2004

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Recommended Citation
Diane P. Wood, "The U.S. Antitrust Laws in a Global Context," 2004 Columbia Business Law Review 265 (2004).

THE U.S. ANTITRUST LAWS IN A GLOBAL CONTEXT

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For more than a hundred and ten years, the U.S. antitrust laws have stood at the center of what loosely (and to some, heretically) could be called the industrial policy of the United States. Competition, undertaken by private economic actors and constrained only by rules designed to protect the integrity of the market itself, has been the force that has led to unparalleled economic success. There is much in these laws, however, that is rooted in the particular history and economic circumstances of the United States, starting with the name that they bear: *antitrust*. It is a quaint name, evocative of long-dead robber barons and swashbuckling Presidents. Other countries with more recently enacted laws give them the more straightforward label of "competition" laws—laws designed to protect competition and consumers.

This morning, I would like to explore the extent to which the U.S. antitrust laws differ from the systems that have developed elsewhere, particularly in the European Union, a place whose competition regime is soon to be reflected in the national laws of more than twenty-five countries. Differences do exist, and it is worth identifying what those differences are, why they exist, and how they matter. We will see that those differences are important even now, not only to practitioners of the slightly esoteric field of "international antitrust," but also to the rest of the antitrust bar. And the importance of understanding the way others view this field will only become greater over time; the ideas that our counterparts elsewhere have of competition law will inevitably affect the way that American firms do business,

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and possibly even the content of domestic U.S. antitrust law itself.

What are the differences? In certain respects, one might think that there are few important differences between the United States and the European Union when it comes to competition law. Both systems are based on the principles that free markets are best; that competition will produce the best mixture of goods and services in the most efficient way; and that the role of government is only to ensure that the market can operate without distortions stemming either from private actions or governmental policies. More than that, the modern competition laws of the United States and the European Union have common roots, in both the American experience of the first half of the twentieth century and the deeper common law traditions from which the Sherman Act[1] sprang. Not surprisingly, in light of these unifying factors, a student of comparative competition law would observe that many E.U. cases are resolved in exactly the same way that an analogous American case would have been. But, as we all know, the devil is in the details, and in each major area of antitrust doctrine, significant differences in perspective are easy to detect. Those differences have led to distinctive doctrines and occasionally inconsistent results. Given the time limits of this morning's program, I will look only briefly at the different substantive areas of antitrust law—horizontal arrangements between competitors, vertical arrangements, single-firm monopoly or dominance, and mergers—and highlight a few of the salient differences that come to mind.

Let us begin with the area of antitrust that enjoys perhaps the highest degree of global consensus: *agreements between competitors*. The Organisation for Economic Co-operation and Development, which counts among its members the thirty most industrialized democracies in the world, has issued a recommendation urging all of its members to condemn "hard core cartels," which it defines (just as you would expect) as naked price-fixing, market

[1] 15 U.S.C. §§ 1-7 (2000).

allocation, production restriction, or bid-rigging arrangements.[2] But, importantly, the recommendation recognizes that even in this area, which ought not to give rise to much controversy among countries committed to antitrust rules, there are exceptions. For example, some countries (including the European Union) take the position that cartels might be justified as a response to a crisis in the economy—so called "crisis cartels," or "rationalization cartels." The European Union has on rare occasions authorized these kinds of arrangements, under the power presently lodged in Article 81(3) of the Treaty Establishing the European Economic Community, better known as the Treaty of Rome.[3] Even the United States, you will recall, flirted with this idea during the Great Depression of the 1930s, and the Supreme Court took a surprisingly lenient view of the arrangement before it in *Appalachian Coals, Inc. v. United States*,[4] which came between *United States v. Trenton Potteries Co.*[5] and *United States v. Socony-Vacuum Oil Co.*,[6] both of which condemned all price-fixing in stern terms. But today, basic U.S. antitrust law contains no general mechanism that would permit an exception to the rule against cartels for industries in distress. Another persistent sore spot in the cartel area is the existence of legally tolerated export cartels. Some (though not necessarily all) Webb-Pomerene associations and export trading companies might fit that description. To the extent that an export arrangement among competitors is legitimately described as a cartel rather than a joint venture—that is, it exists solely because it will be more profitable to reduce

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[2] Recommendation concerning Effective Action Against "Hard Core" Cartels Ministerial Meeting, Paris (Apr. 27-28, 1998), *available at* http://www1.oecd.org/daf/clp/recommendations/rec9.com.htm (last visited April 19, 2004).

[3] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, *amended by* TREATY OF AMSTERDAM, Oct. 2, 1997, O.J. (C 340) 1 (1997).

[4] 288 U.S. 344 (1933).

[5] 273 U.S. 392 (1927).

[6] 310 U.S. 150 (1940).

output and increase prices and no efficiencies from joint operations are likely—it is a raw way of harming foreign consumers, whose injuries are not likely to bother a domestic political constituency.

The basic principle at stake here is thus whether there really is, or should be, a blanket prohibition against cartels, or if this is a contingent prohibition that can be varied country by country, or circumstance by circumstance. The United States, with its strong criminal penalties against hard-core cartel behavior, and its record of increasingly severe criminal fines and prison sentences, stands well over at the blanket prohibition end of this spectrum (though even the United States is not squeaky clean, if one looks at the various ways in which things that look like cartels might be justified under other laws). Many other countries, especially developing countries, are not ready to take such a strong stand.

Joint ventures among competitors are evaluated in the United States under the rule of reason, and they receive analogous treatment in Europe and elsewhere. (A brief institutional digression is important, however: in countries and regions with essentially an administrative system for competition law enforcement, prosecutorial discretion operates as a kind of substitute rule of reason in all cases. Although some other countries have some version of a private right of action, the United States still stands alone in its heavy reliance on the "private attorney general" to enforce these and other similar public laws. This point is important when one tries to understand why negotiations about global competition rules have proven to be so difficult to launch and why the United States has not been enthusiastic about this project.) One can imagine differences of opinion about the characterization process itself: is the arrangement really a cartel or really a joint venture?

The other differences that exist between the United States and Europe have more to do with the kinds of ancillary restraints that will be viewed as permissible. Must the joint venture admit all comers who are willing to pay a reasonable price of admission, or can it be exclusive? Must it do business on an equal basis with all customers, or can it collectively refuse to deal with some? Must it license intellectual property that it has developed, just as an individual inventor or developer could do, or does the collective nature of the entity necessitate or justify special rules? At the margins (and undoubtedly over generalizing), it seems to me that U.S. antitrust law tolerates far more in the way of ancillary restraints than does European law (though, as we all know, the Second Circuit recently issued an important decision relating to joint ventures in *United States v. Visa U.S.A., Inc.*[7] that found that the Visa network had overstepped permissible bounds). Duties to deal are not viewed with as much skepticism in Europe as they are here. Furthermore, the possibility in Europe of permitting a concerted arrangement upon conditions makes it easier for regulatory authorities to intervene. If we were to abandon the private right of action and cut off the right of the state attorneys general to enforce the federal laws, we might find ourselves drifting in the same quasi-regulatory direction.

The differences between U.S. law and that of many other countries are even greater when we turn to *vertical arrangements*. There was a time in the United States, of course, when both price and non-price vertical restraints were condemned as *per se* violations of the law, and when intellectual property licensing was subject to the infamous "nine no-no's." The intellectual re-thinking of vertical restrictions inspired by the "Chicago School" changed all that. For those of us who are or who have been academics who hope to make a difference in the "real world," this is a gratifying story indeed. Academic questioning, followed by serious empirical research, found its way gradually into the mainstream of the law. The Supreme Court's 1977 decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[8] changed both the particular analysis of non-price vertical restraints and the general approach to antitrust questions forever. It made economics the discipline that was *primus inter pares* for the

[7] 344 F.3d 229 (2d Cir. 2003).
[8] 433 U.S. 36 (1977).

entire field of antitrust, and it gave new meaning to the idea that had originally been expressed in the Court's 1962 merger decision in *Brown Shoe Co. v. United States*:[9] "It is competition, not competitors, which the [Sherman] Act protects."[10] In time, it became clear that this meant that it was not enough for a rival of a firm—even a monopolist—to complain that it had been excluded or forced out of a market, because that might have happened for reasons that the antitrust laws applaud—greater efficiency, lower prices, better products. By the time the Court decided *Cargill v. Monfort*,[11] it was expressing skepticism about the idea that competitor complaints about mergers (or anything else) could be taken at face value.

The same evolution of thought about vertical restraints has taken place to a degree in Europe, but it has been more cautious and qualified. Several reasons may explain why the E.U. rules on permissible distribution practices have insisted on more protection for distributors, and have permitted less autonomy for manufacturers. The first comes from the initial purpose behind including competition rules in the Treaty of Rome in 1958: the original six countries knew that they were trying to forge a common market out of countries with more than a millennium of independent existence. Even private practices that had the effect of impeding flows of goods, services, capital, and people between member states had to be condemned if this ambitious goal was to be achieved. A second reason for the differences that can still be observed may be the fact that the law of some of the member states limited a company's right to refuse to deal with a reputable business partner. Unlike in the United States, where *United States v. Colgate & Co.*[12] had been on the books for nearly the entire history of the law, duties to deal were an imaginable part of the business culture. Third, Europe was predisposed for many years to protect small

[9] 370 U.S. 294 (1962).

[10] *Id.* at 344.

[11] 479 U.S. 104 (1986).

[12] 250 U.S. 300 (1919).

businesses against the large multinational companies. In the late 1960s, recall that Jean-Jacques Servan-Schreiber's book, *Le Défi Américain* (The American Challenge)[13] appeared, which argued that American multinationals were about to take over Europe and the rest of the world. A regulatory approach to the behavior of upstream firms, against that background, made sense. As I indicated, much of this is changing in Europe. The new block exemption regulation and guidelines on vertical restrictions take a much more economic approach to vertical restrictions than the European Union has done in the past. Market integration may not be perfect, but it has come a long way since 1958. Nonetheless, one can see in this area and in the next one—regulation of the conduct of dominant firms—a greater concern about the ways in which firms with influence or some market power behave, and a greater willingness to intervene.

Before leaving this subject, a word about intellectual property licensing is in order. Here, as in many places, the similarities between Europe and the United States are more important than the differences. Both sides consulted extensively with one another in the early 1990s while the U.S. Federal Trade Commission and Department of Justice were developing their Guidelines for the Licensing of Intellectual Property, and the European Union was working on its corresponding block exemption in the same area. Both sides take the view that intellectual property ("IP") nothing less, but nothing more, than a form of property.[14] Certain consequences important to antitrust law flow from that simple proposition: IP is entitled to protection as property; the fact that a firm owns IP in a certain area does not necessarily imply that the holder has a monopoly (or a dominant position); but by the same token IP, like other

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[13] JEAN-JACQUES SERVAN-SCHREIBER, THE AMERICAN CHALLENGE (Ronald Steel trans., Atheneum 1st ed. 1979) (1968).

[14] Antitrust Guidelines for the Licensing of Intellectual Property, U.S. Department of Justice and the Federal Trade Commission, (Apr. 6, 1995) *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm.

property, can be abused or misused. Another source of the convergence between European and American policies in this area comes from the fact that both Europe and the United States are signatories to the World Trade Organization's Trade Related Intellectual Property, or TRIPS, agreement.[15] The most important differences in this area show up when we move to the next topic, which is perhaps the single most problematic one that exists.

I am referring, of course, to section 2 of the Sherman Act[16] in the United States, which prohibits *monopolization and attempts to monopolize*, and to Article 82 in Europe, which prohibits *single firm or collective abuses of a dominant position*. These are the laws that address the conduct of single firms with substantial market power and, in the case of Europe, also firms that collectively are in a dominant position and allegedly abusing that position. Our differences go well beyond the vocabulary used in each law. Indeed, we might summarize this area in one word: Microsoft. In the beginning (meaning in the early 1990s), the U.S. Department of Justice and the Commission in Europe brought coordinated proceedings against Microsoft for violations of their respective competition laws. Microsoft went so far as to waive certain rights of confidentiality so that a three-way resolution of charges stemming from practices like its per processor licensing could be achieved. The gambit was successful: the three parties agreed on remedies in July of 1994; the Commission implemented them immediately; and the Department of Justice implemented them after the D.C. Circuit found in 1995 that the district court should have approved its consent decree under the Tunney Act's procedures.[17]

But, as we all know, that was not the end of Microsoft's antitrust problems on either side of the Atlantic. The

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

[16] 15 U.S.C. § 2 (2000).

[17] United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

Department of Justice went on to sue Microsoft in 1998; the district court found that many of its activities related to its web browser Internet Explorer had violated the law;[18] and the D.C. Circuit affirmed substantial parts of that judgment (though not, of course, the controversial remedial decree that would have broken Microsoft up into two separate companies).[19] Afterwards, rather than face an uncertain fate on remand, the Department entered into another consent decree with Microsoft, which is still in effect. In the meantime, the European Union kept up their own scrutiny of the company. Just a couple of weeks ago, Microsoft was appearing in closed hearings at the Commission to defend itself against charges that it had unlawfully tied its Media Player into the Windows operating system. The Commission, according to reports in the press, was threatening fines that could reach up to $3.2 billion, as well as an order requiring Microsoft to strip Windows Media Player from the operating system so that rivals like RealPlayer or Quicktime would have a fair shot at reaching consumers.[20]

It is useful in this respect to compare the way the D.C. Circuit treated the Department of Justice's allegations of tying in its 2001 opinion with the approach the Commission is now taking. The Department had charged that Microsoft violated section 1 of the Sherman Act when it bundled together the Internet Explorer web browser with its operating system. The D.C. Circuit first concluded that the *per se* rule against tying was not appropriate, despite the fact that it had already found that Microsoft had a 90% share of the tying product market (Intel-compatible operating systems) and the fact that the Supreme Court had implied in

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[18] United States v. Microsoft, 84 F.Supp.2d 9 (D.D.C. 1999).

[19] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001).

[20] *See, e.g.*, Brandon Mitchener & Matthew Newman, *Microsoft and European Union Aim for Settlement After Key Hearing*, WALL. ST. J., Nov. 24, 2003, at A3; John R. Wilke & Brandon Mitchener, *A Global Journal Report: Microsoft Faces Threat of European Union Fines*, WALL. ST. J., Nov. 12, 2003, at A3.

the 1984 *Jefferson Parish v. Hyde* case[21] that something in excess of 30% of a tying product market would be enough to make anticompetitive forcing possible.[22] The court of appeals found the market new enough that it required a careful analysis under the rule of reason before the alleged tie could be condemned; it remanded for that purpose.[23]

The Commission's recent effort to challenge the Media Player tie suggests that it would not hesitate to forbid this kind of leverage in the market. Indeed, while leverage theories in general have fallen into a certain disrepute in the United States, thanks once again to economic analysis, they are still accepted both in Europe and in many other countries. Other theories of liability that apply to single-firm behavior also receive a more sympathetic reception not only in Europe but in many other countries. A few examples suffice to make the point. The "essential facilities" doctrine in the United States has actually been applied in very few cases, and the facts of those cases have been extreme: topographical impossibility of duplicating a facility has been accepted, as has impossibility arising in part out of a regulatory environment. But the mere fact that it would be expensive to attempt new entry is normally not enough, by itself, to require a monopolist to deal with rivals or customers. (We are likely to learn more about the scope of this doctrine from the Supreme Court's opinion in the pending case of *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko,*[24] unless the Court decides to resolve the case on standing grounds or on some other basis apart from the merits.) In Europe, in contrast, this doctrine is generally accepted. The opinion of Advocate General Francis Jacobs in *Oscar Bronner GmbH Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG,*[25] is illuminating in this

[21] 466 U.S. 2 (1984).

[22] *Microsoft*, 253 F.3d at 89-90.

[23] *Id.* at 94.

[24] 305 F.3d 89 (2d Cir. 2002), *cert. granted*, 123 S. Ct. 1480 (2003). After this talk was given, the Supreme Court decided *Verizon Inc. v. Law Offices of Curtis v. Trinko, LLP*, 124 S. Ct. 872 (2004).

[25] Case C-7/97, 1998 E.C.R. I-7791, 4 C.M.L.R. 112 (1998).

regard. He acknowledged that the Court of Justice had never explicitly adopted the doctrine, but he went on to conclude that in refusal to supply cases, the notion of essential facility had played an important role. (In his opinion, however, he concluded that a dominant media firm had no duty to allow a rival daily newspaper to have access to its home-delivery system—a result that is surely consistent with what would have happened in the United States.) In *Irish Sugar Plc v. Commission*,[26] the Court of First Instance found that a dominant firm in the industrial sugar market had abused its position when it granted discriminatory price rebates to its customers. As the Court put it, "the distortion of competition arises from the fact that the financial advantage granted by the undertaking in a dominant position is not based on any economic consideration justifying it, but tends to prevent the customers of that dominant undertaking from obtaining their supplies from competitors."[27] No such obligation to justify a price, or a financial advantage, is imposed on U.S. firms.

The Commission's decision in the 2001 *Michelin* proceeding[28] is another good example of the difference in mindset in this area. Michelin is a major manufacturer of tires. Worldwide, the Commission stated, Michelin and Bridgestone each had some 18% to 20% of the market; Goodyear had 15%, and Continental, Sumitomo, and Pirelli were in the 5% to 8% range. Michelin had higher shares in Europe as a whole—32%, and even higher shares in France—somewhere between 51% and 65%. The Commission found on these facts that Michelin had a dominant position, and that it had abused this position through a system of fidelity rebates given to its dealers, aimed at keeping the dealers' business. It did not engage in

[26] Case T-228/97, 1999 E.C.R. II-2969, 5 C.M.L.R. 1300 (1999).

[27] *Id.* ¶ 114.

[28] Commission Decision 2002/405/EC of June 20, 2001 Relating to a Proceeding Pursuant to Article 82 of the EC Treaty (Case COMP/E-2/36.041/PO - Michelin), 2002 O.J. (L 143) 1.

the type of predatory pricing analysis that might have occurred in the United States, if a large firm were accused of charging prices so low that its competitors could not keep up with it.

Similarly, in the relatively recent decision in the *Deutsche Telekom AG* matter,[29] the Commission found that Deutsche Telekom, the dominant German telephone company, had abused its position in the market essentially by a classic price squeeze. The Commission's opinion begins with the statement, "This decision concerns unfair pricing contrary to Article 82(a) of the EC Treaty."[30] It goes on to explain that the margin between the prices that Deutsche Telekom was charging its competitors for unbundled access to local loops in Germany and the prices it charged end-users for access to its fixed network were not sufficient to enable the competitors to compete with it. Once again, we may see soon if this type of claim raises antitrust concerns under section 2 of the Sherman Act[31] in this country, if the Supreme Court reaches the merits in the *Trinko* case.[32] In the Seventh Circuit, however, we have decided that if the only thing the monopolist local loop carrier did was to fail to comply with obligations imposed by the Telecommunications Act of 1996 that *go beyond* antitrust rules, then no antitrust claim has been stated.[33] Because even monopolists have no obligation affirmatively to help out their competitors—once again, under Seventh Circuit law at least—this kind of behavior standing alone is acceptable.

The last area related to dominance where a notable difference exists between the United States and the European Union has to do with collective exercises of market

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[29] Commission Decision 2003/707/EC of 21 May 2003 Relating to a Proceeding Under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 Deutsche Telekom AG), 2003 O.J. (L 263) 9.

[30] Commission Decision 2003/707/EC of 21 May 2003 Relating to a Proceeding Under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 Deutsche Telekom AG), 2003 O.J. (L 263) 9, at 9.

[31] 15 U.S.C. § 2 (2000).

[32] *See supra* text accompanying note 21.

[33] *See* Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000).

power. When no agreement can be proved, and no single firm has enough market power to justify a claim of attempted monopolization, U.S. law does nothing about the situation. Many of you will remember efforts to address this "gap" during the 1970s, when the Federal Trade Commission was pursuing its shared monopoly or oligopoly theories in a number of industries. In the end, however, nothing came of this, and no administration since then has shown any interest either in re-opening these efforts or in amending the laws to close the gap. The story is quite different in Europe: collective dominance as a theory is alive and well. The Court of First Instance's *Irish Sugar* decision, mentioned above, is just one of many examples. The Court quoted from an earlier Court of Justice decision holding that "a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers."[34]

Last, but by no means least, we come to the topic of *mergers and acquisitions*. In this area, just as in the remainder of competition law, the Commission has been conducting a comprehensive review of its policies. One topic up for discussion was whether it should change the test for assessing mergers from one that asks whether the merger is likely to create or strengthen a dominant position (the "dominance" test) to one that asks (as does the Clayton Act) whether the merger is likely substantially to lessen competition (the "SLC" test). The Commission was concerned that, at least under one interpretation of the dominance test, it was difficult to apply the existing merger regulations to transactions that might lead to anticompetitive coordinated effects, where none of the remaining firms in the market independently qualified as dominant. It has decided, however, not to change to the SLC test, principally for reasons of institutional stability.

[34] Case T-228/97, 1999 E.C.R. II-2969 ¶ 46.

Instead, the proposed amendment to the regulation will define "dominance" in a way that would permit a coordinated effects case to be brought. Interestingly, this will require driving a wedge between the definition of dominance used for Article 82 purposes and the definition of dominance used for merger review purposes—a consequence the Commission has expressly recognized.

Many of the differences between the United States and the European Union that I have already noted with respect to Article 82 also apply to merger review. Other points include the fact that the European law uses a lower threshold for concluding that dominance exists, that it is more concerned with phenomena like vertical foreclosures and leverage, and that the authorities do not have the same institutional skepticism about complaints against the transaction lodged by rivals. This is not to say, I stress again, that results in merger cases reviewed by the Commission are often different from those reached in the United States or elsewhere. The contrary is true. But some high-profile cases have arisen in recent years where conflicts bubbled up to the surface, including the Boeing/McDonnell Douglas transaction that narrowly escaped open disagreement, and the General Electric/Honeywell deal that was permitted in the United States but blocked when the Commission decided to challenge it. The Commission did so principally because of its concern about so-called "portfolio effects"—the advantage it thought GE would have over its competitors for large jet engines because of the strength of its financial affiliate and because it would have a broader portfolio of avionics and non-avionics products to offer customers. That is not a theory that the American authorities either accepted on those particular facts, or would be likely to accept as a matter of theory.

As an outsider, I can only speculate about what lies behind the two approaches. Candidates for an explanation include a greater concern about the conduct of large and economically powerful firms; a greater willingness to regulate; greater weight on the preservation of rivals in the market and less concern with the position of consumers; or the thought that consumers will be better protected over the medium to long term if more rivals are preserved, even if there is some short-term inefficiency. One does not have to assume that the Europeans were just listening to the wrong economists, or to economists who did not understand their subject well enough, to explain how *General Electric/Honeywell* came out as it did in the Commission. It is worth noting, too, that the correctness of this decision is a matter of debate within Europe just as it is across the Atlantic.[35] The Court of First Instance has not hesitated in recent years to overturn the Commission when the court concludes that the Commission's decision is not soundly based.

This quick overview should convince you that, despite the many areas in which the differences between the United States and Europe are vanishingly small, important areas of debate continue to exist. That leads naturally to the question why those differences exist and in what ways they matter. Once again, all I can offer is speculation, informed both by my own experience at the Department of Justice and by the statements officials from other countries have offered over the years.

One possible explanation is an economic version of American exceptionalism: the United States, by tradition, by resources, by global economic and military power, is *hors categoire*, as our French friends would say, and part of that distinctiveness is reflected in our antitrust laws. A corollary of that explanation may be the proposition that the search for unified, global competition principles is doomed to failure: one size will never fit all, and we should logically expect distinctive competition laws in smaller countries, in developing countries, in countries with a stronger history of state direction of the economy, and so on. Another possibility is that the United States, by virtue of having a

[35] Commission Decision 2004/1391 of July 3, 2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement (Case COMP/M.2220—General Electric/Honeywell) 2004 O.J. (L 48) 1.

longer tradition and more experience with antitrust, simply stands in the vanguard—in time, other countries will see the wisdom of the rules that have been adopted here and will choose to follow the American example. Finally, a third possibility is that the United States and the more than 100 other countries around the world with competition laws are all feeling their way toward a common solution that will be informed by the experience of all.

Only the second of those possibilities is consistent with the idea that U.S. antitrust rules will serve as the long-term model for the rest of the world, and thus that we should not expect any changes. The first also anticipates that the U.S. rules will remain the same, but that conflict among systems will be inevitable. While it is logical to think that the U.S. outcome will prevail in many—maybe most—of those conflicts, it would require more hubris than I have to assume that the U.S. outcome will prevail in every one of them. Particularly if some kind of formal or informal dispute resolution bodies develop for the field of antitrust, whether in the OECD, the International Competition Network, the World Trade Organization, or elsewhere, it will be important for us to understand where conflicts are likely to arise and which principles are likely to prevail. The third possibility—outright negotiation of a world competition code—may seem unlikely at this point, and it is something I have often argued against. Nevertheless, calls for the development of agreed principles or basic rules continue, and it would be unrealistic to think that this could never happen. If it does, then once again, it would be foolish to think that the rest of the world will automatically adopt a pristine version of U.S. antitrust law. It is possible that any such principles will be worded so generally that both the United States and the European Union will already be deemed to comply with them, but at that point one must ask whether such an exercise would be worth the effort.

Even if it turns out that there is never any formal globalization of antitrust law, the mere fact that an entity as large as the European Union is soon to be has chosen a slightly different path raises important questions for both scholars and practitioners in the area. Are the principles we now regard as essential for a soundly based antitrust law universal? Does the social science of economics describe accurately all human behavior, in all countries, at all times? Is a country's history unimportant when we consider what kind of competition law it needs? If the answer to any of these questions is no, then we need to understand both why our own antitrust laws work well for us; to consider whether different rules might be working equally well for others; and to ask whether there is anything we might learn from the experience of others in this burgeoning field. This effort should repay us richly, as we strive to improve our laws, create greater coherence between the federal and state antitrust systems, and reap the benefits of competition in the future.