Comparing and Contrasting the EU and the US Approach in Competition Law: So Close but So Far

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Abstract

It is of great academic interest that the two main representatives of the Western world, the EU and the USA, have developed antitrust and competition law approaches and policies that have certain significant similarities but also quite a few crucial differences. The paper deploys a functional comparative analytical model in the first place but also a more contextual approach, in the second instance, by taking into account historical and economic arguments and theories as to the development of antitrust laws in the USA and the EU. The paper's comparative analytical model otherwise proceeds both on a macrocomparative and a microcomparative basis. For instance, the author initially concentrates on the broader differences and similarities between the two comparables. Thereafter, the paper's focus is on key specific substantive differences and similarities, especially ones that would have arisen out of contextual reasons. Furthermore, the paper explores the differences between the American and the European approach as ones that range from procedural matters, semantics and historical reasons to resolution mechanisms, substantive matters and the involvement or not of political considerations. This is a paper that aims to provide an up-to-date comparative analysis as to the points of divergence and convergence between the two major systems of competition law in the Western sphere by taking into account legal, historical and economics matter as well as latest developments.

Keywords: antitrust law, comparative law, competition law, EU, USA

JEL Classification: K210

1. Introduction

This paper explores and compares the two main schools of legal thought and practice in the Western world, when it comes to competition and antitrust law: US antitrust law and EU competition law. The purpose of the paper is to offer a comparative analysis of certain of the main differences and similarities between

the US and the EU approach in the area. It does so by way of a macrocomparative type of analysis but also through indicative microcomparisons.

1.1 One Ideology – Two Schools

In the essence of the matter, there is one ideology that defines the Western world's legal systems: economic liberalism and/or economic neoliberalism. It is this ideology that also acts as the fundamental basis of the world of globalisation in one way or another. For most intents and purposes, in the danger of stating the obvious, both the EU and the USA, as poles of economic and legal power, would be Adam Smith's economic offspring. One can certainly observe this in the strong sense of economic individualism that is found in the USA or even in the Four Freedoms of EU law and so on. Thus, government is, ideally, both in the US and in the EU, not the regulator but the supervisor of economic activity, unless, of course, it would be of the essence for the government to intervene. In Europe, especially through the advent of the School of Ordoliberalism, the state would have to take a somewhat more active approach in building the right regulatory frameworks for market players to operate in an environment of economic freedom. As a matter of fact, the position here would be that such an approach would offer legitimacy to the ordoliberal thesis, the thesis crystallising into a form of a regulatory system with the public interest in mind (Megay, 1970, p. 432). This public interest ordoliberal thesis seems to form the core of EU's approach by also emphasizing *inter alia* the welfare of the consumer in a market of free competition that would also accommodate the legitimate interests of market players. When compared to the EU approach, the US approach has traditionally tended to be more hands off in intervening in the markets. Indeed, American competition law theory, moving away from ordoliberalism, would be informed by such schools of economic thought as the Chicago School, the Post-Chicago School and the Harvard School (Crane, 2009; Horton, 2012; Yoo, 2020). However, in the essence of the matter, both the US and the EU legal and economics orders are otherwise broadly similar. Here one speaks of the same genus of legal and economics systems but of different species. The fact that the EU is a different legal species to the US in competition policy matters emanates also from a reality wherein the overwhelming majority of EU Member States are civilian, whilst the overwhelming majority of the United States are common law systems (with the partial exception of the State of Louisiana, the private laws of which combine both common law and civilian elements). In any case, both the EU and the USA are indeed liberal economics orders, orders that largely comply with the ideas of formalism, the laissez faire laissez passer doctrine and the idea of individualism and freedom of one to pursue their goals subject to minimum external legal restraints. As the analysis that follows will show, the comparison of

these two broadly similar worlds comes with both differences and similarities in competition and antitrust matters.

1.1.1 Comparing Antitrust Schools of Legal Thought

To compare the EU and the US approach in the area of antitrust matters is like comparing much of the legal soul and heart of whole economic and legal systems, namely that of the two main representatives of the Western world, the EU and the USA. Indeed, a comparative examination of the quintessential characteristics of the EU and the US antitrust mentality and their competition systems is ultimately about their respective pictures of the markets world. The image of competition laws in the EU and the US mirrors the very economic soul of the EU and the US. Furthermore, legal thought and policy in this area have clearly been the result of economic thought to a considerable extent but slight 'twists and turns' of the legal approaches and policies of the US and the EU in the area make them intercommunicable but not necessarily wholly compatible. On the surface, the comparables here would point to similar approaches. Practically, however, especially on closer examination, significant differences seem to prevail, despite efforts for harmonisation and the continuous cooperation of EU and US authorities in relevant matters.

1.1.2 The Context of Globalisation & Regulatory Competition

Moreover, both schools operate in the context of globalisation. However, what seems to be an interesting consideration is that US antitrust law seems to come somewhat closer to a classic (neo)liberal economics analysis, in that the consumer *stricto sensu* is not a key consideration as opposed to the EU approach where the effect of unfair competition on consumers forms part and parcel of relevant key considerations. Of course, this is mere theory. In practice, the US model, especially through its more sophisticated analysis and compliance with strict economic theory might result in greater benefit to the consumer. Furthermore, one notes here the legal race between the EU and the US to spread their antirust regulation and enforcement models around the world. A legal peculiarity, which seems to favour however the spread of the EU model to a greater extent than the US model currently, is the fact that the EU model comes with a simpler administrative template to the US one, even if the substantives of EU competition law tend to be more convoluted and more open ended than those of US antitrust law. As a result, the EU's administrative template in the area is taken to be simpler and, therefore, easier to emulate in jurisdictions around the world, which is also attested by the partial retreat of the US approach around the world, with more systems adopting the EU approach (Bradford *et al.*, 2019, p. 761).

For instance, the EU competition model has been emulated in one way or another in such leading jurisdictions as Argentina, China, India, Turkey, Indonesia and Mexico, whereas the US antitrust model has been by and large followed in Canada, Australia and New Zealand (Bradford *et al*., 2019, pp. 751–752). The comparatist also notes here the fact that, even though the EU competition has effectively derived from the civilian legal tradition, it has flourished also in the leading common law jurisdiction of India (Bradford *et al*., 2019, p. 762). The US antitrust law model, on the other hand, does not currently find fertile ground in any of the civilian jurisdictions, especially after the rewriting of the Laotian competition law of 2014, which combines mostly competition law ideas from Vietnam and, to a more limited extent, competition law ideas from the EU (Van Uytsel & Hongvichit, 2020, pp. 4–5). One, therefore, readily concludes from all the above, that the greater exportation of the EU model of competition to both common law and civilian jurisdictions is a fact of life, whilst the US antitrust model seems to be more readily embraced by common law jurisdictions currently.

1.1.3 Convergence, Divergence & Cooperation

The two major schools of antitrust law may have converged to a certain limited extent. Both of them hover between classical liberalism and more regulated forms of liberalism (as opposed to neoromantic narratives that would perceive modern competition laws in the West as the midway between capitalist ideal and socialist ideal). Moreover, as one would reasonably expect, the American antitrust authorities and the European Directorate General for Competition frequently cooperate (Abbott, 2005, p. 2). Nonetheless, the precise legal position here would be one in which one speaks of fundamentally different approaches with a small number of points of limited convergence. However, an important consideration would be the fact that these limited points of convergence detract one's analysis from deeper comparative understandings (Fox, 2014, p. 130). Furthermore, as Manne put it, even though 'the EU's approach to competition policy appears close to that of the US, it is fundamentally at odds with the sound economics that under-pins much of US antitrust law in several crucial ways' (Manne, 2018, p. 3). An aspect of the practical divergence of the two regulatory systems is also the fact that EU regulators tend to take a more aggressive approach in the area of enforcing antitrust matters than US regulators (Bradford *et al*. 2019, 734). The point as to the divergence between the two regulatory systems otherwise becomes most apparent, when it comes to them dealing with similar antitrust matters: it is often the case that the EU and the USA 'often find themselves at odds in high-profile investigations of anticompetitive conduct' (Bradford *et al*., 2019, p. 732).

Another point of divergence has to do with the very remit of central antitrust provision in the US and the EU. For instance, monopolistic practices in the US

under section 2 of the Sherman Act would fall under Article 102 TFEU, the European provision on abuse of dominance. However, a clear point of divergence is noted between the comparables here, in that an abuse of dominance in the US would not fall under the remit of Section 2 of the Sherman Act (Fox, 2014, p. 150). Greater are the divergences still between the US Supreme Court and the Court of Justice of the European Union, when it comes to the jurisprudential essence of their decisions. The situation becomes even more interesting by reason of the fact that competition agencies *per se* in the US and the EU seem to become somewhat convergent in their approaches (Fox, 2014, p. 151).

2. Comparison

This part of the analysis will be dedicated to a direct comparison of the US and EU competition law and policy approaches allowing for a contextual analysis where appropriate. The analysis is divided into a macrocomparative element and a microcomparative element.

2.1 Functionalism & Context

The EU and the US are the two main representatives of the Western world in matters economic, legal and political. Concurrently, they are also two of the main pillars of the world economy, other economic powers of great significance being the United Kingdom, Russia, China and Japan. Historical and ideological reasons have resulted in certain divergences in antitrust laws and practices between the US and the EU. In comparative legal studies, the main test when comparing two or more legal realities would be the school of functionalism (Zweigert & Kötz, 1998, p. 34). However, comparative law as a subject has evolved in recent decades by involving contextualism in its analysis. As such, a comparative analysis can proceed through combining the forces of functionalism with the so-called 'contextual why' (Platsas, 2008, pp. 4–5). With regard to an indicative comparative chart as to differences and similarities between the US and the EU approach in the area of competition law, Table 1 below offers an overview.

Table 1: Comparative Chart

	US Approach in Antitrust and Competition Matters	**EU Approach in Antitrust and Competition Matters**
Macrolevel: Independence of Antitrust Authorities	Independent from political interference	Open to political interference
Macrolevel: form of settlement	Judicial – administrative	Administrative – judicial
Macrolevel: relevance of question of fairness per se	Less relevant than previously or largely irrelevant nowadays	Less relevant than previously or largely irrelevant nowadays

Macrolevel: overall ethos	Law and Economics	Law and Politics
Macrolevel: degree of centralisation	Less centralised than its EU counterpart	More centralised than its US counterpart
Macrolevel: key character	Prioritisation of antitrust intervention costs	Prioritisation of competition as a process
Macrolevel: regulatory competition	Less exported model than its EU counterpart (mainly in the common law world)	More exported model than its US counterpart (both in civilian and common law jurisdictions)
Microlevel: doctrine	Both differences and similarities to the EU model are observed	Both differences and similarities to the US model are observed
Microlevel: goals and objectives	Largely similar, albeit not always; certain divergences in underlying economic theories	Largely similar, albeit not always; certain divergences in underlying economic theories
Microlevel: precautionary principle	Considerable divergences in the area	Considerable divergences in the area
Microlevel: interference of political authority	Unlikely	Likely
Microlevel: procedure per se	Divergent	Divergent
Microlevel: predatory pricing approach	Less expansive approach in the US	More expansive approach in the EU
Microlevel: economics analysis per se in the enforcement of competition policy	Compliant with economic analysis	Largely disinterested in economic analysis
Microlevel: exploitative abuses	Disinterested overall in exorbitant or excessive prices	Interested in exorbitant or excessive prices

2.2 Macrocomparison

At the macrocomparative level, a more straightforward system of antitrust law in the USA is one what one generally observes, when comparing the American approach to the EU approach. The American approach centres itself around the original Sherman Antitrust Act 1890, as this has been amended by the Clayton Antitrust Act 1914. Further amendments to the Clayton Antitrust Act 1914 have been achieved by virtue of the Robinson-Patman Act 1936. Section 2 of the Sherman Act is enforceable by the Department of Justice and also by the Federal Trade Commission. Nonetheless, the majority of antitrust cases are legally actioned by private parties (Fox, 2014, p. 136). An interesting feature of the US Antitrust system is also the fact that whilst court-based as a whole, it is possible for litigation to occur both in the American courts and the Federal Trade Commission. The high degree of independence of the US antitrust authorities is something one would have to note here and it is the case that relevant agencies

very rarely attract any sort of interference from higher governmental authorities (Fox, 2014, p. 131). The US Supreme Court's decisions in the area must otherwise be respected and applied by both the courts and the Federal Trade Commission as a matter of course. Furthermore, the original social justice characteristic of fairness of American antitrust law towards the 'little guy' in the market seems to be largely irrelevant nowadays in the decisions of bodies within the US legal order, as the law would not, technically speaking, be concerned with questions of fairness or a level playing field (Fox, 2014, p. 131).

The formal predecessor of the EU, on the other hand, the European Community, had had to develop its own competition regulatory framework with the birth of the European Economic Community, as this came about through the Treaty of Rome 1957. However, from the legal historical point of view, the first common Western European competition rules would be found in the provisions of the Paris Treaty 1952, the Treaty Establishing the European Coal and Steel Community. The core of the EU competition law would, of course, be found in Articles 85 (81) and 86 (82) of the original Treaty of Rome 1957 (now Articles 101 and 102 TFEU). It would be important to note at this point the ambitious legal aim behind the Treaty of Rome, it being the creation of a new legal order in Europe in the face of international law. Amongst other things, one of the goals of the particular treaty was to bring down trade barriers in the limited geographical legal space of Western Europe (see 'Original Six' States of Belgium, France, Italy, Luxembourg, Netherlands and West Germany). Despite its limited territorial scope, the original Treaty of Rome and, by extension, old Articles 85 and 86 would create legal history: Europe, for the first time, would create an extensive set of common economic law rules, thereby abolishing the preferential treatment that national companies would enjoy at least up until the early 1950s. Europe was changing and a new supranational form of competition law was in its first steps. Unlike the US approach, the EU approach, as one would expect, is essentially civilian, and would be about the creation of a level playing field for European undertakings. Articles 101 and 102 TFEU are about abuse of dominance and anticompetitive practices. Implementation of relevant EU framework occurs under a system of Directives and Regulations, as this would be provided for in Article 103 TFEU. The respective responsibilities of the national competition authorities of the Member States and the Commission are found in Articles 104 and 105 TFEU respectively. Finally, under Article 106 TFEU, state-granted privileges to any public companies cannot be used to pre-empt an environment of free competition.

The overall ethos and certain of the legal standards of the compared antitrust approaches is what differentiates them. Overall, the EU approach tends to be legal-political in competition matters with a slightly higher degree of centralisation to its American counterpart, when the US approach tends to be largely decentralised

and one that would be more legal-economics based. For EU competition law it would seem that what matters the most is 'the process of competition, seeking to enable all market actors to compete on their merits', whilst for US antitrust law the emphasis would be on the 'costs of antitrust intervention' (Fox, 2014, p. 143). Also, EU competition law is not monothematic; as stated, it prioritises the process of competition; the idea of fairness is not a key theme [this being somewhat reminiscent of the US approach otherwise]; the approaches of the Commission and the Court of Justice of the EU are somewhat divergent; the Commissioner for Competition may set different goals depending on who is in this position; the school of ordoliberalism seems to be still the prevalent school of thought in Europe, whilst the rate of cases has slightly increased over the years (Stylianou & Iacovides, 2021, p. 5).

2.3 Microcomparison

Despite the largely common economics ideology that characterises the USA and the EU, one could clearly maintain that at the level of microcomparisons, the two antitrust systems have even more profound differences than at the level of macrocomparisons. Additionally, there have been certain calls in favour of US antitrust law emulating the competition law of the EU (Khan, 2016; Khan & Vaheesan, 2017). Such calls have been mostly met with scepticism in the US (Manne, 2018, pp. 2–3). By all means, what one would need to appreciate at the level of microcomparisons is that even small differences can have significant consequences (Manne, 2018, p. 2). The microcomparative headings that follow are offered on an indicative basis.

2.3.1 Doctrine

First and foremost, one notes at the microcomparative level differences in doctrinal matters between the antitrust and competition systems of the EU and the US. For instance, we are informed that in the USA the burden of proof on a *prima facie* anticompetitive agreement falls on the shoulders of the defendant, who would have to put forth an efficiency justification, the plaintiffs countering such a point by displaying anticompetitive impact under a rule of reason analysis (Abbott, 2005, p. 4). Of course, Article 101 TFEU would by and large correspond to section 1 of the Sherman Act in the USA. Nonetheless, whereas the European perception of the world in competition matters would put value to the benefit of the consumer, its greatest interest by virtue of Article 101 TFEU would lie in the parties' economic freedom, which, in turn, would place the emphasis of the European approach on block exemptions. Thus, European competition lawyers would traditionally be mainly interested with devising trade agreements that would fall within block exemptions, as opposed to them making competitive sense *per se* to participants (Abbott, 2005, p. 5). However, despite this, the European and

the American approach seem to have come somewhat closer with the changes that were brought about in European competition law in 2004.

2.3.2 Goals & Objectives

Additionally, the goals and objectives in the two systems are not always similar. The European Parliamentary Research Service has rightly concluded in 2014 that, whereas [most] of the goals of both the EU and US competition laws and policies are similar, their approaches differ (European Parliamentary Research Service, 2014, p. 1). It would seem that this has to do with the way these two legal orders have developed their competition and antitrust regulatory frameworks in the first place. Also, it goes without saying that the very constitutional orderings of the EU and the US are quite different. Thus, the US is a federation, whereas the EU is more of an association of otherwise sovereign States, which devolved certain of their constitutional powers to supranational EU bodies, in pursuit of common economic, social and political goals. Finally, the European approach, unlike the American approach, comes much closer to the school of ordoliberalism. Therefore, one notes here the partially different ideological upbringing of the two comparables as the third key reason for their divergences, especially when it comes to the practical enforcement of competition policy.

2.3.3 Precautionary Principle

There is also considerable divergence in the area of the precautionary principle. The situation in US antitrust law would be worthy of re-calibration, in that it has been repeatedly recognised by the US Supreme Court that the American courts face challenges as to recognising between pro-competitive and anticompetitive practices leading to 'false positives', whereas the presumption under EU competition law is that markets are unlikely to function well or self-correct, if left to their own devices (Manne, 2018, p. 3).

2.3.4 Interference of Political Authority in the EU and Absence Thereof in the US

Fundamentally, another difference one notes between the two comparables is that the US approach is a hybrid approach between law and economics, whereas the EU approach is more of a hybrid approach between law and politics. Of course, almost everything is political in the realm of law, unless it would have to be a technocratic exercise that one would prioritise in lawmaking and enforcement processes. A paradox in EU competition law, however, is the fact that, whilst the Commission stands for the clearest and most extensive manifestation of a technocratic body amongst EU institutions, it can act politically in competition law matters. Indeed, the head of the Directorate General for Competition in the Commission is a politician, whose competition policy approach may set a very different tone to the competition policy approach of his/her predecessor, even if

the competition authorities of the Member States themselves would tend to be perceived as highly technocratic (Coppola & Nazzini, 2019, p. 3). In this respect, the US approach can be described as wholly technocratic, whilst the EU approach as a midway approach between political and technocratic considerations.

2.3.5 Both Systems Allow for the Judicial Examination of Matters but their Procedures Differ

Whereas the US model clearly benefits from a greater continuous tradition of resolving competition matters through litigation, both the US and the EU model allow for the adjudication of matters in independent formal courts of justice (Coppola & Nazzini, p. 8). Naturally, relevant procedural rules would differ but that would be the case because of the traditionally different procedural rules one would observe between the US and the Member States of the EU. This divergence of procedural rules would tend to be systemic and historical rather than one which would have developed because of the way antitrust and competition laws in the US and the EU would have developed.

2.3.6 More Expansive Predatory Pricing Approach under EU Law

Also, under current EU law competition and practices, an undertaking would be *ab initio* presumed to have engaged in predatory practices, if it could be simply established that the undertaking has reduced a price below average variable cost, as was shown in the judgment of *AKZO Chemie BV v Commission of the European Communities.* US antitrust law is different in this respect, if not more complex, in that a finding of predatory pricing will be established on the basis that a plaintiff can prove that a company reduced its prices below their incremental costs and there was a probability that the company would recoup initial losses (Fox, 2019, p. 303) as in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*

2.3.7 Economics Analysis in the Enforcement of US Antitrust Law

The US approach in antitrust policy enforcement is one that has been at the centre of reform of policy in the United States. Here one notes the greater alignment of economic theory, empirical evidence and an error-cost analysis to antitrust policy enforcement (Easterbrook, 1984; Manne, 2018, pp. 41-42). Whereas one could argue that by and large EU competition law is compliant with such a school of economics as ordoliberalism, economic analysis *per se* would not necessarily characterise EU competition law enforcement the way such a type of analysis would characterise US antitrust law currently. One would be reminded in this respect of the fact that a person such as the Commissioner for Competition in the EU could actually change the direction of the EU approach in the area of enforcement to a significant extent, something that one does not observe in the US, especially considering that political interferences in the area of enforcement

would be a very rare phenomenon in the States. As has been rightly suggested, the US antitrust structure is 'shaped by the political process through the election of Congress and the President [but it] is nonetheless largely insulated from direct political concerns' (Manne, 2018, p. 44).

2.3.8 Exploitative Abuses Divergence

Another interesting point of divergence between our two comparables would be exploitative abuses. Here the point that has been made in the past is that US law, perhaps because of its greater degree of fidelity to economic liberalism, would be unconcerned with one might consider excessive or exorbitant prices, something that is not the case under EU competition law (Manne, 2018, pp. 54–55). The EU's approach on this might be clearly down to its general allegiance to the school of ordoliberalism, a somewhat more regulated school of economic liberalism than economic liberalism *per se*. In this respect, EU competition law would be deemed more consumer-friendly than US antitrust law would be considered.

3. Conclusion

It was the purpose of this paper to expose on an indicative basis certain similarities and differences between US and EU antitrust law. The legal orders, in which EU competition law and US antitrust law operate, are otherwise at the forefront of the globalisation phenomenon and would subscribe to economic liberalism, with or without digressions to ordoliberalism and economic neoliberalism. The differences between US antitrust law and EU competition law remain significant and this is something one would have to note when comparing these two different worlds, even after the 2004 reform of EU competition law, which harmonised somewhat more the two different schools of thought. Of course, there would be space for further convergence in the future but, equally, one would also have to note here the traditional scepticism of US circles towards the otherwise newer and somewhat less technocratic EU competition law model. After all, the US antitrust approach has served the American legal order well for more than a century. Would that be a reason sufficient enough in itself to keep the US antitrust approach, policy and law divergent from certain of the more advantageous aspects of EU competition law? Probably not. Equally, one could certainly argue that the political interference over competition law and policy in the EU could be the subject matter of competition law reform in Europe. However, one would also have to conclude with a finding which effectively recognises the full authority of legal orders to prescribe their antitrust and competition strategies as they see fit. The ideal of convergence between the US and the EU in the area of antitrust policies and law remains but, considering the

slightly different priorities of these two legal orders in the area, it remains to be seen how close these different realities will come in the future.

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