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Superpowers Across the Sea: An Analysis of Competition Law in the US and EU via the Lens of Cultural, Political and Legal Values

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Abstract

This paper explores the differences in antitrust law between the United States (US) and European Union (EU) through the lens of cultural, political, and legal values. In regards to culture, the US and EU differ with respect to government involvement and public opinion, and such is reflected in each nation's antitrust policies. Within the political realm, party values—namely conservatism or liberalism—and historical legislation—namely the Sherman Act, Clayton Act, Celler-Kefauver Act, and European Community (EC) Treaty—play a key role in the enforcement of antitrust law. Similarly, antitrust is approached differently in the US and EU with respect to legal values. This paper analyzes the cases of *Plessy v. Ferguson* (1896), *Standard Oil Company of New Jersey v. US* (1911), *Brown v. Board of Education*, and *US v. Microsoft* (2011) to demonstrate the varying legal values inherent to the US and EU and how such values will play a role in the future of antitrust in both nations..

Introduction

Throughout history, two global superpowers have made their mark on the field of antitrust. The US—armed with the Sherman Antitrust Act—and EU—armed with Articles 81 and 82 of the EC Treaty—have developed worldly reputations concerning the enforcement of competition law. The Sherman Antitrust Act of 1890 was originally brought before Congress to combat trusts and cartels that had become widespread throughout the country (Cornell, 2010). Historically, the Sherman Act is one of the simplest pieces of legislation to exist. It contains two highly relevant sections in

relation to this paper—the first makes contracts, combinations, and conspiracies in restraint of trade illegal while the second section deems monopolization and attempts to monopolize illegal (Cornell, 2010). In addition, the Clayton Act of 1914 and the Celler-Kefauver Act of 1950 were introduced as additions to the Sherman Act. These amendments and sections will be analyzed later in regards to their significance. In relation to the EU, Articles 81 and 82 of the EC Treaty nearly mirror Sections 1 and 2 of their US counterpart. According to Bumgardner (2005), Article 81 prohibits cartels and other practices that distort competition. Article 82 prohibits the abuse of dominant power in the market (Bumgardner, 2005). Of importance is the fact that the EC Treaty was reformed into the Treaty on the Functioning of the European Union (TFEU). Under this reformation, Articles 81 and 82 became Articles 101 and 102. Essentially, the original language was kept intact, but the new articles allowed for expansion under the original rules, much like the amendments to the Sherman Act (Bumgardner, 2005). These new EU competition articles will be analyzed in further detail throughout the latter portion of this paper.

Furthermore, the inherent values of the US and EU can be critically analyzed in relation to the enforcement of antitrust law. Historically, the US is much more conservative than its rather liberal EU counterpart (Horton & Schmitz, 2002). Thus, one can analyze the US and EU in regards to their inherent cultural, political, and legal values and the effect these values have had on the field of antitrust law.

United States

First, US values can be analyzed from a cultural standpoint. Going back to the late 1700s, America was founded on the notion of freedom and equality (Peritz, 1996). That being said, one must keep in mind that for much of America's history, equality did not mean equal opportunity across the board (Peritz, 1996). The Civil War put a stop to slavery and the Emancipation Proclamation declared African-Americans to be free—but that freedom only extended so far. The landmark case *Plessy v. Ferguson* (1896) created the 'separate but equal' doctrine, stating that so long as public facilities were equal in stature, racial segregation was constitutional. Thus, the Supreme Court, in a 7-1 decision, indicated that although African-Americans had been freed, the courts still had the power to alter that freedom in any given situation (*Plessy v. Ferguson*, 1896). It would be nearly sixty years until the 'separate but equal' doctrine was repealed. In *Brown v. Board of Education* (1954), the Supreme Court delivered a landmark ruling that declared racial segregation to be unconstitutional in schools. The 9-0 decision under the Warren Court helped renew the fundamental ideals of true equality and sparked an era of racial reform in which integration was at the forefront.

In conjunction with this heightened level of equality, the idea of fairness has long played a role in American culture and is still prevalent today (Horton, 2011a). In order for anything to be considered fair, one may believe that every person should have an equal opportunity to succeed. Or one may believe that rules and guidelines should be designed in such a way that limits any one person from having an advantage over the other. In addition, one may reason that reciprocity, giving something to receive something else, should be taken into account. But according to Horton (2011a), the problem with applying these values to antitrust lies in the fact that the Chicago School of economics does not endorse them.

According to Horton (2011a), the Chicago School embraces the ideals of concentration in the marketplace and survival of the fittest. The difficulty in embracing the idea that bigger is better, however, lies in society's general belief in the fundamental values of fairness and ethics as previously detailed. The Chicago School purports that a concentrated marketplace of mergers and combinations results in greater efficiency in which values have no significance. But as Horton (2011a) argues, "Efficiency . . . improves with an increasingly shared set of motivations . . . related to trust, fairness, and cooperation" (p. 500). Stemming from the idea of evolutionary biology, values foster morality, which in turn holds society together. This morality reflects inherent generosity the Chicago School does not account for. As such, the moral values of fairness and reciprocity work to create a free, but fair, market in which innate cultural values are kept intact. In essence, the cultural values of fairness, freedom, and equality are certainly important and can further be applied to the US from a political and legal perspective.

As history has shown time and time again, politics tend to dictate the rigor with which antitrust cases are enforced and the ways in which they are decided (Peritz, 1996). Historically, America is politically conservative but that status alone does not serve as the greatest reflection of Supreme Court decisions in antitrust law. Rather, the best indicator may be public opinion and policy during a given political era. As Justice Oliver Wendell Holmes, Jr. explained, "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind" (Adams & Brock, 2004, p. 104). Adams and Brock (2004) further argue that the ethos of a particular time affect judicial outcomes. Mr. Dooley echoed their argument by saying that "the Supreme Court follows the election returns" (Adams & Brock, 2004, p. 104).

For instance, during Franklin D. Roosevelt's (FDR) time as president, he came to be known as the 'trust buster'. The former president created stricter enforcement of antitrust law during an era that came to be known as the New Deal. Public opinion began to shift rather dramatically and the Supreme Court handed down many more rulings that declared monopolies to be in violation of the Sherman Act (Peritz, 1996). In contrast, the Ronald Reagan era was marked by a severe lack of enforcement of antitrust law. Upon taking office, Reagan declared that he would not be focusing his efforts on the enforcement of such laws because they ran contrary to the concept of *laissez-faire* (Adams & Brock, 2004). As a result, antitrust was not in the political spotlight, and it did not take priority from a public policy standpoint.

The fact of the matter is, therefore, that antitrust enforcement depends largely upon political timing but also upon the language with which laws can be enforced. It is for this reason that two key amendments were added to the original Sherman Act. As mentioned previously, the first was the Clayton Act of 1914. The Clayton Act was introduced in the legislature primarily as a result of the Standard Oil decision. In *Standard Oil* (1911), the Supreme Court found the company to be in violation of the Sherman Act after restricting trade through anticompetitive behavior. As a repercussion, the court ordered the company to be divided into geographically competing parts. However, the court did not anticipate that Standard Oil would merge its subsections to culminate an even greater profit than before. To prevent similar legal loopholes, the Clayton Act came into being, as did another piece of legislation designed to regulate antitrust enforcement. According to Peritz (1996), the Clayton Act and the Federal Trade Commission (FTC) Act sought to expand federal enforcement powers of antitrust laws. Both acts introduced a shift away from the common-law language of 'property' to include 'competition', a word never written in the original Sherman Act. Specifically, Peritz (1996) articulates that the Clayton Act would set stricter guidelines in

regards to specific acts such as price-fixing and unlawful mergers. In addition, the FTC Act would create a new federal agency designed to regulate unfair competitive conduct (Peritz, 1996).

The Celler-Kefauver Act of 1950 also brought about significant political changes to the enforcement of the Sherman Act (Peritz, 1996). Initiated by former Congressmen Emmanuel Celler (D-NY) and Estes Kefauver (D-TN), the Act sought to prevent the abuse of economic power and concentration (Peritz, 1996). As Peritz (1996) states, the Celler-Kefauver Act applied most significantly to Section 7 of the Clayton Act (pp. 196-197). First, the Celler-Kefauver Act closed the assets loophole, which failed to mention the acquisition of assets in restraint of trade; it only mentioned anticompetitive stock acquisitions (Peritz, 1996). Peritz (1996) believes this loophole resulted from political debate concerning the value of competition versus that of a person's property rights. Second, the Celler-Kefauver Act extended Section 7 of the Clayton Act to include all corporate mergers, not only those between competitors in direct competition. Thus, legislation was influenced as a result of public opinion, reflected through the Celler-Kefauver Act, at the time (Peritz, 1996).

Finally, America's legal values can be analyzed with respect to antitrust law and its application. US courts were founded on the value of justice in that the guilty individual is held responsible for the crime or tort committed (Peritz, 1996). The problem with serving justice in the field of antitrust lies in the complexity of the issue and the vigor with which the laws are actively enforced. According to Adams and Brock (2004), antitrust issues are inherently economic but any violations must be dealt with through the complex legal system. Justice is also hard to come by as a result of the level at which antitrust laws are enforced by separate agencies. Clearly, the courts can only try cases which fall within their jurisprudence (Peritz, 1996). If agencies do not pursue probable antitrust violations due to the lengthy process of preparation, litigation, or possible case dismissal, then the courts cannot hand down judgments to any anticompetitive companies (Peritz, 1996).

As Adams and Brock (2004) further state, a third problem within the justice system lies in the courts' interpretation of the facts. Decisions are often influenced by public policy as explained previously. Public policy can further determine how judges interpret the exact same set of facts—that is, whether the court employs a Rule of Reason or per se approach. The Rule of Reason is used when deciding a case based on the totality of the circumstances whereas the per se approach is characterized as a bright-line rule (Peritz, 1996).

Two cases which exemplify the workings of the legal system in both the US and EU are those of the General Electric/Honeywell merger and Microsoft. In 2000, General Electric (GE) announced that it would be acquiring the already-large company of Honeywell. US authorities approved the powerful horizontal merger, saying it would improve competition and ultimately lead to lower prices (Elliot, 2001). The EU's approach, which differed greatly from the US, will be analyzed further in the upcoming EU section.

In regards to *US v. Microsoft* (2001), the US and EU again took very different approaches. In 1998, the Department of Justice and twenty other states brought a lawsuit against Microsoft alleging violation of the Sherman Act (Brinkley & Lohr, 2001). The case was heard under Judge Penfield Jackson who concluded that Microsoft was guilty of monopolization, attempt of monopolization, and tying under Section 2 of the Sherman Act (Brinkley & Lohr, 2001). After hearing testimony of

Microsoft's threats to smaller companies and its plans to tie the software to Internet Explorer, Judge Jackson ordered a remedy in which Microsoft would be split into two entities (Brinkley & Lohr, 2001). Microsoft immediately appealed the judgment and was re-tried in the Court of Appeals. The second court affirmed the monopolization violation but reversed the attempt to monopolize violation and determined that the Rule of Reason, rather than per se, should be applied to the tying violation. For that reason, the Court of Appeals remanded on the tying issue and ordered that remedies be vacated (Brinkley & Lohr, 2001). As Adams and Brock (2004) contend, the Microsoft case dealt heavily with the idea of a 'thrust upon' conundrum. The US insisted that Microsoft had taken anticompetitive steps to maintain its operating systems monopoly, but Microsoft contended that its monopoly was merely the result of superior skill and success in the marketplace (Adams & Brock, 2004). Ultimately, the Microsoft case was settled out of court as a result of the Court of Appeals ruling in 2001 (Brinkley & Lohr, 2001).

In sum, the US operates through inherent cultural, political, and legal values including freedom, equality, conservatism, and justice. As exemplified through the Sherman Act, Clayton Act, and Celler-Kefauver Act, the field of antitrust is influenced at least in part by public opinion, giving rise to varying applications of the law within the justice system. In the final section of this paper, the same three categories encompassing culture, politics, and the law shall be analyzed with respect to the EU.

European Union

First, one can analyze the cultural values of the EU with respect to competition law. According to the European Commission (2007), a Commission study of citizens residing in EU member states showed that the values of peace and environmental protection are of utmost importance. Reportedly, 61% of Europeans surveyed said that peace should be preserved and enforced in European society. Respect for nature was ranked second with 50% of the vote. American-based values such as freedom of speech and entrepreneurship were ranked much lower on the list, receiving 37% and 10% of the vote respectively (European Commission, 2007). With respect to antitrust law in the EU, these values indicate that the consumer matters. Whereas the US is more concerned with promoting competition as a whole, the EU tends to focus more on protecting the specific competitor and consumer involved (Bumgardner, 2005). This cultural foundation leads one to analyze the EU's political values, as well.

While the US is inherently conservative, the EU is inherently liberal. Horton and Schmitz (2002) contend that ordo-liberal Europeans—those who emphasize the importance of free markets—believe that economic freedom is directly related to political freedom. As such, widespread competition is designed to promote economic well-being for consumers and competitors. Indeed, as Horton (2011b) explains in an article on US merger guidelines, the US has recently seemed to craft its antitrust law to converge with that of the EU. He further contends that if the US fails to respond to economic liberalism it will ultimately lose its place as a worldwide leader in antitrust. The EU's motive to protect competitors ties directly into Europeans' views of government involvement. According to the Pew Research Center (2011), a study of American and European values found that nearly 60% of Americans believe the ability to pursue goals without state interference is more important than the state interfering to help the needy. In contrast, three EU member states—Spain, Germany, and France—are in favor of increased government involvement

by a percentage of roughly 65%. This call for increased government involvement can be observed through the EU's antitrust laws, which were strengthened in the adoption of the TFEU in 2009.

As alluded to previously, Articles 81 and 82 of the EC Treaty served as the primary law regulating competition until the treaty was amended through the Treaty of Lisbon (European Union, 2011). The ratification of this treaty brought into effect the TFEU which was partially designed to strengthen competition laws in order to better protect competitors in the market (European Union, 2011). Upon adopting the TFEU, Articles 81 and 82 were amended and became Articles 101 and 102. While the fundamental principles remain the same, the primary difference lies in the expansion of the Articles' language. According to the European Commission (2012a), Article 101 establishes that concerted practices—such as cartels, conspiracies, and consolidations—are illegal when competition is prevented, restricted, or distorted. Such concerted practices that would be considered a violation of Article 101 include direct or indirect price-fixing, controlling or limiting production or investment, sharing the market, deliberately placing competitors at an unfair disadvantage, and unfair contracts (European Commission, 2012a).

Furthermore, Article 102 sets forth the competition legalities concerning the abuse of power. Under Article 102, many of the same concerted practices apply that were detailed in Article 101. According to the European Commission (2012b), the inherent difference lies in the 'abuse of dominant position' clause. Article 102 articulates that such abuse within the internal market shall be deemed incompatible and in violation of the article so long as trade could be restricted between EU member states.

Finally, the EU can be analyzed from a legal perspective. Much like the US, the EU courts are concerned primarily with serving justice. The primary difference lies in the vigor with which the two nations enforce competition law. While US antitrust laws are typically considered more powerful in nature, the EU has enforced its competition laws much more vigorously in practice (Bumgardner, 2005). This can be regarded as both inherently good and bad. From the EU's perspective, strict enforcement of antitrust laws helps protect the competitor. But the EU also takes much greater steps than the US in finding anticompetitive behavior in the first place. Such steps, which included dawn raids of public offices, were heavily enforced during Mario Monti's term as Competition Commissioner—the officer responsible for overseeing competition within the European Union. Under the law, EU officials could raid business offices if they had a reasonable suspicion that anticompetitive behavior was taking place (Bumgardner, 2005).

The EU's aggressive approach to the enforcement of competition law can be analyzed with respect to two cases mentioned previously—the GE/Honeywell merger and Microsoft. Despite the fact that the US had already approved the merger between the two US-based companies, the EU blocked it. According to Horton and Schmitz (2002), this indicates that the Chicago School's high regard for efficiency has failed to catch on in the EU. Instead, the EU disregarded GE/Honeywell's argument in favor of efficiency because EU competition law is more concerned with the effect on competitors in the long run, not any usefulness such a merger may have in the short run (Horton & Schmitz, 2002).

Finally, the Microsoft case lends itself to key legal differences between the US and EU. As explained previously, the US ultimately settled the Microsoft case out of court after the initial

Helland: Superpowers Across the Sea: An Analysis of Competition Law in the finding of fault was considerably reversed. Despite this landmark US decision, the EU found Microsoft to be in violation of competition law. Specifically, the EU determined that Microsoft had not complied with a 2009 court order to allow consumers a choice of browsers. As a result, experts believe that the EU will harshly penalize Microsoft in order to use it as an example for other non-compliant companies (T. J. Horton, personal communication, September 27, 2012). Although Microsoft blamed the failure of compliance on a technical problem, it is likely that the EU will impose hefty fines and strict orders (T. J. Horton, personal communication, October 24, 2012). As of September 2012, Microsoft had already been fined more than \$1.25 billion for past failures to comply. As a result of its non-compliance with the 2009 order, Microsoft could be fined up to 10% of its yearly revenue, totaling \$7.4 billion (T. J. Horton, personal communication, September 27, 2012). This legal difference between the US and EU is substantial as it indicates that the EU pursues antitrust justice more aggressively and often with greater impositions than its US counterpart.

Conclusion

In conclusion, the US and EU differ in regards to the application of their cultural, political, and legal values to the field of antitrust. While the US values independence, fairness, and overall equality, the EU values peace and government oversight. Politically, the US leans toward the conservative side while the EU tends to be more liberal. Legally, both nations are concerned with serving justice, but historically the EU has done so more aggressively. The application of such differing values helps to explain the two approaches in trying antitrust cases. Furthermore, by analyzing such inherent values one may understand the fundamental differences in the evolving world of antitrust and work to strengthen it in such a way that betters society while preserving competition. If the US intends to remain a global superpower in law and politics, it must continue to shift its antitrust policy to more clearly align with that of the EU. Doing so will forge a more compatible alliance between the two nations and create an antitrust policy free of loopholes, adverse political and cultural influences. Indeed, if the US and EU can create a global antitrust agenda, both will prosper in the legal realm while remaining in the forefront of international leadership. But, as with most policies, only time will tell whether either converges with the other.

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