

INTERNATIONAL DEVELOPMENTS, Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge

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Text

[*113] THE EU'S RECENT ANTITRUST FINES against several leading international tech and platform firms are startling: Google was fined \$ 5.1 billion for alleged tying and exclusivity arrangements related to pre-installed search and \$ 2.7 billion for allegedly "favoring" its own comparison shopping service; Qualcomm was fined \$ 1.22 billion for allegedly paying Apple not to buy chips from rivals; and Intel was fined \$ 1.3 billion (which was set aside by the EU Court of Justice) based on the claim that it abused loyalty rebates. But why are these firms penalized in the EU for dominance "abuses," yet they go unscathed in the United States for the same or similar practices?

Some in the business community view these divergent outcomes as "techlash"—outright frontal attacks on U.S. innovation and success; others attribute it to differences in enforcement systems and objectives, including the EU's continuing effort to build a discrimination-free "internal market" among Member States. In the midst of these dramatically different outcomes, both jurisdictions, at least publicly, continue to seek convergence on monopoly/dominance law and policy to the extent feasible.¹

The goal of this article is two-fold: first, to provide a summary of where full or partial convergence has occurred; second, and perhaps more importantly, to detail the procedural and substantive areas of continued divergence.

Setting the Stage

To start, there are simple differences that are not likely to change any time soon. Article 102 is both more specific and broader than Section 2 of the Sherman Act, and the enforcement and judicial systems also are quite distinct. Unlike in the U.S., in the EU's administrative law system, the Commission is the investigator, prosecutor, and decision maker; it does not have to go to court to impose penalties or other remedies. Moreover, in contrast to the U.S., the Commission's decisions are given significantly more discretion with respect to competition policy choices and the assessment of complex economic issues.²

¹ See, e.g., Johannes Laitenberger, Developments in EU Competition Control in the Global and Digital Age, Remarks Before the Fordham Antitrust Law and Policy Conference (Sept. 6, 2018), http://ec.europa.eu/competition/speeches/text/sp2018_12_en.pdf; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Problems with Global Antitrust Enforcement, Yale School of Management (Feb. 20, 2016), <https://som.yale.edu/problems-with-global-antitrust-enforcement/keynote-address-edith-ramirez>.

² See José Carlos Laguna de Paz, *Judicial Review in European Competition Law*, U. OXFORD FAC. L., https://www.law.ox.ac.uk/sites/files/oxlaw/judicial_review_in_european_competition_law.pdf.

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Yet, in broad terms, there has been significant convergence over the past decade and a half. Since the early 2000s, the EU has been committed to using much more economic analyses in its assessment of dominant firm behavior, which to a significant degree is consistent with the use of economic analyses in the U.S. courts since the late 1970s. For example, last year's *Intel* decision³ solidified a move away from non-rebuttable to rebuttable presumptions for certain dominant firm practices (there, loyalty discounts), which also aligns more with Sherman Act principles insofar as the focus is on actual effects rather than formalistic categories. And both the EU and the U.S. are committed to a "consumer welfare" focus, even if, as I discuss below, the adopted flavors are a bit different.

Where, then, is the divide? The key differences can be summarized as follows:

- The EU's view of "dominance" is broader than "monopoly" in the U.S.
- The EU places a "special responsibility" on dominant firms not to "distort competition" in any market; the U.S. does not.
- At least in the context of alleged foreclosure through exclusivity arrangements, the EU places the burden on the dominant firm to prove that its conduct did not foreclose (and was not "capable of" foreclosing) competition or, alternatively, that the conduct was "objectively necessary" to achieve customer-related efficiencies. In the U.S., both the government and private plaintiffs carry a relatively heavier burden of proof throughout a Section 2 case.
- The EU does not require likely "recoupment" for price-related predation (predatory pricing, margin squeezes). In the U.S. it is a prerequisite.
- The EU wishes to create or protect rivalrous market structures and readily accepts raising rivals' costs (RRC) theories as a basis for proving a "distortion of competition" in the dominant firm's market. The U.S. is more tolerant of dominant market structures (especially resulting from innovation or efficiencies) and looks more to consumer welfare metrics to assess overall market harm, including after considering efficiencies and other justifications.
- The EU accepts "leveraging" into a separate market as an overarching Article 2 concern. In the U.S. that theory died with *Trinko*.⁴
- The EU allows (though cautiously) for a duty to deal under an "essential facilities"-type doctrine. In the U.S. that notion, too, is all but dead.

[*114] Much of this divergence stems from the U.S. courts' concern with "false positives"--erroneously condemning pro-competitive or neutral conduct--as well as a reluctance to undertake judicial intervention (and, effectively, oversight) of complex, unilateral business practices. Given these procedural and substantive differences, it is fair to observe that, absent a unifying process and analytical framework, the Atlantic divide on monopoly/dominance policy and law will persist.

The Different Statutes and Systems

Article 102 Is Both Broader and More Specific. The foundational differences between U.S. monopoly law and EU dominance law and policy are quite significant and derive from diverse historical contexts. Section 2 arose from the concern over the consolidation and power of the great U.S. trusts and was enacted in 1890 along with Section 1 of the Sherman Act. As written, Section 2 does not tell us much: "Every person who shall monopolize . . ." ⁵ Instead, Section 2 is only understood through a lengthy common law history that includes the rise and fall of various per se categories as well as the enormous impact that different economic schools of thought (i.e., the Chicago School and the "Post-Chicago" School) have had on Section 2 jurisprudence. In recent decades, in particular, U.S. courts have

³ Case C-413/14 P, *Intel Corp. v. Comm'n*, ECLI:EU:C:2017:632 (GC Sept. 6, 2017).

⁴ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁵ 15 U.S.C. § 2.

become extremely cautious about presuming the expertise to determine the difference between pro- and anticompetitive conduct of monopolists.

In Europe, by contrast, the prohibition against "abuses of dominance" was introduced in Article 86 of the 1954 Treaty of the European Economic Community (TFEU), which, even at its inception, sought to open markets and level the playing field across Member States—a distinctly "ordoliberal" influence.⁶ Historically, what is now Article 102 places a premium on the freedom to compete, and the increased choice that brings, which is reflected in the language itself. Among other things, Article 102 "abuses" include:

- "imposing unfair purchase or selling prices or other unfair trading conditions";
- "limiting production, markets or technical development to the prejudice of consumers";
- "applying dissimilar conditions to equivalent transactions . . ."; and
- "making . . . contracts subject to acceptance . . . of supplementing obligations which . . . have no connection with the subject of such contracts."⁷

On the surface, the differences in the statutes are significant. Section 2 says nothing about an "abuse," let alone by "limiting production" (which effectively is the same as raising prices). Likewise, the concept of "unfairness" referenced in Article 102 is foreign to Section 2. And while violations for "price discrimination" and "tying"-related conduct may fall within certain interpretations of Section 2, Article 102 incorporates these prohibitions directly into the statute, which is consistent with a rule-based, administrative law system. Finally, while neither the Sherman Act nor the TFEU includes any notion of proving harm to ultimate consumers or assessing efficiency justifications, decades of U.S. common law have led to the requirement that the monopolist's conduct harm consumers. Moreover, under U.S. law, an alleged monopolist always has the opportunity to justify its conduct on efficiency or other procompetitive grounds—essentially a rule of reason standard. By contrast, Article 102 on its face and as applied over several decades (with the exception of *Intel*, discussed below), historically operated much like a per se rule, presuming irrebuttable harm where the Commission found that the conduct fit into an "abuse" category. And while, in theory, one could argue about effects and efficiencies, these seemed to carry little weight.

DG Comp Has More Discretion than U.S. Enforcers. An often-overlooked distinction between the U.S. and the EU is that the Commission does not have to go to court to impose a penalty or other remedy on a party. Moreover, on complex economic issues or policy choices, the reviewing courts in the EU grant the Commission broad discretion (although the EU courts have much broader powers to assess the appropriateness of fines).⁸ In sharp contrast, the DOJ and FTC cannot unilaterally "impose" any relief on a party, but instead must first seek and obtain that relief from a federal judge who, in turn, is charged with following case law both on the substance of the alleged violation and the scope of the remedy. Moreover, the common law system gives U.S. courts, including the Supreme Court, significant latitude to interpret Section 2 of the Sherman Act and to delve deeply into complex economic issues that often are determinative.

The natural consequences of these systemic differences are subtle, but far reaching. The EU Commission is relatively free to pursue whatever substantive policy or theory of liability it chooses, subject only to later review (with the limitations noted above). That flexibility also applies to what competition policies to pursue through Article 102, a concept that in the U.S. would be limited by what realistically could be achieved in court.

Another key difference between the two jurisdictions is that, in the EU, there is not the same constant feedback from the courts that we find in the U.S. common law system, which might otherwise help clarify the scope and

⁶ See generally Peter Behrens, The Ordoliberal Concept of "Abuse" of a Dominant Position and Its Impact on Article 102 TFEU (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045.

⁷ Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) 47 (formerly Article 82 TEC).

⁸ See Laguna de Paz, *supra* note 2.

application of Article 102. For example, without that flow of case-law guidance, the Commission may find itself interpreting *Intel* for years without further clarification from EU courts. The simple point is that any opportunity for convergence driven by case law is made more complicated by the different processes of the two systems. These differences can be exacerbated by rapidly changing markets that can make any case law pronouncements themselves seem immediately outdated.

Use of Economic Analyses and the Consumer Welfare Paradigm

The EU Uses Economics, but the Flavor Is Distinctly Post-Chicago. In terms of economic influences between the two jurisdictions, one sees an interesting blend of convergence [*115] and divergence with respect to distinct economic schools of thought. At the risk of oversimplification, the battleground is drawn between the Chicago School,⁹ which focuses on price effects and efficiencies and continues to influence the U.S. courts, and the Post-Chicago School,¹⁰ which is grounded in game theory and posits that there are predatory strategies that, under certain conditions, can harm consumers by first harming rivals in a variety of ways and degrees. Post-Chicago economics underlies most current theories of market foreclosure, so-called raising rivals' costs, and other forms of exclusionary conduct. And while these more recent economic theories have had significant influence on the U.S. agencies (and many courts), in the EU they seem all but fully embraced by the Commission.

The dichotomy makes a certain amount of sense, at least historically. Not only do the EU's history and statute (as written) reference "fairness," the use of modern economics in EU analyses did not come into play until the early 2000s--i.e., the EU never experienced the full force of Chicago School economics as did the U.S. agencies and courts. Thus, while the U.S. may still be viewed as significantly influenced by Chicago School thinking--including the recent *AMEX* decision¹¹ (discussed below)--the EU Commission began to focus on economic analyses when concepts of foreclosure, leveraging, and raising rivals' costs had become prominent in the economic literature. The relatively greater influence that Chicago School economics has had on U.S. courts is subtle, but important: even where Post-Chicago School economics is accepted by U.S. courts, there remains a strong focus on whether any alleged foreclosure results in power over marketwide price, and any such effect must also be weighed against any efficiency or other justifications. As I describe below, in the EU, by contrast, these limitations appear nascent.

The EU Focuses More on "Leveling the Playing Field." Another subset of what many view as two of the competing economic schools of thought relevant to U.S./EU divergence revolves around the question of whether "monopolies" and dominant firms are in fact good for innovation--the classic Schumpeter versus Arrow debate. In the 1940s, Harvard economist Joseph Schumpeter proposed that the high profits that come with monopoly provide the incentive to innovate and that the "gales of creative destruction" in that quest are good for consumers.¹² By contrast, Kenneth Arrow wrote in the 1960s that innovation and consumers are best served by the pressure of having more competitors in a market and, therefore, monopolists seek to preserve the status quo.¹³ While some

⁹ See generally William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

¹⁰ See generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power over Price*, 96 YALE L.J. 209, 213-14 (1986).

¹¹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹² See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

¹³ See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609 (Richard Nelson ed., 1962).

economists do not necessarily see these views as conflicting,¹⁴ their differences and their influences are readily apparent.

In the U.S., for example, one can clearly see a Schumpeter theme behind the *Trinko* articulation that the ability to charge monopoly prices is "an important element of the free market system" that "attracts 'business acumen' in the first place."¹⁵ In sharp contrast, in the EU, excessive pricing is itself an "abuse" under Article 102; hence, the pursuit of "monopoly rents," even in the context of competition "for the market," does not fit neatly within EU substantive law. Equally important, the EU appears much more interested in promoting "rivalry" among current and prospective firms (and the attendant expansion of "choice"), which in turn leads to a focus on ensuring market structures with multiple participants.¹⁶ In the U.S., however, protecting "rivalry as such" is not an objective, and the courts, as well as the antitrust agencies, are much more willing to accept highly concentrated markets that flow from innovation or efficiencies, including network effects.¹⁷

A variation on the theme is that, in the U.S., all firms, including monopolists, can vigorously engage in competition "for the contract," including those agreements that in varying degrees foreclose opportunities for current or prospective rivals. To be sure, various pricing or contracting practices by monopolists can raise foreclosure concerns in some circumstances--e.g., unjustifiable long-term exclusives, coercive tying, etc.--but the contrast in the EU for this type of competition remains sharp. The EU seems concerned, however, with any agreements involving dominant firms that disadvantage rivals, even if those agreements themselves are the result of a competitive process. And while a EU defendant can argue that any foreclosure is overcome by objective efficiencies or justifications (e.g., the prevention of "free riding"), those arguments, to date, are not reflected in the outcomes of any litigated cases.

The EU's Focus on Consumer Welfare Centers More Around Protecting Rivalry. There are those who would say that the U.S. and the EU have converged by focusing on consumer welfare as a guiding principle for enforcement and judicial decisions. That is true if one thinks of a prior time when the EU condemned certain practices quite formalistically without regard to any demonstrable impact on markets or consumers.

Yet, in large part because of Article 102's history and the EU's related policy objectives, the EU's understanding of consumer welfare in the Article 102 context appears grounded more in how the conduct in question affects rivals, choice, and entry barriers than it does ultimate consumers.¹⁸ Again, while the Article 102 Guidance speaks in terms of protecting competition, not competitors, there seems to be a presumption of sorts that harm to rivals, or just making the playing field less "level," necessarily harms consumers or raises sufficient risk of such harm to warrant intervention.¹⁹ And, no doubt, there are those in the Post-Chicago School of economics who would support that inference.

¹⁴ See Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 *ANTITRUST L.J.* 575 (2007); Carl Shapiro, *Competition and Innovation: Did Arrow Hit The Bull's Eye*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 361 (Josh Lerner & Scott Stern eds., 2012).

¹⁵ *Trinko*, 540 U.S. at 407.

¹⁶ See generally Francisco Marcos, *The Prohibition of Single-Firm Market Abuses: U.S. Monopolization Versus E.U. Abuse of Dominance* (IE Law Sch., Working Paper No. AJ8-238-I, 2017), <https://awards.concurrences.com/IMG/pdf/ssm-id3028629.pdf>.

¹⁷ See D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 *MICH. L. REV.* 955 (2017) (reviewing and discussing DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* (2015)).

¹⁸ Eur. Comm'n, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 [now Article 102] of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7 [hereinafter 2009 Guidance Paper].

¹⁹ *Id.*

U.S. courts, on the other hand, have remained fairly dedicated to the idea, even in the context of Post-Chicago economics, that consumer welfare (in the sense of harm to ultimate consumers) must be diminished, which requires proof of market-wide anticompetitive effects (e.g., on price, quality, or output) that are not outweighed by procompetitive efficiencies or justifications. The difference is evident, for [*116] example, in the contrasting outcomes of the U.S. and EU investigations into Google's comparison shopping services. The FTC acknowledged that Google's conduct may have harmed rivals, but found no basis to find market-wide harm to consumers,²⁰ whereas the EU fined Google \$ 2.7 billion. Likewise, in the recent *AMEX* decision, the Court appeared inclined to endorse the solidly Chicago School view of Section 2 in suggesting that increases in output (or other indicators of market efficiency and health) trump harm to rivals, including under theories of raising rivals' costs.²¹

Where Significant Divergence Remains

"Dominance" Is Easier to Show in the EU. One important area of divergence is the threshold question of what can constitute "monopoly power" or "dominance" in the first place. In the U.S., this statutory requirement often is proven indirectly with evidence of high market shares in well-defined antitrust markets, typically those that exceed 60-70 percent, coupled with high entry barriers and fairly static market dynamics. In the EU, however, "dominance" can be found with market shares below 40 percent as long as the

Commission finds that the firm has the ability to behave independently of its competitors, customers, and consumers.²² This difference in and of itself can lead to significant divergence (although in most recent EU actions involving high-tech or platforms, the firms in question have been found to have particularly high shares, subject to contentions over market structure and marketplace dynamics).

The EU Places "Special Responsibilities" on Dominant Firms. By far, the most fundamental overarching difference between the U.S. and the EU is that, in the EU, "dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets."²³ This special responsibility--again, rooted in the "disempowering" objectives of ordoliberalism--was first recognized by the Court of Justice in the early 1990s when all forms of exclusionary conduct were effectively deemed anticompetitive by rule.²⁴ Accordingly, one may question whether this mandate currently makes sense as the EU courts and the Commission continue to shift to an economic assessment of effects flowing from challenged conduct.

The 2009 Guidance Paper, however, is clear on the continued vitality of this special responsibility framework, explaining that the scope of that responsibility "must be considered in the light of the specific circumstances of each case."²⁵ We know from the Guidance Paper that the Commission reads that as a duty "not to allow [a dominant

²⁰ See Statement of the Federal Trade Commission Regarding Google's Search Practices, *In re* Google, Inc., FTC File No. 111-0163 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

²¹ See *Am. Express*, 138 S. Ct. at 2288 (explaining that even if merchant fees increased, "this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices," and highlighting that there must be "evidence that . . . output was restricted or prices were above a competitive level" in the relevant market--there, credit card transactions (citation omitted)).

²² See Marcos, *supra* note 16, at 6.

²³ Press Release, Eur. Comm'n, Commission Fines Google [euro] 4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018) (IP/18/4581).

²⁴ See Marcos, *supra* note 16.

²⁵ 2009 Guidance Paper, *supra* note 18, at 8.

firm's] conduct to impair genuine undistorted competition on the common market." ²⁶ And, elsewhere, the Guidance Paper speaks in terms of not "impair[ing] effective competition," creating "obstacles to competition" or "hampering competition from competitors." ²⁷ In essence, because of this special responsibility--informed by Post-Chicago School economics--the EU bars dominant firms from engaging in practices that make it more difficult for rivals (current and potential) to compete "on the merits" by foreclosing market opportunities. Hence, there is less of a focus on preventing certain market-wide outcomes (as in the U.S.) and more of an aim to promote and preserve a rivalrous competitive process, which in a large sense is presumed to protect ultimate consumers.

A Heavier Burden of Proof for "Dominant Firms." Post-*Intel*, the burden-shifting paradigm under Article 102 is now clear and it, too, sharply contrasts with U.S. procedure. To start, the EU identifies situations where a dominant firm may be engaging in conduct that the Commission believes "forecloses" rivals. As there is no judicial review of that threshold decision, the bar is not particularly high for the Commission. That characterization then creates a rebuttable presumption that vertical restrictions of dominant firms are unlawful. The burden then shifts to the dominant firm to show that its conduct is not "capable of" foreclosing competition, including under some of the *Intel* factors. ²⁸ If the dominant firm "puts forward good enough arguments," the Commission would then have to "show that the conduct can indeed foreclose competition." ²⁹ Finally, the dominant firm can attempt to prove that its conduct is "objectively necessary" or "produces substantial efficiencies which outweigh" the actual or potential foreclosure effect. ³⁰

In practice, this burden-shifting paradigm weighs heavily against the dominant firm. It would seem relatively easy, for example, for the Commission to find potential foreclosure effects and then conclude that the dominant firm has failed to prove a negative--that the conduct is "incapable" of foreclosing competition in a way that may "distort" competition in any market. And even if the firm comes forward with sufficient evidence to shift the burden back to the Commission, it also would seem fairly easy for the Commission to find that the conduct is likely to impede or foreclose rivals, because the Commission does not also have to prove actual or likely market-wide effects--at least not to the same extent that the U.S. agencies would have to in court.

The EU Does Not Require Recoupment for Price-Related Predation. More substantively, a major area of divergence concerns condemning predatory pricing--the notion that a monopolist can invest in below-cost pricing (or bidding or margin squeezes) with the prospect of driving out rivals. Starting with *Brooke Group*, ³¹ U.S. courts have required allegations and proof of likely "recoupment"--i.e., that the firm is likely to drive out rivals to the degree that it can later raise prices, enhance its monopoly power, and harm consumers. As U.S. courts observe, the strategy appears rarely attempted, ³² and there are very few cases on the strategy in any form.

²⁶ *Id.* at 7.

²⁷ *Id.* at 11.

²⁸ See Johannes Laitenberger, Competition Assessments and Abuse of Dominance, Remarks on the Two Themes of the EU Competition Workshop, at 8 (June 22, 2018), http://ec.europa.eu/competition/speeches/text/sp2018_11_en.pdf. In order to precipitate a rebuttable presumption, *Intel* requires the Commission to analyze the extent of the undertaking's dominant position, the share of the market covered by the practice, the duration and amount of the rebates, and evidence, if any, of the undertaking's intent to exclude equally efficient competitors. *Intel Corp.*, ECLI:EU:C:2017:632, P 139.

²⁹ See Johannes Laitenberger, Enforcing EU Competition Law in a Time of Change, Remarks Before the W@competition Conference at 10 (Mar. 1, 2018), http://ec.europa.eu/competition/speeches/text/sp2018_03_en.pdf.

³⁰ 2009 Guidance Paper, *supra* note 18, at 12.

³¹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

³² *Id.* at 227-29.

In the EU, however, there does not appear to be a recoupment requirement. Presumably, the theory is that a rational firm would only engage in such conduct if there were a real prospect of benefiting from it. Or, at a minimum, it is conduct that "harms rivals" or unbalances the playing field (and, [*117] certainly, there are RRC theories centered around predatory pricing). Either way, these are major differences that are unlikely to change.

The divide between the U.S. and the EU on price discrimination and margin squeezes is equally significant. In the U.S., these are grouped within the predatory pricing paradigm as they typically involve lower prices to some group of customers (in both monopoly and monopsony settings), and raise concerns of removing consumer benefits with potential false positives. Accordingly, both price discrimination under Section 2(a) of the Robinson-Patman Act ³³ and margin squeezes under Section 2, require demonstrable proof of the ability to recoup—again, a very difficult standard to meet. In the EU, by contrast, the probability of recoupment for these parties is not required, and the agencies and the courts appear to assess the conduct more in a Post-Chicago framework. Hence, price discrimination and margin squeezes pose risk to firms if their conduct appears to raise rivals' costs and injure significant competitors under, for example, the "as efficient competitor" test. ³⁴

The EU Is Receptive to Non-Price Predation Theories. A critical difference between the U.S. and the EU centers around how a monopolist or dominant firm may behave to "maintain" its market position (assuming it was achieved appropriately). In the U.S., the notion is that even a monopolist may compete aggressively, including where it harms rivals or creates entry barriers (for example, through innovation, scale efficiencies, or network effects), as long as its conduct can be viewed as "competition on the merits." ³⁵ Hence, monopolists can engage in exclusive dealing arrangements, loyalty rebates, and even tying or bundling as long as those agreements are not coercive and do not unduly foreclose competition from rivals in a way that demonstrably harms ultimate consumers. While this may sound similar to the EU standard, the key difference is that, in the U.S., courts are not trying to preserve "rivalry as such" and will let even "destructive competition" take place absent significant foreclosure of markets balanced against the promotion of innovation or demonstrable efficiencies. Indeed, many in the U.S. (and elsewhere) take the position that proving net harm to ultimate consumers under RRC and foreclosure strategies is either inherently speculative or too complex for judicial intervention. ³⁶

The EU, however, appears willing to intervene to foster competitive market structures and maintain the opportunities of smaller rivals and new entrants. In this respect, the EU focuses on any conduct by dominant firms that may impact rivals (especially those that would otherwise be equally efficient), "distorting" competition and, in turn, ultimately harm consumers. ³⁷ In essence, the EU's premise is that "leveling the playing field" is the best way to promote innovation, protect consumer welfare, and help create one internal EU market.

The EU Embraces "Leveraging" as an Overreaching Theory. A critical and transparent difference between the U.S. and the EU is on the subject of "leveraging" as a Section 2 or Article 102 violation. "Leveraging" is the notion of a monopolist or dominant firm (of one market) engaging in conduct that adversely distorts competition in a second market in which the acting firm is not dominant. The conduct can involve a range of behaviors, including tying, exclusive (complete or partial) contracts, loyalty programs, etc. The key is that the stronger position in one market is

³³ 15 U.S.C. § 13(a).

³⁴ 2009 Guidance Paper, *supra* note 18, at 11, 17.

³⁵ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (describing "the willful . . . maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

³⁶ See generally J. Thomas Rosch, I Say Monopoly, You Say Dominance: The Counting Divide on the Treatment of Dominant Firms, Is It Economics?, Remarks at the International Bar Ass'n Antitrust Section Conf. 13-14, (Sept. 8, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/i-say-monopoly-you-say-dominance-continuing-divide-treatment-dominant-firms-it-economics/070908isaymonopolyiba_0.pdf (noting that the central criticism of the Post-Chicago School is that it relies on "possibility theorems" that are "seldom met in the real world").

³⁷ 2009 Guidance Paper, *supra* note 18.

"leveraged" into a separate market in a way that gives the monopolist or dominant firm an advantage that it otherwise would not have.³⁸

In the U.S., the doctrine was alive and well for decades, especially in the Second Circuit through the *Kodak* decision,³⁹ and was followed by several other circuits as well. But that all came to a crashing halt in *Trinko* where the Court explained that, as a matter of statutory interpretation, for a Section 2 violation there must be either monopolization of the second market or at least proof of "attempt" to monopolize (a theory not available in the EU). Thus, with the stroke of a pen, leveraging was gone in any Section 2 case (other than per se tying) that allegedly involves extending monopoly power from one market into another. Moreover, even if plaintiffs were able to convert those cases to Section 1 challenges of vertical "agreements," they would still have to deal with proving market-wide harm to competition and combating the proffered justifications for the vertical agreements—no small task in the U.S. Finally, even for tying or bundling, in the U.S. *Microsoft* decision,⁴⁰ the per se rule was effectively discarded for markets involving high-tech products sold as a bundle (or other circumstances where the distinctions between two products are blurred or efficiency justifications are plausible).

In the EU, however, emboldened by a large dose of Post-Chicago economics, leveraging has settled in as a standard theory of exclusion and harm. In fact, the notion of leveraging to harm rivals underlies most of the large dominance fines in the headlines since *Intel*.⁴¹ Thus, while the Commission often lays out its reasoning under what appear to be standard theories of tying or exclusive dealing (complete or partial), at the end of the day a foreclosure leveraging theory would appear to suffice. At a minimum, the notion of leveraging, and any related evidence, likely will continue to be a major focal point of agency investigations and enforcement activity in the EU and in a large sense will ensure some degree of continued Atlantic divide.

The EU Continues to Accept the Notion of "Essential Facilities." The EU notion of so-called essential facilities in many ways mirrors the U.S. doctrine, which had a long but limited life that imposed a duty to deal with rivals under Section 2.⁴² But that duty, too, was effectively killed by *Trinko*, just not as directly. In the U.S., there is a high premium on being able to keep and "exploit" what one creates, and absent an *Aspen*⁴³-like unjustifiable withdrawal from an otherwise profitable and open-ended collaboration with a rival, there is no "duty" to deal with or help rivals, no matter the effects on the market.

[*118] For its part, the EU has narrowed its version of the essential facilities doctrine, but it is still available under certain conditions⁴⁴ (as it is in several other non-U.S. jurisdictions). It also has some consistency with a tradition in the EU of trying to keep the playing field level, a history inconsistent with Section 2 jurisprudence and the U.S. courts' reluctance to interfere with innovation incentives and property rights.

Seeking Convergence Remains a Laudable Goal

Assuming the areas of convergence and divergence detailed here are close to the mark, the question then is what, if anything, to do about it? As a threshold matter, I assume convergence remains a valuable objective with the aim of increasing predictability and avoiding divergent outcomes, where possible. The difficulty, however, is that very little flexibility lies on the U.S. side. Absent re-writing the Sherman Act, Section 2 common law is so deeply

³⁸ See Laitenberger, *supra* note 1 (summarizing recent EU enforcement actions).

³⁹ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

⁴⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁴¹ See generally Laitenberger, *supra* note 1 (summarizing recent EU enforcement actions).

⁴² See *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983).

⁴³ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁴⁴ See generally 2009 Guidance Paper, *supra* note 18.

developed that U.S. agencies have little discretion to expand the reach of Section 2 in ways that may close the divide. Again, they would have to get a court (and then appellate courts) to agree to any shift that, for example, more expansively adopted Post-Chicago School thinking. The question, then, becomes whether the European Commission—which does have greater discretion—should consider changes that might close the gap.

Here are a few ideas for the Commission to consider. First, rather than flowing from an umbrella "special responsibility," it might promote convergence to shift EU policy to an Article 102 standard founded more completely on an effects-based analysis of consumer harm (including justifications). Second, a consumer welfare standard that relies in part on protecting "rivalry as such" as a prophylactic proxy for ultimate consumer harm tends to protect competitors over consumers in the dominant firm's market, especially in the short run. The EU may want to consider a standard of foreclosure that requires demonstrative proof of power over price (including output and quality) in the relevant market. Third, "leveraging" as a broad basis to find anticompetitive harm creates a flexibility that tends to render the more exacting elements (and economics) of tying, exclusive dealing, etc., superfluous rather than focusing on actual consumer harm in separate markets; this theory, too, may benefit from a market-wide harm requirement. Fourth, imposing duties to deal under interpretations of antitrust laws—as opposed to direct legislation—tend to create significant innovation disincentives, which the EU recognizes but has not definitively resolved. Finally, the likelihood of convergence may increase if the burden of proving these substantive requirements always remained with the Commission—after all, it is the entity seeking to impose penalties and remedies (without having to go to court). This could precipitate a greater focus on evidence of actual harm to consumers rather than theories of potential harm that may be viewed as inherently speculative.

There also remains an important practical consideration weighing in favor of seeking further convergence, especially from the EU perspective. In our global, digital economy, some of our greatest innovations lead to market structures that are highly concentrated and also naturally result in significant scale and network-efficiency advantages for the successful innovator. Arguably, such "creative destruction"—and resulting market concentration—is as much a manifestation of "competition on the merits" as any artificially created marketplace focused on the number of rivals.

This is not to suggest that "monopolists" or dominant firms cannot improperly "foreclose" rivals and harm ultimate consumers—which they can—but rather that it may not be a useful policy to turn on those whose mere success creates dominant market structures and efficiency advantages. Indeed, as long as dominant firms in the EU (and Member States)—especially, successful innovators—are exposed to a much higher relative risk than in the U.S. and elsewhere, it may continue to be difficult in the EU to attract the risk capital that often backs the next generation of successful (and potentially dominant) firms in the digital economy. While most would agree that substantive antitrust standards should not be sacrificed to this other form of competition, these considerations may well be a factor in the EU's broader policy objectives.