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US versus EU Antitrust Law

With regard to Antitrust Law, the similarities on both sides of the Atlantic outweigh the remaining differences by far. This holds true, at any rate, today, after more than 100 years of legal development. I would like to summarize this in eight statements:

1. The central difference was initially that the relevant U.S.-American law is much older. The Sherman Act dates from 1890, the Clayton Act, which introduced merger control, from 1914 (with a significant improvement by the Celler-Kefauver Act in 1950). These laws were not only existent on paper. They were rigorously enforced in practice. National competition laws in Europe developed mainly after the Second World War. Their development was triggered by the introduction of the rules on competition in the European Community in 1958. The latter induced many of the Member States, *e.g.* Italy, to introduce laws against restraints of competition for the first time.

2. Another difference was and is that the U.S. forms a continent. This means, in our context: The experience with legal enforcement is much broader. Even today, it is often impossible to address competition issues in detail without referring to U.S.-American decisions, *e.g.* when analyzing the differences between mere conscious parallelism and prohibited concerted actions. At the same time, American case law is accompanied by an excellent academic discourse. Even today, the most important innovations come from the U.S. For instance, the development of replacing a formal legal approach with a more economic approach originated in the U.S. The same is true for leniency programmes in order to fight price-fixing more efficiently. By now, Brussels and Bonn have copied this approach. Overall, the U.S.-American Antitrust

Law can be understood to be a kind of "original parent legal system" from which the other competition law regimes are derived.

3. The American Antitrust Law was – at least initially – more political, insofar as it could be made the subject of a public debate. It played a role in deciding elections. *E.g.*, in the beginning, the influence of farmers and their associations was decisive. The fact that American Antitrust Laws included criminal sanctions from the beginning was important as well – even today, European Competition Law does not provide for this remedy. The availability of criminal sanctions influenced the public awareness. Today, Antitrust Law has lost much of its sex appeal even in the USA. Questions of constitutional interpretation, abortion, school prayers etc. dominate the public debate. In Europe, Competition Law is still a playing field for specialized experts. It does not play a major role in the education of either lawyers or economists.

4. A difference between the legal systems lies in the role of the state. In the USA, antitrust is a matter for private actors. In Europe, the role of the state was inevitably involved. This was due to the extensive involvement of the state in the economy on this side of the Atlantic, in the banking and insurance sectors, in telecommunications, in the postal services, in the energy sector, in transport. This is reflected in provisions such as Article 86(2) EC, according to which the rules on competition do not apply to public services under certain circumstances. Political priorities to foster – or at least: not to impede – so-called national champions despite competitive concerns have to be seen in this context as well. In Germany, this is manifested in the instrument of the "Extraordinary Clearance by the Secretary of Economic Affairs" (*Ministererlaubnis*) in the area of merger control: For reasons of the overriding public interest, every anticompetitive merger can be cleared by a political body. A recent example is the merger of E.ON, the largest energy supplier, with Ruhrgas AG, the largest gas supplier in Germany. The public interest reason advanced was the improved security of national supply. Connected to the role of the state is the independence of the competition authorities. In the USA, the independence of agencies is part of the system of checks and balances. In France, where, in Rousseau's tradition, the sovereignty of the people is held to be indivisible and inalienable, this can only be perceived to be a fundamental error. In Germany, an interruption in the chain of political accountability (so-called "*ministerialfreie Räume*") is acceptable, as long as the independent agency is established in order to pursue a one-dimensional objective,

not a multi-dimensional one. The decision of multi-dimensional problems requires political balancing. An agency, if independent and therefore exempted from political accountability, lacks the political mandate for such balancing procedures.

These observations have to be qualified: In the USA, as well, the state gets involved into competitive issues; however, it does not usually do this under the disguise of Antitrust Law. An example is the preferential treatment of small enterprises in tender offers in the area of public procurement. This is the result of special laws. This does not change the result that the competitive outcome is interfered with, but it is transparent who bears the responsibility. Overall, the higher influence of the state in Europe probably reflects a less severe distrust against the government, rooted in the tradition of Frederick II of Prussia, who wanted to be seen as the first servant of the state.

5. A common feature of the competition law regimes on both sides of the Atlantic is that they claim for themselves a wide international reach. It suffices that a restraint of competition has effects within their own territory, regardless of where and by what enterprise it is effected (“effects doctrine” or “extraterritorial application of competition law”). A difference lies in the U.S. Antitrust Law’s better ability to assert itself: Uncle Sam has a very long arm. This is due to the fact that the USA usually makes up half of what is called the “world-wide market”. No globally acting enterprise can afford not to be present on the U.S.-American market. This inexorably leads to the result that it can be caught by the American jurisdiction without any strain. The consequence is, for instance, that when an employee of Hoffmann-LaRoche is involved in the implementation of a prohibited price-fixing cartel which has effects on the American market, he will, after sentencing, be a ‘good boy’ and board a plane to the U.S. in order to serve his sentence.

6. The objectives pursued by the two legal systems are, for the most part, identical. It is the protection of competition that is at stake. So-called “populist goals”, the elimination of “bigness as such”, the maintenance of a kind of separation of powers between society and the state, do not play an immediate role. In the USA, the last efforts in this direction were made under the Carter administration. Likewise, the laws do not pursue any public interest objectives transcending the objective of competition, with exceptions in Europe as demonstrated by the above-mentioned clearance by the secretary of economy in German merger control. In order to protect competition,

Germany and, at least for the time being, the case law of the European Court of Justice seek to prevent an interference with the freedom to compete; the USA tend to pursue a more consumer welfare-oriented approach. The difference is of importance in a philosophical sense, less so in the day-to-day application of competition law. It can become relevant in marginal cases. Over here, *e.g.*, it suffices for predatory pricing that a dominant undertaking tries to eliminate a competitor with prices below cost. The competitor is protected with regard to his freedom to compete. In the USA, this does not suffice. The market has to be structured in a way that the dominant firm can recoup its losses and make the intended profit. If this is impossible, for instance because there will be immediate entry by newcomers as soon as prices are raised, the U.S. Supreme Court does not recognize the facts to support a predatory pricing claim.

7. The basic legal framework concerning restraints of competition is in essence the same. This is true for horizontal restraints (cartels) as well as for vertical agreements, *e.g.* exclusive dealing agreements. The distinction between prohibited restraints of trade and legitimate cooperation is achieved in the U.S. by way of distinguishing between per se-cases and rule of reason-cases. The dogmatic approach in the Europe is different – there is an outright prohibition with the possibility of an exemption –; but in practice, the results hardly differ. The prohibition of the abuse of a dominant position in Europe is more differentiated. In particular, the level of prices can be controlled, even though this is of marginal relevance in the practical application. Sec. 2 of the Sherman Act in the USA, the prohibition of monopolization and attempted monopolization, is heavy artillery by comparison, and it is used only in rare cases. But it can lead to the restructuring of an entire industry, as in the 1982-divestiture case of AT&T. A remedy of this nature is unknown in Europe. In the area of merger control, the substantive test is stricter in the USA (“may substantially lessen competition”); but in practice, this test has come close to the traditional European standard of the creation or strengthening of a dominant position. Occasionally occurring differences of opinion between the competition authorities on the respective sides of the Atlantic should not be overstressed. The process in the merger case McDonnell/Douglas was mistakenly politicized in Europe. In the merger GE/Honeywell, which was not stopped in Washington but prohibited in Brussels, there was a simple difference in the competitive evaluation of a complex set of facts. Such things happen. Apart from that, the cooperation between the competition

authorities in Brussels and Washington works excellently. This cooperation even goes as far as establishing joint case teams.

The most recent change of the substantive test for mergers in European merger control – the "significant impediment to effective competition"-test – is influenced by the American law. It has only a very narrow area of application, the so-called 'unilateral effects' in a tight oligopoly. It has yet to be seen whether this change, the formulation of which is the result of a compromise between conflicting standpoints, will develop any practical significance.

8. With regard to the procedure, both legal systems build upon a rule of law, which is more pronounced in the United States than in Europe. A remarkable difference consists in the fact that in the USA, approximately 75% of all antitrust cases are brought by way of private enforcement (follow on-cases are already subtracted in this figure). Although its possibility existed from the beginning, private enforcement became important only from the 1960s onwards. In Europe, private enforcement is hitherto practically non-existent. This has to do with certain peculiarities of the American legal system, which are absent in Europe and are widely regarded as undesirable.

   - There is, for example, no pretrial discovery procedure. This sort of fishing expedition leads in essence to self-incrimination of the defendant. In Germany, such a rule could infringe constitutional rights.

   - In the USA, contingency fees for lawyers provide a strong incentive to invest in antitrust cases. In Germany, they are regarded as contravening public policy. The lawyer is regarded as a part of the legal justice system, not as an entrepreneur who seeks to maximize profits.

   - Likewise, treble-damages in the case of successfully proven restraints of trade work as an incentive. Such punitive damages are foreign to German law. In so far, U.S. judgments are not recognized; the public order-exception applies.

   - Class actions as practiced in America do not infrequently border on blackmailing. Legal clarification is not the issue. Pressure is put on an enterprise, in particular by way of negative publicity, in order to force it to concede to a lucrative settlement.

- Under American civil procedure law, the American rule prevails. *I.e.*, a defendant who was wrongly sued has to bear his own legal costs. The unsuccessful plaintiff does not have to reimburse them. This creates a significant potential for threat in the hands of an economically strong plaintiff. The civil procedure can mutate into an instrument for restraining competition.

  Currently, significant efforts are exerted in Europe to promote private enforcement in competition law. I do not support this development. The danger of abuse is too great. Private parties are no Robin Hoods, they pursue their private interests and nothing else. All too frequently, they do not promote competition, but impede it.

Overall, it is fair to say: The arguably most important influence of the USA on foreign legal systems has been in the context of constitutionalism. With regard to specific areas of law, the Antitrust Laws have played the most influential role. And they continue to do so without a loss of momentum.