Monopolization and abuse of dominance: Why Europe is different

by ELEANOR M. FOX*

The U.S. law of monopolization and the EU law of abuse of dominance share some common ground. The projects for convergence, however, have tended to obscure some basic differences. Each set of laws grows from its own roots and lives in its own “house” of institutions and value sets. Convergence is more apparent at the agency level, while distinctiveness is unmistakable at the level of the highest court of each jurisdiction. More than twenty-five years ago, there was a significant gap at the high court level between the U.S. and the EU law governing dominance. Over this quarter century, EU law has moved toward more appreciation of outcome-focused economics while preserving other Community perspectives, values, and objectives. Nonetheless, perhaps surprisingly, the size of the gap remains approximately the same, due to the significant movement of U.S. law in the direction of nonintervention. This article identifies precisely the points of divergence, in the interests of knowledge and awareness, while supporting the projects of convergence, in the interests of nurturing a sympathy of systems.

KEY WORDS: antitrust, abuse of dominance, monopolization, convergence, divergence, comparative competition law

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I. INTRODUCTION

There is growing antitrust literature on convergence. Much of the literature argues that in this complex world with multitudinous global transactions we need common standards of law and, indeed, that common soft norms can become international standards that the rest of the world should adopt. In practice, the law of the United States and of the European Union (EU), or some combination of it, is taken to be the developed world model.

It has long been recognized that discovering common EU-U.S. standards in the law on abuse of dominance and the law on monopolization would be a challenge. But the challenge has been accepted. Thus, work proceeds in the International Competition Network on particular sets of conduct that might amount to abuse of dominance or monopolization, such as exclusive dealing and predatory pricing, in an effort to derive recommended principles for the world.

This article argues that the efforts at convergence through derived international standards tends to obscure fundamental differences and may thereby detract from a deeper comparative understanding of the law. The efforts presume an ease of and incentive toward horizontal accommodation by each jurisdiction to the other free from loyalty to its own system, and thus they discount the reality that each system answers to its own drummer. The EU law on exclusionary restraints must be derived from EU Treaty law and case law thereunder, not the law of the United States, even though it may well be informed by the law of the United States, and vice versa. This article examines rooted differences and explores their implications for convergence. This inquiry does not imply any questioning of the projects for convergence by the International Competition Network and others. Quite to the contrary; the projects for convergence play a vital role in maximizing the sympathy of systems in the world.

This article will (1) briefly reflect on the different context and heritage of EU competition law and U.S. antitrust law, including institutional design and the relationship between the competition authority and the highest court, (2) pair cases from each side of the ocean to elucidate differences in application of abuse of dominance–monopolization law, and (3) examine the reach of EU abuse law where U.S.
monopolization law has no counterpart, namely, affirmative duties combined with settlement commitments to make markets work better, and prohibitions of anticompetitive state grants and measures. Finally, the article will place the divergences in context.

In 1986, I wrote an article comparing U.S. monopolization opinions and European abuse of dominance judgments at the time. The article identified various divergences. Now, more than a quarter of a century later, the roots of the divergences remain, but EU abuse law has moved in the direction of U.S. monopolization law in 1986 by reason of its appreciation of economic effects, and U.S. monopolization law has moved toward greater abstention. Thus, while each body of law has evolved along its own spiral, the size of the gap between the two remains approximately the same.

II. THE TWO DIFFERENT HOUSES IN WHICH THE COMPE TITION LAWS ARE SITUATED

The U.S. house of antitrust is, structurally, the less complicated one. I shall describe it first.

Famously, the Sherman Antitrust Act was adopted in 1890. Section 2 states that no person shall monopolize or attempt or conspire to monopolize. The statute is enforceable by the Department of Justice, by injured private parties, who may be awarded treble damages, and by the states of the United States for their residents. It is enforceable also by the Federal Trade Commission under its authority to prevent unfair methods of competition. The substantive scope of the law has expanded and contracted overtime. For many years it was interpreted to help the underdog against great concentrations of power. Today, the law has been stripped of its equity and social policy content and is enforced in the name of consumer welfare and efficiency. The U.S. monopoly law never had state anticompetitive acts significantly within its sights.

U.S. monopolization cases are litigated in the courts, or in the Federal Trade Commission and the courts. The two federal antitrust agen-

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1 Eleanor Fox, Monopolization and Dominance in the United States and the European Community—Efficiency, Opportunity, and Fairness, 61 Notre Dame L. Rev. 981 (1986).
cies are largely independent; they can take or decide not to take action, almost always without interference from higher governmental authorities. In interpreting the law, they must apply the holdings of the Supreme Court of the United States. The Supreme Court has decided a number of monopolization cases in the recent past and has provided a decisional framework that puts much stress on a ground rule of “letting markets work” on their own and thus minimal government intervention. The Court has telegraphed its concern that if dominant firms are encumbered with duties to competitors, the imposition of these duties will undercut incentives to invest and invent.

The contemporary Supreme Court repeatedly expresses concern with false positives, protecting competitors from competition, and chilling low-price competition, and it expresses the institutional concern that antitrust rules will involve the courts in supervisory duties that strain their capabilities and amount to regulation.

The U.S. antitrust laws were adopted in a period of industrial revolution when big business was consolidating and a few famous tycoons (dubbed Robber Barons) were accumulating wealth and power at the expense of the “little guy.” In the last thirty years, the Supreme Court has delinked antitrust from these origins and history. The antitrust case law of the 21st century generally assumes that markets are vibrant and that if the little guys do not succeed it is because they are inefficient; they must try harder. The law is not concerned with fairness or level playing fields.

In the European Union, the competition law dates back to 1957 with the signing of the Treaty Establishing the European Economic Community (the Treaty). The provision against abuse of dominance is now numbered Article 102 of the Treaty on the Functioning of the European Union (TFEU), a successor treaty. The Treaty Establishing the European Economic Community was designed to establish one common market in order to anchor peace in Europe. In many ways the Treaty tries to establish a level playing field, meaning that firms should be able to compete on their merits and not be fenced out by power, privilege, or favoritism. The competition provisions embody this principle. At the time the Treaty was adopted, most of the Member States (six at the start) harbored privileged state-owned enterprises, gave preferences to their own nationals, and maintained high
trade barriers to protect “their” firms. The Treaty was designed to tear down and keep down the barriers and preferences. This is still a central motivation of the Treaty. EU law today is very much linked to the economic problems that gave birth to the European Community and that still have relevance.

The competition law of the Treaty prohibits abuse of dominance and anticompetitive agreements. It does so in many more words than does U.S. law, more along lines of civil than common law. The very language of the Treaty in its prohibition of abuse of dominance includes language of fairness and appears to express both equity and efficiency motivations.

The Treaty also includes provisions that anticipate and counter abuses of dominance facilitated by a Member State. First, TFEU Article 106(1) provides that, as to public undertakings and those to which exclusive privileges are granted, Member States shall “neither enact nor maintain in force any measure contrary to the rules contained in the [EU] Treaties, in particular [the antidiscrimination and competition provisions].” As a practical matter this means that, in many cases, state-granted exclusive rights cannot be enforced to preempt a competitive market. Second, Article 4(3) of the companion Treaty on Euro-

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2 TFEU Article 102 provides:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
pean Union imposes on the Member States a duty of “sincere cooperation.” The Member States must “facilitate the achievement of the Union’s tasks and refrain from any measure that could jeopardize the attainment of the Union’s objectives.” This means that Member State laws that enlist firms to behave in prohibited anticompetitive ways must be “disapplied.”

This holistic conception strikes a different balance and creates a different relationship between antitrust, regulation, public policy, and the state in the EU than in the United States.

In Europe, the competition authority is the Directorate General for Competition of the European Commission, which is supervised by the commissioner who is entrusted with the competition portfolio. The directorate typically undertakes market studies as well as enforcement of antitrust (abuse of dominance and agreements), state aids, and merger law. It confers with the European Parliament, and it responds to and incorporates the initiatives of the European Commission as articulated by its president. It typically studies sectors in order to identify market problems in areas of priority for the EU, such as energy, and it follows up with cases to help open up and integrate the market, as it has done and is doing in energy. The European Commission is currently focusing also on telecommunications, postal services, the knowledge-intensive (including digital) sector, and the pharmaceutical sector. It takes as a priority facilitating connections to network industries across the EU. Not surprisingly, the annual report of the European Commission on competition policy is quite different from the annual report of the U.S. Department of Justice on antitrust. The former reflects the holistic policy of the EU. The latter is first and foremost focused on the size of the fines and number and length of the jail terms the Antitrust Division of the Department of Justice has imposed on members of cartels by settlement agreement or through the courts.

EU competition law is enforced also by the Member States. Moreover, private parties have a right under European law to compensation for any violation of the Treaty that harms them; but they must sue under the procedural vehicles of the Member States, most of which embody few incentives and some significant disincentives to private actions. A proposed European framework directive would set
minimum standards for the Member States and increase the viability of private actions.

The European Court of Justice has developed a large body of case law on abuse of dominance. The law establishes that dominant firms have a special responsibility not to erect or maintain barriers that frustrate the access of nondominant firms to markets. Some recent judgments reveal a concern for competitiveness, efficiency, and consumer welfare, but all within the framework of general EU policy. Even the usage of the words “consumer welfare” and the phrase “to protect consumers” do not correspond with the usage of the words in the U.S. cases.4

In the EU the investigated party may settle the matter, without admitting liability, by offering commitments that meet the European Commission’s concerns. While negotiated outcomes are also available in the United States, U.S. enforcement of section 2 of the Sherman Act and the somewhat more flexible Federal Trade Commission counterpart are not overshadowed by settlements; in Europe commitment decisions are now the usual way of resolving Article 102 violations alleged by the European Commission. Thus, a substantial number of Article 102 outcomes derive from commitment decisions, resulting in a soft regulatory law.

Who has control over the agenda for competition law and policy? Is there a coherent competition law and policy for the United States? For the EU?

In the United States, “control” over the national antitrust agenda is loose. There are multiple sources of antitrust enforcement. The

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3 Case C-209/10, Post Danmark A/S v Konkurrencerådet, judgment of Mar. 27, 2012 (not yet officially reported).

4 See Case C-280/08P, Deutsche Telekom AG v. Comm’n, 2010 E.C.R. I-9555, paras. 179–182 (enforcement against a price squeeze may cause retail prices to rise to alleviate the squeeze, but this is for the greater good of the functioning of the market to the benefit of all players).

Department of Justice can sue in the courts and write amicus briefs in private cases. The Federal Trade Commission can bring proceedings, which may be appealed to the courts. But most antitrust cases in the United States are brought by private parties. Indeed private cases, almost entirely, have shaped the Supreme Court’s antitrust docket for many years. Antitrust policy is shaped by the agencies, but the preponderant share of U.S. antitrust activity relates to enforcement of the law, not studies and advocacy. U.S. antitrust agency policy prioritizes cartel cases, health care cases, and other restraints in the pharmaceutical sector. Concerns and studies (especially consumer concerns identified by the Federal Trade Commission) may result in policy statements and theories for antitrust lawsuits and, in some cases, proposals for legislation. Upon the advent of a new presidential administration, U.S. antitrust policy tends to involve a rhetorical resetting of the stage, either promising more aggressive enforcement or vowing more trust in markets.

In Europe, control of the competition agenda is tighter. Common policy for the EU (broad policy, of which competition is but one piece) is articulated at the European Commission level with significant input from the Member States. In antitrust adjudication, there are more direct lines to the top than in the United States—for example, from the Commission through the General Court to the Court of Justice, and from national courts (which are bound by Commission interpretations absent conflicting direction from above) directly to the Court of Justice. There is no “bubbling up” of issues in lower courts, conflicts of circuits, and eventual, if ever, high court resolution, as in the United States.

III. CASE PAIRS OF OPPOSITES

The most startling literal differences between U.S. and EU law on abuse of dominance have been well recorded. They are most obvious in refusal to deal and margin-squeeze cases, but are not limited to these cases. The contemporary U.S. Supreme Court opinions exude a philosophy or perspective that permeates U.S. antitrust analysis.

The Supreme Court’s opinion in *Verizon v. Trinko* set the blue print for this perspective. In *Trinko*, Bell Atlantic (later acquired by

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Verizon), was the incumbent telephone service provider in the northeastern United States. Bell Atlantic owned the elements of the local loop—bottleneck elements connecting long distance service to the local market. For many years, it operated under conditions of legal monopoly in local service areas. Technology changed, enabling local service competition. Congress passed the 1996 Telecommunications Act, easing the way for new entry into local service and requiring incumbents to give their rivals nondiscriminatory access to the local loop. Bell Atlantic nominally gave its new rivals access to the local loop and undertook to serve them as required by the new Act, but it adopted a simple plan to dissuade its customers from migrating to the feistier new rivals; it disrupted the rivals’ service. The rivals complained to the Federal Communications Commission, which agreed with the complaints, penalized Bell Atlantic, and ordered Bell Atlantic to compensate the abused rivals. Customers of the rivals sued, claiming that Bell Atlantic’s disruptive conduct was also an antitrust violation, which it might well have been because the 1996 Act expressly does not preempt the antitrust laws.

The case came to the Supreme Court on Bell Atlantic’s motion to dismiss the pleadings. The Court first characterized the exclusionary practice as a refusal to deal (although Bell Atlantic had never refused to deal), teeing up a rhetoric that would change American “monopolization” discourse. The Court said that firms must have freedom not to deal, lest they be handicapped by “sharing” duties that would undermine their incentives to invest and invent. While there may be exceptional circumstances that justify a duty, the Court rejected the argument that the rival telecoms had a right to fair and nondiscriminatory connective service to the local loop. It declared that the Supreme Court has never recognized an essential facility doctrine, and even if there is one, it does not cover this case because there had been some dealing and a regulatory agency had power to order dealing.

Extolling the virtues of freedom not to deal even for a dominant firm, the *Trinko* Court stated that antitrust does not impose affirmative duties just because “some other approach might yield greater competition.”

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7 *Id.* at 415–16.
In Telekomunikacja Polska, on virtually the same facts as Trinko, the European Commission held that the strategy by the incumbent to limit access to its telephone network distorted competition and violated TFEU Article 102. Under the Polish Telecommunications Law, which was based on the EU regulatory framework, the Polish telecommunications operator was under the obligation to allow remunerated network access to alternative operators willing to offer broadband Internet access to end-users; thus, to the new competitors on the retail market. However, Telekomunikacja Polska used delaying tactics in negotiations with the new rivals, failed to provide them accurate information or provided inaccurate information, and limited their access to the subscriber lines. The Polish National Regulatory Authority found that Telekomunikacja Polska’s conduct violated its Polish statutory obligation. The European Commission also opened proceedings. It found that Telekomunikacja Polska’s practices were part of a strategy to prevent or at least delay the entry of competitors into the retail market and that they constituted an abuse of dominance within TFEU Article 102.

A few years after Trinko, the U.S. Supreme Court decided Pacific Bell Telephone Co. v. linkLine Communications, Inc. Pacific Bell was the incumbent telephone service provider in a West Coast region of the United States. It provided local telephone service and, as the historical incumbent, owned the elements of the local loop. It also supplied digital subscriber line (DSL) service—for fast computer access through phone lines—to Internet service providers (ISPs) at wholesale and sold DSL service at retail. Under Federal Communications Commission regulations, Pacific Bell had the duty to supply service at wholesale to DSL providers. During some periods it charged its DSL retail customers less than it charged the ISPs at wholesale. The price of wholesale service was regulated; Pacific Bell proposed the rate and the Federal Communications Commission approved it, as the Commission must do for all filed rates unless they are “unjust and unreasonable.”

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8 Case COMP/39.525, Telekomunikacja Polska, 2011 O.J. (C 324) 7. In the European cases the regulatory authority is at Member State rather than European level. This might have led the European authorities either to give more deference to the regulation, on subsidiarity grounds, or to give less deference on policy coherence grounds. It chose the latter.

The ISPs sued for a price squeeze, unlawful under section 2 of the Sherman Act. Pacific Bell moved for judgment on the pleadings, arguing that, after Trinko, it had no antitrust duty to deal and therefore no duty to avoid a price squeeze. The lower courts declined to dismiss the case, acknowledging that Pacific Bell had no antitrust duty to deal but holding that Trinko was not otherwise relevant because it was not a price squeeze case. The Supreme Court reversed. It held that Trinko was controlling. In Trinko, it said, plaintiffs claimed that Bell Atlantic did not give them good enough service; here plaintiffs claimed that the incumbent did not give them a good enough price. It is all the same. Since Pacific Bell had no antitrust duty to deal at all, it had no duty to sell at a price advantageous to the rivals. Accordingly, charging a high wholesale price was not illegal. Furthermore, the retail price was not a predatory price (below cost en route to monopoly). Therefore the retail price was not illegal. If both prices are legal, said the Court, their sum cannot be illegal.

Virtually the same facts arose in Europe in Deutsche Telekom. The German regulator regulated Deutsche Telekom’s prices, but Deutsche Telekom had sufficient scope to cause an increase in its retail prices by applying to the regulator for the right to charge higher prices and obtaining authorization to do so. Deutsche Telekom was not exonerated by the fact that the German regulator encouraged the wholesale-retail price relationship that imposed the margin squeeze and opined that the squeezed competitors should simply cross-subsidize to survive. The European Court of Justice held the margin squeeze illegal.

Deutsche Telekom was followed by TeliaSonera, in which a Swedish court made a preliminary reference to the European Court of Justice seeking to be advised of the governing principles of the law on mar-

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10 Even if Pacific Bell had charged a predatory price, the Court was doubtful that the plaintiffs could win their case. 555 U.S. at 456–57 (“Even if the amended complaint is further amended to add a Brooke Group [predatory pricing] claim, it may not survive a motion to dismiss. For if [Pacific Bell] can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents [Pacific Bell] from putting them out of business by pricing them out of the market.”).
12 Id. paras. 84–86.
gin squeeze. The Court advised as follows, invoking the oft-cited duty of special responsibility of a dominant firm under EU law and liberally quoting from Deutsche Telekom:

The function of those [competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union . . . .

Accordingly, Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly . . . but also to those which are detrimental to them through their impact on competition . . . . [I]t remains the case that, in accordance with settled case-law, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market . . . .

It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for [advanced DSL] input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature . . . .

Thus, we find directly conflicting analysis and directly conflicting holdings.

Fidelity rebate cases are lurking in the background as another potential subject for comparison and contrast. In Tomra, the Court of Justice of the EU held that individualized, targeted fidelity rebates by a dominant firm going back to day one on all purchases and tailored to all or most of a customer’s requirements are likely to strengthen the firm’s dominant position by distorting competition in violation of Article 102. The Court said:

“[I]t is . . . unnecessary to undertake an analy[sis] of the actual effects of the rebates on competition, given that, for the purposes of establishing an

14 Id. para. 22.
15 Id. para. 24.
16 Id. para. 34 (emphasis added).
17 Case C-549/10P, Tomra v. Comm’n, Apr. 19, 2012 (not yet published).
infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct is capable of having an effect on competition . . . 

The Court of Justice rejected Tomra’s defenses that it never priced below cost, that it did not sacrifice profits, that its rebate plan had not harmed competition, and that competitors had a sufficient open market to realize scale economics. The Court said that the “effective price for the last units” was “very low because of the ‘suction effect’.”

The “loyalty mechanism” was therefore able to “drive out [Tomra’s] competitors by means of the suction to itself of the contestable part of the demand.”

As to predatory pricing, the U.S. Supreme Court in *Brooke Group* articulated a demanding rule requiring the plaintiff to prove not only below cost pricing but also a probable recoupment scenario, meaning that a court will analyze the structure of the market and incentives of the players to determine if the predator will probably be able to raise prices above prepredation prices high enough and long enough to at least recoup its losses in the below-cost sales. The European Court of Justice specifically considered and rejected the *Brooke Group* requirement of probable recoupment.

The U.S. Supreme Court has not yet spoken on fidelity rebates. Currently the circuits are split between a rule of law based on exclusionary foreclosure subject to justification and a rule that would protect the freedom of low pricing unless the price is predatory. *Trinko* and *linkLine* may be the handwriting on the wall.

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18 Id. para. 79. See also id. para. 68.
19 Id. para. 78.
20 Id. para. 79.
24 See Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008).
The recent Google investigations on both sides of the Atlantic provide another pair in point, although not documented in judicial decisions. Google occupies about seventy percent of the computer search market in the United States and more than eighty percent in Europe. Competitors, including Microsoft, complained that Google presents search results on vertical searches (such as maps, restaurants and travel) that give Google services a privileged position thereby diverting business from its competitors. The U.S. Federal Trade Commission conducted an investigation for nearly two years and ultimately closed the investigation on grounds that the evidence “did not justify legal action.” The European Commission opened an investigation, found (preliminarily) serious violations, and is, as of December 2013, considering whether to accept settlement commitments from Google.

Why would it be so difficult to prove a monopolization violation against Google’s preferences to itself in the United States and not so difficult to prove an abuse violation in the EU? The following factors are relevant. U.S. law is demanding. It requires proof that Google has monopoly power. It also requires a legal conclusion that Google had a duty of fair dealing with its rivals—a hard burden after Trinko and linkLine. If Google had a duty, it would require proof that Google used its monopoly power to obtain additional power by reason of its preferences to itself that diverted business from its rivals in each separate market, such as maps, travel services, and restaurant guides. It would require a showing of harm to consumers. And, finally, a plaintiff would have to blunt the assertions (and fairly widespread default assumptions) that (1) Google is the epitome of an inventive firm (it invented its search engine and presumptively has the right to use it for its own advantage); (2) intervention by a court will chill Google’s incentive to invent, and a rule of law imposing a duty on Google will in general chill firms’ incentive to invent; and (3) more pragmatically and immediately, any court order requiring Google to deal equally


with rivals would in effect be invoking the essential facilities doctrine (which the U.S. does not have, at least not for this circumstance) and would risk involving the court in duties of supervision beyond its capabilities, as cautioned against in *Trinko* and *linkLine*.

In the United States, each of these elements presents a high hurdle for a plaintiff. As to each, the bar is lower under European abuse of dominance law. With respect to the conduct element itself (assuming sufficient proof of dominance and acknowledging no *Trinko* problem regarding duty to deal), it is possible that the European Commission would satisfy European Court of Justice standards of prima facie proof by showing that Google’s preferences to itself diverted from its rivals substantial business that they would otherwise have won “on the merits,” thus distorting competition.

As appears from the cases, the EU perspective on abuse of dominance at the Court of Justice level stresses the *process* of competition, seeking to enable all market actors to compete on their merits, particularly efficient and potentially efficient competitors. The U.S. law of monopolization at the Supreme Court level stresses the costs of antitrust intervention, tending toward per se legality in a number of situations and otherwise imposing considerable burdens on plaintiffs to show how the particular conduct will increase market power and harm consumers and that the finding of a violation would not compromise low prices and incentives to innovate.

**IV. OTHER CASES AND INITIATIVES FOR WHICH THE UNITED STATES HAS NO COUNTERPART**

While the cases of opposites are startling, initiatives reflecting interventions in Europe where the U.S. antitrust law simply has no counterpart are at least equally informative of basic differences in the regimes. Two lines of authority are relevant. The first we might call affirmative antitrust; a dominant firm may have an affirmative obligation to make a market work better. In the second, a Member State has adopted measures that harm the market, and the Member State’s measures violate the competition principles of the Treaties. In some cases the Member State must disapply its own law. In other cases the grantee of exclusive rights by the state may be stripped of the right to exercise them.
While in the “pairs of opposites” cases, U.S. advocates may claim, rightly or wrongly, that the EU precedents coddle competitors and handicap efficiency, in some “no counterpart” cases EU law may have the high road if judged by the standard of efficiency. U.S. law simply does not reach so far. At least this is so regarding certain state anti-competitive acts.

A. Affirmative obligations: Making markets better

The European Commission, concerned with underperformance in the European energy sector, undertook a sector inquiry. It determined that there was insufficient competition, including insufficient entry, and that a major part of this problem was that both the leading German gas supplier, E.ON, and the leading French gas supplier, GDF, had reserved their gas transport capacity to themselves—to their own transmission subsidiaries—for a term of many years. As a result competitors could not access pipelines to reach customers. After the inquiry, the Commission proposed to improve the EU legislative and regulatory framework for energy markets. It also initiated several proceedings to open the gas market. The cases alleged abuses of dominance and failure to meet essential facility obligations by conduct including “capacity hoarding” and “strategic underinvestment” in new capacity; that is, failing to invest in capacity needed by the market even though the investment would have been profitable. The cases were concluded by commitment decisions of the gas suppliers to open their capacity by reducing their reservations to themselves.

The energy sector commitment cases are an example of integral European policy culminating in obligations of the leading market players to take action to improve market conditions. Earlier examples

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include telecommunications policy, including liberalization measures and follow-on exemption decisions. Exemption decisions allowed joint ventures of leading telecommunications companies from different Member States (such as France and Germany) to proceed with their planned alliance on condition that the partners agreed to liberalize their national markets, even though it was hard to detect any negative impact of the alliance on competition.\textsuperscript{29}

The theme of affirmative obligations also permeates judgments of the European Court of Justice in cases of dominant firms and their special responsibilities. In \textit{AstraZeneca},\textsuperscript{30} a firm dominant in antiulcer medicine with the product Losec, was facing the expiration of its patent and thus the competition of generics. Among other things, AstraZeneca changed the form of Losec from capsules to tablets with multiple microgranules, and it applied to deregister the marketing authorizations for Losec capsules in Denmark, Sweden, and Norway. If Losec capsules were deregistered, generic companies could no longer rely on the registrations for proof of safety and would have to incur significant expenses to get authorization; moreover, parallel importers were likely to lose their parallel import licenses. The Court found that the request for deregistration constituted an abuse of dominance. So holding, based on a long string of citations, the Court reiterated the test for abuse: The dominant firm violates the law where its conduct, by methods other than competition on the merits, “has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”\textsuperscript{31} AstraZeneca argued that it had a right to request withdrawal of an authorization that it was no longer using and noted that it was costly to maintain registrations, but, the Court held, the fact that AstraZeneca desired the deregistration to hinder the competition of parallel importers and generics trumped any such right.

\textsuperscript{29} See \textit{EUROPEAN COMMISSION, XXVI REPORT ON COMPETITION POLICY} 1996, at 36–38 (1997).


\textsuperscript{31} \textit{Id.}, para. 74 (emphasis added).
B. Invalidating state measures

The Treaty on European Union (TEU) and the TFEU (together, the Treaties) have two sets of provisions that invalidate certain state anti-competitive measures under the competition laws. The first regards grants of exclusive rights. The second regards anticompetitive legislation that undermines the competition rules. The U.S. has no counterparts.

1. TFEU ARTICLE 106(1) The TFEU creates a category of public enterprises and those to which Member States have granted exclusive rights. As to these firms or entities, the Treaty imposes an obligation: Member States must not enact or maintain “any measure contrary to the rules contained in the Treaties, in particular [the antidiscrimination and competition rules]. This obligation, contained in Article 106(1), is read in conjunction with the competition rules in the TFEU, usually Article 102, which prohibits abuse of a dominant position. This combination has a powerful effect. The State may not grant exclusive rights that produce an abuse of a dominant position, and, as per Article 102, a dominant position can be abused by a contraction of production (Article 102(b)), excessively high or low prices (Article 102(a)), or unreasonable foreclosures (case law in general).

A number of cases illustrate the breadth of the EU law. Postal services are prominent among them. In Corbeau, the European Court of Justice held that a mail delivery service with an exclusive license could not legally prevent the entry of a private express delivery service except to the extent that exclusivity was necessary to achieve a public mission. In Slovenská pošta, the Slovakian post office had a monopoly over traditional mail delivery. Private enterprises developed an adjacent new market—hybrid mail services—that involved businesses’ sending invoices by Internet to local mail delivery offices, which would print and deliver the invoices locally. To take advantage of this new market, the Slovakian post office adopted a measure to extend its monopoly to the adjacent market, thus displacing the entrepreneurs who had developed hybrid mail delivery. The adoption of this measure without justification was an abuse of dominance.

A German public agency with the exclusive license to provide executive recruitment services infringed the competition law by the mere exercise of its right to keep out competition, because the agency was clearly not in a position to satisfy the demand for such services. In another example, Port of Genoa, Italy was held to have infringed the law by adopting national legislation granting a firm engaged in port services an exclusive right to organize dock work at the port. The statute had created incentives for inefficient and anticompetitive behavior, and Italy infringed the competition law.

TFEU 106(1) has stunningly broad implications and may, along with Article 4(3) of the TEU, constitute a long reach of European competition law to control anticompetitive state measures.

2. TEU ARTICLE 4(3) The TEU is, in effect, the overarching institutional and constitutional treaty. Article 4(3) of the TEU states that the Member States have a duty of “sincere cooperation” to carry out the tasks that flow from the Treaties. TEU Article 4(3) provides that the States must “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.” TEU Article 4(3) is read in conjunction with the antitrust articles of the TFEU. This combination results in the obligation of Member States not to enact or apply laws that would undermine the competition rules, in particular by inducing or requiring market actors to act in violation of TFEU Articles 101 or 102.

Although TEU Article 4(3) has not been frequently invoked, its usage is instructive. Perhaps the best example is the Italian matches case, Consorzio Industrie Fiammiferi. It had a law organizing a match cartel. It required all producers of matches in Italy to join a consortium. A minister was required to set the price for matches, and the consortium of Italian producers was required to allocate quotas to

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all sellers in Italy. The process was to be overseen by government officials. The consortium allocated quotas so as to substantially exclude German and Swedish producers. The Italian Antitrust Authority brought proceedings and found antitrust violations by both Italy and the Italian producers. As to Italy’s responsibility, the European Court of Justice said:

Although Articles [101 TFEU (anticompetitive agreements) and 102 TFEU (abuse of dominance)] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4 TEU], which lays down a duty to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

The Court has held in particular that Articles [TEU 4 and TFEU] 101 are infringed “… where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [TFEU 101] or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. . . .”

The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.37

The judgment of the European Court of Justice in Italian matches38 states a rule directly contrary to the one applied by the U.S. Supreme Court.39

37 Id. paras. 45–6 & 49 (emphasis added). See also id. para. 50 (“[The competition] rules would be rendered less effective if, in the course of an investigation under [TFEU 101] into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles [TEU 4] and [TFEU 101] and if, consequently, it failed to disapply it.”).

38 The principle is limited by the EU version of the U.S. state action doctrine. See Joined Cases C-94/04 & C-202/04, Cipolla v. Fazari and Macrino v. Meloni, 2006 E.C.R. I-11421. Italy had adopted lawyer fee schedules based on a draft submitted by the lawyers’ association. The Court declined to find a violation of TEU 4(3) and TFEU 101 for lawyer price-fixing because the fee schedule had to be approved by the Minister of Justice before it could enter into effect. Therefore the fee schedule was not deprived of its character as legislation by
Court in the celebrated case of *Parker v. Brown*, where the U.S. Court refused to enjoin the operation of a California statute organizing a public-private raisin cartel. If the case had arisen in Europe, the Italian court would have been obliged to “disapply” the cartel-enabling law.\(^3^9\)

If the statute were similarly anticompetitive but did not commandeer private firms to carry out the cartel, the EU analysis would move seamlessly from competition law to internal market trade (free movement) law.\(^4^0\) If Italy had a law requiring retailers of burial caskets to be funeral directors licensed by Italy (a law not explainable except by protectionism) and some modicum of inter-Member State commerce were involved,\(^4^1\) Italy would have violated the Treaties’ articles on free movement of goods, free movement of workers, and freedom of establishment, but not competition law.

The U.S. has no counterpart to TFEU 106 or TEU 4(3). Perhaps the United States is not so clearly in need of a counterpart because there are fewer—albeit still abundant—instances of excessively anticompetitive state measures obviously not justified by any public interest, along with a greater chance that the political process will work to limit such restraints. But probably few other competition jurisdictions in the world share these characteristics. Perhaps as a by-product of the U.S. gap, the subject of anticompetitive state acts is not on the agenda of
delagation to private operators. The Court observed, however, that the Italian rules (requiring high fees) could make it harder for out-of-state lawyers to contest the Italian market, and accordingly it held that the Italian court was obliged to consider whether the state-sanctioned fee schedule violated EU free movement rules.

\(^3^9\) See Eleanor Fox, What If *Parker v. Brown* Were Italian?, in 2003 FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY (B. Hawk ed., 2004). In *Parker v. Brown*, the state won; under EU law, the state would have lost. The Italian statute was disapplied rather than preempted because the European Court has no power to void a Member State law.

\(^4^1\) See Cipolla, 2006 E.C.R. I-11421.

\(^4^1\) In the United States there is a conflict of circuits on the constitutionality of just such state laws on the sale of caskets. Compare St. Joseph Abbey v. Castille, – F.3d – (5th Cir. 2013) (unconstitutional; no rational basis), with Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (constitutional; protectionism is a rational basis).
U.S.-EU convergence and is not normally on the template of technical assistance providers and other advisors (surely not on the syllabus of most Americans) of what a good competition law should contain.

V. DIVERGENCES AND ASYMMETRIES IN CONTEXT

Notably, this article is not about symmetries and correspondences. A significant portion of U.S. and EU law on abuse of dominance and monopolization corresponds. In particular, monopolistic conduct prohibited by section 2 of the Sherman Act is likely to constitute an abuse of dominance under TFEU Article 102, although not vice versa. A striking resemblance would be expected, because the law purports to treat the same subject.

The convergences are greatest at the agency level, not the court level. Agency policy and formulations of laws are very much influenced by technicians, especially antitrust economists the most prominent of whom share a relatively similar training and culture across the world. So, too, divergences would be expected, because each set of laws grows from its own roots. The divergences are most pronounced among the highest courts of the land. The Competition Directorate in Europe faces a highest court that applies the Treaties’ values of openness and access, often engages in formal legalistic analysis, and sometimes applies rules of fairness. Accordingly, the Court’s pronouncements tend to proscribe more than the Competition Directorate’s guidance would. The U.S. agencies face a highest court that tends to apply values of trust in the market and deep respect for the business judgment of even dominant firms, expecting thereby to maximize innovation, efficiency, and a notion of freedom. The Supreme Court’s holdings proscribe less conduct than most current U.S. agency officials deem anticompetitive.

The homogenization of antitrust economics and analysis may be only half good. The currently dominant approach tends to reflect a political economy theory of nonintervention. Its default assumptions do not describe the monopolized economies of poor developing countries. It is likely, in most cases, to advantage those who are already advantaged.

There is, consequently, debate within the Federal Trade Commission as to whether and how section 5 of the Federal Trade Commission Act should
see more administrative-level convergence and more judicial-level divergence.\textsuperscript{44}

Despite the subtle and not so subtle divergences, there are many on-going projects for convergence—nudging the law (or statements of it by the agencies as applied to various conduct) to “be” the same thing in all jurisdictions as applied to the same facts. The premise is that trade and commerce are international and competition law is national. A crazy quilt of a hundred different rules applied to the same transaction or conduct puts huge costs on the transactions and the firms involved in them and creates huge inefficiencies for which both the transacting businesses and the consuming public pay. Further, it creates hostilities between clashing jurisdictions. If we can find, nudge, or push commonality, or even the appearance of it, we can smooth trade and political interactions between our two jurisdictions and the world.

There is a tension between the ideals of a smoothly flowing world of commerce following harmonious rules of law and the contextual needs and individuality of systems. But, more important to this article, there is a reality of not insignificant divergences, based not just on different words in decisions and judgments but different roots, histories, statutes (and Treaties), patterns of growth and adjustment, and meanings. To appreciate and capitalize on the commonalities is noble and constructive and can indeed help the world go ‘round more smoothly. But to “imagine away” the differences is not constructive. It is important that distinctions are appreciated, by parties to transactions, by policymakers, by students and teachers, and by the people in general, for purposes of information,

awareness, sympathetic understanding, consideration of possibilities for improvement, and validation and legitimacy in any given culture.

This article has been a small attempt to appreciate the differences.