanations that have been put forth to justify such restrictions. I would note, however, that a recent review paper by FTC economists Luke Froeb, James Cooper, Dan O'Brien, and Mike Vita, indicated that empirical studies lend little support to anticompetitive explanations for vertical restraints. Rather, efficiency explanations

I believe that European analysis of vertical restraints will over time become more closely aligned with the American approach. The release of EC Vertical Distribution Guidelines in 2000 essentially moved European vertical restraints enforcement analysis toward a rule of reason approach that takes account of efficiencies. The 2004 EU Modernization, which sweeps away the old regulatory filing system and sets the stage for case-by-case adjudication of individual matters in diverse tribunals, will also move European enforcement closer to the American model. In the United States, it is conceivable that "post-Chicago" economic theories suggesting

[2] In *State Oil v. Khan*, 522 U.S. 3 (1997), the Supreme Court held that maximum resale price maintenance agreements are not *per se* illegal. The Court, however, has not yet repudiated the *per se* condemnation of minimum resale price maintenance.

additional theoretical anticompetitive explanations for vertical restraints, under certain circumstances, will strengthen the hands of plaintiffs.[3] At the same time, "new institutional economics" analysis may invigorate efficiencies stories.[4] Overall, it appears to me that both the United States and Europe will settle on a policy generally hospitable to vertical distribution restrictions that possess plausible efficiency explanations.

Let me add a brief word about intellectual property licensing agreements. The EC's 2004 IP Licensing Guidelines essentially establish a rules of reason framework for assessing such restrictions – a framework which takes due account of the role restrictions play in allowing an IP holder to obtain returns that legitimately flow from his property right. The EC Guidelines are in the spirit of the Antitrust Guidelines for the Licensing of Intellectual Property, jointly released by the Justice Department and the FTC in 1995.[5] The American approach had been hostile to almost all IP licensing restraints prior to the 1980s. Subsequent economic policy analysis, now embodied in the U.S. Guidelines, reflects a more nuanced assessment that scrutinizes the effects of such restrictions on competition in product, technology, and innovation markets. The EC Guidelines also by and large reflect this more nuanced approach. In addition, both the EC and American Guidelines establish useful safe harbors for restraints that facially do not appear capable of facilitating the exercise of market power in a relevant antitrust market – typically

[3] Although I am not a fan of post-Chicago "possibility" theorems, which have not been verified empirically, they have received sufficient coverage in the academic and trade press to suggest that they certainly will be invoked by plaintiffs, and may be seized upon by some courts.

[4] For a good introductory discussion of the application of the "new institutional economics" to antitrust, see *Improving the Economic Foundations of Competition Policy*, Remarks by Timothy J. Muris, Chairman, Federal Trade Commission, before the George Mason University Law Review's Winter Antitrust Symposium (January 15, 2003), *available at* http://www.ftc.gov/speeches/muris/improveconfoundatio.htm.

restraints that affect only a relatively small portion of such a market. There are some differences. The EC Guidelines are more detailed and prescriptive, and they arguably retain more of a concern that even licensing that creates new competition should not be excessively restrictive. The basic American approach instead is that where a decision to license yields new competition that did not previously exist, parties should be given wide latitude in crafting licensing arrangements, lest antitrust micromanagement eliminate incentives to license in the first place. In sum, the recognition of efficiencies in IP exploitation, relevant market analysis, and an assessment of likely effects are central to both jurisdictions' IP Licensing Guidelines. Although they differ at the margins, the two Guidelines' approaches are in large part reconcilable – an important fact, given the increasingly international nature of much IP licensing.

B. Issues Related to Monopolies

Now let us turn to the treatment of monopolization. As I explained last week, American antitrust law does not treat obtaining or maintaining a monopoly as an antitrust violation, unless the potential or actual monopolist has engaged in "exclusionary conduct." The U.S. Supreme Court has repeatedly stated – most recently in the *Trinko* case – that exclusionary conduct is conduct that makes no economic sense but for its tendency to eliminate or lessen competition. In *Aspen Skiing*, the Supreme Court stated that exclusionary conduct is conduct that excludes rivals on some basis other than efficiency. Thus, conduct by a dominant firm that "makes economic sense" in that it promotes that firm's efficiency does not violate Section 2 of the Sherman Act –

[5] The FTC-DOJ IP Guidelines are available at http://www.usdoj.gov/atr/public/guidelines/ipguide.htm.

even if such conduct harms existing or potential competitors.[6]

By contrast, Article 82 of the Treaty of Rome, which sanctions any "abuse of a dominant position," clearly sanctions efficient as well as inefficient conduct. The current European approach is succinctly summarized in the 1983 European Court of Justice's *Michelin I* decision, in which the Court states that "A finding that an undertaking has a dominant position . . . simply means that, irrespective of the reasons for which it has a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market." Under that standard, a dominant firm's verifiable efficiency reasons for conduct that promotes the firm's dominance are looked at askance under European case law precedents, even though such reasons would establish a strong defense to antitrust liability in the United States. The current European case law approach has much in common with decades old American cases, now discredited, that deemed efficient actions by a monopolist – such as expansions of capacity – as violative of Section 2 of the Sherman Act, to the extent they harmed competitors.

It might appear at first blush that, if antitrust's goal is the maximization of consumer welfare, the European approach is superior to the American approach. After all, it might be said, efficient actions that allow a firm to maintain its monopoly harm consumers of the monopolized

[6] Admittedly, the Federal Court of Appeals for the District of Columbia Circuit suggested in its 2001 decision in *United States. v. Microsoft*, 253 F.3d 34 (D.C. Cir.) (en banc), *cert denied*, 122 S. Ct. 350 (2001), that a monopolist's conduct might qualify as "exclusionary" if it imposes anticompetitive harm that is disproportionately larger than any efficiencies it engenders. That brief statement in one case, however, has been endorsed neither by the U.S. Supreme Court nor by Federal antitrust enforcement agencies. Moreover, it was made in passing in the context of an unusual case involving a host of challenged actions by a widely recognized monopolist.

good or service and harm competing producers as well. Thus, although the monopolist's efficient acts may expand its producer's surplus – to use the jargon of neoclassical price theory – such acts reduce both consumers' surplus and the surplus of harmed competitors. In short, if "efficient" monopoly maintenance is allowed, consumers' surplus unequivocally goes down, and total surplus (the sum of consumers' and producers' surplus) likely falls as well, under a broad set of assumptions. Accordingly, by preventing "efficient" monopoly maintenance that American law would allow, Article 82 jurisprudence is welfare-superior to Sherman Act Section 2 jurisprudence, assuming we accept this train of reasoning.

I would respectfully submit, however, that this line of analysis is fatally flawed, in that it relies on static (and rather artificial) measures of "welfare" without regard to the dynamic nature of competition. If one views competition as a dynamic process (as did Hayek and the Austrian economists), an antitrust policy that deters dominant firms from efficient conduct reduces the expected return to business success. Accordingly, such a policy undermines the incentive of individual firms to innovate and take risks, and, I would argue, thereby diminishes the force for innovation and enhanced productivity in the economy as a whole. Moreover, by allowing less efficient firms to remain in an industry, shielded from an aggressive market leader, such an antitrust policy delays the reallocation of scarce resources to higher valued uses and deters the realization of efficient industry structures. These dynamic effects suggest that total welfare is enhanced by a policy that allows dominant firms to engage in aggressive yet efficient conduct – a policy that more closely reflects the American Section 2 standard than the European Article 82 standard. I should add, to be fair, that DG Competition is considering guidelines that would recognize a role for efficiency justifications in Article 82 analysis. Any such guidelines, however, would have to be very carefully crafted in light of European case law precedents. That concludes my editorial comment.

In actual application, however, do Sherman Section 2 and Article 82 yield very different results? It depends. Consider pricing. Successful single product predatory pricing cases are extremely difficult to bring and win under Sherman 2, because the Supreme Court in its *Brooke Group*[7] decision held that price predation requires a showing of both below cost pricing and a likelihood of recoupment of losses. Article 82, which directly refers to "unfair" selling prices in its laundry list of possible Article 82 problems, does not impose this limitation. On the other hand, the legal status of multi-product bundled sales by a monopolist in one product line is somewhat uncertain in the United States. Different appeals courts have derived different tests and the Supreme Court has not yet intervened to settle the question.[8] On the whole, however, it appears to me that European enforcers are more likely than American enforcers to view bundling carried out by a dominant firm as a problematic practice. American enforcers appear to be more attuned to the substantial efficiency justifications economists have put forth for bundling schemes. The harsher treatment of Microsoft's bundling practices by the European Commission

---

[7] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Although Brooke Group actually was a Robinson-Patman Act case, subsequent case law has clarified that its principles apply fully to Sherman Section 2 cases. Notably, the United States Department of Justice recently was unsuccessful in bringing a predatory pricing case against American Airlines.

[8] Most recently, in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (*en banc*), *cert. denied*, ___ U.S. ___ (2004), the Federal Court of Appeals for the Third Circuit reinstated a jury verdict finding that 3M's bundled product rebate program (in which "loyalty discounts" were granted to purchasers of multiple 3M products) maintained 3M's transparent tape monopoly and thus violated Section 2. Significantly, plaintiff made no showing of pricing below cost in this case. Other Federal court decisions have been less solicitous to bundling theories.

than by the U.S. Justice Department – a matter in which both enforcers had brought monopolization cases – illustrates this point, in my view.

In the non-pricing, non-bundling arena, a wide variety of practices may under certain circumstances be held violative of either Section 2[9] or Article 82. Given time constraints, I will not explore those practices. I will only note, once again, that under current law, American enforcers and courts, unlike European enforcers, almost invariably will leave undisturbed efficient business conduct, even if its effects are to allow a firm to maintain its monopoly.

One last point of difference merits brief mention. In addition to its use as a sword against existing monopolists, Section 2 reaches inefficient behavior that may allow a non-dominant firm to obtain a monopoly. By contrast, Article 82 does not sanction conduct, whether efficient or inefficient, until a dominant position has been obtained. Thus EC enforcers lack the flexibility to "nip monopolies in the bud" – perhaps helping explain the somewhat more aggressive stance the Europeans take in addressing single firm conduct. I believe that Article 82 language and case law will continue to distinguish American and European practices in this regard.

C. Merger Enforcement

Now on to merger analysis. The European and American approaches to merger

[9] Although vertical foreclosure agreements, price squeezes, predatory pricing, refusals to deal, new product innovation and promotion, anticompetitive litigation, and monopoly leveraging have been held to constitute prohibited monopolization, those categories are not exhaustive, and a variety of other practices (for example, business torts) have, under appropriate circumstances, also been held to violate Section 2. See ABA SECTION OF ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 252-253 (5th ed. 2002).

enforcement have moved closer together in recent years and, in large part, continue to converge. I would highlight the EC's adoption of "Guidelines on the Assessment of Horizontal Mergers" in December 2003, which philosophically are very much in tune with the U.S. Horizontal Merger Guidelines in their structure and in their emphasis on economic principles. Of particular note, the new EC Guidelines and the U.S. Guidelines are quite similar in their concentration tests, approaches to efficiencies, and tests for anticompetitive effects (the EC's adoption of a "significant impediment to effective competition" standard substantively mirrors the American statutory "substantial lessening of competition" test). Also noteworthy is the agreement between the EC and the U.S. antitrust agencies to adopt "best practices" for the coordination of merger reviews in Europe and the United States.[10] What's more, consistent with American practice, DG Competition recently has strengthened the role of economists in merger analysis (by creating a chief economist position and increasing economist staffing).

That is not to say that all differences between American and European merger analysis will soon disappear, for at least three reasons.

First, EC enforcers tend to weigh seriously competitors' complaints when evaluating a proposed merger. The EC emphasized those complaints in reviewing the *GE/Honeywell* merger, for example, and has done so in numerous other matters. By contrast, American enforcers generally tend to reject such complaints, on the ground that competitors may be expected to

---

[10] US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations*, *available* at www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

oppose transactions that render the merging parties relatively more efficient than the complainers. Mergers that facilitate collusion should not be the focus of competitive complaints; even a merger that entrenches dominance may allow fringe competitors to "shelter under" the dominant enterprise. There may be situations in which complaining competitors' interests align with those of consumers, but American enforcers, unlike their EC counterparts, require extremely strong proof that that is the case.

Second, EC antitrust enforcers when reviewing proposed mergers tend to use economics differently than their American colleagues. I base this conclusion on my discussions with European counterparts in interagency working groups. American enforcers typically insist on hard facts-based evidence to support an economic theory of harm. European enforcers are more willing to accept theories of harm even in the absence of hard facts, based on post-Chicago economic models. Those models typically are "possibility theorems" that posit harm if various assumptions are met. Applying them absent a showing that the conditions actually are present is a dubious proposition, in my view.

Third, and related to the second point, EC enforcement officials are willing to invoke non-standard theories and thereby entertain challenges to mergers that do not impose short term harm on – indeed, apparently benefit – consumers. In *GE/Honeywell*, for instance, DG Competition stressed "mixed bundling" discount plans and future possible vertical foreclosure in opposing the deal, despite apparent short-run consumer benefits in buying bundled offerings. In so doing, the EC emphasized the welfare of particular competitors that might be harmed by these practices and exit the market, leaving consumers in the long run worse off. American antitrust enforcers rejected such an approach, given the number of conditions required for these theories to support a finding of future consumer harm, the difficulty of predicting longer term effects, and the importance of tangible merger-specific near-term increases in consumer welfare.[11]

I do not mean to appear overly chauvinistic in my evaluation of EC substantive merger analysis. It may well be that harm to major competitors, which lies at the heart of my critique, is more closely associated with harm to competition in Europe. Specifically, to the extent that European labor law and other European regulatory barriers impede entry once major competitors have exited, it is possible that the survival of key competitors – at least in certain high fixed cost concentrated industries such as aviation – is of some significance to long-term consumer welfare. (In my view, the best solution to this problem might be to reform inefficient regulations rather than bring questionable merger challenges, but that is beyond the scope of today's lecture.)

Also, American federal merger enforcement is far from flawless. Notably, the federal courts recently have rejected certain FTC and Justice Department merger challenges, underscoring the fact that DG Competition is not alone in having its prosecutions subject to second-guessing by tribunals. Furthermore, existing differences in evaluations of economic theories and competitor complaints are not immutable and should not be overblown. They may well diminish with the passage of time, as merger review processes and Merger Guidelines

---

[11] For an FTC critique of the EC's approach to *GE/Honeywell* and similar cases, see *Merger Enforcement in a World of Multiple Arbiters*, Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, before the Brookings

analyses are further harmonized.

Finally, even to the extent both jurisdictions' analytical approaches become virtually identical, there will inevitably be cases when enforcers reach divergent decisions on particular mergers. This is most likely to happen when geographic markets are national or regional, and anticompetitive effects appear likely within one jurisdiction but not in the second jurisdiction. In such situations, because there is no fundamental difference in approach, divergent outcomes should not produce friction; indeed, sometimes agreements on divestitures that cure localized problems may be feasible. In other cases there may be earnest differences in assessments of relevant facts. All in all, however, I expect a continuation in the trend toward increasingly consistent EC and US enforcement agency analyses of proposed mergers.

III. Antitrust Immunities

Now to antitrust immunities. To recap, the United States' record in this area is less than stellar, as I stressed last week. In addition to sector-specific immunities, the "state action" and *Noerr* "petitioning" immunities promote and yield durable government-imposed barriers to competition in diverse segments of the economy. Such barriers typically are more harmful than purely private barriers – the latter are more subject to erosion through market forces because they lack the force of public law. The jury is out regarding the extent to which the U.S. Federal Trade Commission will succeed in convincing courts to scale back state action and petitioning

Institution Roundtable on Trade and Investment Policy, *available* at protections. It appears safe to say, however, that competition-lessening immunity doctrines will not be rendered insignificant any time soon. I should add, however, one positive note. Competition-lessening competitive restrictions that have major negative spillovers across state lines are subject to possible condemnation under the Commerce Clause of the U.S. Constitution, which gives Congress plenary power to regulate interstate commerce. The scope for such "negative" application of the Commerce Clause is a complicated question, which, unfortunately, is beyond the scope of this presentation. I would, of course, be pleased to address this issue during the question and answer session.

The European record with respect to immunities, although far from flawless, appears to be a bit better than the American record.[12] Industry-specific antitrust exemptions are of somewhat less weight in the European Union, and protections for anticompetitive government petitioning and state action are less expansive. Former Commissioner Monti commendably began to subject the regulated professions to serious competition-law scrutiny, something which the United States has done since the 1970s. Whether the professions will be accorded truly serious antitrust oversight, of course, remains to be seen. DG Competition's vigorous challenge to illegal state aids is impressive, although EC law does not reach all such aids, and the greatest international source of distortion through government subsidy – the Common Agricultural Policy – remains untouched.

---

http://www.ftc.gov/speeches/Muris/Brookings.pdf.

[12] Two of the best short treatments of "state action" in the European Community are Richard Wainwright and Andre′ Bouquet, "State Intervention and Action in EC Competition Law," and Eleanor M. Fox, "What if Parker v. Brown Were Italian?" Both those papers were presented at the October 2003 Fordham Corporate Law Institute Thirtieth Annual Conference on International Antitrust Law and Policy. (The Conference volume including these and other papers is available for purchase at http://www.jurispub.com/books.asp?id=223.)

IV. Antitrust Enforcement by Subsidiary Governmental Organs and Private Enforcement

Let me now say a few words about antitrust enforcement by subsidiary governmental organs and private antitrust enforcement. Empowering European national courts directly to apply EC Competition law, is, of course, a key element of the May 2004 modernization program. Former Commissioner Mario Monti has argued that consistency in decisionmaking among national courts will be promoted through the efforts of the European Competition Network; and through enhanced clarity provided by new EC exemption regulations, notices, and guidelines. It will also be spurred through methods of cooperation established between DG Competition and the national courts established pursuant to Regulation 1/2003 – to wit, establishment of a legal basis for national judges to request opinions of DG Comp, and the submission of amicus curiae submissions to courts by DG Comp. DG Comp, through Regulation 1/2003, is also encouraging private enforcement of EC antitrust law in national courts.

To the extent these efforts are successful, national court enforcement of European antitrust law may come to resemble somewhat the enforcement of American antitrust law in federal district courts. The U.S. federal district courts, though scattered nationwide and subject to review by different intermediate tribunals, apply a common body of well-developed Sherman and Clayton Act jurisprudence in a generally consistent fashion. Perhaps European national authorities, enforcing European antitrust law, will play the role of American state attorneys general who invoke federal antitrust law to bring *parens patriae* actions. This is a salutary development for the most part – but I would advise this audience that not all such suits are efficiency-enhancing, even if well motivated. In my opinion, public enforcers from subsidiary jurisdictions are more likely than federal authorities to bring ill-considered suits – because of inferior expertise and, occasionally, an excessive desire for publicity.

I am even less sanguine about the benefits of private litigation. In the United States, private antitrust litigation has even more frequently proven problematic than public enforcement by state attorneys general. Too often private plaintiffs have sought to use the threat of antitrust suits to undermine efficient competitors. I suspect that private antitrust litigation may remain far less significant in Europe, given the absence of a private enforcement culture and American-style treble damages – probably a fortunate outcome for Europeans, in my regard. Perhaps private litigation invoking European federal antitrust law will be just the right volume – enough to make up for governmental underenforcement, but not enough to impose substantial burdens on efficient competitors through socially undesirable overenforcement.

Before I finish, let me address the consistency of national antitrust laws with European federal antitrust law. I am not at all convinced that the expansion in Europe of public and private litigation pursuant to national or subnational (as in Spain) antitrust statutes would be a good thing. National antitrust laws in practice are more likely than European federal law, I suspect, to promote expansive theories of liability that undermine economic efficiency. That certainly has been the experience in the United States, as state laws have shown a greater tendency than federal law to expand theories of liability that interfere with efficient business practices. As a practical matter, DG Comp may find it hard to bring national and regional antitrust laws into line with economic good sense, because of high monitoring costs, resource limitations, and informational complexities. In short, I believe that antitrust enforcement, regrettably, has the tendency to rot (or at the very least turn sour) as it expands in scope and takes on new localized forms.

V. Conclusion

In conclusion, European and American antitrust policies have converged somewhat, and increasingly employ a common vocabulary rooted in economics. Nevertheless, the two regimes maintain and will continue to maintain their distinctive flavors. In particular, European antitrust analysis is moving closer to the American approach of emphasizing efficiency-based case-by-case analysis of restrictive agreements among firms, but differences remain, particularly in attitudes toward vertical practices. Differences in statutory approaches to single firm conduct will prevent American monopolization and European dominance law from converging completely, but Europe may move closer to the American approach of assessing the efficiency of such conduct. Although the EC's adoption of American-style merger guidelines suggests greater future convergence, contrasting merger assessments may continue to surface periodically – centered, for example, on whether "bundling" and "conglomerate effects" should ever be grounds to enjoin a merger. Antitrust immunities will continue to limit the scope of action for both American and European enforcement authorities; a greater spotlight on the harm flowing from such immunities in both jurisdictions may offer some prospect for the narrowing of exemptions. The incidence of enforcement of federal antitrust law by subsidiary governmental organs – a staple of U.S. policy – may be expected to rise in Europe. Finally, private enforcement of federal European antitrust law will also expand, but private litigation is unlikely to achieve the prominence it enjoys in the United States.

Thank you for your attention. I await your questions.