New York State Bar Association
Antitrust Section Annual Meeting

ANNUAL REVIEW OF DEVELOPMENTS AND HOT TOPICS

January 2019

I. VERTICAL MERGERS

1. *United States* v. *AT&T, Inc.* (AT&T-Time Warner Merger)

- Summary: In 2016, AT&T announced its agreement to acquire Time Warner for approximately $108 billion, and after an investigation, the DOJ filed suit to block the proposed merger in late 2017. In June of this year, a federal court in D.C. concluded that the government had failed to meet its burden to establish that the merger would be likely to substantially lessen competition. The court rejected the increased leverage theory of harm, determining that AT&T was unlikely to withhold Time Warner content from rivals for significant periods. It similarly threw out arguments that (i) AT&T would hinder the development of virtual or live video distributors by restricting access to necessary Time Warner content; or (ii) prevent rival distributors from using its products—HBO, in particular—as a promotional tool to attract and retain customers.

- Status: This action is ongoing. The government appealed the district court ruling in October 2018. Oral argument before the D.C. Circuit was held on December 6, 2018.

- Material:

  - *United States* v. *AT&T, Inc.*, No. 17-cv-2511 (D.D.C. June 12, 2018), https://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf.

  - Brief of Appellant United States, *United States* v. *AT&T, Inc.*, No. 17-cv-2511 (Oct. 18, 2018), https://www.justice.gov/atr/case-document/file/1085516/download.

  - Elai Katz, *AT&T-Time Warner and a Rare Judicial Perspective on Vertical Mergers*, N.Y. L.J. (June 25, 2018), https://www.law.com/newyorklawjournal/2018/06/25/att-time-warner-and-a-rare-judicial-perspective-on-vertical-mergers/.

  - *U.S. Department of Justice Merger Guidelines, Non-Horizontal Merger Guidelines*, DEP'T OF JUSTICE (June 14, 1984 *revised* April 8, 1997), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

  - Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC, FTC (2018) (remarks of D. Bruce Hoffman Acting Director, Bureau of Competition),

https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

2. Cigna Corp.-Express Scripts Holding Co. ("ESI") Merger

- Summary: In September 2018, the DOJ formally approved the merger of Cigna, a health insurance company, with ESI, a pharmacy benefit management ("PBM") company. In its assessment of the proposal, the DOJ analyzed whether the merger would: (i) substantially lessen competition in the sale of PBM services; or (ii) raise the cost of PBM services for Cigna's health insurance rivals. The government determined that because Cigna's PBM nationwide business is small and that several other PBM companies—both large and small—would remain in the market post-merger, the proposed Cigna-ESI merger would be unlikely to substantially lessen competition in the sale of PBM services. It further concluded that the merger would be unlikely to allow the merged company to increase costs to Cigna's health insurance rivals or to lead ESI to raise PBM prices to Cigna's rivals. The matter was resolved without a case being filed.

- Material:

  - *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger*, DEP'T OF JUSTICE (Sept. 17, 2018), https://www.justice.gov/atr/closing-statement.

3. CVS Health Corporation-Aetna Inc. Merger

- Summary: In October 2018, the DOJ announced a settlement resolving its complaint against CVS and Aetna requiring that CVS divest Aetna's Medicare Part D prescription drug plan business for individuals before proceeding with the proposed $69 billion merger. In its complaint, the DOJ argued that the combination of CVS and Aetna would cause anticompetitive effects, including increased prices, inferior customer service, and decreased innovation in sixteen Medicare Part D regions across twenty-two states. Further, the merger would result in the loss of competition between CVS and Aetna and in lower-quality services and increased costs for consumers, the federal government, and taxpayers.

- Status: The government reached an agreement with CVS and Aetna regarding the divestiture, and the two companies closed the deal on November 28, 2018. However, at a hearing on December 3, the federal trial court declined to give its approval of the agreement under the Tunney Act and asked the companies to hold some operations separate. Instead, expressing concern about lingering antitrust issues, the court ordered that the DOJ must first respond to the more than 95 public comments that had been filed against the merger. This process is expected to take until February 2019. The court's request preventing the companies from integrating after announcement of a settlement resolving the government's concerns is highly unusual, commentators say.

- Material:

    - Complaint, *United States* v. *CVS Health Corp.*, No. 18-cv-02340 (D.D.C. Oct. 10, 2018), https://www.justice.gov/opa/press-release/file/1099831/download.

II. TWO-SIDED MARKETS

4. *Ohio* v. *American Express Co.*

- Summary: In June 2018, the United States Supreme Court affirmed the Second Circuit's holding that American Express's anti-steering provisions in its merchant contracts do not violate federal antitrust law. The anti-steering provisions prohibit merchants from avoiding fees by steering customers' use (or non-use) of Amex cards. Amex says the provisions allow it to better compete for cardholders through easier checkouts, maximized rewards, and encouraged spending at merchants; plaintiffs argue that the provisions reduce card companies' incentives to offer merchants—the middleman—lower prices or better terms.

  In its holding, the Court ruled that the antitrust analysis must consider customers on both sides of credit card transactions, including merchants and cardholders, when assessing antitrust claims. Consequently, in considering only one side of the credit card transaction, plaintiffs failed to garner sufficient evidence of antitrust violations and meet their burden under the rule of reason standard. However, the Court noted that "it is not always necessary to consider both sides of a two-sided platform," and the necessity of considering both sides depends on the extent to which the two sides' pricing and demand are interconnected. Further, academics have noted that even in a two-sided analysis, defendants may not always win, since a dual assessment may actually reveal anticompetitive conduct that may have gone undetected in a one-sided inquiry. The Court also acknowledged that even where costs may increase, anti-steering provisions could be economically efficient and enhance welfare.

- Material:

    - *Ohio* v. *American Express Co.*, No. 16-cv-1454 (June 25, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf.

    - Elai Katz, *Supreme Court Tackles Two-Sided Platforms*, N.Y. L.J. (Aug. 17, 2018), https://www.law.com/newyorklawjournal/2018/08/17/supreme-court-tackles-two-sided-platforms/.

5. *U.S. Airways, Inc.* v. *Sabre Holdings Corp.*

- Summary: In 2011, U.S. Airways sued Sabre challenging a contract between the two companies, which included a provision requiring U.S. Airways to grant Sabre access to all of its flight and fare information and prohibited U.S. Airways from offering lower fares for those same flights in other distribution channels, like its own website. The agreement, U.S. Airways alleged, reinforced Sabre's market power, stifled competition,

and harmed both the airline and consumers. In 2017, Sabre appealed to the Second Circuit to throw out a $15 million jury award against it; U.S. Airways filed a cross-appeal, arguing that the district court should not have dismissed its Section 2 Sherman Act monopolization claim.

Following the June 2018 Supreme Court order in *Ohio* v. *American Express Co.*, both parties submitted ten-page letters to the Second Circuit arguing how the decision to uphold the credit card company's anti-steering policies advance their own claims. Sabre views the market as two-sided, and argues that the circuit court should reverse the verdict on the grounds that only a one-sided market was considered by the jury. U.S. Airways contends that the global distribution service market does not exhibit the same interdependency that exists in the credit card market, as a market is two-sided for antitrust purposes only when it exhibits demand interdependency.

- Status: This action is ongoing. A short hearing was held in the Second Circuit on December 13, 2018.

- Material:

    - Letter from U.S. Airways, Inc. re: *Ohio* v. *American Express Co.*, *U.S. Airways, Inc.* v. *Sabre Holdings Corp.*, Nos. 17-960 and 17-983 (July 16, 2018), https://dlbjbjzgnk95t.cloudfront.net/1063000/1063882/https-ecf-ca2-uscourts-gov-n-beam-servlet-transportroom-servlet-showdoc-00206286595.pdf.

    - Letter from Sabre Holdings Corp. re: *Ohio* v. *American Express Co.*, *U.S. Airways, Inc.* v. *Sabre Holdings Corp.*, Nos. 17-960 and 17-983 (July 16, 2018), https://dlbjbjzgnk95t.cloudfront.net/1063000/1063882/https-ecf-ca2-uscourts-gov-n-beam-servlet-transportroom-servlet-showdoc-00206286908.pdf.

6. *Anderson News, L.L.C.* v. *American Media, Inc.*

- Summary: In July 2018, the Second Circuit affirmed a New York federal court's summary judgment order that Anderson News, a magazine wholesaler, failed to provide sufficient evidence of alleged Sherman Act violations by magazine publishers. In the face of rising costs, Anderson raised surcharges for the publishers in an attempt to curb losses and adjust market structure. When the publishers declined to submit to the higher costs and new structure, they ceased operations with Anderson and the wholesaler alleged an illegal boycott. The Second Circuit concluded that Anderson failed to show that the publishers' rejection of the surcharges was "more likely than not" the result of a conspiracy, rather than independent decision-making. Ultimately, the court concluded, Anderson's allegations made "no economic sense" and it was not "surprising that defendants quickly rejected the proposal in favor of switching to existing wholesalers without surcharges, refusing to accept the terms of Anderson's new business model."

  To combat the argument that its surcharge plan made no economic sense, Anderson pointed to economic literature on multi-sided platforms, which was assessed extensively in connection with the Supreme Court's decision in *Ohio* v. *American Express Co.* and

has been viewed as restrictive for certain antitrust plaintiffs. While the argument was not adopted by the circuit court, such advocacy helped to further explore the nature of two-sided markets.

- Materials:

    - *Anderson News, L.L.C.* v. *American Media, Inc.*, No. 17-2808 (2d Cir. Dec. 7, 2018), https://law.justia.com/cases/federal/appellate-courts/ca7/17-2808/17-2808-2018-12-07.html.

    - Elai Katz, *Competitor Communications Not Enough to Infer Antitrust Conspiracy*, N.Y. L.J. (Dec. 18, 2018), https://www.cahill.com/publications/antitrust-monthly-column/2018-12-18-competitor-communications-not-enough-to-infer-antitrust-conspiracy/_res/id=Attachments/index=0/Competitor%20Communications%20Not%20Enough%20to%20Infer%20Antitrust%20Conspiracy.pdf.

III. STANDING

7. *Apple Inc.* v. *Pepper*

Summary: In August 2017, Apple appealed a Ninth Circuit decision that held customers of the Apple App Store are direct purchasers of Apple and therefore, have standing to sue Apple under the Clayton Act and consistent with the *Illinois Brick* doctrine, the latter of which grants antitrust standing only to direct purchasers. On the merits, plaintiffs allege that the App Store violates antitrust law and that Apple forces App Store customers to pay higher prices for apps than they would have in a competitive market. As indicated, however, the question taken up by both the Ninth Circuit and the Supreme Court is one of standing. The circuit court reasoned that because Apple functions as a distributor for app developers, customers make their app purchases directly through Apple's App Store, rather than from the distributors themselves. "Whether a purchase is direct or indirect does not turn on the formalities of payment or bookkeeping arrangements," the court observed. "If plaintiffs were direct purchasers from Apple solely because Apple collected their payments, Apple could escape antitrust liability simply by tinkering with the order in which digital banking data zips through cyberspace during a sales transaction."

In its appeal to the Supreme Court, Apple continues to argue that App Store customers are only indirect customers, and under the *Illinois Brick* doctrine, do not have standing to sue Apple. Apple sells its distribution services to app developers, it argues, who are its direct purchasers; it does not possess any price-setting power. The DOJ, in November 2018, argued before the Court in Apple's favor. However, other sentiment seems to support the Ninth Circuit's holding: FTC Commissioner Slaughter has made clear her view that app purchasers are direct Apple purchasers as a result of the relationship and infrastructure between Apple, the App Store, and the app developers.

- Status: This action is ongoing. Oral argument before the Court took place on November 26, 2018.

- Materials:

    - *In re: Apple iPhone Antitrust Litigation*, No. 14-15000 (9th Cir. Jan. 12, 2017), https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/12/14-15000.pdf.

    - Rebecca Kelly Slaughter, *You Should Have the Right to Sue Apple*, N.Y. TIMES (Dec. 20, 2018), https://www.nytimes.com/2018/12/12/opinion/apple-pepper-antitrust-supreme-court.html.

IV. TRADEMARK SETTLEMENTS

8. *In the Matter of 1-800 CONTACTS, Inc.*[1]

- Summary: In November 2018, the FTC issued an order holding that 1-800 Contacts had violated Section 5 of the FTC Act by entering into and enforcing fourteen trademark settlement agreements with other contact lens sellers. The FTC concluded that the agreements effectively restricted the ability of competitors to bid for key-word advertising in search engines that would inform consumers of identical products available at lower prices. This resulted in the artificial reduction of prices that 1-800 Contacts paid, in addition to the reduction in quality of search engine results delivered to consumers. The FTC concluded that 1-800 Contacts could have used less anticompetitive means to protect its trademarks and other intellectual property.

- Dissenting Statement: Commissioner Phillips argued that the full rule of reason inquiry should be applied to trademark settlement agreements, so as to provide guidance to the market, increase certainty, encourage brand investment, and enhance competition. In failing to "grapple fairly" with the trademark context of the agreements, Commissioner Phillips warned that the majority order would either (i) treat clearly pro-competitive conduct as presumptively unlawful; or (ii) require the Commission and federal courts to litigate inherently fact-specific intellectual property infringement claims in every antitrust challenge to a settlement agreement. The net result would be uncertainty and the undermining of current trademark policy.

- Status: This action is ongoing. 1-800 Contacts has filed a motion for a stay pending appeal to a federal court of appeals. It has 60 days from the date of the November 7 order to file any such appeal, which is likely, given the motion and the strong dissent of Commissioner Phillips.

- Material:

[1] *In the Matter of 1-800 CONTACTS, Inc*. appeared in our panel outline last year. At that time, the FTC had issued an initial decision in connection with the 2016 administrative complaint. In its 2017 Initial Decision, the FTC upheld the complaint, ruling that the "evidence in this case demonstrates that the advertising restraints imposed by the Challenged Agreements cause harm to consumers and competition in the market for the sale of contact lenses online. This is sufficient to establish Complaint Counsel's prima facie case that the agreements are anticompetitive. The evidence fails to prove that the Challenged Agreements have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects of the Challenged Agreements. Accordingly, the Challenged Agreements violate Section 5 of the FTC Act."

- *In the Matter of 1-800 CONTACTS, Inc.*, No. 9372 (F.T.C., Nov. 7, 2018), https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf.

- *In the Matter of 1-800 CONTACTS, Inc.*, No. 9372 (F.T.C., Nov. 7, 2018) (Commissioner Slaughter, concurring), https://www.ftc.gov/system/files/documents/public_statements/1421321/docket_no_9372_concurring_opinion_of_commissioner_slaughter_public_0.pdf.

- *In the Matter of 1-800 CONTACTS, Inc.*, No. 9372 (F.T.C., Nov. 7, 2018) (Commissioner Phillips, dissenting), https://www.ftc.gov/system/files/documents/public_statements/1421309/docket_no_9372_dissenting_statement_of_commissioner_phillips_redacted_public_version.pdf.

V. ANTITRUST STANDARDS OF REVIEW

9. *In re: Blue Cross Blue Shield Antitrust Litigation*

- Summary: In December 2018, the Eleventh Circuit upheld a district court ruling and denied an interlocutory appeal by Blue Cross Blue Shield ("BCBS") that argued against application of the *per se* standard for certain of BCBS's allegedly restrictive practices related to a valid trademark license agreement. In the underlying case, health care providers and subscribers brought claims that BCBS entered into anticompetitive trademark licensing agreements with independent insurance providers, which allegedly severely restricted the ability and incentive of the defendants to compete with each other. The district court ruled in April 2018 that it would analyze the agreements as a whole and under the *per se* standard. The vast majority of conduct in antitrust litigation (except for naked restraints) is analyzed under the rule of reason standard and that the April decision relied heavily on two older Supreme Court cases that have been criticized as overly strict in their application of the *per se* rule in certain contexts. The circuit court did not provide detailed reasoning in its two-page ruling.

- Status: The action is ongoing. Class certification is the next major stage of the case in the district court.

- Material:

  - *In re: Blue Cross Blue Shield Antitrust Litigation*, No. 18-90020 (11th Cir. Dec. 12, 2018), https://dlbjbjzgnk95t.cloudfront.net/1110000/1110763/18-90020_documents.pdf.

  - *In re: Blue Cross Blue Shield Antitrust Litigation*, No. 13-cv-20000 (N.D. Ala. Apr. 5, 2018), https://www.leagle.com/decision/infdco20180406941.

10. *United States* v. *Kemp & Associates*

- Summary: In October 2018, the Tenth Circuit overturned a district court's decision to dismiss the government's criminal antitrust indictment against an heir location service provider as time barred and reaffirmed the "payments theory"—the theory that receiving payments after the termination of an agreement suffices as conduct in furtherance of a conspiracy. Specifically, it held that a conspiracy continues for as long as those involved receive payments on the unlawfully obtained contracts: "a Sherman Act conspiracy, such as the one alleged here, remains actionable 'until its purpose has been achieved or abandoned.'" Additionally, and although the circuit court ultimately determined that the issue was not ripe for formal appeal without a final judgment from the trial court, it strongly urged the district court to reconsider its holding that the claims be adjudicated under the rule of reason standard.

- Status: This action is ongoing. To the extent the trial court rejects the suggestion of the Tenth Circuit and applies the rule of reason, the government may consider dropping the case, notwithstanding the favorable ruling on the payments theory. Not only will the rule of reason standard create greater hurdles for the government in proving its case, but the stated policy of the United States Attorney's Antitrust Manual is to only charge conduct that is considered to be *per se* illegal and not to criminally prosecute cases under the rule of reason standard.

- Material:

    - *United States* v. *Kemp & Associates*, No. 17-cr-1418 (10th Cir. Oct. 31, 2018), https://www.ca10.uscourts.gov/opinions/17/17-4148.pdf.

VI. EUROPEAN ANTITRUST AND DATA DEVELOPMENTS

11. Recent Trends in European Law: Competition and Big Data

- Summary: Big data in the context of competition law has become a major point of interest in the EU. To that end, a conference focused on the implications of the key upcoming digital changes for competition policy, markets, and consumers has been scheduled by the Commissioner for Competition in early 2019. As many companies merge with other companies in order to gain access to large datasets—in fact, such transactions have almost tripled between 2008 and 2012—authorities must now analyze the proposed mergers with an eye towards several different issues: the potential effects to the structure of the market where a merger could increase the concentration of data; the potential ability of a newly formed entity to restrain others' access to data (*i.e.*, exploitive conduct or exclusionary agreements); and the ease with which a company can differentiate the prices its sets based on data showing buying habits of its customers (*i.e.*, price discrimination).

  Yet, access to and use of big data may not be enough to conclude that a company has market power or is dominant in the relevant market for purposes of antitrust analyses. Instead, it is considered one factor among many that antitrust authorities consider,

including the size of the company, existing and potential competitive constraints, any countervailing power exercised by the buyers, the type of the data in question, and the way the market operates. For example, the European Commission approved the Facebook-WhatsApp merger after concluding that the increased data collection from WhatsApp users by the new entity may prompt some users to switch to different consumer communication apps that they perceive as less intrusive; the Commission also considered the presence of a significant number of other market participants that collect user data.

- Material:

    - A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU: Hearing Before S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights, 115th Cong. (2018) (statement of Eleanor Fox, Professor of Law Walter J. Derenberg Professor of Trade Regulation New York University School of Law), Appendix A.

    - *Commission Appoints Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers to Commissioner Vestager on Future Challenges of Digitisation for Competition Policy*, EUROPEAN COMMISSION (Mar. 28, 2018), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/commission-appoints-professors-heike-schweitzer-jacquescremer-and-assistant-professor-yves_en.

    - *Competition Law and Data*, BUNDESKARTELLAMT (May 10, 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big Data Papier.html.

    - *The 2017 M&A Report: The Technology Takeover*, BOSTON CONSULTING GROUP (Sept. 26, 2017), https://www.bcg.com/publications/2017/corporate-development-finance-technologydigital-2017-m-and-a-report-technology-takeover.aspx.

    - Facebook/WhatsApp, COMP/M.7217 (E.C. Oct. 3, 2014), http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

APPENDIX A

Prepared Statement of

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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

Washington, D.C.
December 19, 2018

as of Dec. 21, 2018

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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." [not attached to this version]

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."[2] 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.[3] 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 law.

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

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 anti-competitive. 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.[4] 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.[5] 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 abolished, private firms would conspire to re-erect them, and they did. Moreover, most of the nations had

[4] 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).

[5] See Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

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.[6]

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.[7] In this second phase, the European Commission adopted, and the Courts followed, a more economic approach.[8] 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 competition law and specifically into abuse of dominance law. EU competition law stresses market ac-

[6] *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).
[7] 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.
[8] See Nils Wahl, Recent trends at the Court of Justice of the European Union, Concurrences Competition Law Review 4 (2018).

cess 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.[9] 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.[10] While US competition law abhors duties of dominant firms to deal with competitors, calling such duties "forced sharing," undermining incentives to invent,[11] EU law applies a contrary principle: Dominant

[9] 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).

[10] 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).

[11] See Trinko, supra note 3.

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).[12] EU law does not require proof of probable recoupment.[13] 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.*[14]

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 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

[12] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).
[13] *See* Akzo Chemie v. Commission, Case C-62/86, EU:C:1991:286.
[14] 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.

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[15] 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 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.[16] 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 or privilege.[17] 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 anticompeti-

[15] 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.
[16] It is popular, however, for Americans to accuse the EU competition law of protecting competitors. See E. Fox, "We Protect Competition, You Protect Competitors," 26 World Competition 149 (2003). Europeans might respond with at least equal conviction, "We protect competition, you protect incumbents."
[17] 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."

tive practices."[18] 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[19] 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 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 so as not to block their competition on the merits. The whole EU Treaty exudes sympathy with non-discriminatory market access. It is not surprising that President of the European Commission Junker listed second

[18] Leegin Creative Leather Products, Inc., v. PSKS, Inc., 551 U.S. 877 (2007)(concurring and dissenting).
[19] Actually there is no one consumer welfare standard, and "consumer welfare" is not very descriptive of what courts in unilateral conduct cases do. "Protecting the market process" is a better descriptor.

in his 10 Commission priorities for 2015-19: a digital single market.[20] 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.[21]

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 US law assumes that even dominant firms tend to act in the interests of consumers and that duties to deal undercut incentives (of the dominant firm) to invent, while Europe gives dominant firms the responsibility not to obstruct outsiders' efficient competition on the merits and aspires to unleash outsiders' as well as incumbents' incentives to innovate. This century has brought forth new forms of competition and innovation and also new forms of power and its abuse. For solutions, we need law flexible enough and enforcers wise and knowledgeable enough to deal with these new sources and uses of power.

[20] "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.

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