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SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS

Prepared Statement

of

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Regarding

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

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Introduction and Summary

I am grateful to the Chairman and members of this Subcommittee for the opportunity to present testimony comparing competition-law approaches to monopolization and abuse of dominance in the United States and the European Union. I applaud the longstanding efforts of this Subcommittee to explore the many challenging questions that arise from antitrust policy and enforcement and I am honored to be allowed to contribute to the Subcommittee's efforts. For the record, I am not appearing on behalf of any entity or other individual; the views expressed herein are my own.

The laws prohibiting monopolization in the U.S.[1] and abuse of dominance in the EU[2] are phrased in very general terms, creating broad discretion for the enforcement agencies to choose which marketplace conduct they will challenge and for the courts to choose which enforcement approaches they will endorse. Several characteristics of EU enforcement, however, allow much greater discretion than in the U.S. First, the EU is less consistent than the U.S. in assuring that challenges to dominant-firm conduct conform to basic theoretical and empirical tests of economic rationality. Although the European Commission and the EU courts frequently invoke economic reasoning in their analysis, they also give weight to certain policy themes and objectives that are in some degree of tension or conflict with economic objectives. In general, this has led to stricter prohibitions of competitive conduct under abuse-of-dominance standards than under U.S. monopolization law. Moreover, because the EU adopts this more eclectic approach, it is more difficult for business firms and their legal counselors to predict how specific market conduct will be evaluated by EU authorities, relative to those of the U.S.

Finally, the greater discretion and uncertainty characteristic of EU abuse-of-dominance enforcement is magnified by a number of significant weaknesses in the structure and procedures of the key EU institutions, including the European Commission and the EU courts. Four points stand out in this regard: (1) Although Commission competition decisions are subject to review by the EU courts, such decisions are made by the College of Commissioners – a body consisting of twenty-eight individuals with limited expertise in the legal and economic disciplines most relevant to antitrust enforcement. None of the Commissioners participates in the conduct of the investigation, the composition of the record or the direct review and assessment of evidence. (2) At no point in the European enforcement process is the accused firm entitled to a presentation of evidence and arguments before any decision making official. The only "hearings" provided under Commission rules are conducted before an agency official lacking

[1] 15 U.S.C. § 2.
[2] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C326) 47.

substantive decision-making authority and empowered to exercise only limited control over the conduct of the proceedings. (3) Prior to judicial review, the entire enforcement process is conducted within a single directorate-general of the Commission, with limited external supervision and no meaningful separation between those who investigate cases, formulate objections, and guide decision-making. (4) Finally, the EU appellate process is prolonged and generally provides the Commission with a broad margin of discretion. These institutional characteristics and procedures tend to reinforce the other circumstances that give rise to more restrictive and more uncertain prohibitions on dominant-firm conduct, relative to the situation that prevails in U.S. monopolization cases.

This testimony expands on the differences between EU competition-rule enforcement and American antitrust law. For reasons explained below, the U.S. approach to monopolization has a variety of advantages over EU abuse-of-dominance enforcement. The EU deserves recognition, however, for providing significant benefits to competition in a number of important fields. The European Commission's competition advocacy and its application of competition rules to certain government-created market restraints has encouraged the liberalization of some economic sectors from restrictions previously imposed by Member States. This is evident in parts of the energy, telecommunications, and transportation sectors. Thus, any criticism of the EU approach to abuse of dominance is intended to be constructive.

Conversely, the U.S. approach is not perfect: in previous writings I have urged the U.S. Supreme Court to accept more monopolization cases for plenary review in order to clarify the analysis to be used by lower courts and the federal agencies regarding various types of monopolization claims.[3] While the Court has made substantial progress in formulating and explaining rules involving conduct such as predatory pricing and unilateral refusals to deal, additional clarification is clearly warranted in a number of other areas – for example, the circumstances under which conduct involving intellectual property rights may give rise to monopolization claims.

Differences Between US and EU Competition Law

The U.S. statutory provision prohibiting monopolization (Sherman Act Section 2) and the EU prohibition on abuse of dominance (TFEU Article 102) share basic similarities, but there are important differences as well. Each jurisdiction allows virtually any type of marketplace conduct by a firm with

[3] Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187 (1999); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749 (1995). These arguments have been heeded to some extent, as the Court provided substantial guidance on certain types of monopolization claims in *Verizon Comm's Inc. v. Trinko*, 540 U.S. 398 (2004), and *Pacific Bell Tel. Co. v. linkLine Comm's, Inc.*, 555 U.S. 438 (2009).

"monopoly power" (U.S. law) or "dominance" (EU law) to be questioned. However, a number of specific competitive practices are subject to different treatment as between the two jurisdictions. These practices include predatory pricing, refusals to deal, exclusive agreements, certain price discounts referred to in the European Union as "loyalty" or "fidelity" rebates, and tying and bundling.

TFEU Article 102 also broadly condemns so-called "exploitative" conduct such as the imposition of "unfair pricing," "unfair trading conditions" and/or "applying dissimilar conditions to equivalent transactions." These have no direct analogue in U.S. monopolization law. Although Section 5 of the Federal Trade Commission (FTC) Act condemns "unfair methods of competition,"[4] the courts have been reluctant to construe this prohibition in a manner inconsistent with Sherman Act Section 2.[5] The U.S. Supreme Court has recognized that courts are not institutionally competent to determine if and to what extent a monopolist's price may be excessive, nor are they equipped to monitor and adjust judicial pricing restrictions as required by the constant shifts in costs, product mix and quality, competitive conditions and technology that occur in real-world markets. Moreover, the Court also recognizes that high prices may be a critical element of the market system for rewarding innovation and uniquely successful competitive performance. Thus, to limit a monopolist's discretion over price – in the absence of any improper exclusionary conduct by the monopolist – may short-circuit the innovation process, which is the most important determinant of the long-term competitive dynamism of our economy.[6] The U.S. does regulate prices and other terms of trade, as well as entry, exit and other elements of certain industries, but not through the rules and institutions fashioned for antitrust, which involves broad principles of competitive conduct applied throughout most of the private sector economy. Such regulation is generally confined to particular industries that exhibit persistent and significant market failure, and implemented through specialized institutions designed to acquire and apply expertise in the unique characteristics of particular sectors.

Underlying these specific areas of tension or conflict, the EU approach to abuse of dominance relies on some general principles or approaches that are not adopted in current U.S law. The EU condemns conduct "*capable"* of resulting in a "distortion" of competition (*i.e.*, even without any evidence of actual or likely harm to the competitive process), with the term "capable" being construed broadly to include conduct that would escape liability under U.S. monopolization rules. Second, under EU law, a dominant firm has a "special responsibility not to allow its conduct to impair genuine undistorted

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[4] 15 U.S.C. §45(a).

[5] For example, federal courts rejected an attempt to extend the "unfair methods of competition" concept to limit monopoly conduct affecting adjacent markets in which the defendant does not compete. *See* Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920 (2d Cir. 1980).

[6] *See*, *e.g.*, Verizon Comm's Inc. v. Trinko, 540 U.S. 398, 407 (2004).

competition on the common market."[7] This idea that successful firms have a legal obligation to subdue their competitive conduct once they achieve significant market power made an appearance in U.S. law in an earlier era. In 1945, a leading monopolization case, *United States v. Alcoa*,[8] went so far as to rule that conduct by a monopolist is an act of monopolization unless the monopolist carries the burden of proving that its conduct was compelled by circumstances beyond the monopolist's control. Although never explicitly overruled, this aspect of *Alcoa* conflicts with more recent Supreme Court monopolization law, as well as the substantial body of economic literature showing that many forms of unilateral conduct such as investment in new capacity, or vertical integration (either through merger, or by use of vertical restraints) are generally procompetitive or benign, even when undertaken by firms with significant market power.

The EU's "special responsibility" doctrine is said to reflect the belief that there is an independent value in rivalry between firms beyond its contribution to economic performance.[9] This suggests that competition law should encourage or protect rivalry even when doing so would reduce economic performance. Although *Alcoa* endorsed this view, the U.S. now clearly rejects the protection of competitors, as distinct from the protection of the dynamic process of competition, as a proper antitrust-law policy objective. EU law has taken steps that could reduce the potential dynamic costs of its approach to certain abuse-of-dominance claims, specifically by invocation of the "as-efficient competitor" principle – *i.e.*, that conduct should not be regarded as abusive if it does not restrict the opportunities of competitors that are "as efficient" as the dominant firm. In practice, however, the application of this principle involves considerable complexity and difficult assessments. It has not appreciably reduced the ambiguities or changed the more restrictive character of EU enforcement, relative to U.S. monopolization law.[10]

Consequences of the Legal Differences

The arguments for and against the respective positions of the United States and the European Union on these issues have been debated at length in scholarship and policy discussions. For purposes of the current hearing, the main point is that each of these differences tends to create a wider area of

[7] *See* Case C333/94P, Tetra Pak Int'l. SA v. Commission, 1996 ECR I-5951, ECLI:EU:C:1996:436.

[8] 148 F.2d 416 (2d Cir. 1945).

[9] *See*, *e.g.*, Wouter P. J. Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 37 WORLD COMPETITION: L. & ECON. REV. 405 (2014).

[10] The Commission has issued additional guidance that provides some insight on its approach to exclusionary abuses. *See* Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, COM (2009) 864 final (Feb. 9, 2009), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=GA. The treaty article relevant to abuse of dominance – Article 82 – has since been renumbered as Article 102.

potential liability under the EU standard relative to the U.S. standard, and greater ambiguity on the EU side about whether specific conduct is permissible. The breadth and ambiguity added to the task of compliance by businesses operating within the jurisdiction of the European Commission by the need to comply with the EU standard have great practical and economic importance.

Both the United States and the European Union impose enormous penalties on firms that violate rules prohibiting monopolization and abuse of dominance. In the United States, a firm held liable for monopolization may be broken up and/or required to pay hundreds of millions of dollars in treble damages (including payment by the losing party of the winning plaintiff's attorneys' fees) to private and/or government claimants. In the antitrust cases involving the former Bell System, both occurred. Similarly, the EU has repeatedly imposed fines extending into the billions of Euros on firms that infringed Article 102. Given such huge consequences, well-counseled businesses seek to avoid conduct likely to attract challenge by the U.S. or EU antitrust authorities.

Moreover, aside from these enterprise-threatening remedies, the process of being investigated and of defending against allegations of monopolization or abuse of dominance is extremely costly, inconvenient and distracting for the accused firm. Aside from attorneys' fees and other out-of-pocket costs of complying with massive investigation and litigation burdens, intense efforts are usually required by a firm subject to major antitrust proceedings to control a wide variety of related distractions and to limit collateral damage to its business. Such a firm must fight a constant public-relations battle to assure that investors, customers, suppliers, and others do not simply assume that rumored or unproven allegations are true. The firm may be faced with unique burdens to attract, retain, and motivate valuable executives and other employees who might consider other opportunities given the legal shadow cast over the accused firm. Thus, even when a firm obtains complete vindication at the end of the legal process, there can be significant costs and disadvantages of meeting an antitrust challenge. These are likely to be reflected in reduced competitive vigor by the accused firm, leading to other adverse economic impacts.

Given all of these potentially devastating consequences, well-counseled businesses are powerfully motivated to conform their behavior to applicable legal requirements. Conduct that presents a significant risk of challenge under monopolization or abuse of dominance standards is generally avoided. Ambiguity in applicable legal standards, however, threatens a wide range of competitive behavior. It is well recognized in US law that vigorous competition is often hard to distinguish from illegal exclusionary conduct. Indeed, the U.S. Supreme Court has shown consistent sensitivity to the risk of false condemnation of competitively benign conduct that can arise when antitrust rules are ambiguous or

unnecessarily restrictive.[11] Given the potential differences in perspective, if specific competitive practices seem aggressive, or if they could be viewed as harmful by an unsympathetic observer, they often must be avoided in order to reduce antitrust risk to a tolerable level – even if the firm has significant confidence that it would be entitled to engage in such conduct consistent with applicable law. Even a small risk of an antitrust challenge is often not worth taking in view of the enormous potential adverse consequences.

This tendency of firms to avoid lawful conduct that might nevertheless attract legal challenge presents a well-recognized and fundamental dilemma to antitrust enforcement. Legitimate competition and successful innovation by a firm can put pressure on its competitors. If that stress is viewed mistakenly as an injury to the competitive process and results in the innovative firm becoming subject to antitrust investigation and condemnation, then economic performance suffers. If a firm perceives that lowering prices, expanding output, introducing new and superior products or adopting novel forms of promotion or distribution will be greeted with hostility by antitrust authorities, then such a firm becomes more likely to pull its punches and self-limit its opportunities for growth and expansion. This ultimately reduces the economic performance of the firm and its industry sector, to the detriment of customers, consumers and economic performance.

The adverse competitive impacts that arise from legal ambiguity and excessive hostility toward ambitious but legitimate conduct are recognized under U.S. law, which speaks of a "chilling effect." The more restrictive EU abuse of dominance principles and the broader ambiguity introduced by the variety of asserted concerns underlying Article 102 tend to produce a broader "chilling effect" than U.S. monopolization standards. Even a well-counseled firm may find it challenging to predict how the EU will view competitive conduct under Article 102. While there is significant uncertainty regarding the likely outcome of proceedings under both U.S. and EU standards, the U.S. courts have displayed greater regard for the consequences of legal ambiguity and potential confusion between vibrant competition and competitively harmful conduct.

<u>The Amplifying Effect of Institutional and Procedural Differences</u>

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[11] *See* Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 283 (2007) ("[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets."); Verizon Comm's Inc. v. Trinko, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (internal quotations omitted)).

Aside from these differences in the substantive rules applicable to monopolization and abuse-of-dominance cases, there are also very important differences between the two jurisdictions in the institutional and procedural set up of antitrust enforcement. These differences also reinforce the uncertainty confronted by firms that operate subject to EU rules on abuse of dominance, relative to the uncertainty of the U.S. monopolization prohibition as enforced through the U.S. legal process. The limitations of the EU enforcement process that I describe below have been subject to criticism by a number of distinguished European competition-law experts and practitioners. The Subcommittee might be especially interested in the views of Ian S. Forrester, a Queen's Counsel at the Scots bar who is currently serving as a judge of the EU General Court, which is the appellate court of first instance for competition decisions of the Commission. While still in private practice with a global law firm, he authored an article expressing his personal views, entitled "Due Process in EU competition cases: A distinguished institution with flawed procedures."[12] Another informative contribution was made by John Temple Lang, an experienced EU practitioner and a law professor at Trinity College, Dublin, who served for a time as a Hearing Officer in European Commission competition cases. His views are contained in a Special Report of the Center for European Policy Studies entitled, "Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003" (November 2011).[13]

The EU enforcement process is virtually unique in the world of antitrust. The ultimate responsibility for enforcement of the EU competition rules resides with the full College of Commissioners (subject to appellate review by the EU Courts). The College consists of one representative nominated by each of the 28 Member States and confirmed through a complex political process conducted at five-year intervals involving the EU Parliament and the Commission's President-elect. Each Member State government controls the nomination of its Commissioner, and the Member State governments are closely involved in the process by which Commissioners are confirmed and their respective portfolios are assigned for the term of the Commission. The appointed Commissioners are almost always Member State politicians or senior bureaucrats. Direct experience with competition law is rare within the College, and, insofar as public information discloses, no Competition Commissioner has

[12] Ian S. Forrester, *Due Process in EU Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 E.L. REV. 817 (2009), https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf.
[13] John Temple Lang, *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, *in* CURRENT DEVELOPMENTS IN EUROPEAN AND INTERNATIONAL COMPETITION LAW 219 (2011), https://www.ceps.eu/system/files/book/2011/11/Reform%20of%20Commission%20Procedure%20in%20Competition%20Cases_withcover.pdf.

had prior experience, at the time of his or her appointment, as a Member State antitrust enforcement agency official or as an antitrust specialist in private practice (whether economist or lawyer).

Equally important, although the College is the decision maker in EU competition cases, the College has no direct involvement with the details of competition matters because it does not carry out the day-to-day responsibilities of investigating and conducting proceedings in any specific case. Those responsibilities are assigned to the Directorate General for Competition (DG Comp), under the leadership of a Director General appointed by the Commission. DG Comp staff generally do possess relevant qualifications – training in and/or experience with antitrust law and/or economics – that more closely resemble those of other antitrust enforcement agencies in the U.S. and other jurisdictions. But the central point remains that the Commissioner for Competition is a Member State politician, confirmed by the EU Parliament for the explicit purpose of exercising political control over the activities of DG Comp.[14] The Competition Commissioner is not an antitrust specialist in any other sense. Although in the U.S. a number of FTC Commissioners, including the Chairman, have attained that position without benefit of professional antitrust credentials, the FTC always includes Commissioners who do have such credentials. The Assistant Attorneys General that have been chosen to lead the Department of Justice Antitrust Division, our other federal enforcement agency, have been distinguished by expertise and reputation as either a practitioner or an academic in the field of antitrust – at least those appointed within living memory. In the U.S. our federal judges have the last word in contested antitrust matters, and few of these are antitrust specialists. However, our judges are deliberately insulated from politics and other *ex parte* influences by the various Article III protections, as well as extensive formalized rules of procedure, evidence and judicial ethics.

In the European Union, the College of Commissioners must approve every competition decision (although there is a system of delegation in place and many routine matters can be determined without significant review by the full College). The Commissioners' lack of professional background in antitrust is often mitigated to some extent by the presence within their individual *cabinets* (personal staff) of an individual with qualifications relevant to competition matters. But each Commissioner remains in control of his or her vote on matters coming before the College, including competition decisions. Although Commissioners are bound to act on the basis of the file before the Commission, and to place loyalty to the EU treaties above loyalty to the interests of the specific Member State that nominated them, there is always a margin for the exercise of discretion <u>on behalf of the EU's objectives</u> (as distinct from Member States), and there is always the possibility for broader perspectives and influences to enter into the

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[14] *See*, Letter from Jean-Claude Juncker, President of the European Commission, to Margrethe Vestager, Comm'r for Competition (Nov. 1, 2014), http://ec.europa.eu/archives/juncker-commission/docs/vestager_en.pdf.

Commissioners' deliberations based on sources and considerations lying outside the case record, strictly speaking. Indeed, it is rarely possible to determine with precision whether a specific Commissioner's actions have been developed subject to inputs that are not known to the recipient of the Commission's decision.

Looking more closely at the day-to-day case operations of DG Comp, one can observe a degree of disjunction between the decision makers of the College and the evidence and arguments comprising the record in a competition matter. All aspects of an investigation and the pursuit of any resulting case are directly managed and executed by DG Comp staff; the assessment of the evidence, the analysis of whether to issue a Statement of Objections and, if so, the precise content of the SO, are within the immediate control of DG Comp throughout the process except for certain discrete stages at which the approval of the College, subject to review and input by the Commission's Legal Service, is required. This includes approval of the SO, and the approval of any decision on the merits. Once an investigation is authorized the College has no direct role in the acquisition or assessment of evidence, and their consideration of the matter is based on presentations – personally or through their *cabinets* -- by the Commissioner for Competition and/or internal meetings with other DG Comp officials and staff. At certain critical stages the Advisory Committee, consisting of representatives of the competition agencies of each of the Member States, has input to the process leading to the decision (whether to issue a Statement of Objection (SO) or a merits decision on a particular matter), and it should also be said that the parties – as well as third parties – may sometimes provide views directly to the individual Commissioners (either directly or through their *cabinets*).

A second and more fundamental point, however, is that no respondent in an EU competition matter is entitled to a trial. Although DG Comp will organize a hearing upon respondent's request at a certain stage of proceedings following issuance of an SO, such a hearing does not by any stretch satisfy the definition of a trial (or on-the-record administrative hearing under FTC procedural rules) in a U.S. court. The key differences are so extensive as to defy itemization. The character of a U.S. judicial proceeding is determined to a large extent by the enormous effort devoted to developing and testing evidence and testimony, including those obtained through pretrial discovery proceedings, evidence obtained from third parties, and testimony and supporting reports by expert witnesses. Although this type of evidence plays a role at DG Comp hearings, that role is much less extensive than in U.S. proceedings. Numerous steps prescribed to assure protection of U.S. defendant's rights by controlling and testing evidence and testimony are more limited and much less formalized in DG Comp proceedings. Cross-examination is not available in DG Comp hearings, although there is some opportunity for parties as well

as interested non-parties to direct questions to each other and to the DG Comp case team. Members of the Advisory Committee are also participants in DG Comp hearings.

Another critical difference between U.S. trial proceedings and EU hearings is that no decision maker is present in the Commission "hearing" while the evidence and arguments are presented and discussed. This is first because there are no individually identified decision makers in an EU competition proceeding other than the College of Commissioners, which acts as a collective body. Of course, the Director General and other senior DG Comp officials and the Competition Commissioner are presumed to have a managing and perhaps a controlling role in the decision-making process, but generally neither the Director General nor the Competition Commissioner participates in DG Comp hearings. This is in stark contrast to U.S. judicial proceedings, in which defendants have the protection of being able to compose the record, present and cross examine witnesses (including experts) and present arguments directly to an identified individual who will be the initial decision maker in the case, and whose impartiality is protected by a variety of formalized and strictly enforced rules. These include the protections of Article III of the U.S. Constitution, as well as limits on *ex parte* contact, rules of evidence and procedure, and judicial ethics.

In short, there is little institutional assurance that the EU decision maker (the College of Commissioners) has a comprehensive understanding of the details of the record and well-informed views regarding the credibility and weight of the numerous items of evidence and empirically based economic arguments usually regarded as critical to the determination of antitrust proceedings in the U.S. The limited capacity of the Commissioners and their *cabinets* to master the details of the evidence and arguments relevant to an impartial and objective determination of the matter at hand inevitably constrains the College's ability to detect, challenge and remedy flaws in cases presented to them. Even assuming high levels of professionalism and the best intentions on the part of DG Comp staff, there will be an inevitable human tendency to minimize or discount exculpatory evidence, to choose among numerous alternative legal arguments and interpretations in ways that tend to favor the Commission's position over that of the respondent, or to adopt colorable but ultimately unsound reasoning about the available evidence, all in service of a particular conclusion favored by DG Comp. To suggest otherwise is to ignore the most persuasive and well-supported teachings of both cognitive science and public choice theory.

In fairness it must be said that there are some protections available for the rights of defense in EU competition proceedings.[15] The proposed recipient of a decision must be afforded access to the file, and

[15] The Commission has provided a broad description of the institutional and procedural protections available in competition proceedings. *See* EUROPEAN COMMISSION, PROCEEDINGS FOR THE APPLICATION OF ARTICLES 101 AND 102 TFEU: KEY ACTORS AND CHECKS AND BALANCES, http://ec.europa.eu/competition/antitrust/key_actors_en.pdf.

must be informed of and allowed to respond to allegations underlying any decision. For those parties that choose to exercise their right to an oral hearing, a Commission hearing officer will organize and provide broad supervision of the proceedings, and will later file reports concerning the implementation of the rights of defense. These protections are, however, very limited compared to a U.S. federal court trial or an FTC adjudicative hearing, where the full record is composed, the evidence and testimony taken, and all the legal and economic arguments are presented before the specific individual who is identified and credentialed as the initial decision maker.

The final element of EU institutional structure that must be considered when assessing the consequences of the high degree of discretion characteristic of the EU system is the nature and role of the EU judiciary. For a variety of reasons the EU courts have had a much less influential role in limiting the discretion of the Commission with regard to its competition decisions, compared to the degree of control and influence that the federal judiciary exercises over federal antitrust enforcement. First, to the extent that the EU Treaties adopt a range of policy objectives as the basis for the competition rules – including for example the concept of competitive "distortion," the "special responsibility," the prohibition on "unfair prices" and terms and the promotion of rivalry apart from its effect on economic performance – the EU courts may hesitate to insist that the Commission's enforcement actions focus only on the ultimate economic effect of competitive conduct. As the long history of government agency management in myriad other contexts amply illustrates, it is extremely difficult to control a bureaucratic process charged with the simultaneous pursuit of multiple objectives and provided discretion to determine how each objective will be weighted in particular matters. Second, the duration of judicial review in the EU is very long. Some U.S. antitrust proceedings are comparable in length to some EU proceedings (including the appellate stage), but in general appellate delay is more significant in EU competition matters.

The recent proceedings involving the current Commission abuse case against Intel Corp. provide an example. Following a long series of Court of Justice precedents, the Commission found that Intel had abused its dominant position in a purported x86 computer processor market by offering loyalty discounts to certain customers.[16] Intel offered a defense that the impugned conduct affected only a limited portion of the market, its main competitor had prospered and the market in general had become more rather than less competitive during the relevant time period. The Commission rejected this evidence in light of longstanding precedent to the effect that loyalty discounts by a dominant firm are condemned on the basis of their tendency to lead to competitive distortion – hence the actual effect of the discounts was irrelevant to whether Intel had violated its "special responsibility". The Commission was affirmed by the appellate

[16] Case C-413/14 P, Intel Corp. v. Comm'n, EU:C:2017:632 (CJEU Sept. 6, 2017).

court of first instance, the General Court. But the CJEU reversed, finding that the Commission was obligated to consider evidence of the sort offered by Intel, since it could rebut the Commission's assertions that the impugned conduct would lead to a competitive distortion. The ECJ decision was rendered approximately nine years after the initial Commission decision.

What is interesting about this case – from the perspective of how the European courts tend to constrain the discretion of the Commission – is that the Commission almost immediately set about minimizing the impact of the ECJ's holding. Specifically, Director General Laitenberger stated publicly that Intel would be entitled to an assessment of the evidence of competitive effects (or lack thereof) only if it had provided "sufficiently serious and substantial arguments" – suggesting strongly that the Commission would be free to ignore exculpatory market evidence if it could not meet a steep initial burden.[17] The Director General's move to evade or deflect the objective impact of the CJEU's decision was sufficiently blatant that it drew an apparent rebuke from one of the CJEU's Advocates General in a different pending abuse-of-dominance case.[18] In many respects this sequence of statements and events provides strong evidence confirming that the Commission has substantial discretion in its interpretation and application of Article 102, even in circumstances where the CJEU has – after a near-decade-long appellate process – sought to place clear markers to limit the Commission's flexibility to condition its legal environment favorably to itself.

CONCLUSION

Current U.S. monopolization law is relatively well-crafted to provide coherence in understanding and compliance and efficiency in administration, and to further the most essential antitrust objective, namely to assure that our dynamic competitive process is maintained for the long-run benefit of all. Current U.S. law is properly dismissive of concerns over preserving rivalry as a value independent of this objective despite economic cost. The EU standards for abuse of dominance – for whatever reasons deemed sufficient by the Commission and the EU courts – contain a variety of elements that are in tension with the main policy objective of the U.S. law of monopolization. The U.S. approach is not perfect: as I mentioned in the Introduction, on previous occasions I have encouraged our Supreme Court to be more forthright in formulating rules for the evaluation of specific competitive practices that are faithful to the sound underlying basic principles expressed in its recent Section 2 and other antitrust cases. In my view, any effort to adopt the unique EU abuse concerns into our law would be a move in the wrong direction.

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[17] Johannes Laitenberger, Director General, European Comm'n, Accuracy and Administrability Go Hand in Hand, Address Before the Charles River Associates Conference, Brussels (Dec. 12, 2017).

[18] Opinion of AG Wathelet in Case C-123/16 P, Orange Polska S.A. v. Comm'n, EU:C:2018:87 ¶ 76 (CJEU Feb. 21, 2018).

At the very least such proposals should bear a very heavy burden of justification based on sound and empirically based analysis of the real-world consequences of various legal approaches. The EU has made notable contributions to competition policy, but I do not think the U.S. should follow its example in the field of monopolization.