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Although U.S. and EC antitrust law have converged considerably in the last few years, significant differences remain in the treatment of dominance under Article 82 of the EC Treaty. This difference is perhaps best illustrated by the number of dominance cases brought in the European Community in the high-tech arena against U.S. companies at the behest of other U.S. high-tech companies whose complaints have fallen on deaf ears in the United States. EC competition law experts defend this divergence as necessary to trigger innovation in the European Union and to protect consumers. The obvious question raised is whether EC competition law has anything to do with spurring innovation in the European Union (and whether it may not in fact discourage innovation).

The question comes to mind because all of the high-tech complainants and their target defendants are U.S. companies, suggesting that the absence of breakthrough EU companies in the high-tech space is evidence not of the success of EU innovation policies but of their failure. The point to be made in this article is not so much that EU competition enforcement may have discouraged innovation as that it may have simply distracted attention from other, much more important policies in the European Union that have made it more difficult for entrepreneurs to succeed there than in the United States.

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The irony of the dominance cases, in short, is not that Europe has provided a friendlier forum than the United States for complaining competitors, but that the complainers by and large do not include any EU companies.

What *does* impact innovation in Europe? There are various policy differences between Europe and the United States which help account for the relatively different levels of innovation. Before quickly reviewing them, however, it is important to state, by way of summary, that they may not be as important overall as the cultural state of mind that they reflect.

Probably the most obvious difference is the role of higher education, tax policy, and the funding of research and development (“R&D”). The United States has a number of high-tech incubation centers linked to research universities with high private endowments or significant state support. Silicon Valley in California, Route 128 in Massachusetts, Research Triangle Park (“RTP”) in North Carolina, and the Rockville, Maryland-Washington, DC-area suburbs (which house the National Institutes of Health and the U.S. Food and Drug Administration) come quickly to mind. The United States devotes a significantly higher percentage of its federal budget to R&D than Europe does, and its charitable contribution policies encourage the development of huge private endowments. On the European continent, however, the EU Member States tend to want to control education funding, but do not even provide the same level of state funds, let alone compensate for the lower level of private funding.

There is, in addition, no precise EU analogue to the Bayh-Dole Act, a 1980 U.S. statute which facilitates the conversion of publicly supported research into intellectual property (“IP”) that may be commercialized by private entities. Finally, and perhaps most importantly, the United States provides much broader access to higher education for its students than the European Union—some 80 percent of U.S. students are exposed to higher education while the EU number is only 60 percent. Furthermore, surveys show that graduate level students—including EU students—would prefer on balance to study in the United States than in Europe.

Many Europeans are aware of these policies and are taking steps to correct the situation. The so-called Bologna Process has dramatically improved student mobility throughout Europe and therefore also the competition for the best students by the best universities. Some universities have formed partnerships with leading U.S. and EU companies that rival RTP and Silicon Valley. Indeed, such a center is located not far from Brussels and conducts leading research in pharmaceuticals and chemicals. One result of this center is that Dow Chemical, based in Michigan, has located its research operation near Brussels to take advantage of what is the world’s leading chemical research being done in the region. The European Union is also considering funding of an MIT-style research university to serve Europe as a whole. In short, the research and innovation picture is improving in Europe, but any pharmaceutical company, to take one industry highly dependent on research, will attest to the loss of R&D jobs to the United States over the last two decades.

A related issue is labor policy, which effectively discourages the hiring of young people because it makes their discharge so difficult that few employers will take a hiring risk, especially start-ups that by definition do not have a strong economic foundation (but which provide the bulk of new employment and innovation in any economy). The same could be said of the minimum wage in Europe, which is set at a very high percentage of the average wage and which, like the labor policy, discourages the hiring of young people who are just starting their careers.

Another issue is that although European capital markets function very well for established companies, they do not provide much venture capital or “angel investor” support for start-up companies. There is not much social support for founders of startups either. There are many stories of entrepreneurs who are discouraged by their peers and prevailing social attitudes toward risk-taking and the accompanying stigma of failure. Even those startups that become established often find that the investment banks they have retained to take them public instead try to encourage them to sell out to bigger companies. This helps explain why year after year, if not decade after decade, the same companies appear in the top-20 rankings for most of Europe.

Against these headwinds, which are thankfully being challenged, a few tweaks in the Article 82 abuse of dominance rules will not make that much difference in encouraging innovation. But EU enforcement of competition rules can do a lot of damage by punishing success, so the competition policy itself is important. DG Competition has also done pioneering work in helping break down the power of state-supported entities

like utilities and is curbing state aid. Where unfair state support is eroded, innovation can better prosper. But the heart of innovation will always reside in the energy of individuals who are willing to take big risks without much help from governments, which are notoriously bad at picking winners and properly inhibited from taking big risks with the public's money.