Prepared Statement of

Eleanor M. Fox

Professor of Law
Walter J. Derenberg Professor of Trade Regulation
New York University School of Law

before the
United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on
A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU

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Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee,

My name is Eleanor Fox. I am a professor of law at New York University School of Law. I hold the chair of Walter J. Derenberg Professor of Trade Regulation. I have been a member of the faculty of NYU School of Law since 1976. Immediately before then I was a partner in the law firm Simpson Thacher & Bartlett. I graduated from New York University School of Law in 1961 and hold an honorary doctorate degree from the University of Paris–Dauphine (2009). My books include a casebook EU COMPETITION LAW (Elgar 2017) co-authored with Damien Gerard; a casebook US ANTITRUST IN GLOBAL CONTEXT (3rd ed. West 2012); a casebook EUROPEAN UNION LAW (4TH ed. West 2015) co-authored with Goebel, Bermann, Atik, Emmert & Gerard; and a study THE DESIGN OF COMPETITION LAW INSTITUTIONS with Michael Trebilcock (Oxford 2013). My book with Mor Bakhoum, MAKING MARKETS

WORK IN AFRICA, will be published in January 2019 by Oxford University Press. My bio may be found on my NYU Law faculty page at https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19924

I am pleased to discuss the comparative approaches of the United States and the European Union to the monopoly/abuse of dominance problem, and to suggest how the comparison might facilitate thinking about the new problems we confront in the high tech, big data space. I will first explain the similarities and differences between the two bodies of law, and second suggest lessons from cross-fertilization.

I attach a short interview of me on the subject of US/EU competition law and big tech, and my article, "Why Europe Is Different."

I. A COMPARISON

The United States

The US Sherman Act was enacted in 1890 to control the power of the big trusts. Senator John Sherman famously said: "If we will not endure a king..., we should not endure a king of trade."[1] Through major legislation in 1914 (the Clayton Act, the Federal Trade Commission Act) and 1950 (the Cellar Kefauver merger act), Congress extended the reach of the law to control power, to protect the little guy, and to stem a rising tide of economic concentration for social, political and economic ends. Congress tried to ensure against fascism, at one end, and communism, at the other, by protecting the market. Antitrust was the economic democracy of the market.[2] But through the years the Supreme Court excessively expanded the law's reach, condemning some perfectly normal aggressive business behavior, and, beginning especially in 1981 with the Reagan Administration, the Supreme Court set about to cut back the reach of the

[1] See 21 Cong. Rec. 2455 et seq. (1890) (remarks of Senator Sherman).
[2] See Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium," 66 Cornell L. Rev. 1140 (1981).

law. Case by case, the law changed to an efficiency prescription. For mergers the paradigm became: There should be no antitrust intervention unless the transaction would decrease consumer surplus. In monopoly cases, the Court assumed and assumes that what firms do is good for consumers; that freedom of even dominant firms will produce the most efficiency and innovation and thus will be best for consumers, competitiveness and markets. Today in US monopoly law (Section 2 of the Sherman Act), there is relatively small scope for condemnation of conduct as anticompetitive. To be condemned, the acts must not only constitute a use of monopoly power; they must create more monopoly power or at least entrench existing power. And by default presumption, the Court assumes that this will not happen; that the market will work.[3] Many lower courts, and often our two excellent federal antitrust agencies, are more watchful watchdogs against abuses of power than Supreme Court jurisprudence would predict.

Europe

Meanwhile in Europe, at the end of World War II, a critical core of European nations resolved to create a new structure of governance so as never to have a war again. Six nations, led by Germany, France and Italy, formed first the European Coal and Steel Community in 1951/52 and then the European Economic Community in 1957/58. The project depended upon community – upon a single European market. As Adam Smith said, people who trade (intensely) together don't fight wars with one another. They come to respect one another and leave hatreds behind.[4] Free trade in the internal market was at the heart of the conception. That meant border barriers must fall. But as the founders correctly anticipated, once tariffs and quotas were

[3] See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009). See Modernization, supra note 2; Eleanor Fox, The Efficiency Paradox, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (R. Pitofsky ed., Oxford University Press 2008).
[4] See Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

abolished, private firms would conspire to re-erect them, and they did. Moreover, most of the nations had their own national champions, often state-owned, and almost always beneficiaries of state-conferred privilege. Thus it was necessary to include antitrust within the Treaty itself, to prevent private power and privileged enterprises from undermining community. As a result, the EU Treaty contains Article 101, against anticompetitive agreements, and Article 102, against abuse of dominance.[5]

Like the US, the EU went through two important phases with regard to the question: When is single-firm conduct anticompetitive? In the first stage, EU law was formalistic. It was very hard on dominant firm conduct that had exclusionary effects on smaller firms. It contained broad presumptions against, for example, exclusive contracts by dominant firms. The second phase came in the 1990s and even more dramatically in the first decade of the new millennium, epitomized by the 2009 guidance on dominant firm conduct.[6] In this second phase, the European Commission adopted, and the Courts followed, a more economic approach.[7] While incorporating economic analysis into the law, Europe retained certain guiding principles and approaches reflecting the place of antitrust in the Treaty. These approaches include: EU law is about community and integration. EU competition law is sympathetic with EU's internal market free-movement law, which stresses the importance of free movement across Member State lines. Likewise, EU law is antagonistic to Member State restraints and the privileges they grant to favored firms. It views such restraints and privileges as distortions of competition. Both aspects – respect for free movement and antagonism to state restraints – are imported into EU

[5] *See* Alan Ryan, Antitrust laws and unilateral conduct – transatlantic divergences and how to manage them, New Frontiers of Antitrust Conference, 11 June 2018, Concurrences Competition Law Review 3 (2018).
[6] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal 24.2.2009 C 45/7.
[7] See Nils Wahl, Recent trends at the Court of Justice of the European Union, Concurrences Competition Law Review 4 (2018).

competition law and specifically into abuse of dominance law. EU competition law stresses market access and the right to contest markets on the merits. It is sympathetic to access to networks. It is hostile to dominant firms' using leverage to take advantages for themselves at the expense of competitors, thereby "unleveling the playing field." It does not aim to protect inefficient competitors. Rather, EU precedents safeguard a clearer path of the outsider to access markets on the merits, free from obstructions by dominant firms. Nonetheless, from the point of view of detractors who worry about excessive enforcement against dominant firms, the EU approach does protect competitors.

Presumption and Divergence

EU competition law adopted its more economic approach nearly two decades ago. However, it never adopted the Chicago School premises. It does not assume markets work well. It does not admonish: Trust the market – especially not when the market is concentrated and dominated by a single firm. It does not presume that antitrust intervention is likely to mess up the market and chill competition and innovation. Its teaching implies a belief that lowering barriers to entry and keeping a clear path for challengers is likely to make the market more dynamic and thus serve consumers better. When dealing with innovation incentives, US cases are likely to assume that antitrust action against a dominant firm will chill the firm's incentives to invent.[8] EU law is more likely to find that the dominant firm's challenged conduct will chill the outsiders' incentives to invent, and has documented this effect in specific cases.[9] While US competition law abhors duties of dominant firms to deal with competitors, calling such duties

[8] See Trinko, supra note 3; linkLine, supra note 3; Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013). But see United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

[9] See Microsoft Corp. v. Commission, Case T-201/04, 2007 E.C.R. II-3601 para. 654 (examples of products by Sun and Novell that were stymied); Google Android, European Commission, http://europa.eu/rapid/press-release_IP-18-4581_en.htm (Android forks example).

"forced sharing," undermining incentives to invent,[10] EU law applies a contrary principle: Dominant firms, especially firms with power in one market who compete in an adjacent market, have the special responsibility not to impair rivals' competition on the merits.

Both jurisdictions want to preserve and facilitate sustainable low pricing even if it displaces small firms that can't keep up with the competition, but US law makes it harder than does EU law to attack below cost pricing. US law requires the plaintiff to prove a probable recoupment scenario (defendant must be likely to recover its losses by charging monopoly prices high enough and long enough after the predatory siege).[11] EU law does not require proof of probable recoupment where the dominant firm had exclusionary intent.[12] It is enough that the predator thought the scheme was worth it.

Despite these different presumptions and principles, much of the unilateral conduct law is virtually identical on both sides of the ocean. But the different presumptions and principles have resulted in diametrically different results on nearly identical facts in some key cases, especially regarding refusal to deal, as described in my attached article, *Why Europe is Different.*[13]

II. Implications for Big Tech, Big Data

The big tech, big data firms are posing challenges to this country and to the world. A handful of high tech giants are dominating markets. The firms generally were started from scratch by entrepreneurs with great ideas that have attracted millions of users. They are networks and make use of network effects, which please consumers (who get more friends or

[10] See Trinko, supra note 3.
[11] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).
[12] *See* Akzo Chemie v. Commission, Case C-62-86, EU:C:1991:286.
[13] Eleanor Fox, Monopolization and abuse of dominance: Why Europe is different, 59 Antitrust Bulletin 129, 136-39 (2014). The Polish Telecom case has since been affirmed by the General Court. Orange Polska S.A., formerly Telekomunikacja Polska S.A. v European Commission, Case T-486/11 ECLI:EU:T:2015:1002.
Please note that my article, Why Europe is different, was published before the major EU Court of Justice case, *Intel*, which leans more than previously towards an economic approach. Intel v Commission, C-413/14 P, ECLI:EU:C:2017:632.

suppliers or buyers), but create high barriers to entry and, with it, power. They offer their products on one side of the market for zero; on the other side they make huge revenues from advertising, often by selling the data of their users. They operate with low-price models, not the high prices that have traditionally attracted antitrust attention. Some have been exposed for serious misuses of data. Some have waged media campaigns of false information against critics. The platforms that offer services in competition with their customers tend to prefer their own products and demote their rivals, to stamp out creative rivals by appropriating their ideas, to mine the data of the firms they host to provide the next big thing, and to breach privacy. Are the firms violating the competition laws? Does it depend on whether the laws are those of the US or those of the EU? It might.

The new forms of business, even to the extent that they may be abusive, pose challenging questions under Section 2 of the Sherman Act. The market definitions are difficult and contestable. Monopoly power may be hard to prove, especially if, as usual, power is measured by the extent to which the firm can raise price above a competitive price for a significant time. Anticompetitive conduct may be difficult to prove, especially if the plaintiff must establish, as frequently demanded, that the conduct lowers output and raises prices.

Under EU competition law, the case is easier to make. EU law is less demanding of proof of the market. Moreover, a firm might hold a dominant position even when it does not have monopoly power or be dangerously likely to get it as demanded in the United States. It might be a gatekeeper rather than a traditional monopolist. A firm might abuse its dominance when it uses its power in one market to get significant competitive advantages in an adjacent market by blocking competitors' access by conduct that has no competitive merit. An important platform might abuse its dominance under EU law by refusing to deal fairly with a competing

rival on the platform when the refusal squeezes out an otherwise efficient rival.

These qualities of EU law make it a more flexible tool than the Sherman Act to deal with the new problems of high tech/big data. Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, also has this flexibility. The flexibility does not prejudge the answers. The European Commission and Courts[14] and the US FTC would want to consider all of the facts; they would consider the reasons for and benefits of the challenged conduct. They would consider the effects on innovation on both sides – the insider seeking to justify its strategy and the outsider or user seeking fair, non-discriminatory, transparent and non-exploitative treatment. The European Commission and the US FTC can consider the consumer protection as well as the antitrust the problems; and the European Commission may consider any violations of the European privacy directive. A holistic treatment of the issues might be what we need.

The standard for analysis: US/EU

I will comment on the standard for analysis: What is anticompetitive? Here, perhaps surprisingly, US and EU competition law converge in broad concept, even while displaying big differences in presumptions and applications. Both the US and the EU, by their antitrust laws, are trying to protect the market. Neither law protects inefficient competitors from competition itself. Both laws welcome the winds of competition and sustained low pricing. The Court of Justice expresses the goal of EU competition law variously as protecting consumers' interests and as protecting the interests of all market players – meaning all but those who want protection

[14] EU Google Shopping, in which the European Commission condemned Google's demoting rivals in order to place itself first, on returns from searches, 27 June 2017, is on appeal to the General Court.

or privilege.[15] The US Supreme Court sometimes says the goal of US antitrust is consumer welfare and sometimes says (as did Justice Breyer in *Leegin*) "to maintain a marketplace free of anticompetitive practices."[16] This is the market goal, the robust market goal, or the market process goal. What it does not admit into the antitrust paradigm is protection of non-competition interests.

There is a false dichotomy afoot that says: Either we protect the tried and true standard of consumer welfare[17] or we sink into a mire of special interests. The real dichotomy is antitrust as market law versus antitrust without market boundaries. US antitrust and EU competition law are market law. This, of course, is the tip of another inquiry – What interventions are good and important to help make the market work better for the good of the people, or to prevent its degradation by the use of economic power? This essay has described two points of view or perspective in answer to the question. Still, the basic market facts that the analyst needs to know are virtually the same.

Does Europe Discriminate?

I am of course aware that various colleagues and even Presidents have accused the European Commission of suing successful American high tech firms because they are successful. I have read the European decisions and judgments carefully and I do not believe that the European Commission has discriminated against American firms. The principles applied by the EU courts and Commission to the US firms are principles deeply embedded in the European

[15] See Margrethe Vestage, "Reflections on the landmark cases," Interview, *Concurrences* 4 (2018), 12-16: "Part of that [our work] is…establishing a level playing field for all market participants so that competition and innovation can thrive, and consumers get a fair deal, that's the thing for me."
[16] Leegin Creative Leather Products, Inc., v. PSKS, Inc., 551 U.S. 877 (2007)(concurring and dissenting).
[17] "Protecting market process" is more descriptive than "[maximizing or guarding against reduction of] consumer welfare." Both are equally very big tents.

competition law jurisprudence. Breaking company with US law, EU competition law imposes on dominant firms responsibilities to deal fairly with rivals that are their customers. The whole EU Treaty exudes sympathy with non-discriminatory market access. It is not surprising that President of the European Commission Junker listed second in his 10 Commission priorities for 2015-19: a digital single market.[18] And it is worthy of note that cases very similar to the EU cases have been brought or advocated to be brought in the United States.[19]

CONCLUSION

The US antitrust law on monopolization and the EU competition law on abuse of dominance share much in common. They proscribe the anticompetitive conduct of dominant or monopoly firms. However they often part ways in their application, because the United States maintains a default posture that even dominant firms tend to act in the interests of consumers, and a perspective that duties to deal are perverse because they undercut incentives (of the dominant firm) to invent; and in Europe the dominant firm has the responsibility not to obstruct outsiders' efficient competition on the merits, and Europe (more clearly) aspires to unleash outsiders' as well as incumbents' innovation. This century has revealed new forms of competition and innovation and also new forms of power and its abuse. For solutions, we may need law flexible enough and enforcers wise and knowledgeable enough to deal with these new sources and uses of power.

[18] "A Digital Single Market (DSM) is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence." European Commission: Commission and its Priorities, https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market.

[19] E.g., FTC v. Qualcomm, N.D. Cal, Nov. 6, 2018 (granting FTC's motion for partial summary judgment).