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Contrasting Concepts of Competition
A look at U.S. and European Court Decisions

Both the United States and Europe have been forged and structured on the rule of law. Yet on competition questions - the Supreme Court in America, the Court of Justice in Europe along with the adjacent administrative and judicial departments – have rendered diametrically opposed decisions. Why is this so?

The answer lies mainly in the origins, structure and contrasts of the two courts. In turn this explains their diverging focuses on cases decided on both sides of the Atlantic. That background precisely suggests ways for future reductions of past turbulences.

Roots and Contrasts of the two Courts

Freedom is the birthmark and lynchpin of the American credo. Simultaneously the Declaration of Independence speaks of one people. This has resulted in a seamless national framework, and a Supreme Court with a jurisdiction experience of over two centuries, with the judges appointed regardless of their State of residence.

The European Community's original aims were two:

1. Prevent the recurrence of devastating world wars.
2. Build a continental economy.

Significantly, the preamble of the European Community's treaty calls for "the ever closer union of the peoples of Europe". The 27 nations of Europe are not as closely welded together as are the 50 States of America.

Similarly, the EC Court of Justice has both community and individual country elements: it is a Community institution, yet with a judge from each of the 27 nations. Only half a century young, there is still scaffolding on the structure.

At least seven differences stand out in their respective structures:

1. Justices (including the Chief Justice) in the U.S are appointed by the President – after Senate approval - for life; in Europe for a renewable six year term by their national government, with the judges themselves choosing their President for a renewable three year term.
2. Split decisions in the U.S. are very common. In Europe there may be disagreement in private, but once the decision by majority vote is taken in chambers the public ruling is unanimous with all the judges signing the verdict. There is no dissent - oral or written - no minority opinion. The reason for this is clear: a national government must apply the ruling even if its own judge casts a dissenting vote.
3. The U.S Supreme Court essentially hears cases in final appeal. In only two circumstances does it settle disputes as the original court: litigation involving two or more of the 50 States, or those concerning a foreign dignitary. All others are on appeal from circuit courts. In contrast the European Court is basically the original European jurisdiction for most cases: appeals from the Tribunal of First Instance constitute only circa 10% of its workload.
4. The Supreme Court judges sit as a body whereas in Europe they do so in chambers – 3/5/13 - as well as in plenum.
5. In the U.S. the judges themselves decide (when 4 or more so request) the cases to review (80 – 100 a year) while in Europe the Court must examine all litigation brought before it (over 500 per annum).
6. No fines accompany a U.S. judgment. On the contrary the European Court may adjust the fine on the guilty party.
7. There is no restriction on the type of case the U.S. Supreme Court may review (human rights for example). The European Court of Justice limits itself to cases linked to either the original 1957 Rome Treaty or the later one signed in Maastricht in 1992.

Landmark cases underlying the differing Court viewpoints on both sides of the Atlantic

Silhouette (C 355/96)

In 1995 this Austrian manufacturer of luxury eye glasses shipped a batch to Bulgaria under instructions not to sell them in the then Common Market.

A month after being sent to Sofia they were back in Austria and sold by a discounter (Hartlauer) at greatly reduced prices. Silhouette sued Hartlauer for violating its trademark rights. The case bounced up and down the Austrian courts before being sent to the European Court of Justice for solution. The Court sided with Silhouette because the goods had not been sold previously in the Common Market and Silhouette had not given its consent for Hartlauer to do so.

Levi's Jeans (C414 – 416/99)

In a similar case Levi's refused to sell to Tesco a U.K. supermarket chain its line of 501 Jeans. Nevertheless Tesco obtained batches of these jeans from retailers in the U.S. and Mexico, including from authorised Levi's distributors.

Levi's sued Tesco in England and the U.K. High Court referred the case to the European Court of Justice.

Once again the Court ruled in favour of the manufacturer because it had not given its consent for sales to Tesco, and as implied consent cannot be inferred.

Both these cases emphasize the Court's attachment to Community exhaustion for trademarks.

L'anza / Quality King [523 U.S. 135 (1998)]

At the very same time the Silhouette case was being settled in Europe shift now to the United States. Here, L'anza sold shampoo at a premium price to beauty salons, and hairdressing schools. Simultaneously L'anza sent cases of the shampoo to England, but at much lower prices.

A shipment moved from England to Malta and found its way back to the United States for sale by Quality King in supermarkets at discounted prices.

L'anza sued Quality King for breach of copyright and won both in District Court and Circuit Court. In a unanimous vote, the Supreme Court reversed the decision under the "First Sale" doctrine, whereby the owner no longer controls the trademark after the first sale.

In contrast to the E.U. the U.S. clearly opts for international exhaustion for trademarks.

G E – Honeywell Merger (T210/01)

This merger was accepted by the Department of Justice but refused by the European Commission, decision upheld by the Court of First Instance.

The Department of Justice saw nothing wrong with the merger and cleared it with one proviso: Honeywell had to divest itself of its helicopter engine business. Otherwise the Department of Justice felt competition was not impaired with Pratt & Whitney and Rolls Royce both still strong rivals. For the Department of Justice the key to the clearance was the efficiency generated. In the words of Larry Summers chairman of President Obama's National Economic Council: "The goal is efficiency not competition"

The E.U. looked at it differently. The Court ruled that the merger would have strengthened a dominant position in 3 areas:

- Jet engines for large regional aircraft,
- Jet engines for corporate aircraft, and for,
- Small marine gas turbines.

Moreover, the Court confirmed that G.E's dominance was enhanced through G.E's subsidiaries – G.E Capital, its financial arm and GECAS its leasing arm.

Interestingly the Court threw out the complaint that bundling the sale of G.E engines with Honeywell's avionics and non-avionic products would have led to the creation or strengthening of dominant position: a wider range of products than competition did not validate such a charge.

Three years later in the Microsoft case, the bundling issue was handled differently.

Microsoft (T201/04):

In the U.S Microsoft was found guilty of abusing its monopoly position by bundling its Internet Explorer web browser with its Windows operating system, and ordered

by Judge Jackson in April 2000 to split the company into two parts – one for its operating system, the other for its application business.

The Appellate Court overruled this decision.

In November 2002 the Department of Justice and Microsoft signed a Consent Decree whereby Microsoft was still found guilty - but did not have to be broken into two separate entities.

Under this agreement, Microsoft licensed to competitors, technology and corresponding intellectual property protocols to ensure that non Microsoft server software could interoperate with the Windows operating system. However, Microsoft was not ordered to unbundle from its operating system the Internet Browser, the Media Player, nor any other software product.

In Europe Microsoft contested before the Junior Court the Commission's decision that Microsoft had abused its market power:

1. By restricting interoperability between Windows PC and non Microsoft work group servers.
2. By bundling its Windows Media Player with its Windows operating system.

♦ The Court recognised that as a rule companies are free to choose their business partners. However, in certain specific circumstances a refusal to supply data may constitute abuse of dominant position. In this case, the Court confirmed the position of the Commission that only access to Microsoft's proprietary technology would enable competitors such as IBM or Sun Microsystems to remain in the market. Accordingly, the Court ruled the refusal to share such technology with competitors (i.e. to license the intellectual property rights which protect that technology) had the effect of reinforcing Microsoft's dominant position. In turn this created the risk that competition would be eliminated to the prejudice of customers. The Court therefore ordered Microsoft to licence interoperability technology and the relevant intellectual property rights to other software makers at nominal cost.

♦ While Microsoft argued that bundling Media Player with the Windows operating system was promoting innovation and giving customers an added feature, the Court felt this in fact was depriving clients of choice and endangering effective competition.

Microsoft therefore was also ordered to offer side by side and at the same price two versions of Windows - one with the Media player, the other without it.

Reasons for the contrasts:

Burden of Proof

In the United States if the Justice Department and the intervening agency find an anti-trust violation denied by the accused company, it is for the Justice Department to prove its case.

In Europe, the Commission having a vast amount of discretion in fact gathering and fact interpretation, the Court has a definite tendency to accept the Commission's findings, frequently using the terminology "the Commission has not erred in …" The company must convince the Court that the Commission has indeed erred. Depending on which side of the Atlantic you are, the burden of proof is essentially reversed.

Competition and Intellectual Property

In America the prevailing attitude is that intellectual property and competition spur each other on. Competition triggers innovation, which in turn intensifies competition in the market place, which anew, ignites further breakthroughs.

The European position is more ambiguous. The Microsoft case offers a good example.

In order, allegedly, to promote innovation, Microsoft has been ordered to share its intellectual property with competitors for a nominal fee. While this may perhaps promote the emergence of additional products in the short term, it is moot whether the obligation on successful companies to share their intellectual property with competitors will accelerate research or actually "chloroform" innovation. Corporations may balk at investing time and budgets in projects where their rivals would equally benefit yet at little cost.

Market Analysis

In examining a potential monopoly situation the U.S approach is to try to look at the overall market – not just individual competitors. The reason: potential substitution. Markets are fickle, so an overwhelming lead in one niche may evaporate in case of a demand shift or a new entrant.

The focus in Europe is different and more likely to concentrate on the position of individual competitors and their market share.

There may be structural reasons for this. Perhaps because budget limitations are less stringent in America than in Europe, the Department of Justice with a staff of over 400 for merger reviews, can cast a wider net for its investigations. By comparison, at the time of the Honeywell case, the Commission could only draw on a merger task force of 50. To a great extent this explains why it so frequently relies on data from rivals and customers who often by their formal complaints trigger investigations.

Furthermore, in Europe, language barriers and national market segmentation render broad in-depth inquires more complex, more difficult, and result in less clear cut answers.

Finally, anti-trust is a relatively new phenomenon in Europe – just 50 years old – while the U.S. has cumulative experience reaching back nearly 120 years to the Sherman Anti Trust Act.

Consumer Interest

Consumer Interest is the focal point of anti trust action on both sides of the Atlantic. But if the aim is the same, the approach is different. Broadly speaking the American way is to cure an illegal situation, the European to prevent it.

In the U. S, maintaining competition does not mean maintaining competitors. Efficiency is the key benchmark because that is how the consumer benefits most.

On the contrary the prevailing belief in Europe is that the consumer is best served by having a certain number of competitors. The Commission – and the Court – overturned the G.E – Honeywell merger, almost thwarted the one between Boeing - Mc Donald-Douglas, and reined in the supposed Microsoft tentacles.

There is a clear distrust on the part of the Commission of large companies holding large market shares. The European regulator seems to have difficulty recognizing that such companies have incentives to remain efficient and to deliver innovative products to keep existing customers and win new ones.

Hopefully, the Department of Justice and the European Commission will reach common views on future mergers such as Microsoft/Yahoo if it resurfaces.

Market vs Regulation

Except for the present financial crisis, the fundamental gut feeling in the U.S. is to let market forces prevail. The government is seen as slow, heavy handed, and motivated by politics, not economics.

The invisible hand of the market is the best doctor, the best medicine. Intervene only when there is an anomaly. "If it ain't broke, don't fix it".

Although hard to pin down or prove there is no doubt that the invasive hand of the regulator is more welcomed in Europe. There is a general belief that the government is better equipped and better apt to handle economic questions in general and competitive ones in particular than self adjusting markets.

Closing the Gap

It would be naïve to think conflicting anti-trust view points on each side of the Atlantic will disappear. However by appropriate handling they can be fewer and less divisive. Here are a few suggestions towards that goal.

First, come to grips with the problem early, as is now more often the case since the G E clash. Prompt informal and formal meetings between the protagonists can prevent positions becoming crystallised and frozen. An open minded and fluid environment will make compromise and consensus much easier to achieve.

Second, take into account cultural differences, for example: job security in Europe versus job mobility in America. Others are not always obvious. Yet it is key that nuances, subtleties, and imperceptible variances be mutually integrated.

Third, realize that in so many ways this world is one, but in so many others, is extremely diversified. In essence, this makes mandatory multi-cultural education, international work experience and foreign language skills. It is wise to remember that although French is the working language of the E.U. Courts, clearly English predominates in international business.

Only by following these precepts –and probably others– can understanding replace misunderstanding in global competitive dilemmas ■

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