

EU Competition Policy since 1990: How Substantial Is Convergence towards U.S. Antitrust?

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Abstract

In spite of the evidence of strong influence on the incorporation of policy provisions from the U.S. antitrust into the recent competition policy reforms in the European Union (EU), few considerable attempts have been made to analyze the influence of U.S. antitrust on EU competition policy in anticartel enforcement policies, antimonopoly regulation, and the regulation of mergers and acquisitions. The purpose of this article is to fill the gap by attempting to link EU competition policy with U.S. antitrust, provide a critical overview of the most important elements of European competition policy reforms, carry out a comparative analysis between EU and U.S. competition policies, detect convergence or divergence, and account for the degree of convergence and for the relevant mechanisms triggering convergence. The main focus is on the analysis of anticartel enforcement policy, antimonopoly policy, and merger control.

Keywords: EU competition policy, U.S. antitrust, convergence, regulation 1/2003, anticartel enforcement, leniency notice, abuse of market dominance, merger control, merger regulation 139/2004

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Competition policy plays a fundamental role in the organization of domestic market economics (Damro, 2006). The objectives of competition policy are to: (a) establish a competitive order to safeguard economic freedom; (b) maintain a competitive order to boost economic efficiency and technological and economic progress; (c) maintain free and fair competition and prohibit restrictive, illegal, and clandestine practices and unfair advantages through government subsidies; and (d) support small and medium size enterprises and a decentralized structure of supply (Borbély, 2006).

Competition policy has had a distinctive place in the foundation of the European Economic Community (EEC) and the European Union (EU). The central concept behind the EEC was Europe as a single economic unit: a free trade area that would gradually develop into the Single Market. In order to enhance the ability of the EEC to develop the Single Market, competition policy principles were laid down in the Treaty of Rome in 1958, in Articles 81-89 of the Treaty of the European Union (TEU), and in Articles 101-109 of the Treaty on the Functioning of the European Union (TFEU). Monopolies, cartels, vertical mergers, and other restrictive business practices and types of anticompetitive behavior were seen as threats to the Single Market (Budzinski, 2007; Wurmnest, 2008).

In 2004, the year that saw the most significant enlargement of the European Union together with the most significant reforms of the European competition policy since the Treaty of Rome, Regulation 1/2003 came into force, succeeding Regulation 17/1962, the first supranational competition policy regulation in the Community.

However, adoption of Regulation 1/2003 was not the only important reform that has shaped the European competition policy. Significant competition policy reforms were instigated from the early 1990s well into the late 2000s. The European Commission achieved the following:

1. It revised and reintroduced some of the early competition rules that prohibited restrictive practices, cartels, and monopolies in Articles 81 to 89 of the TEU and later in Articles 101 to 109 of the TFEU;
2. It decentralized its powers through sharing its responsibilities with the member states' National Competition Authorities (NCAs) under the European Competition Network (ECN), a complex two-level jurisdictional entity;
3. It modernized European anticartel regulation by introducing the Leniency Notice in 1996, 2002, and 2006 and shifting the mode of regulation from ex ante authorization to ex post control;
4. It imposed more substantial fines for breaching competition rules;
5. It introduced initiatives to increase the role of private antitrust enforcement;
6. It revised Merger Regulation 4064/89 into Merger Regulation 139/2004 and adopted the Commission's Notice;
7. It incorporated a more economic approach into the assessment of anticompetitive behavior in order to increase the role of economics in competition law, as opposed to a legalistic approach.

These reforms signal a plan for the transformation of EU competition policy to a considerable extent through the incorporation of some successful competition policy principles, provisions, and traditions of U.S. antitrust policies (Kovacic, 2008; Montalban, Ramírez-Pérez, & Smith, 2009). Few attempts have been made, however, to analyze the influence of U.S. antitrust on EU competition policy in anticartel enforcement policies, antimonopoly regulation, and the regulation of mergers and acquisitions.

Objectives

The purpose of this article is to fill the gap by attempting to link EU competition policy with U.S. antitrust, provide a critical overview of the most important elements of European competition policy reforms, carry out a comparative analysis between EU and U.S. competition policies, detect convergence or divergence, and account for the degree of convergence and for the relevant mechanisms triggering convergence. The following research question encapsulates these objectives: How substantial is convergence between the competition control models and competition law enforcement systems utilized in the EU and the United States of America?

The goals of U.S. antitrust law are to promote competitive markets that drive down consumer prices whereas the goals and purposes of EU competition law incorporate a larger variety of goals, most notably strengthening economic and social cohesion, integrating European markets, creating the Single Market, and promoting balanced and sustainable development of economic activities (Bagchi, 2005; Budzinski, 2007). Despite these differences, competition policy objectives in these two political jurisdictions are still somewhat similar, which makes it legitimate to compare competition policy content and competition policy application and detect policy convergence or divergence.

EU competition policy is centered on four core pillars: anticartel enforcement, antimonopoly enforcement, regulation of mergers, takeovers, and acquisitions, and state aid. The focus of this article is on the analysis of three pillars, namely anticartel enforcement policies, antimonopoly regulation, and regulation of mergers and acquisitions in the EU, and of their corresponding pillars in the United States of America. State aid, a unique governance structure for the EU, is not included in the analysis.

Framework

Policy Convergence

Policy convergence is the development of similar, sometimes identical, policy objectives, instruments, settings, characteristics, structures, processes, and performances across a given set of political and economic jurisdictions within a given period of time towards a common point, regardless of the causal processes (Knill,

2005). Governments and international organizations are primary actors that set regulatory standards and determine the extent of policy convergence (Drezner, 2005).

Related concepts: policy transfer, policy diffusion, and isomorphism

Policy convergence is sometimes erroneously equated with related concepts such as policy transfer, policy diffusion, and isomorphism. Research studies on policy transfer and policy diffusion are focused on processes rather than results. They share the same empirical focus, namely policy characteristics, with policy convergence, but they differ in terms of their analytical focus. Research on policy convergence focuses on the explanation of changes in policy similarity over time whereas research on policy transfer investigates the content and process of policy transfer, and research on policy diffusion focuses on the explanation of the adoption of patterns over time. Studies on isomorphism share the same analytical focus with studies on policy convergence, namely changes in policy similarity over time. They differ in terms of the empirical focus: studies on policy convergence concentrate on policy characteristics while studies on isomorphism concentrate on mechanisms through which organizations, institutional structures, and cultures become similar over time (Knill, 2005). The focus of this article is on the analysis of competition policy convergence, hence, on the analysis of policy characteristics through tracing changes in policy similarity over time. Policy transfer, policy diffusion, and isomorphism are not classified as convergence in this article.

Policy characteristics, policy outputs, and policy outcomes

Policy convergence studies typically face the issue of the insufficient level of precision attached to the policy dimension under investigation, which suggests that policy characteristics, namely policy goals, policy content, policy application, and policy results need to be distinguished (Heichel, Pape, & Sommerer, 2005). Table 1 shows that policy goals, policy content, and policy application can be grouped into one category: policy outputs. Policy results belong to another category: policy outcomes.

Table 1
Policy Outputs and Outcomes

Policy outputs	Policy outcomes
Policy goals (policy objectives)	Policy results (actual results of policy implementation)
Policy content (rules, regulations and laws)	
Policy application (application, administration and enforcement tools and mechanisms)	

Depending on interpretation and the value added to the concept, it is legitimate to assert that policy convergence is found within any of the following four policy characteristics, or within a combination of some, though not necessarily all four: (a) policy goals (policy outputs), a constellation of objectives for tackling policy problems; (b) policy content (policy outputs), a set of reactions to policy issues by the state, which includes rules, regulations, and laws; (c) policy application (policy outputs), mechanisms and tools available to apply, administer, and enforce regulatory, administrative, or judicial policy; and (d) policy results (policy outcomes), actual results of policy implementation (Bennett, 1991; Dolowitz & Marsh, 1996).

In order to detect convergence, it is best to compare policy outputs rather than policy outcomes because policy outputs are directly linked to causal mechanisms of convergence, in contrast to policy outcomes (Holzinger & Knill, 2005). In this article, competition policy convergence is thus measured from the analysis of policy outputs rather than policy outcomes.

As Table 2 shows, competition policy content and competition policy application are analyzed in each of the following three pillars of competition policy: anticartel policy, antimonopoly policy, and regulation of mergers, takeovers, and acquisitions because there are notable differences in policy content and application between these three clusters of variables. Competition policy content and competition policy application are analyzed indirectly, through the prism of variables in a cluster. Competition policy goals and competition policy outcomes are not analyzed in this article.

Table 2
Competition Policy Outputs and Outcomes

Cluster of variables	Competition policy content (outputs)	Competition policy application (outputs)	Competition policy goals (outputs)	Competition policy results (outcomes)
Anticartel policy	(+)	(+)	(-)	(-)
Antimonopoly policy	(+)	(+)		
Merger control	(+)	(+)		

Degree of policy convergence

In order to obtain a consistent profile of similarity change and therefore to measure policy convergence, the indicator of degree of convergence needs to be applied. Degree of convergence is typically measured by comparing policies across the given countries: policy outputs (the actual policies and programs adopted by the state) and policy outcomes (the results of policies and programs adopted by the state) need to be clearly distinguished. However, preference is given to comparing policy outputs because they are directly linked to causal mechanisms of convergence, in contrast to policy outcomes (Holzinger & Knill, 2005). In this article, the degree of competition policy convergence is thus measured from the analysis of competition policy outputs (competition policy content and competition policy application).

Framework for the Analysis of Mechanisms of Policy Convergence

Conditions, factors, and causes of convergent policy changes are rooted in international, economic, or ideational factors whereas the cases for divergence or limited convergence are rooted in institutional factors (Heichel et al., 2005). However, knowledge deficit, inconsistent literature, imprecise interpretation, and lack of empirical findings complicate the research on conditions, factors, and causes of policy convergence and similar concepts across political jurisdictions. One of the most viable and testable means to summarize conditions, factors, and causes of convergence beyond the broader and imprecise international, economic, and ideational factors is through grouping them into two broad categories: (a) causal mechanisms (independent response to problems, policy imposition, international harmonization, regulatory competition, and transnational communication), which activate the convergent policy changes; and (b) facilitating factors (cultural, institutional, and socioeconomic similarities of the given political systems), which affect these mechanisms (Knill, 2005). Facilitating factors, which are less testable than causal mechanisms, have not been included in the analysis of mechanisms of policy convergence in this article.

Independent response to problems

The mechanism of independent responses to problems is explained as a result of similar but independent responses of political jurisdictions to parallel problems (Holzinger & Knill, 2005).

Policy imposition

The mechanism of policy imposition (penetration) can take either a noncoercive form of voluntary international agreements, which is most often classified as a different causal mechanism, namely transnational communication, or a coercive form of agreements, whereby organizations, institutions, and governments exert formal and informal pressures over dependent organizations, institutions, and governments, forcing them to adopt policy patterns and programs in exchange for subsidies, loans, and other kinds of rewards and privileges (conditionality), or, in case of asymmetry of power, through legally binding agreements (Bennett, 1991; Holzinger & Knill, 2005). Thus, in this article, coercive forms of agreements, rather than voluntary international agreements, are classified as the mechanism of policy imposition (penetration) whereas voluntary agreements are classified as a submechanism of transnational communication (international policy promotion).

International harmonization

The mechanism of international harmonization leads to policy convergence if the governments, organizations, and institutions involved are legally obliged to comply with international or supranational agreements and codes of conduct imposed by governments or international organizations through (coercive) market power (Bennett, 1991; Holzinger & Knill, 2005). For the sake of precision, it is sometimes suggested to classify international harmonization as a submechanism of policy imposition because the core moving force behind it is the imposition of policies through coercive power.

Regulatory competition

The mechanism of regulatory competition triggers compliance as countries facing competitive pressures mutually adjust their policies in order to remove the obstacles to maintaining and improving competitiveness of their markets and to lower their regulatory standards (Drezner, 2005; Holzinger & Knill, 2005).

Transnational communication

In contrast to independent response to problems, imposition of policies, international harmonization, and regulatory competition, the mechanism of transnational communication is solely based on communication between countries and on information exchange. It is further divided into the following submechanisms: lesson-drawing¹; transnational problem-solving²; policy emulation³; and international policy promotion (Holzinger & Knill, 2005).

Framework for the Analysis of Policy Convergence

The analysis of the degree of competition policy convergence between the United States of America and the EU over a given period of time has been based on the comparative analysis of competition policy in the United States of America and the EU in 2008, the reference point towards which convergence in the EU since 1990 has progressed. The framework described below has been proved viable for the analysis of the extent of competition policy similarity. Consequently, it has been partly integrated into the framework of the article to provide a more precise measurement of competition policy convergence.

Van Waarden and Drahos (2002) have suggested that the comparative analysis of regulatory frameworks between several political jurisdictions should be carried out on several clusters of variables (competition policy goals, application of competition policy, scope of competition policy, treatment of horizontal agreements, treatment of vertical agreements, treatment of abuse of dominant position, and merger control) over a given period of time. This framework, originally designed for a comparative analysis between the nation states within the EU, has been shortened and adjusted to the framework of the article for the comparative analysis of the EU and the U.S. competition policy in 2008, and of EU competition policy in 1990; it has been expanded from the theoretical framework explained in the previous sections of the article.

In this article, competition policy content and competition policy application are analyzed in each of the following three pillars of competition policy: anticartel policy, antimonopoly policy, and regulation of mergers and acquisitions because there are notable differences in policy content and application between these three pillars. However, competition policy content and competition policy application are analyzed indirectly and not explicitly. In other words, they are analyzed through the prism of certain variables within a cluster.

The cluster of anticartel policy includes four variables: setup of anticartel policy, system of anticartel law enforcement, mode of regulation, and leniency program.

The cluster of antimonopoly policy entails three variables: setup of antimonopoly policy, assessment of abuse of dominant position, and system of antimonopoly law enforcement. The cluster of merger control policy entails three variables: setup of merger policy, assessment of mergers, and system of merger law enforcement. Table 3 shows these relationships.

Table 3
Framework for Convergence Analysis

Cluster of variables	Variable	Competition policy content	Competition policy application
Anticartel policy	<i>Setup of anticartel policy</i>	(-)	(+)
	<i>System of anticartel law enforcement</i>	(+)	(+)
	<i>Mode of regulation</i>	(+)	(+)
	<i>Leniency program</i>	(+)	(+)
Antimonopoly policy	<i>Setup of antimonopoly policy</i>	(-)	(+)
	<i>Assessment of abuse of dominant position</i>	(+)	(-)
	<i>System of antimonopoly law enforcement</i>	(+)	(+)
Merger control policy	<i>Setup of merger policy</i>	(-)	(+)
	<i>Assessment of mergers</i>	(+)	(-)
	<i>System of merger law enforcement</i>	(+)	(+)

Each cluster of variables contains, besides the analysis of variables and the analysis of the degree of competition policy convergence in these variables, the analysis of the corresponding mechanism(s) of policy convergence that triggered convergence in a given cluster. The degree of competition policy convergence is assessed in each variable according to the following scale: no convergence, insignificant (limited) convergence, significant convergence, and very substantial convergence.

Analysis

Anticartel Policy

Cartels are a form of illegal activity involving a coordinated effort of several parties wishing to restrict competition by means of price fixing, market shares allocation, creating barriers for entry, and so on (Spagnolo, 2008). Collusions increase the equilibrium price at which the market is allocated and give rise to a loss of efficiency and welfare (Brisset & Thomas, 2004). Both the EU and the United States of America emphasize the importance of vigorous cartel busting for fair competition.

According to the principal-agent theory, in order to avoid undesirable political intervention, competition authorities in the United States of America and the EU seek convergence in areas under their discretionary authority (Damro, 2011). Political intervention is the result of inactivity and/or ineffectiveness of competition authorities in tackling domestic issues. The undesirability of political intervention motivates regulators to improve their performance by analyzing positive and negative lessons from other competition policy models, sharing expertise, and working on solutions to policy issues with other specialists. One of the most efficient means to attain these goals has been through transnational communication.

Transnational communication and cooperation between the United States of America and the EU in the framework of anticartel policy is less evident than in the framework of merger control policy, owing to a number of significant impediments for information exchange pertaining to cartels and monopolies in the EU and very few bilateral agreements, as opposed to a great number of multilateral agreements within the Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN), and the World Trade Organization (WTO) (Schaub, 2002). The 1995 OECD Recommendation on Anticompetitive Practices Affecting Trade, the 1998 OECD Recommendation Concerning Effective Action Against Hardcore Cartels, and the Agreement 95/145/EC between the European Communities and the U.S. Government regarding the application of their competition laws, adopted in 1991 and implemented in 1995, are some of the most important guidelines and agreements creating a platform for competition authorities from the United States of America and the EU for information sharing about cases, policy dialogue concerning best practices, and coordination of investigations in the field of anticartel policy (Bhattacharjea, 2006; Davison & Johnson, 2002). Despite the fact that convergence is very hard to trace and attest, especially in multilateral agreements, transnational communication can be singled out as a core convergence mechanism.

The setup of anticartel policy

The setup of anticartel policy can be separated into four stages: first, suspected cartel members are put under examination; second, suspected cartel members are put under investigation; third, if a cartel is detected, administrative or criminal sanctions are imposed on the members of the collusive agreement; fourth, cartel members can file an appeal to courts.

The setup of the EU anticartel policy on the Community level under Regulation 17/1962 consisted of three tiers. On the first tier, which encompassed the first two stages, the Directorate-General IV put prospective cartel members under investigation on suspicion of breaching Article 81 TEC. On the second tier, if a cartel had been revealed, the Commission imposed administrative fines. On the third tier, cartel members could submit an appeal to the Court of First Instance. On the supranational level, Regulation 1/2003 did not change the setup of the EU anticartel policy. The Directorate-General for Competition (DG Comp) and the General Court replaced their respective predecessors (not under Regulation 1/2003).

On the national level, Regulation 1/2003 decentralized anticartel enforcement: Enforcement competence is shared between the Commission and NCAs, which embodies the system of parallel law enforcement and even case allocation (McGowan, 2009). NCAs have become obliged to apply Article 101 TFEU and to enforce EU competition law under the principle of direct effect along with enforcement of national competition laws. The European Competition Network was created to support partnership between DG Comp and NCAs, coordinate information exchange and cooperation vertically and horizontally, and distribute cases to the relevant competition authorities.⁴

The setup of the U.S. anticartel system on the federal level is very similar to that of the EU, with the notable exception of the roles of the main actors in law enforcement and the regulation of fines. The system encompasses three tiers. The Department of Justice (DoJ) and the Federal Trade Commission (FTC) are the main actors on the first tier, which combines the first two stages. State attorneys general are also eligible to start investigations. On the second tier, in case substantial evidence of breaching the Sherman Act is found, the DoJ or the FTC should file suits to the Supreme Court. State attorneys may also do so to enforce state and federal anticartel laws. On the third tier, cartel members may submit an appeal to the U.S. Court of Appeal and ultimately to the Supreme Court.

Despite the noticeable similarities between the two setups, convergence cannot be detected because it presupposes changes in similarity over a given period of time.

The system of anticartel law enforcement

The United States of America and the EU utilize significantly different competition law enforcement systems. The general description below pertains to anticartel, antimonopoly, and merger control enforcement.

The common law model is characteristic of the United States of America: Courts play the main role in interpreting anticompetitive behavior, and legal cases and judicial precedence play the most important role in competition law enforcement. Competition authorities are unable to impose sanctions or inflict penalties. Cases are to be litigated before courts, and judicial authorities make final decisions. The competition law enforcement system leaves room for initiative from private litigators, who are encouraged to initiate legal proceedings against companies in order to receive compensation for damage. In addition to citizens' initiatives, criminal penalties and leniency programs make competition policy law enforcement practices very successful in the United States of America (Wigger & Nölke, 2007). The legal framework within which the competition law is enforced in the common law model is the adversarial system (Spagnolo, 2008).

The civil law model is characteristic of the EU: Competition authorities, rather than courts, play the main role in interpreting anticompetitive behavior, investigating, and decision-making in competition law enforcement. Judicial precedence and private litigation do not play as significant role as in the United States of America. A clause-centric approach prevails in law enforcement, which favors general and somewhat abstract legislation supported by detailed regulatory frameworks (Wigger & Nölke, 2007). The legal framework within which competition law is being enforced is the administrative (inquisitorial) system, whereby public authorities have both prosecutorial and judicial power, which is, however, subject to appeal in courts (Spagnolo, 2008).

The system of anticartel law enforcement in the EU has not changed since 1990. A minor change occurred where the Commission started to encourage private antitrust enforcement and create incentives for private

individuals to turn to the courts to file complaints and start legal proceedings against companies that are suspected of cartel membership. The motive behind such actions should be the possibility of obtaining an injunctive relief, which entitles victims to claim a minimum of full compensation for the loss suffered. The Commission has expressed the intention to foster damage claims for infringements of the anticartel rules in order to better enforce the competition law on the one hand, and to make the procedure of recovering losses from the infringer easier for consumers and companies, on the other hand (Marra & Sarra, 2010).

In reality, however, restrictions on potential compensation for the losses suffered, the high fees for legal services, lengthy legal procedures, the requirement to provide very substantial proof of losses, and, most importantly, the incompleteness and vagueness of EU competition law create serious disincentives to bring private damage claims to the courts. Moreover, cartels are revealed by means of thorough economic analysis and extensive investigations to estimate the costs and benefits of such behavior. Thus, the burden of private litigation has been put on private plaintiffs, but the appropriate conditions have not been created (Peyer, 2011).

A very important aspect has not been addressed by the reforms. Cartelization is treated as a civil rather than a criminal offence on the EU level, which is in contrast not only to jurisdictions of certain NCAs⁵, but also to U.S. jurisdiction. Cartelization is a criminal offence in the United States of America: Huge fines and prison sentences of up to 10 years can be levied on individuals (Hammond, 2009; Morgan, 2009). The system of anticartel enforcement in the EU has thus not experienced any convergence towards the United States of America.

Mode of regulation

The ex ante notification procedure borrowed from “German law and thinking” was incorporated into Regulation 17/1962 (Wilks, 2005, p. 433). The Commission enjoyed extensive procedural powers over the right to grant permission or exemptions from the prohibition: Companies were obliged to notify the Commission of any agreements that could potentially affect trade between the member states (dominance and concentration) and to obtain official approval for contractual agreements or exemption from prohibition. The approval decision by the Commission made any commercial agreements falling under Article 81(1) TEU and exemption decisions⁶ under Article 81(3) TEU immune from legal prosecution. Companies were provided with strong incentives to notify the Commission of any business agreement falling under Article 81(1) TEU or under Article 81(3) TEU if they sought for an exemption in order to secure their ventures from legal prosecution (McGowan, 2005).

The bureaucratic ex ante procedure immediately created a substantial backlog of notifications. Uncoordinated prioritization of cases, costly bureaucratic procedures, insufficient manpower of Directorate-General IV, diversion of time and resources away from the most serious infringements, the state of limbo the companies had been left in, changing economic circumstances, enlargement of the EU, and pressure from the epistemic community of competition policy specialists all instigated abolition of the notification procedure.

Germany’s opposition to the abolition was particularly strong, because the competition system in the EC was to be changed and would no longer be based on Germany’s oldest established competition regime in Europe, the principles of which had exerted a significant influence over the evolution of competition policy in the Community since the 1960s (Kassim & Wright, 2009). Disregarding strong opposition from Germany, the Commission has replaced ex ante authorization by ex post control under Regulation 1/2003, bringing competition control closer to U.S. regulatory traditions (Budzinski & Christiansen, 2005).

Regulation 1/2003 modified the procedure for detecting anticompetitive practices in the EU: Mandatory ex ante notification was replaced by ex post control, while the powers of NCAs and courts were strengthened by decentralizing the enforcement of some competition rules to member states, generally in cases where the rules on the national level were stricter than the rules on the EU level (Loss, Malavolti-Grimal, Verge, & Berges-Sennou, 2008). Market players have become solely responsible for analyzing the effects of their conduct on the matter of infringement of Article 101(1) TFEU and on the matter of exemption under Article 101(3) TFEU. Moreover, companies have become responsible for monitoring other market players’ activities, including their suppliers, distributors, and competitors and reporting to the courts on any matters of infringement of EU competition law.

DG Comp has retained the power of investigation of deals suspected of breaching Article 101(1) TFEU and the power to codify fines and impose them on companies found to be breaching Article 101(1) TFEU. It has also been granted the power to interview representatives from companies, to investigate a particular

sector in the economy, and to search business and domestic premises under Article 105 TFEU (dawn raids). Significant convergence towards U.S. regulatory traditions in terms of mode of regulation has been detected.

*Leniency program*⁷

The DoJ Antitrust Division introduced the first leniency program, Amnesty Program, in 1978. The program was much less successful than the Corporate Leniency Program introduced in 1993; it was also much less generous in terms of reductions in sanctions for reporting companies and possibilities of awarding leniency when companies under investigation decided to report (Spagnolo, 2008). Moreover, the legislation had low transparency, which gave the Antitrust Division much discretion in its interpretation and implementation; in addition, amnesty was not granted automatically to any applicant who came forward first, which posed even more uncertainty problems to prospective leniency applicants.

In 1993, the 1978 Amnesty Program was revised into the Corporate Leniency Program. Section A automatically grants full immunity from legal prosecution to leniency applicants⁸ if, at the time the company self-reports, the Antitrust Division has not received information about the misconduct from other sources and if the company is the first one from the cartel to come forward. Moreover, the company should terminate its activities within a collusive agreement upon reporting of the misconduct, fully cooperate with the Antitrust Division throughout the investigation, provide recovery for damages to the aggrieved parties where possible, prove that it has not coerced the other parties to participate or remain in the collusive agreement and that it has not been the originator of the cartel, and prove that the leniency application is a corporate act as opposed to an individual leniency application.

Hence, it is only the companies that come forward first, and their directors, officers, and employees who are aware of the illegal collusion, that can be granted immunity from legal prosecution, in the event that they were not the originators of a collusive agreement. The combination of rigid rules for leniency applicants, guaranteed amnesty for the companies to self-report first, the ability of the Antitrust Division to obtain higher sanctions for misconduct from courts, and well-advertised penalties increased the attractiveness of leniency programs (Spagnolo, 2008). The Corporate Leniency Program and the Individual Leniency Program, which was introduced in 1994 to complement the corporate policy by offering individual leniency applicants the possibility of receiving amnesty independently of the company for fear of losing financially or in terms of their personal freedom, have yielded considerable success in cartel law enforcement. Success is evidenced in the drastic increase in leniency applications, imposed corporate and individual fines, criminal penalties, and increased deterrence. These programs are considered to have been “at the forefront of cartel enforcement efforts” (Stephan, 2008, p. 538).

However, despite the high numbers of self-reporting cartel members, the prospect of treble-damage lawsuits dissuaded many potential leniency applicants. Plaintiffs could claim as much as triple compensation of damages incurred under such liability requirements. Moreover, leniency applicants could be liable not only for triple compensation of damages suffered by their customers but also for triple compensation of damages of the other cartel members’ customers under joint liability. In 2004, in order to tackle the concerns of prospective leniency applicants and further increase the rate of applications, the Criminal Penalty Enhancement and Reform Act was passed. The Act limited the total private civil liability of leniency applicants who come forward first, including individual applicants, to actual damages incurred, plus the costs of legal services and interest, and removed joint liability for damages. It also increased the potential individual liability, including joint liability, for the participants of a collusive agreement that are not the first to come forward to obtain amnesty (Hinloopen, 2003; Spagnolo, 2008). In this way, the Antitrust Division demonstrated that leniency programs, if properly implemented, could successfully uncover cartels, enhance deterrence, and increase the rate of punishment of infringers.

In 1996, the Commission, encouraged by the successful implementation of the Corporate Leniency Program, adopted the 1996 Commission Notice on the nonimposition or reduction of fines in cartel cases, commonly referred to as the 1996 Leniency Notice, to catch up with the United States of America. The effectiveness of the 1996 Leniency Notice, however, was questionable because of the following reasons:

1. The legislation had an even lower level of transparency, certainty, and predictability than the U.S. 1978 Amnesty Program;

2. Leniency applicants could be granted amnesty from legal prosecution only if the Commission had not already opened an investigation and, when granted amnesty, leniency applicants were required to immediately cease their participation in the collusion, which could hamper the potential investigation into the cartel⁹;
3. By the time the international cartels were disclosed or the leniency application was made, most had already failed or ceased operating;
4. Fines for breaching the competition rules were rather low;
5. The most important cartel investigations concerned international infringements, investigations of which were mostly prompted by or even mirrored investigations by the Antitrust Division (Brisset & Thomas, 2004; Hinloopen, 2003; Stephan, 2008).

The flaws of the 1996 Leniency Notice instigated the Commission to revise and reform the Leniency Program in 2002 and in 2006. In 2002, the Commission Notice on immunity from fines and reduction of fines in cartel cases, the 2002 Leniency Notice, introduced the following measures:¹⁰

1. Full, almost automatic exemption from fines for the first company to report the cartel before the investigation, on condition that the company provided sufficient evidence on the cartel (enough for a sustainable conviction), fully cooperated with DG Comp, ended its involvement in the infringement upon the time of submission of leniency application, and had not coerced other companies to join the cartel or to remain in it;
2. Full, almost automatic exemption from fines for the first company to elicit the cartel after the investigation and reduced fines for subsequent companies, on condition that they provided sufficient information in order for DG Comp to be able to find an infringement, fully cooperated with DG Comp, ended its involvement in the infringement upon the time of submission of leniency application, and had not coerced other companies to join the cartel or to remain in it;
3. More substantial fines for breaching anticartel laws;
4. Reduction of the Commission's discretion in the implementation of the new rules (Spagnolo, 2008; Stephan, 2008).

In 2006, the Commission Notice on immunity from fines and reduction of fines in cartel cases, the 2006 Leniency Notice, amended the 2002 Leniency Notice by dropping the requirement for cartel members to end the involvement in a collusive agreement immediately upon the application. However, the Commission reserved the right to require an immediate ceasing of involvement in a cartel where the integrity of the investigation was not hampered by ending such involvement (Stephan, 2008).

Despite very substantial convergence of the EU Leniency Program towards the U.S. Corporate and Individual Leniency Programs, there are still notable differences between them:

1. Under the EU Leniency Policy, the total private civil liability of the company that comes forward first can waive the fine for actual damages incurred and the costs of legal services whereas under the Corporate Leniency Program, leniency applicants who come forward first need to compensate the aggrieved parties for actual damages incurred and the costs of legal services plus interest. Moreover, the EU Leniency Program offers milder forms of leniency also to the second and third companies to come forward, as opposed to the Corporate Leniency Program, which offers leniency only to the first company to elicit a collusive agreement (Brisset & Thomas, 2004).
2. The Corporate Leniency Program explicitly grants full, automatic immunity from legal prosecution if a leniency applicant meets the required conditions whereas the EU Leniency Program does so merely implicitly, thus potentially dissuading European cartel members from applying for amnesty.
3. Discounts up to 50% are available under the EU Leniency Policy for subsequent applicants involved in a collusive agreement, provided that they commit to active cooperation with DG Comp and report sufficiently valuable information to prove the case. In the United States of America, discounts are not available to the second company to come forward. There are only very small reductions for those subsequent companies that self-report and commit to active cooperation.
4. The Corporate and Individual Leniency Programs provide anonymity for leniency applicants and their identities, and their role in infringement is not made available to damage claimants. The EU Leniency

Program, on the contrary, does not include a general provision of confidentiality: details regarding antitrust infringements can be made available to the public (Brenner, 2011). Arguably, however, the availability of leniency applications to the public is a plus because it allows independent reviewers, policy experts, and analysts to provide their opinions on the matter, warn the public, and disseminate the facts concerning the infringement.

5. The Corporate Leniency Program has a plea bargaining system for the first cartel member to come forward. Under this system, leniency applicants negotiate the terms of their liability, the degree of severity of punishment for infringement, the degree of anonymity of the process of cartel busting, and the discounts for revealing the cartel, such as, for instance, protection from treble damages. In 1989, plea bargaining was made no longer available for the second and third leniency applicants (Spagnolo, 2008).

However, from a broader perspective, these differences appear to be insignificant. The analysis testifies to the assertion that the EU Leniency Program is very similar to the U.S. Corporate and Individual Leniency Programs and proves the instance of a very substantial convergence towards the United States of America since 1990.

Summary

Table 4 shows the main points of anticartel policy convergence between the United States of America and the EU.

Table 4
Anticartel Policy Convergence

Variable	European Union (1990)	European Union (2008)	United States of America (2008)	Degree of convergence
<i>Setup of anticartel policy</i>	Three tiers	Three tiers	Three tiers	No convergence
<i>System of anticartel law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence
<i>Mode of regulation</i>	Ex ante	Ex post	Ex post	Significant convergence
<i>Leniency program</i>	–	EU Leniency Program	U.S. Corporate and Individual Leniency Programs	Very substantial convergence

Antimonopoly Policy

In contrast to the substantial reforms of anticartel enforcement and merger control, antimonopoly competition rules have seen less development (Kovacic, 2008). Moreover, transnational communication and cooperation between the United States of America and the EU in the framework of antimonopoly policy is less evident than in the framework of merger control policy owing to a number of significant impediments for information exchange pertaining to monopolies in the EU and very few bilateral (United States of America-EU) agreements, as opposed to a great number of multilateral agreements within the OECD, the ICN, and the WTO (Schaub, 2002). Transnational communication can be indisputably singled out as the main mechanism triggering convergence through communication and learning in the WTO, the OECD, the ICN, and other organizations, in addition to forums, round tables, conferences, panel meetings, working groups, and so on. Moreover, the influence of U.S. antitrust traditions is evident in the switch to the use of a more economic or effects-based approach in the assessment of a dominant position, the change in interpretations of abuse and of dominance, and attempts to make a wider use of private litigation.

The setup of antimonopoly policy

The setup of antimonopoly policy can be separated into four stages: first, a potential monopolistic market player is examined on grounds of abuse of dominant position; second, the market player is placed under investigation; third, the market player is either allowed to carry out its economic activities or, if monopolization of any part of trade has been detected, sanctions are imposed; fourth, the market player can file an appeal to the courts.

If EU antimonopoly policy in 1990 and 2008, under Article 82 TEC and Article 102 TFEU respectively, is analyzed through the prism of the four-stage application of antimonopoly policy, it should encompass three tiers. On the first tier, which encompasses the first two stages, the market player is examined on grounds of market power abuse (including dawn raids granted by Article 105 TFEU) and placed under investigation by DG Comp. On the second tier, if the monopolization attempt has been proved, the Commission imposes administrative fines. On the third tier, the market player can submit an appeal to the General Court.

The setup of the antimonopoly policy system in the United States of America on the federal level is very similar to that of the EU, with the notable exception of the roles of the main actors in law enforcement. The system encompasses three tiers. The DoJ and the FTC are the main actors on the first tier, which combines the first two stages. On the second tier, in case substantial evidence of breaching Section One (conspiratorial conduct) or Section Two of the Sherman Act has been found, the DoJ or the FTC presents the case to the Supreme Court. On the third tier, the market player can submit an appeal to the U.S. Court of Appeal and ultimately to the Supreme Court.

Despite the noticeable similarities between the two setups, convergence cannot be detected because it presupposes similarity changes over a given period of time. The setup of the EU antimonopoly policy system has been initially similar to that of the United States of America.

Assessment of abuse of dominant position

Competition policy reforms in the EU, targeting the modernization of the assessment and the treatment of cartels and horizontal mergers, have evinced more similarities with the U.S. competition policy principles than the reforms targeting the modernization of the assessment and the treatment of abuse of market dominance (Kovacic, 2008). Comparatively few significant reforms in the field of assessment and treatment of market dominance in the EU have been introduced since 1990. Section Two of the Sherman Act is applied in cases where there is a definite link from the conduct to market dominance, a concept that has no formal meaning in the United States of America but can be interpreted by estimating the effects of the behavior of a company. In the EU, Article 102 TFEU is applicable where there is evidence of pure market dominance, a fuzzy concept based on calculation of market shares.

Dominance, an ordoliberal concept enshrined in European law, lacked precise boundaries until the Commission clarified that companies with market shares as low as 40% can be deemed dominant (Gifford & Kudrle, 2011). The Commission treats market shares at or even below 40% as potential monopolization attempts whereas the DoJ treats shares below 50% as being insufficient to establish substantial market power (Kovacic, 2008). Companies tend to elicit greater scrutiny under U.S. law as their market shares are larger, but only if market shares are larger than 50% while most of the companies with 40% or less are thoroughly scrutinized under suspicion of monopolization attempts under EU law (Gifford & Kudrle, 2011). Consequently, the interpretation of dominance in the EU has not converged towards the interpretation of dominance in the United States of America.

According to a more economic or effects-based approach to the interpretation of abuse of market dominance enshrined in U.S. law, the dominant market player must interpret the concept of abuse as objective, which means that the market player should be treated according to the effects it produced. In contrast, in accordance with the Commission's formalistic approach to the interpretation of abuse of market dominance, behavior can be interpreted as being abusive per se even if it does not actually maintain or strengthen market dominance, i.e., regardless of whether a form of abuse of market dominance has had actual or likely anticompetitive effects (Vickers, 2005).

The formalistic approach has been applied to assessment and treatment of abuse of market dominance up until 2008, when the Guidance Paper on the European Commission's enforcement priorities in applying Article 102 TFEU was adopted. New strategies, factors, and tests have been introduced in the Guidance Paper to enable the switch from the formalistic dominance-based approach to a more economic or effects-based approach. The Commission can intervene only if there is actual evidence that the effect of exclusionary behavior harms consumers or forecloses competitors from the market (Gravengaard & Kjærsgaard, 2010). The methodology of assessment of abuse of market dominance in the EU has not encountered any substantial changes since 1990; however, the shift to starting to use the effects-based approach in 2008, applied in the U.S. assessment methodology of abuse of dominance, indicates limited convergence. A wider zone of liability for dominant companies in the EU, which is ascribed to a stricter classification of dominance and ambiguity in interpretation of Article 102 TFEU by the General Court¹¹, and excessive interventions by the Commission, do still

run contrary to the regulatory traditions of the Antitrust Division (Kovacic, 2008). Altogether, assessment methodology of abuse of dominant position in the EU has insignificantly converged towards the one applied in the United States of America.

The system of antimonopoly law enforcement

The Antitrust Division of the DoJ is responsible for analyzing the companies' behavior on the matter of infringement of Section Two of the Sherman Act on the federal level (or the state attorneys general, who may file suits on the matter of infringement of state and federal competition rules) and filing suits if sufficient evidence of abuse of market dominance has been found. The officials from the Antitrust Division do not have any prosecutorial discretion or judicial power, and their functions are limited to merely filing suits and supplying relevant information to courts. The administrative system of the EU has not converged towards the adversarial system of the United States of America since 1990. The Commission has retained both prosecutorial and judicial power and remained the core actor in enforcing Article 102 TFEU.

However, a minor change occurred in the late 1990s, when the Commission proclaimed its expectation to inflict additional deterrence on economic actors in order to be able to achieve better compliance with European competition law by means of introducing private litigation into the system of antimonopoly enforcement. In addition to this, a greater burden of responsibility for resolving uncertainties in respect of antimonopoly laws has been put on the EU and national courts. These became obliged to accumulate a substantial case law both on pricing issues (predatory pricing, selective price cuts, margin squeezes, and discounts and rebates) and on nonpricing issues (tying, bundling, exclusive dealing, and refusal to supply). Thus, private enforcement started to resemble a system with the parallel application of national and European competition laws, whereby Article 102 TFEU is applicable in cases affecting trade between member states (Peyer, 2011).

Following the introduction of Regulation 1/2003, the Commission decided to compensate for the legal uncertainty and deficit and the lack of coherence in antimonopoly enforcement and to focus on improving the efficiency of damages actions against breaching Article 102 TFEU by introducing the Green Paper in 2005 and the White Paper in 2008 (Böheim, 2011; Peyer, 2011). In contrast to the situation pertaining to private antitrust enforcement in the EU, U.S. antitrust law is said to have a "fine-tune combination of public intervention and private litigation which minimizes the overall impact of anticompetitive conduct" (Marra & Sarra, 2010, p. 132). Hence, the epistemic community of competition policy specialists recommended that the Commission should follow the recommendations on private litigation from the United States of America and adopt its best practices.¹²

Summary

Table 5 shows the main points of antimonopoly policy convergence between the United States of America and the EU.

Table 5
Antimonopoly Policy Convergence

Variable	European Union (1990)	European Union (2008)	United States of America (2008)	Degree of convergence
<i>Setup of antimonopoly policy</i>	Three tiers	Three tiers	Three tiers	No convergence
<i>Assessment of abuse of dominant position</i>	Formalistic dominance-based approach	Effects-based approach	Effects-based approach	Insignificant convergence
<i>System of antimonopoly law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence

Merger Control Policy

Antitrust authorities seek convergence in areas under their discretionary authority in order to avoid political intervention, according to the principal-agent theory (Damro, 2011). Political intervention is the result of the inactivity and/or ineffectiveness of competition authorities in tackling domestic issues. Significant reasons behind instigating intervention are any hindrances to merger activity, uncertainty in merger enforcement rules, delays in merger review process, limited information acquisition, obstacles caused by domestic confidentiality provisions, and so on (Damro & Guay, 2012). Merger control policy convergence between the United States of America and the EU has been triggered to a great extent through communication and bilateral nonbinding agreements within the group of competition policy experts from the United States of America and the EU, the Mergers Working Group, established in 1999, and within the WTO, the ICN, and the OECD (Damro & Guay, 2012; First, 2003; Schaub, 2002).

The stage for convergence was set by adopting the Bilateral Competition Agreement and the Administrative Arrangement on Attendance in 1991 and 1999, respectively: these were both voluntary agreements, which could not override existing national competition laws (Damro, 2011). The Bilateral Competition Agreement included guidelines on information exchange, consultations, enforcement activities, and merger investigations. The Administrative Agreement on Attendance included an explanation of procedures for granting permission for competition authorities in the United States of America and the EU to attend internal hearings and meetings on merger control in these two entities, in case of mutual interest (Damro & Guay, 2012).

In early 2000s, the United States of America-EU Mergers Working Group expanded the previous guidelines and principles to include not only procedural, but also structural issues, and introduced the guidelines on Best Practices on Cooperation in Merger Investigations (Damro, 2011). The Mergers Working Group provided competition authorities from the United States of America and the EU with a platform for information exchange, policy dialogue, and mutual learning. One of the most notable instances of convergence triggered from within the Group was the introduction in 2000 of the European Commission's Notice³ on behavioral and structural remedies, and the replacement of the Dominance Test by the Significant Impediment to Effective Competition (SIEC) Test (Kassim & Wright, 2009; Turk, 2012; Vasconcelos, 2010). Thus, convergence was triggered mainly through the mechanism of transnational communication and regulatory competition (Damro & Guay, 2012).

Convergence of merger control law enforcement systems between the EU and the United States of America has not occurred at all. This attests to the fact that the Commission did not merely attempt to copy the merger control model from the United States of America. Rather, it attempted to incorporate certain best practices into the EU competition control model after the example of the United States of America, without altering the law enforcement approach and the competition law enforcement system with its specific legal culture and traditions.

The setup of merger control policy

The setup of merger control policy can be separated into four stages: first, a merger is examined in order to determine whether it can potentially create a concern for fair competition; second, the effect of merging parties' behavior on competition is determined; third, the decision to approve or prohibit a merger is made; and fourth, parties to a merger can file an appeal to the courts.

EU merger control policy after the adoption of Merger Regulation 4064/89 consisted of only two tiers in the four-stage setup. On the first tier, which encompassed the first three stages, a merger needed to be reviewed by the Merger Task Force within a month or within six weeks if a member state or other parties decided to intervene and offer structural or behavioral remedies. The decision needed to be approved by DG Comp and subsequently by the Commissioners. A merger was either prohibited, or unconditionally cleared, or partially cleared and was subject to commitments or a remedial action plan to diminish anticompetitive effects (in rare cases until the introduction of the Commission's Notice in 2000). On the second tier, after the decision by the Merger Task Force had been made and had been approved by the Commissioners, the parties to a merger could submit an appeal to the Court of First Instance (Lyons, 2004; Zweifel, 2003).

The setup of the merger control system in the United States of America encompasses three tiers. The DoJ and FTC are the main actors on the first tier, which combines the first two stages (decision to investigate a merger, decision to approve/prohibit a merger). They collect the evidence and conclude whether a merger has produced anticompetitive effects according to Section Seven of the Clayton Act (Ghosal, 2011) and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Leddy, Cook, Abell, & Eclair-Heath, 2010). Most of

the cases are settled on the first tier without addressing the courts, but only in clearance decisions. In cases where the DoJ or the FTC wish to prohibit a transaction, they should present the case to the courts and obtain a preliminary injunction to block a merger from a federal district court judge or an administrative law judge¹⁴ (second tier). On the third tier, the parties to a merger can submit an appeal to the U.S. Court of Appeal and ultimately to the Supreme Court (Bagchi, 2005; Leddy et al., 2010; Zweifel, 2003).

The Community merger policy enforcement system differed considerably in its nature from that of the United States of America, which, arguably, had a more transparent system. First, the Commission combined the first three stages into one tier and made a single investigation team responsible for scrutinizing mergers, constrained by very tight deadlines. This situation forced the team to provide estimations and conclusions, often without due scrutiny and rigorous analysis. Second, the appeal procedure designed by the Commission was much more complex, lengthy, and bureaucratic than the appeal procedure in the United States of America, where the courts actively participated in merger investigations and helped to speed up the process, thus sharing the burden of merger policy enforcement with the DoJ and the FTC. Moreover, if an appeal had been once overturned in the EU, the chances of resurrecting a negative merger prohibition were slim (Lyons, 2004). Both in the EU and the United States of America, however, failed mergers and acquisitions alone are a relatively common event. Mergers are canceled because of disagreement between parties or antitrust regulators' interventions after premerger preparation (e.g., GE/Honeywell) (Mantere, Schildt, & Sillince, 2012).

The General Court and the Court of Justice of the European Union have full discretion when investigating the Commission's decision and may annul prohibition decisions as well as clearance decisions. Under Merger Regulation 1/2004, the Commission has retained its rights to act as an investigator, a prosecutor, and a judge in merger control, hence to grant a clearance or a prohibition decision to a transaction. However, the Courts may scrutinize the Commission's factual analysis and verify whether relevant procedural rules have been complied with: Furthermore, in recent years, the Courts have increasingly started to demonstrate their willingness to engage in rigorous examination of the Commission's use of evidence in complex merger cases (Leddy et al., 2010).

Despite the fact that the reforms significantly changed the merger assessment methodology, the setup of merger policy has remained the same and has shown no convergence towards the United States of America. The most notable change not related to the application of merger policy was solving the problem of tight deadlines: (a) extended time schedules for processing applications have been introduced; (b) the Merger Task Force has been abolished, and the officials have been transferred to sectoral units within the Commission, to cope with applications more efficiently; and (c) ad hoc panels (devil's advocate panels)¹⁵ and the position of Chief Competition Economist have been created in order to review drafts of DG Comp regarding merger investigations, double-check analysis carried out by the sectoral units, and add more technical considerations to the analysis of mergers based on the new assessment methodology (a more economic or effects-based approach).

Assessment of mergers

Since 1990s, merger control in the EU has been subject to extensive modernization to eliminate false clearance and false prohibition decisions, whereby the previous structural approach was replaced by a more economic or effects-based approach, and rule-based control was superseded by a case-by-case analysis of actual merger effects: anticompetitive effects (harming consumer welfare) and procompetitive effects (efficiencies) (Budzinski, 2010). Merger Regulation 4064/89 (ECMR), adopted in 1989, incorporated the Dominance Test from the German competition law traditions for assessment of mergers, takeovers, and acquisitions (Weitbrecht, 2008).¹⁶ The Test used a criterion of market abuse (Fernandez, Hashi, & Jegers, 2008; Röller & Wey, 2003).

The Dominance Test was criticized by the epistemic community of competition policy specialists for preferring market shares and market dominance to economic effects in the assessment of mergers (Montalban et al., 2009). U.S. observers argued that the use of the market dominance approach to block mergers ran counter to a reasonable industrial economic analysis (Akbar & Suder, 2006). On the one hand, the Dominance Test could be excessively strict on merging parties, whereby the enhancing efficiency of mergers could be wrongly prohibited following the prohibition of dominance per se according to Article 82 TEC (now Article 102 TFEU). On the other hand, it could be too generous on merging parties by allowing anticompetitive mergers because it put stronger emphasis on market shares in the assessment, instead of measuring economic effects (Lyons, 2004).

Since 2002, the General Court and the Court of Justice of the EU have increasingly started to demonstrate their willingness to engage in rigorous examination of the Commission's use of evidence and challenge its

decisions, which is clearly reflected in the landmark judgments in *Airtours*, *Schneider*, *Tetra Laval*, and *Sony/BMG*. *Airtours* marks the first time the EU Courts overturned a merger prohibition decision: the General Court reproached the Commission for errors in the assessment of collective dominance and provided stricter guidelines for the Dominance Test, which signaled the Courts' intentions to hold the Commission to higher standards of economic analysis in support of its decisions. In *Schneider* and *Tetra Laval*, the Courts overturned the Commission's prohibition decisions based on substantial assessment errors, omissions and inconsistencies, and the lack of substantiated economic analysis. *Sony/BMG* was one of the first major cases in which the Commission attempted to utilize a more economic assessment, and the Court's decision to overturn the case arguably pushed it to reform the assessment methodology of collective dominance. Indeed, through these four landmark judgments, the EU Courts sent a strong message to the Commission that it should conduct a more robust economic analysis supported by reliable quantitative evidence.

The Commission was quick to address the issue through the 2004 Horizontal Merger Guidelines, the amended test, the creation of the post of Chief Competition Economist, disbanding of the Merger Task Force, and the introduction of the devil's advocate panels (Leddy et al., 2010). The Dominance Test has been amended by the SIEC Test to bring the EU competition policy closer to the substantial lessening of the competition test (SLC) used in the U.S. merger assessment and closer to using the effects-based approach (Kassim & Wright, 2009).¹⁷ DG Comp has acquired the power to investigate merger proposals with the new SIEC Test, whereby the issue of dominance and market shares does not need to be central anymore, as stated in Article 2(3) of Merger Regulation 139/2004 (EUMR). Dominance, while being an overriding issue in assessing the anticompetitive effect of mergers, is not the sole criterion for such assessments any longer, whereas it used to be the dominant criterion for assessing the anticompetitive effect of mergers in the EU.

Arguably, however, the introduction of economized merger enforcement has proved to be less successful than anticipated: since the introduction of a more economic approach and an industrial economic analysis into practice, both the DoJ and the FTC, and later the European Commission have less successfully challenged harmful mergers, which is reflected in lows in prohibition decisions. The frictions between the old institutional environment and the new economic approach raised the standard of proof for anticompetitive effects, thus preventing the DoJ, the FTC, and the Commission from putting up sufficient evidence (Budzinski, 2010). Notwithstanding the enforcement problems arising as a result of the introduction of a more economic approach into the EU merger assessment methodology, convergence towards the U.S. merger assessment standards is evident.

Convergence towards the United States of America is equally evident in the way the Commission has started to address efficiencies. In 2001, the Commission acknowledged the confusion about the way it had addressed efficiencies in *Aerospatiale/DeHavilland* and *GE/Honeywell* and introduced efficiency considerations in the 2004 Horizontal Merger Guidelines. These guidelines are very similar to those of the United States of America after the 1997 amendments: (a) both sets of guidelines specify that the efficiencies must be substantial and timely, and they do not reject a total welfare standard, although a consumer welfare standard is intended in the EU guidelines; (b) the burden of proof to demonstrate that no less anticompetitive alternative exists is placed on the parties claiming efficiency; and (c) both sets of guidelines contain the requirement to verify efficiencies, with a more stringent requirement to verification in the EU guidelines, which specify the necessity to quantify efficiencies (Pitofsky, 2007). Assessment of mergers has thus experienced significant convergence.

The system of merger law enforcement

In the United States of America, the jurisdiction pertaining to merger control exemplifies the adversarial system, whereby courts decide on the case since the first instance. In contrast, in the EU, the jurisdiction pertaining to merger control still exemplifies the administrative, inquisitorial, system whereby public authorities, as represented by the Commission, have both prosecutorial and judicial power (Spagnolo, 2008). Under Merger Regulation 4064/89, the Commission enjoyed the power to pass judgment on all mergers occurring in the Community, which made this institution the most important one among the European competition authorities in the field of merger control. Under Regulation 1/2003 and Merger Regulation 139/2004, the Commission has retained its prosecutorial and judicial discretion on all matters concerning mergers, acquisitions, and takeovers (Bagchi, 2005). Unlike the Commission, the FTC and the DoJ do not have the power to prohibit a transaction and need to bring a suit to the federal court and obtain a preliminary injunction to block a merger (Leddy et al., 2010). The system of merger law enforcement in the EU has not experienced convergence towards that of the United States of America.

Summary

Table 6 shows the main points of merger control convergence between the United States of America and the EU.

Table 6
Merger Control Convergence

Variable	European Union (1990)	European Union (2008)	United States of America (2008)	Degree of convergence
<i>Setup of merger policy</i>	Two tiers	Two tiers	Three tiers	No convergence
<i>Assessment of mergers</i>	Dominance-based approach	Effects-based approach	Effects-based approach	Significant convergence
<i>System of merger law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence

Conclusion

In spite of the evidence of strong influence from U.S. antitrust on the recent competition policy reforms in the EU, few attempts have been made to actually measure the influence of U.S. antitrust on the EU competition policy in anticartel enforcement policies, antimonopoly regulation, and the regulation of mergers and acquisitions and to determine what causal mechanisms activate the convergent policy changes. The purpose of this article was to fill such gaps by attempting to link EU competition policy with U.S. antitrust, provide a critical overview of the most important elements of competition policy reforms in the EU, carry out a comparative analysis between the EU and U.S. competition policies, detect convergence or divergence, and account for the degree of convergence and for the relevant mechanisms triggering convergence.

The analysis carried out in this article has provided the answer to the following research question: How substantial is convergence between the competition control models and the competition law enforcement systems utilized in the EU and in the United States of America? Table 7 shows the results of the analysis.

Table 7
Convergence between EU Competition Policy and U.S. Antitrust

Variable	European Union (1990)	European Union (2008)	United States of America (2008)	Degree of convergence
<i>Setup of anticartel policy</i>	Three tiers	Three tiers	Three tiers	No convergence
<i>System of anticartel law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence
<i>Mode of regulation</i>	Ex ante	Ex post	Ex post	Significant convergence
<i>Leniency program</i>	–	EU Leniency Program	U.S. Corporate and Individual Leniency Programs	Very substantial convergence
<i>Setup of antimonopoly policy</i>	Three tiers	Three tiers	Three tiers	No convergence
<i>Assessment of abuse of dominant position</i>	Formalistic dominance-based approach	Effects-based approach	Effects-based approach	Insignificant convergence
<i>System of antimonopoly law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence
<i>Setup of merger policy</i>	Two tiers	Two tiers	Three tiers	No convergence
<i>Assessment of mergers</i>	Dominance-based approach	Effects-based approach	Effects-based approach	Significant convergence
<i>System of merger law enforcement</i>	Administrative (inquisitorial)	Administrative (inquisitorial)	Adversarial	No convergence

Concerning the mechanisms triggering competition policy convergence, the mechanism of transnational communication has been singled out as the main trigger. Concerning the competition law enforcement system and the law enforcement approach, no convergence in any of the three pillars has occurred.

Despite the strong evidence of consistent transnational communication between the EU and the United States of America, competition policy convergence has not been complete. The EU has been selective in altering the competition policy rules.

Endnotes

- ¹ This submechanism is based on the analysis of positive and negative lessons; it can take forms of either mere copying of policies or other, more sophisticated forms of policy adoption, including hybrids of transferred components and completely new policy models.
- ² This submechanism is typically triggered by the epistemic community of policy experts, bound by relatively common knowledge and expertise and driven by the necessity to tackle similar domestic problems by means of sharing expertise and finding effective solutions to policy issues.
- ³ This submechanism is triggered when countries utilize evidence about policy programs from other countries, especially the ones that display more institutional compatibilities. Confirmation of the process of policy emulation requires very strong evidence of awareness and utilization of evidence about policy programs from other countries and explicit or implicit similarity of policy goals and instruments.
- ⁴ Competition authorities that first receive a complaint generally start an investigation on their own but can request assistance from other competition authorities: NCAs, competition agencies, and DG Comp. In situations where cases affect more than three member states, DG Comp is placed to act while NCAs are relieved of their competence. Moreover, NCAs are obliged to inform DG Comp of all details regarding the cases falling under Article 101 TFEU, which are processed in their national courts, and to follow the Directorate's decisions when it initiates investigation of these cases, without the right to overrule or contradict its decisions. They are also obliged to exchange information about cases among themselves and to apply the Union law if fair trade between member states is affected. National courts and NCAs are required to apply the Articles of the Treaty of the European Union (TFEU) with priority over national competition laws whereas national competition laws could be applied only if they are stricter than the EU competition rules (Kassim & Wright, 2009).
- ⁵ Currently, the EU antitrust laws limit the punishment for noncompliance to civil penalties on the EU level, and only Ireland and the United Kingdom have adopted policies of seeking incarceration for individual offenders after the example of the Antitrust Division of the United States of America Department of Justice, on the national level. In Greece, criminal fines can be levied on individuals in addition to noncriminal fines on companies, and in Cyprus, France, Germany, Austria, and Slovakia, imprisonment of offenders involved in cartels is also possible (Morgan, 2009).
- ⁶ Individual or block exemptions for agreements and contracts falling under the category of *advancing technical or economic progress or improving the production or distribution of goods* (McGowan, 2005).
- ⁷ Because of the clandestine nature of cartels, competition authorities generally encounter serious difficulties in detecting and obtaining sufficient hard evidence on them (Brisset & Thomas, 2004). Intrinsicly, all cartels share three fundamental features. First, members to a collusive agreement might undercut other members by offering secret price cuts to their customers. In order to curb opportunism and free riding, cartel members need to develop a governance structure within the cartel, which cannot be done without explicit contracts enforced by the legal system. Second, besides being profitable, a cartel needs to be feasible as well. In order to sustain feasibility, cartel members need to police compliance with the internal agreements and deter defections. Third, cartel members need to acquire information on the other members' anticompetitive practices in order to be able to coordinate and monitor the cartel (Spagnolo, 2008). Thus, all cartels are unstable by default, which enables competition authorities, normally constrained by lack of resources and limited investigatory powers, not only to conventionally and to a large extent ineffectively police industries, but also to complement deterrence by leniency and whistleblower programs, which are especially efficient in inducing cartel members to elicit their (intrinsicly) unstable collusions and to inform on their partners (Friederiszick & Maier-Rigaud, 2008).
- ⁸ U.S. Corporate Leniency Program, Section A: <http://www.justice.gov/atr/public/guidelines/0091.htm>
- ⁹ Moreover, leniency applications were disregarded unless there was very substantial evidence of existence of the cartel (Stephan, 2008).
- ¹⁰ The European Commission Notice on immunity from fines and reduction of fines in cartel cases, 2002: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219(02):EN:NOT)
- ¹¹ Substantial U.S. case law on market dominance contains sets of precise rules to classify behavior as procompetitive or

exclusionary, which aids significantly the courts and the Antitrust Division whereas there is neither substantial case law nor a set of precise and complete rules on the abuse of market dominance in the EU (Kovacic, 2008).

- ¹² In order to ensure better functioning of private enforcement and drive it closer to the perfect state of equilibrium of pure private and pure public enforcement, different enforcement mechanisms need to be combined, while remembering that pure public or pure private enforcement mechanisms cannot be efficient. Theoretically, when the court is sufficiently accurate (i.e., is likely to rule in favor of the defendant when the defendant is innocent and against the defendant when the defendant is guilty), complementing private enforcement with public enforcement is always efficient and socially beneficial. In this situation, companies tend not to use the law in their strategic interests because the sufficiently accurate court rules only against guilty defendants. When the court is less accurate, the complementation of public enforcement with private enforcement is efficient and socially beneficial only if the state allocates sufficient financial resources to back up the due litigation. When the state does not do so and the court is less accurate, companies tend to use the law in their strategic interest. The criterion of activity/inactivity of the state is no less important than the accuracy/inaccuracy criterion of the court. The combination of private and public enforcement leads to the dominance of private enforcement over public enforcement if the state is inactive. The state is aware of the active enforcement by private parties and does not intervene in the processes. If the state is active, the combination of private and public enforcement leads to the dominance of public enforcement over private enforcement and gradually replaces private enforcement because private parties tend not to bring cases to courts by themselves when they know that there exists an institution responsible for litigation. Thus, the combination of private and public enforcement is more efficient and socially beneficial than pure public or pure private enforcement, but the criteria of accuracy/inaccuracy of the court and activity/inactivity of the state need to be accounted for (McAfee & Mialon, 2008).
- ¹³ Before the introduction of the European Commission's Notice in 2000, mergers, takeovers, and acquisitions were in most cases either unconditionally approved or prohibited by the Commission, which left little room for partial approvals on condition that parties to a merger commit to a certain action plan or agree to adopt the Commission's remedies. The situation changed when the European Commission's Notice was adopted in 2000 and incorporated into Regulation 139/2004 in 2003, which outlined its policy in relation to merger remedies and commitments in case of partial approvals (Vasconcelos, 2010). Since then, the use of commitments or (structural) remedies has become widespread in EU merger regulation. The Notice allowed DG Comp to determine specific areas of concern in larger mergers and adopt measures (remedial action) to address these (Turk, 2012). Merger remedies could be grouped into two categories: structural remedies and behavioral remedies. Structural remedies modify the allocation of property rights and can include full or partial disablement of an entire enterprise followed by the deprivation of rights. Behavioral remedies only set constraints on the property rights of the newly merged entity or commit the parties to a merger to fulfill certain agreements (Vasconcelos, 2010). Although the Commission appeared to be more inclined to start making use of the option of partial approval by officially adopting the policy in relation to merger remedies and commitments, it preferred to apply structural remedies rather than behavioral remedies, which in most cases amounted to prohibition.
- ¹⁴ The latter option is available to the FTC only.
- ¹⁵ However, devil's advocate panels face a similar problem as the one faced by the Merger Task Force: there are still somewhat strict time schedules to follow (Lyons, 2004).
- ¹⁶ The substantive test of the creation or strengthening of a dominant position is designed by DG Comp, based on market share, and performed by the Merger Task Force. The Merger Task Force could challenge a merger agreement by proving that the agreement would either lead to an entity with a market share of more than 50% or would result in the creation of a collective dominant position (Akbar & Suder, 2006).
- ¹⁷ It must be noted, though, that efficiency is interpreted differently by the merger control authorities in the EU and the United States of America. Efficiency is closely linked to welfare standards, which are different in these two political economies: consumer welfare standard is used in the EU, and a hybrid of consumer welfare standard and total surplus welfare standard is used in the United States of America (Renckens, 2007). Hence, the test itself cannot be used to compare merger efficiency in the United States of America and in the EU accurately.

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