Competition in the High Technology Sector

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The European Union's approach to competition law and enforcement demonstrates an attitude in the high-tech and media sector, that – due to its anti-competitive and interventionist measures – will harm innovation in this critical sector.

The divergence of EU and US antitrust agencies' approach to competition law implementation and enforcement are most apparent in measures towards the conduct of high-tech firms, where the EU's legalistic approach created a chilling environment for innovation in the sector.

The European Commission's approach to competition in the high-tech sector

This note examines the recent approach of the EU's Directorate General for Competition in the enforcement of competition law in the high-tech and media sectors. We are concerned that the direction of travel of EU competition enforcement in this sector is progressively more and more anti-competitive and interventionist and will harm innovation in this critical sector on a global basis.

The EU is a major regulatory power, and its actions are copied by other jurisdictions. It is possible that interventionist policies in the EU will lead to a race to the bottom where new and emerging high-tech firms will increasingly pull their competitive punches assuming that all jurisdictions will follow the EU's lead. This could have a huge impact on global innovation.

It is therefore useful to look at how these issues have been and are handled by the other major antitrust power, the United States and whether we can learn anything from different approaches to antitrust enforcement in this area.

Differences between the EU and US Approaches

The EC and the US antitrust agencies have diverged considerably in a number of areas of competition law implementation and enforcement. This divergence is particularly great in their approaches to the conduct of high-tech firms.

There have been a number of recent cases, where the European Commission has applied its competition law to the very large tech giants from the US. Starting with the Microsoft case in 2007, and moving through Intel, and now Google, and the state aids cases against Apple and Amazon, the Commission has imposed fines or some sort of sanction on the marquee US tech giants. Meanwhile the reaction of the FTC and DOJ in the US has been much more muted. These cases are exposing fault lines between the US and EU approaches, and between an economics-based approach and a more legalistic one.

The chilling environment for innovation in the EU's high-tech sector is due to its excessive use of doctrines. A typically more interventionist approach also means the EU is keen on finding abuse of dominant position more readily.

With respect to cartels, US and EU law have become broadly more aligned, and procedures, though by no means the same have been drawn closer. It is in the area of single firm conduct that we see some major differences. The EC has a much lower market share threshold than the US above which a firm could be in dangerous territory.

In the US, market share must be quite high (typically seventy per cent or more) before it can possibly be considered to have power over price or a dangerous probability of doing so, but even here, the firm must then do something illegal (i.e. abuse that market power). What the firm does must then be judged on the anti-competitive effect, not, crucially on the intent of the firm.

In the EU, this threshold is much lower, and is compounded by the use of other doctrines such as the collective dominance doctrine, where a small number of firms (2 or 3) can have collective dominance if their market share is combined and exceeds sixty or so per cent. This approach to competition policy has a chilling effect on innovation particularly in the high-tech sector. Under EU law, abuse is also required for there to be an infringement, but the EU has typically had a more interventionist approach, finding abuse of dominant position much more readily based on doctrines like the duty to deal.

A comparative analysis of US antitrust and EU competition law

While antitrust enforcement is a legal process, as in all economic lawmaking, the law must express real economic forces. Competition law has evolved considerably in both of the major antitrust jurisdictions, the EU and the US in the last century, and it is worth recapping how and why these trends have occurred, in order to understand the present-day differences.

In the US, in the early days of competition enforcement, immediately after the passage of the Sherman Act (the US antitrust law), enforcement was focused on breaking up the big trusts, such as Rockefeller's Standard Oil. But, as enforcement evolved, the US adopted a much more legalistic and less economic approach. European competition law arose out of a fear that firms would cartelize European markets and damage the goal of a market integration in Europe.

In the 1960s and 1970s, US antitrust law was used in profoundly anti-competitive ways to help small businesses, holding that small fragmented markets were a public good in and of themselves. US antitrust enforcement diverged quite considerably from the economic goal of promoting consumer welfare. For example, in the *Alcoa* decision, Judge Learned Hand stated that preserving a social landscape of a multitude of smaller players was one of the goals of antitrust, at whatever cost.

In the *Brown Shoe* case, fragmentation of a market by the courts was seen as an end in itself, favouring the smaller producer against larger rivals. The US supreme court stated that the antitrust laws were designed to "protect small, viable locally-owned businesses" even where this "resulted in higher costs." This was eventually recognized by economists like Harold Demsetz who note in a series of papers in the 1960s and early 1970s that we have no theory that suggests that a fragmented market was an intrinsic good, advocating broad regulatory policies that maximized consumer welfare.

Gradually the tide in the US turned towards a much stronger economic underpinning. This economic underpinning has provided the intellectual foundations for the approach of the US antitrust authorities to high tech firms and those operating in the new media economy.

Competition law in the European Union

In the EU, competition law from its inception has been at least as much about promoting EU market integration as it has been about spurring competition. While US antitrust law has, in recent times, been focused on the limited goal of consumer welfare with respect to private behaviour, EU law has always had more objectives, tied to the European project itself.

These differences have manifested themselves in a number of ways, for example, US law is much more tolerant of vertical restraints on competition, such as exclusive distribution arrangements. EU law is much less tolerant of these arrangements because of concerns that distributors would operate against the wider goals of market integration.

The EU competition enforcement system has been more rules-based and legally formalistic than the US one. Since 1995, the EU went through a series of reforms, not unlike the evolution of US antitrust law. In 2001, Mario Monti became the first EU Competition Commissioner to declare that consumer welfare was not only "a" goal of competition policy but "the" goal. So there has been much more convergence between EU and US law between 1995 to 2005.

However recently we have seen some significant differences in particular with respect to cases involving high tech companies and those operating in the new media economy.

References

United States v. Alcoa, U.S. Court of Appeals for the Second Circuit, March 12, 1945. Available at: https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/

Brown Shoe Co., Inc. v. United States, U.S. Supreme Court, June 25, 1962. Available at: https://supreme.justia.com/cases/federal/us/370/294/

Mario Monti, The Future for Competition Policy in the European Union, Address at Merchant Taylor's Hall, London (July 9, 2001). Available at: http://europa.eu/rapid/press-release_SPEECH-01-340_en.pdf